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The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU

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Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU

The EU as a Confederal Union of Sovereign Member Peoples

Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU

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Table of Contents

Acknowledgments V

The EU as a Confederal Union of Sovereign Member Peoples: An introduction and overview 1
1 Introduction: Reconnecting the EU 1
2 The descriptive and normative objectives of a confederal approach 3
3 Three tests and challenges for a confederal approach 6
4 Method, approach and limitations 7
4.1 Normalism v. exceptionalism 8
4.2 Caveats and limitations 10
5 Structure and outline 11

Part I The Confederal Perspective 13

1 The why and how of American confederalism: Establishing a comparative grid for the EU 15
1 Introduction: A trip down constitutional memory lane 15
2 Why (American) confederalism? 16
2.1 Why confederalism? 16
2.2 Why the American Confederation? 21
3 Specific aims and hypotheses 24
4 Comparative methodology: Comparing apples and I-pads? 26
4.1 Caveats and limitations: The inherent hubris of comparison 26
4.2 The practice and methodology of constitutional comparison 30
4.2.1 The epistemic interest: To what end are we comparing? 31
4.2.2 Five approaches to constitutional comparison 32
4.2.3 A classificatory and functional approach 33
4.2.4 Core assumptions: The possibility of comparison and overarching categories 35
4.3 Designing the confederal comparison 38
5 Concepts and terminology: Specific and general concepts used 40
5.1 Terminology: General conceptions used 40
5.1.1 Federation 42
5.1.2 Confederation 43
5.1.3 Member people 44
5.2 Terminological shifts and traps 45

6 The confederal cradle 46
6.1 The road to confederation 47
6.2 The Sovereign States 48
6.3 Brief overview of the Articles 50
6.4 A successful failure: Challenges and difficulties of assessment 51
6.5 'The failure of this our current government' 54
7 Reversing confederalism: The federal modifications 57
7.1 Fundamental modifications 58
7.2 Structural modifications 59
7.3 Increased competences and implied powers 59
7.4. Institutional modifications and the system of representation 60
7.5 A comparative grid 61

2 The Confederal Comparison 63
1 Introduction: A point by point comparison 63
2 Foundations: Fundamentals of the constitutional systems compared 64
2.1 Foundations: Ultimate foundation of authority 64
2.1.1 We the peoples 64
2.1.2 We the People 66
2.1.3 We the peoples and/or states? 68
2.2 Foundations: The use of force against the States? 71
2.2.1 The use of force under the Articles 71
2.2.2 Force as a necessary federate backbone 72
2.2.3 The use of force in the EU 72
2.3 Foundations: Taxation and the generation of revenue 74
2.3.1 The problem of revenue under the Articles 74
2.3.2 Taxation and revenue in the Federation 76
2.3.3 The generation of revenue in the EU 77
2.4 Foundations: Amendment 80
2.4.1 Unanimous amendment of the Articles 80
2.4.2 A federate process for amendment by majority 81
2.4.3 Amending the EU Treaties 82
2.5 Foundations: Secession 86
2.5.1 The possibility of secession under the Articles 86
2.5.2 The eventual impossibility of secession under the federate Constitution 87
2.5.3 Secession from the EU 88
2.6 Foundations: Expanding the Union 90
2.6.1 Accession under the Articles 90
2.6.2 Accession under the Federation 91
2.6.3 Accession to the EU 92
2.7 Sub-conclusion foundational modifications 95

3 Structural elements and modifications: Direct, separate and supreme government 95
3.1 Structure: Legal supremacy and direct effect 95
3.1.1 The lack of legal supremacy and limited direct effect in the Confederation 95
3.1.2 The supreme law of the Federation 98
3.1.3 Legal supremacy and direct effect of EU law 99
3.2 Structure: Separate versus merged government 103
3.2.1 Merged government in the Confederation 103
3.2.2 Separate government in the Federation 103
3.2.3 Separate or merged government in the EU? 104
3.3 Sub-conclusion structural modifications 106
4 The authority of the centre: Objectives, attribution and specific competences 106
4.1 The authority of the centre: Objectives 107
4.1.1 Objectives under the Confederation 107
4.1.2 Objectives under the Federation 109
4.1.3 Objectives of the EU 109
4.2 The authority of the centre: Attribution 112
4.2.1 The narrow doctrine of attribution in the Confederation 112
4.2.2 A broad doctrine of attribution in the Federation 113
4.2.3 Attribution in the EU 114
4.3 The authority of the centre: Specific objectives 118
4.3.1 The Confederation and the war focus 118
4.3.2 The Federation: Combining the internal and the external 122
4.3.3 The EU and the internal focus 123
4.3.3.1 The regulation of trade: A federal centre of gravity 123
4.3.3.2 The relative absence of war and defence competences 125
4.4 Sub-conclusion: An interesting mix of central authority 127
5 Institutional modifications 128
5.1 Institutional modifications: Representation and the legislature 128
5.1.1 Representation and the Confederal legislature 128
5.1.2 The federate modifications to the legislature and the system of representation 130
5.1.3 The EU legislature and system of representation 133
5.1.3.1 The Council of Ministers 134
5.1.3.2 The European Parliament 137
5.1.3.3 The European Commission 139
5.2 Institutional modifications: The executive 141
5.2.1 The weak executive under the Articles 141
5.2.2 The powerful executive in the Federation 142
5.2.3 The executive in the EU 143

5.3 Institutional modifications: The judiciary 146
5.3.1 The (absent) judiciary in the Confederation 146
5.3.2 The essential judiciary in the Federation 147
5.3.3 The judiciary in the EU 148
5.4 Sub-conclusion institutional modifications 151
6 The Confederal Comparison: Overview and conclusions 152

3 The EU as an inverted confederation with a federate superstructure: The strengths of a modified confederal form 157
1 Introduction: Three general propositions on the nature of the EU 157
1.1 Structure 158
1.2 Caveats and limits 158
2 The inverted confederation: Europe as Impire 159
2.1 The relevance of the external for the EU… 162
2.2 …but the primacy of the internal and economic 163
2.3 Inverting the confederal pattern 165
2.4 The constitutional benefits of inverted confederalism 165
2.4.1 A constant impetus for cooperation 166
2.4.2 Structural-institutional benefits 167
2.4.3 The self-deepening effect of the internal focus 168
2.4.4 Riding the market wave 169
2.5 The inverted confederation: Sub-conclusion 171
3 A confederal foundation with a federalized superstructure 172
3.1 Negative integration as a confederal backbone 174
3.2 Determining competences 176
3.3 Adaptability and pseudo-amendment 177
3.4 Enabling self-deepening 179
4 Rule by law, self-control, and the importance of stable Member States 180
4.1 The importance of stable and well-constituted members for confederal rule 181
4.2 The (more) stable basis of the EU and the capacity of self-control 183
4.3 A rule by law: The USB of confederal organization 185
4.4 Laws impire and the plural nature of the EU order 189
5 Back to Madison's Score Card: Evaluating the modifications 192
5.1 General lack of power and energy in the centre and compliance in the states 192
5.2 Weak finances and unstable states 195
5.3 Lack of competences and the inability to (make) amend(s) 196
6 Madison's score card: A clear pass grade 197

4 The costs of modification and the limits of the confederal form: Of new and exacerbated problems 199
1 Introduction 199
2 A market without borders or an EU without limits? 199
2.1 The challenge of an unlimited market: Collective action 202
2.2 Fundamental rights 203
2.3 In search of confederal limits? 204
3 Limits and risks of the rule by law 205
3.1 Areas not amenable to legal control 206
3.2 Unbalancing the Trias 207
3.3 Setting an amendment trap 208
3.4 Reliance on stable Member States and member courts 210
3.5 Absolving political responsibility 211
4 The increasing schism between foundation and superstructure 212
4.1 An increasing schism: A problem of normative capacity 213
4.2 The no-demos challenge...or not 215
4.3 The limited capacity of a confederal system for direct conflict 217
5 Conclusion: The weaknesses of a modified confederation 219

5 Of elite structures and anti-democratic revolutions: The process of federation 221
1 From Confederation to federation: The process 221
2 Elites and elite structure: If you cant beat them make them join you 222
2.1 The federate path to power in the US 222
2.2 The national path to (EU) power 225
3 The anti-democratic revolution 227
4 The benefits of secrecy: Inverting the convention scheme and attached amendments 230
5 Attached amendments 232
6 Aemulatio, not innovatio 232
7 Process conclusions 233

6 Conclusions part I: The Modified Confederal Model of the EU 235
1 The modified confederation as a model? 235
2 An inverted confederation with a federate superstructure relying on a rule by law 236
3 Weaknesses and risks of a modified confederal system: A widening gap… 238
4 Closing the gap? 240

Part II A confederal conception of sovereignty 241

7 Towards a confederal conception of sovereignty 243
1 Introduction: 'We the peoples'? 243
2 Aims and advantages of a confederal conception of sovereignty 244
2.1 Removing sovereignty as an obstacle to constructive theory 244
2.2 Grounding the EU in its sovereign member peoples 245
2.3 The fit of confederal sovereignty with EU Treaties and case law 246
2.4 Confederal constitutionalism and confederal supremacy 246
2.5 An attractive narrative: A confederal evolution of democracy 247
3 Approach and method: Limiting scope and ambitions 247
4 Structure 251

8 The statist and pluralist challenge 253
1 Sovereignty as an obstacle: The statist and the pluralist challenges 253
2 Central dichotomies: National v. international or statism v. pluralism 254
3 The statist – pluralist dichotomy 255
4 Statism: The sovereign state as bulwark and safe haven 257
4.1 Academic statism 257
4.2 Empirical statism 261
4.3 The key tenets of statism 262
4.4 Application: Judicial statism 263
4.4.1 The Lissabon Urteil: The statist challenge of the Bundesverfassungsgericht 264
4.4.2 Background and brief overview of the Lissabon Urteil 265
4.4.3 A sovereign people under a sovereign constitution in a sovereign state 266
4.4.4 Democracy as the normative armour of the sovereign state 267
4.4.5 The case of sovereignty and democracy v. integration 269
5 Pluralism: Overcoming sovereignty and our darker selves 272
5.1 The EU as crown witness against sovereignty 274
5.2 The key tenets of pluralism 276
5.3 The fit and failure of pluralism 278
5.4 The statist rejoinder 279

6 The statist – pluralist divide: Bridging attempts 280
6.1 Constitutional pluralism: Constitutionalizing plurality without hierarchy 281
6.2 Heterarchy under Contrapunctual principles 282
7 Conclusion: A sovereign either/ or? 285

9 A tale of entanglement: The evolution and confusion of internal and external sovereignty 287
1 Introduction-A tale of entanglement 287
2 Five phases of historical development 288
3 Bodin and the origin of the absolute myth 289
3.1 The internal focus and relative absolutism of Bodin's sovereign 290
3.2 The personal sovereign and the impossibility of a constitution 292
3.3 The prescriptive nature of sovereignty 293
3.4 The descriptive fallacy 294
3.5 Sub-conclusion: Dismantling the absolutist myth of Bodin 296
4 The Primitives and the creation of the external 297
4.1 Discovering the external via the internal 297
4.2 A new concept is born: External sovereignty 298
5 The constitutionalization of the internal sovereign 299
5.1 The abstract sovereign: Abstractions don't shoot 300
5.2 The constitutional layer 301
5.3 The Federalists and the sovereign 'We' 302
5.4 Combining federalism, sovereignty, and democracy 304
6 Fulfilling the myth: External sovereignty and the creation of the absolute 305
6.1 From Monarch to State: Disconnecting the external from the internal 306
6.2 The absolute external sovereign 307
6.3 The conceptual dominance of external sovereignty 307
6.4 Sub-conclusion: Towards a fifth step in sovereignty? 308
7 The EU: Where internal and external sovereignty meet? 309
7.1 The conceptual fit of integration and confederal sovereignty 310
7.2 The clash between internal and external sovereignty 311

10 The Confederal Potential of 'We the peoples' 313
1 Introduction: The uses of confederal sovereignty 313
2 Outlining a confederal conception of sovereignty 314
3 The fit between confederal sovereignty and the legal and normative basis of the EU 317

3.1 The legal fit: Delegation of sovereign powers 318
3.2 The normative fit: The value of democracy, popular rule and identity 319
3.3 The evolutionary fit: The increasing relation between the EU and the individual 322
4 Dissolving the clash between statist sovereignty and plural integration 324
4.1 Statism and confederal sovereignty 325
4.2 The statist Maginot line against integration 327
4.3 Trapping the people and the democratic process in the state 328
4.4 The potential benefits of confederal sovereignty for statism 330
5 Pluralism and the confederal perspective 331
5.1 Free floating authority 333
5.2 The descriptive basis and prescriptive weakness of pluralism 334
5.3 The plural reality of confederal sovereignty 335
5.4 Sub-conclusion: Where statism and pluralism meet? 338
6 Grounding the Union: A sufficient popular foundation for the EU 339
6.1 Counter arguments: The people, really? 344
6.1.1 Statal instead of popular delegation 344
6.1.2 Overstating the exclusion of the people 344
6.1.3 Overcoming past shortfalls in popular consultation 347
6.2 Institutionalizing confederal sovereignty 347
6.3 Sub-conclusion: A direct and subsidiary link 348
7 To constitute or not to constitute: Why does constitutionalism fit the EU? 349
8 The confederal primacy of EU law 352
8.1 The narrow but ultimate normative primacy of the national constitution 353
8.2 The weaker but broader claim of EU supremacy 353
8.3 Confederal primacy: The peaceful coexistence of EU and national primacy 355
9 The normative appeal of confederal sovereignty 357
9.1 The importance of self-understanding for democratic legitimacy 359
9.2 A confederal fairytale? 360

11 Conclusions part II: Sovereignty as part of the solution 363
1 The possibility and possibilities of confederal sovereignty 363
2 The fit and advantages of confederal sovereignty 365
3 The confederal promise and challenge 368

Part III Towards a democratic union of sovereign member peoples: Application and Conclusions 371

12 A confederal evolution of the democratic process 373
1 Applying confederalism: The democratic process and the EMU crisis 373
2 A confederal evolution of the democratic process 374
3 Confederal causes: The lack of a national process to control 374
3.1 The democratic disconnect: An irrelevant national democratic process? 375
3.2 The unconstitutionalized double role of the state 380
3.3 The missing national link in confederal democracy 382
4 Building blocks of a confederal democracy 383
4.1 Building blocks: Delegation as democratic substance 383
4.2 Three guidelines for the national institutionalization of integration 385
4.2.1 EU senates 386
4.2.2 Competences 387
4.2.3 Prerequisites for national control 389
4.2.4 Conclusions EU Senates 389
5 EU contributions to confederal democracy 390
5.1 Political space: De-constitutionalization at the EU level 390
5.2 Guiding and compelling national democratic evolution 392
6 Conclusion: The democratic potential of confederal rule 394

13 The Sovereign Debt and EMU crises: A perfect confederal storm? 397
1 A perfect confederal storm? 397
2 A tale of three crises 397
2.1 A permanent stability mechanism 401
2.2 Of six-packs, duo-packs and plus-pacts 403
2.3 A new outer circle of EU law: The TSCG 405
2.4 From Banking Unions to a 'deeply' 'genuine' EMU 406
3 The EMU crises: Confederal diseases? 409
3.1 The internal focus and the momentum of self-deepening 410
3.2 Hitting the weak spots: Money 412
3.3 Politics and conflict 413
3.4 The schism between confederal basis and federate superstructure 415
4 Confederal pitfalls in responding to the crisis: Mind the gap… please 416
4.1 Exploding the federate superstructure 416
4.2 Relocating democracy to the EU level 418
4.3 Only conquer what you can defend 420

5 Confederal cures? 421
5.1 Designing confederal checks at the national level 421
5.2 The alternative of automaticity 425
6 A confederal course to weather a perfect confederal storm 426

Conclusion: The EU as a Confederal Union of Sovereign Member Peoples 429
1 The challenging potential of European integration 429
2 Confederalism and the EU: The modified confederation as a model 430
2.1 Three comparative key findings 431
2.2 Three confederal key conclusions 432
2.3 The lack of federate driving forces 433
3 A confederal evolution of sovereignty 434
3.1 The conceptual fit of confederal sovereignty 434
3.2 De-complicating reality 435
3.3 Advantages of confederal sovereignty: From technocratic frog to democratic prince 436
4 Confederal tests and application: Democracy and the EMU crisis 438
4.1 A confederal evolution of the national democratic process 438
4.2 A confederal answer to the sovereign debt and EMU crises 439
5 Strengths and weaknesses of confederalism 440
6 Towards a democratic confederal union of sovereign member peoples, or the confederal come back! 442

Summary 443

Nederlandse samenvatting 457

Bibliography 473

Case Law 491

Curriculum Vitae 497

The EU as a Confederal Union of Sovereign Member Peoples: An introduction and overview

'What is regarded as a distinctive and exclusive feature of a federal state may be achieved in a typical confederation of States'[1]

'With the emergence of permanent multinational 'communities,' of which the European Community is the prime example, we are now witnessing a revival of confederal arrangements.'[2]

1 Introduction: Reconnecting the EU

This thesis reconnects the EU to two classic constructs of constitutional theory: confederalism and sovereignty. Two powerful but unfashionable constructs whose joint potential for European integration remains largely unexplored and undervalued.[3] The primary instrument to explore this potential is comparative. The EU will be contrasted with the rather unknown but rich example of the American Articles of Confederation, and their evolution into the now famous American federate system. A comparison with the confederal roots of the United States which is revealing for both confederalism and sovereignty, and illustrates the potential of linking both for a constructive constitutional theory of the EU. A theory which does not have to overcome history, but connects with it, and may thereby help to recapture the EU and the increasing authority it wields.

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1 H. Lauterpacht, 'Sovereignty and Federation in International Law' in: E. Lauterpacht (ed.) *International Law, Being the Collected Papers of Hersch Lauterpacht, vol. 3* (CUP, 1977), 21.

2 D.J. Elazar, *Exploring Federalism* (University of Alabama Press 2006), 51.

3 For confederalism see M. Burgess, 'Federalism' in: A. Wiener and T. Diez (eds.), *European Integration Theory* (2nd edition, OUP, 2009), 30. Also see Elazar (2006), 9: 'Western Europe is moving towards a new-style confederation of old states through the European Community (…).', and R.L. Watts, 'Federalism, Federal Political Systems, and Federations' 1 *Annual Review of Political Science* (1998), 121-122: '(…) the European Union after Maastricht, which is basically a confederation but (…) has some features of a federation.' For sovereignty cf already N.Walker, 'Preface', in: N.Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2006), v.

As for confederalism, the proposed comparison traces where the EU has blended a traditional confederal set-up with some of the federate modifications that were key to the US evolution into a federate system. These federate modifications can then be isolated, and the effect of grafting them onto a confederal basis studied. An exercise from which the EU emerges as an *inverted* confederal system which has *reinforced* a confederal foundation with a federate superstructure, and relies heavily on a *federate rule by law*. Based on these findings the descriptive fit and normative appeal of confederalism for the EU can then be explored more generally. Can confederalism, for instance, help us to better understand the nature and functioning of the EU, including the constitutional root causes of its surprising strengths and weaknesses? Or can it assist normatively in creating the ideal picture needed to drive, guide and justify its further development? Here the inherent capacity of confederalism to combine a certain degree of constitutional order with a flexible and plural reality may be of value. Especially so because the EU seems to have found some ways to reduce the structural weaknesses also inherent in the traditional confederal scheme. If so, this may bring confederalism, traditionally the ugly duckling of constitutional theory, back into play, and not just for the EU.

As for sovereignty, it will become apparent how the American transition to a federation relied on an evolution in the doctrine of internal and popular sovereignty. By relocating sovereignty in the people, public authority could be delegated to two separate governments. Emulating this evolution in the US, this thesis explores the possibility of a *confederal conception of popular sovereignty*. One which allows multiple sovereign peoples to delegate part of their authority to one shared European government. An objective for which the American example will be complemented by a more general conceptual analysis of the flexible internal core of sovereignty itself.

Where the US spearheaded a federate evolution in sovereignty to support their new federate system, therefore, the EU may champion a confederal evolution in sovereignty to support its own updated form of confederalism. A confederal conception that would soften the false juxtaposition between sovereignty and integration. Instead, it could conscript sovereignty as part of the solution, allowing sovereignty to fill some vital gaps in the confederal model and demonstrating the potential that is unleashed when these two concepts are properly linked and allied. A linkage that could *inter alia* allow a confederal EU to directly ground itself on the sovereign member peoples, who appear the only source capable of carrying the ever-increasing legitimacy demands of the EU. Most importantly, it could do so in a way that helps to rediscover these peoples as the ultimate locus of political authority, at least at the conceptual constitutional level. As a result confederal sovereignty may also be of use in realigning the democratic process, both at the national and the EU level, with the polycentric realities of today. It may thereby release the member peoples from their increasing entrapment within their states, and establish democratic control, albeit in a different form, at those levels where it increasingly matters in a globalized world.

2 The descriptive and normative objectives of a confederal approach

Jointly the comparative exploration of confederalism and sovereignty form the two key ingredients of the overarching conception of the EU as a confederal polity of sovereign member peoples examined in this thesis. A constitutional system that is founded *both* on the popular sovereignty of its member peoples, and on the Member States that remain the primary bodies through which these people organize themselves. An overarching conception that would also fit our Neo-Westphalian world where states have surrendered their near monopoly on exercising public authority but nevertheless remain of central importance.[4] A world, therefore, where government, and the mechanisms for democratic control, need to be realigned with the reality that needs governing. A world where the confederal form may finally come into its own.

This overarching aim must and will of course be deconstructed into multiple more specific aims along the way. Here, however, it is important to already indicate some of these specific aims, and especially to separate the analytical and descriptive from the normative claims, at least to the extent that the descriptive can be uncoupled from the normative in law and constitutional theory.[5]

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4 Cf also N.Walker, 'Late Sovereignty in the European Union', in: N. Walker (ed), *Sovereignty in Transition*, (Hart, 2006), 5. I prefer the term neo-Westphalian to his post-Westphalian, as it better captures the continuity, as well as the enduring, if diminished role of the states. it also comes closer to his use of 'late sovereignty'. It fully shares, therefore, the sentiment he expressed elsewhere that '(…) rather than signaling a break with the paradigm of political modernity centered upon the modern state and its legal and constitutional edifice, the EU reflects and contributes to a variation in the form of political modernity.' N. Walker, 'The Place of European Law', in: G. de Búrca and J.H.H. Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012), 57.

5 Cf the distinction as made by Rosenfeld and Sajó 'From a descriptive standpoint, the scholar examines systematically the comparative constitutional work that participants undertake, performing a number of tasks ranging from classification to critical assessment. (…) Normative, or prescriptive scholarly work, on the other hand, concentrates on what the scholar deems desirable or feasible, depending on the latter's empirical, ideological, or discipline based position.' M. Rosenfeld and A. Sajó, 'Introduction', in: M. Rosenfeld and A. Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012), 10. At the same time this distinction is not to deny the inherent normative element in *choosing* the comparator, in this case confederalism, from amongst the multiple other possible candidates for comparison. Cf N. Jansen, 'Comparative Law and Comparative Knowledge' in: M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006), 314.

To begin with this thesis makes several descriptive, factual claims about confederalism, sovereignty and the EU. It is, for instance, claimed that the EU can be usefully understood as a modified confederal system.[6] For the EU does combine several of the core characteristics of a confederation with some federate elements. Furthermore, approaching it as such contributes to a better understanding of its functioning and nature and may guide future modifications. Such modifications, after all, should build on the specific strengths of the modified confederal model, whilst avoiding the remaining confederal pitfalls. Similarly, it is claimed that sovereignty *is* compatible with far-reaching integration, if only we return to the more appropriate internal and popular strands within sovereignty. Strands that are inherently more amenable to sharing and dividing authority. Strands that are also conceptually prior and more fundamental than the unsuitable external conceptions of sovereignty generally applied to the EU, and which lead to a false dichotomy between sovereignty and the EU. Equally the federate evolution in sovereignty that took place in the US is not a normative claim, but a descriptive fact, as is the inherent potential within sovereignty for a further confederal evolution.

Added to these descriptive claims, yet separable from them, are several normative claims. Chief amongst these is the claim that a conception of the EU as a confederal union of sovereign member peoples is attractive and desirable. A conception that should be pursued and further realized where possible.[7] This, for instance, because of its tendency to respect and strengthen other desirable outcomes such as respect for autonomy, identity and diversity, debate and cooperation. Crucial values in a world where we both need far-reaching cooperation and respect for local identities.[8]

In addition the confederal conception allows the EU to ally with other valuable normative constructs in constitutional theory, such as democracy, state, sovereignty and citizenship. Instead of having to oppose and overcome them, and with them the national systems that rely on these constructs as well, the EU can be be allowed to build on these constructs in a symbiotic manner. Instead of radically rejecting them, therefore, the EU can

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6 See in this regard also the conclusion of Burgess that the EU is 'an evolving, highly decentralized, federal union of states and citizens with limited but significant public duties, obligations and responsibilities that is built upon 'unity in diversity'. And: 'It is, in other words, a new kind of federal-confederal union that we can classify either as a '*new confederation' or a new federal model*.' Burgess (2006), 238-239 (my italics).

7 This should not be mistaken, however, for a 'missionary' type of suggestion that confederalism forms a panacea to all the problems of the world, which it certainly is not. Cf in this regard also M. Forsyth, *Unions of States: The Theory and Practice of Confederation* (Leicester University Press 1981), 9.

8 These outcomes also relate to the liberal and contractual nature of federalism itself. In the words of Burgess: '(…) – a voluntary union, we are reminded, and one that is founded on liberal democratic principles that recognize, respect and tolerate differences and diversity.' Burgess (2006), 236.

better be made compatible with these traditional concepts, improving them where possible. One of the main advantages of a confederal focus in this regard may precisely be its capacity to provide updated conceptions of such classic constructs as sovereignty, also for the *national* level. Such updated notions may help national constitutions and democratic systems, on which a confederation must rely, to adapt to their new roles and functions in a globalizing reality, and hence to retain their relevance. In doing so they may also counter the simplistic notions now often used to hold constructive national debates hostage.[9] In the long run, integration and cooperation are necessary to protect and improve traditional constructs such as democracy, identity state or sovereignty. For as always, survival lies in adaptation, not fossilization.

Lastly, and closely related, there is the normative claim that the ultimate basis of public authority should be the people, and not, for instance, the states. Even the state, after all, is there for the people. Yet the risk exists that the people are squeezed out of the equation in the clash between the EU and the Member States. Any solution to the relation between the states and the EU, therefore, should be found in rediscovering the people that should support and control both.

These normative claims build on the descriptive claims, but of course require additional normative justification: an Is cannot be transformed into an Ought that easily. Where necessary, such further normative justification will therefore be provided, or at least the need for it acknowledged. As indicated, furthermore, these normative claims can be separated from the descriptive ones. One can agree that the EU can currently be described and understood as a confederal system, without agreeing that the confederal form is desirable, now or in the future. Even where one, for other normative reasons, rejects the confederal form, and for instance prefers a federate or purely intergovernmental *telos* for the EU, however, the descriptive reality of a confederal EU remains relevant and should be acknowledged. Both the transition to the desired form of the EU, as well as the normative justifications for that form, after all, must take into account the current confederal reality.

9 See typically T.H.P. Baudet, *The significance of borders: why representative government and the rule of law require nation states* (Doctoral thesis Leiden University 2012).

3 Three tests and challenges for a confederal approach

To further develop these descriptive and normative claims, the confederal framework will be tested against three challenges, selected to represent both theory and reality.

On the plane of theory, confederalism will be set against, or rather between, the conflicting schools of statism and pluralism.[10] Statist approaches attempt to fit the EU within the existing statal framework. Here states remain the ultimate, irreducible building blocks. Typically such approaches lead to an unavoidable but unconvincing choice: The EU either has to stay within the confines of an international organization, or it must become a (federal) state.

The opposite approach of pluralism starts from those novelties in the EU that seem to defy this statal framework. Building on these novelties the central tenets of statism are rejected, especially its assumption of a fixed hierarchy with the sovereign state at the top. Instead, we are invited to a plural reality where multiple centres of authority co-exist in civilized heterarchy. Although such pluralist approaches often accurately describe reality within the EU, they also tend to deconstruct far more than they can reconstruct. Once the statal framework has been scuttled, there is generally little stable or constructive theory left to replace it.

It will be examined whether these influential but opposing views of both schools may be partially reduced to a false juxtaposition between sovereignty and integration, and whether their respective strong points may therefore be partially synthesized under a confederal approach. For this purpose the statist camp will be primarily championed by the German *Bundesverfassungsgericht* and its forceful case law on European integration. As a primarily academic school of thought, the pluralist camp will be represented by some of its leading scholars.

Second, linking theory and practice, this thesis explores how a confederal approach may assist in securing a more stable and legitimate basis for the EU. A major theoretical and practical challenge that will clearly not be settled here, but does lead us to an analysis of a confederal evolution of the democratic process itself. Some highly tentative proposals will be made in this regard to better align national systems to their participation in an overarching confederal constitution, and to anchor the EU directly in the national constitutions of its Member States. The place where a confederal Union should logically be anchored.

10 See for a detailed discussion of both schools part II, chapter 8.

Lastly, switching from theory to harsh reality, the confederal approach will be further tested against the EMU crisis. A challenge to any constructive account of the EU, it will be seen if the proposed ideas can assist, however tentatively, in better understanding the EMU crisis as a perfect confederal storm. In addition, it is examined if a confederal analysis may also help in descrying a general direction for structural solutions to the crisis. Solutions that both reinforce the EMU, without subsuming the Member States altogether in a European federation, and thereby overstepping the outer bounds of a confederal structure.

4 Method, approach and limitations

It is contested whether jurisprudence, let alone constitutional theory, can have a truly 'scientific' method.[11] Acknowledging these limits, this thesis relies on several of the common methods that are available within jurisprudence. Considering the central role of the American Articles of Confederation constitutional comparison obviously forms one particularly important method. This comparative exercise is complemented by historical and conceptual analysis, especially concerning sovereignty. Both are established methods which can rely on existing practice and on established categories, yet retain many pitfalls. Added to these key methods are the staple methods available to jurisprudence, such as the legal analysis of treaties, legislative acts and judicial rulings and the study of secondary literature. These methods will be introduced more thoroughly at later stages in this thesis where they can be linked directly to the research carried out. Together these methods provide structure and formalization, which, although not as strong as in physics or mathematics, may certainly support more modest claims.

11 This already because the objects of study are not immutable laws of nature. They are changing social realities, partially determined by our own social practices and understanding of them. Cf Walker (2006b), 16-17 or G. Frankenberg, 'Comparing constitutions: Ideas, ideals, and ideology – toward a layered narrative', 4 *International Journal of Constitutional Law* (2006), 444.

4.1 Normalism v. exceptionalism

In addition to these methods this thesis is also based on a more general, underlying approach, or perhaps even perspective. It examines where the EU is *not* unique, but (comfortably) fits within existing categories.[12] For though the EU is innovative on several points, it did not develop outside, or independent of, the realm of human knowledge and experience.[13] Nor should its further development be based on the assumption that it ought to do so.[14] This approach could be termed normalism, at least to contrast it with its opposite of exceptionalism, which predominantly focuses on those areas where the EU is presumed to be unique.

Normalism therefore searches for commonality rather than uniqueness. This because it assumes that understanding *starts* where it becomes clear how something is related to existing experience and knowledge, even if the object of study challenges and changes that existing knowledge.[15] This does not reject exceptionalism as a useful paradigm. Nor does it deny, or wants to deny, the highly relevant differences that do exist between the EU and

12 See already P. Hay, *Federalism and Supranational Organisations* (University of Illinois Press 1966), 37 and 44 'the Sui Generis label 'not only fails to analyze but in fact asserts that no analysis is possible or worthwhile, it is in fact an 'unsatisfying shrug.' For a more recent rejection of the *Sui Generis* approach, also see, B. de Witte, 'The European Union as an international legal experiment', in: G. de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism* (CUP 2012), 19 et seq., and also L. van Middelaar, *De passage naar Europa, Geschiedenis van een begin*, (Historische Uitgeverij 2009), 29 et seq.

13 Quite the opposite, in fact, as is illustrated by the key role that the experiences with pooling of resources during WW I and II played in conceiving the European Coal and Steel Community (ECSC). Generally for the allies, but specifically for Monnet who had a central place in this project, as well as a lead role in the settlement of the Saar region dispute under the League of Nations. With the benefit of hindsight this was a clear precursor to the ECSC. See J. Monnet, *Memoirs* (Doubleday 1978), 85 et seq. and F. Duchêne, *Jean Monnet, The First Statesman of Interdependence* (W.W.Norton 1994), 41 et seq. On the negative focus of exceptionalist approaches and the *Sui Generis* qualification, also see C. Schönberger, 'Die Europäische Union als Bund: Zugleig ein Betrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas' 129 *AÖR* (2004), 81.

14 '(…) rather than signaling a break with the paradigm of political modernity centered upon the modern state and its legal and constitutional edifice, the EU reflects and contributes to a variation in the form of political modernity.' Walker (2012), 57.

15 Elazar (2006), 28 summarizes it nicely: 'in this he follows the English conceit of rejecting political theory. As a result, he does not do much to advance our knowledge of the subject.' Cf also A. Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' 31 *JCMS* (1993), 476, describing how in fact the excessive focus on the EU's *sui generis* nature might also have been based on an implicit assumption that it would develop into a federation anyway, meaning what was of interest was the process, not the current parallels with other forms of political organization.

other polities.[16] In the language of genetics, however, if the EU is indeed a Genetically Modified Constitution, which mixes different strands of constitutional DNA, it is still relevant to identify which genes remain unaltered, which have mutated, and which of these mutations might contribute to specific characteristics of the EU. Only then can we isolate the unique modifications and understand their effect on the overall organism, instead of just qualifying the entire creature as unique. As changing less than two percent of DNA can make the difference between a human and a chimpanzee, furthermore, the claim that the EU is unique and at the same time largely consists of known constitutional building blocks are not mutually exclusive either. Excessive exceptionalism, however, only leads to the identification of infinite unique phenomena at the cost of the possibility of learning and knowledge.[17]

Although perhaps less spectacular than exceptionalism, furthermore, normalism also allows the comparative knife to cut both ways: where confederalism and sovereignty may help to understand the EU, the EU can be used to test and develop existing constitutional theory.[18] Especially important in this regard is that the EU might provide insights that help stabilize and improve the confederal form more generally.[19]

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16 For an interesting example, and constructive interplay, of exceptionalism and ordinarism also see the debates on the US constitution at Philadelphia, with Hamilton, for instance, analyzing all former confederacies and basing proposals on British experience, and Pinkney rejecting such comparisons for: 'The people of this country are not only very different inhabitants of any State we are acquainted with in the modern world; but I assert that their situation is distinct from either the people of Greece or Rome, or of any state we are acquainted with amongst the antients. …(…) I believe this observation will be found generally true: – that no two people are so exactly alike in their situation or circumstances as to admit the exercise of the same Government with equal benefit: that a system must be suited to the habits & genius of the people it is to govern, and must grow out of them.' (Charles Pinkney according to Madison's notes on the convention, June 25, 1787). Cf also F. McDonald (ed.), *Confederation and Constitution 1781-1789* (Harper & Row 1968), 146. For some clear normalism see Governor Morris, July 2nd 'Thus it has been all the world over. So it will be among us. Reason tells us we are but men: and we are not to expect any particular interference of Heaven in our favor.' (McDonald (1968), 157).

17 Which explicitly does not mean that the EU cannot be innovative, nor does it imply a Burkean sanctification of tradition and experience. For a (strong) rejection of the *sui generis* and exceptionalist approach to the EU also see R. Schütze, 'On "Federal" Ground: the European Union as an (Inter)National Phenomenon', 46 *CMLRev* (2009), 1090 or M. Kumm, 'The Moral Point of Constitutional Pluralism. Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection' In: J. Dickson and P. Eleftheriadis (eds) Philosophical Foundations of European Union Law (OUP 2012), 216.

18 B. de Witte, 'Sovereignty and European Integration: the Weight of Legal Tradition' *Maastricht Journal of European and Comparative Law* (1995), 146.

19 A. Cuyvers, 'The confederal come-back: Rediscovering the confederal form for a transnational world' 19 *European Law Journal* (2013), issue 6 (forthcoming).

4.2 *Caveats and limitations*

Obviously the project outlined so far faces numerous pitfalls and has to acknowledge far-reaching limitations.[20] For example it engages with several of the most complex and contested conceptions in constitutional theory. To make matters worse it tries to comparatively apply these concepts to multifaceted and shape shifting entities like the EU and the US.[21] How to compare two phenomena where no consensus seems to exist on either one of them, and where the practice of constitutional comparison itself is already heavily contested?

Many disciplines, and even more extremely insightful minds, furthermore, have occupied themselves with the problems and questions underlying this thesis. The resulting corpus of knowledge makes selection unavoidable, and makes it impossible to explicitly engage with all relevant views and contributors.

In addition, the method chosen rather rigidly juxtaposes confederate and federate systems, even though the realities behind these labels is, of course, far less clear cut than such a categorisation implies. The risk of this method is acerbated by the exclusive focus on the US as a comparator, as other (con) federal systems present different mixtures of confederal and federate elements. Even within the US, furthermore, the distinction between the confederate and the federate constitutions can be relativized. For example, some of the more federate elements, such as judicial review or the prohibition to secede, only established themselves well after formal federation.

Rigidly clinging to a theoretical distinction between confederalism and federation may, therefore, actually get into the way of understanding the reality of EU integration, especially where the crux of EU integration might lie in the way it *blends* the confederal and the federate, and hence escapes the (con)federal dichotomy. Acknowledging these risks, however, the dichotomy between confederal and federate is consciously developed and adhered to in this thesis with some rigor. Yet the rigidity of this framework should not be mistaken for a denial of the mutability and variability of (con)federal systems. Let alone that it should be a mistaken for a rigid understanding of the EU. Quite the opposite: A relatively rigid analytical framework provides precisely the backdrop against which to better frame and understand the fluid reality of European integration, and explore the constitutional potential that lies in the middle ground between the confederal and federate archetypes. Nevertheless, the risks and limits of the con-

20 For a detailed discussion of the methodology used see below chapter 1, section 3. For a very clear overview of the general problems facing comparative law, see C. Saunders, 'Towards a Global Constitutional Gene Pool', 4 *National Taiwan University Law Review* (2009), 5-7.

21 A. Rosas and L. Armati, *EU Constitutional Law* (Hart Publishing 2010), 8 et seq.

federal dichotomy as an analytical tool must be acknowledged already at this stage.

All of these limitations affect the strength and value of any conclusions reached. Many more restrictions and limitations could, furthermore, be enumerated, and will be throughout this thesis. Numerous reasons, in short, exist to despair and to reject the current enterprise as utmost *hubris*. Some reassurance may, however, be had from the fact that this thesis can also benefit from the valuable work that has already been done by others, both regarding the objects under study and the process of comparison itself. Perhaps the most pressing reason to embark on the path proposed, however, is that we do not seem to have any choice. The EU is not a theoretical exercise, but a reality carrying immediate responsibilities to over five hundred million citizens. As it appears current theory is not yet capable of fully addressing the challenges this raises, and a sustained, joined effort is needed to improve our response to them.

5 Structure and outline

Although a more detailed outline will be provided in each part, the general structure of this thesis is as follows. Part I (chapters 1-6) will compare the EU with the American confederation and its subsequent transformation into the US federation. To this end chapter 1 will first explain and justify our focus on (American) confederalism, and set out the specific methodology used for the comparison. Subsequently it will introduce the American confederation and develop a 'comparative grid' of sixteen key modifications that together constituted the American transition from a confederation to a federation. A grid which can then be used in chapter 2 to trace the relative position of the EU between the US confederation and the US federation via a point by point comparison on these sixteen points. Chapter 3 will then aggregate the results of this comparison into three central propositions on the modified confederal nature of the EU polity. Based on these propositions it subsequently examines in what ways these modifications have strengthened the constitutional system of the EU. Chapter 4 then takes the opposite tack and asks what the specific flaws and weaknesses are of the modified confederal system that has developed in the EU.

In chapter 5 attention shifts to the *process* of federating in the US: How did the US transform itself into a federate system? Some of the most interesting factors driving and enabling that process, at least from the perspective of the EU, will be discussed. These include, *inter alia*, the typical elite structure in the US at the time, the anti-democratic aims and undertone of American federation, and some of the tools and tricks used to amend and ratify the federate constitution. Chapter 6 contains a sub conclusion of part I on the potential of the confederal form to understand, guide and support the EU.

Part II then focuses on sovereignty and its confederal potential to address the core weaknesses revealed in part I, including the need to strengthen the confederal foundation of the EU, and to realize the democratic potential of the confederal form (Chapters 8-11). To this end part II first introduces the idea of confederal sovereignty, the central aims and advantages of confederal sovereignty, and the methodology used (chapter 7). Subsequently the statist and pluralist challenges to sovereignty are set out. Challenges that seemingly lead to an inevitable and fundamental contradiction between sovereignty and integration, and therefore a choice for either the sovereign state or a plural EU (chapter 8). We then return to the conceptual evolution of sovereignty itself to take a closer look at this apparent contradiction. Based on a historical and conceptual analysis of sovereignty, and inspired by the federal evolution of sovereignty in the US, it will be shown how the internal and external strands within sovereignty should be carefully separated as two distinct concepts, which have become gradually confused over time. It is then demonstrated how the EU should be approached from the internal concept of sovereignty, instead of the external one as is usually done, and how such an internal conception of sovereignty does not inherently conflict with integration but rather contains the potential for a further confederal evolution (chapter 9). This potential is then explored and applied in chapter 10, which illustrates the different advantages of confederal sovereignty, including its capacity to provide a stronger confederal foundation for the EU, provide a partial synthesis between statism and pluralism, reconcile the respective national and EU claims to primacy and help to create a positive democratic narrative for the EU. Capacities that are especially important because they help address several of the confederal weaknesses and risks identified in part. I. Chapter 11 then provides a conclusion of part II, after which part III further applies the mutually reinforcing outcomes in part I and II to the two other challenges set: Outlining a confederal evolution of the democratic process (chapter 12) and understanding and weathering the EMU crises (chapter 13). Lastly the main findings and suggestions are brought together in a final conclusion.

Part I

The Confederal Perspective

1 The why and how of American confederalism: Establishing a comparative grid for the EU

1 Introduction: A trip down constitutional memory lane

We now turn to the confederal form and its potential for the EU. Part I of this thesis will examine if confederalism, perhaps in an updated version, might advance our understanding of the EU, or at least of certain elements in its constitutional structure.[1]

To focus, ground, and limit the comparison between the EU and the confederal form, the EU will be positioned between two *concrete examples*. On the one side the EU will be compared with the first, and rather unknown, confederal constitution of the Unites States.[2] For the 'United States of America' were created as just that, a confederation of independent and sovereign states, united in some common objectives under the 'Articles of Confederation and Perpetual Union' (the Articles).[3] On the other side of the comparison will be the constitutional modifications that together transformed this brief, and far from successful, confederal pact into the now famous American federate constitution of 1787, which has been in force ever since.

The current chapter first deals with the why and how of the proposed comparison. Starting with the why, section 2 sets out the reasons that support a confederal comparison as well as the specific focus on US confederalism. Section 3 then outlines the central aims and hypotheses underlying this comparison. Switching to the how, section 4 sets out the methodology chosen to structure the comparison between the EU and the US. In addition, it further recognizes some of the caveats and pitfalls that accompany this

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1 On the use of the term constitutional in this regard also see C.W.A. Timmermans, 'The Constitutionalization of the European Union' (2001-2002) 21 *Yearbook of European Law*, 1, as well as generally G. de Búrca and J.H.H. Weiler, 'The Worlds of European Constitutionalism' (CUP 2012). See for a detailed of the question why constitutionalism fits the EU chapter 10, section 7.

2 K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism' 4 *American Journal of Comparative Law* (1990), 234 in note 124 alludes to it. Cf further L.C. Backer, 'The Extra-National State: American Confederate Federalism and the European Union' 7 *Columbia Journal of European Law* (2001), 173 at 224 and J. Goldsworthy, 'The Debate About Sovereignty in the United States: a Historical and Comparative perspective', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 426.

3 Cf. McDonald (1968), 2 'The Articles were in fact a treaty between thirteen powers, which explicitly reserved their sovereignty and independence.'

comparative exercise. Section 5 then introduces the key terms and concepts for our discussion of confederalism, establishing some working definitions and key distinctions concerning federalism. Once the why and how have been established in this manner, we can make our acquaintance with the curious case of the American Confederation and its transformation into a federation in section 6. An overview which will allow us, in section 7 to develop the framework for a detailed and structured comparison between the EU and the US in chapter 3: a framework that will take the form of a comparative grid based on 16 key federate modifications.

2 Why (American) confederalism?

So why focus on confederalism within the plethora of alternative theories that exist? And why focus on American confederalism, instead of on Swiss or German confederalism, or the concept of confederalism in general? Before outlining the proposed comparison and its objectives, this section first explains and justifies these choices, starting with the choice for confederalism in general.

2.1 Why confederalism?

Federalism aims to create a middle ground between unity and diversity.[4] Not surprisingly, therefore, applying federal theories to the EU is a long established project.[5] Be it as an (implicit) finalité, a way to grasp the dynamic process of integration, or a means to describe its multilevel legal system, the notion of federalism, in its plethora of meanings,[6] has been part of the

4 D.J. Elazar 'Introduction' in: D.J. Elazar (ed) *Self-Rule/Shared Rule: Federal Solutions to the Middle East Conflict* (University Press of America 1984), 1, as well as the detailed discussion of federalism below in chapter 1, section 5.

5 The Schuman declaration itself already spoke of the ECSC as 'a first step in the federation of Europe'. See further: P. Hay (1966), P. Pescatore, 'International Law and Community Law – A Comparative Analysis' 7 *CMLRev* (1970), 167, M. Cappelletti, M. Seccombe and J.H.H. Weiler (eds), *Integration Through Law – European and the American Federal Experience, Vol. I* (De Gruyter 1986), Watts, (1998), 118, K. Lenaerts, 'Federalism: Essential concepts in evolution – the Case of the European Union', 21 *Fordham International Law Journal* (1998), 746, M. Burgess, *Federalism and the European Union: The Building of Europe 1950 – 2000* (Routledge 2000), A. von Bogdandy, 'The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty' 6 *Columbia Journal of European Law* (2000), 27.

6 For instance the EU is already federal in the sense that it is based on an actual constitutional covenant, rather than historical, organic growth or conquest. Cf. Elazar (2006), 4. See further below chapter 1, section 5 for a further discussion and delineation of the different concepts used.

debate on the EU from the very start.[7] The federal project, furthermore, seems to be regaining its vitality and utility for EU discourse.[8]

Within this federal project, the added value of this thesis primarily lies in its focus on the *con*federal dimension. A dimension that, in the words of one prominent author in this field, has so far been 'often either ignored or overlooked in the mainstream literature on the federal idea and European Integration.'[9] Something he qualifies as a 'mistake' because 'confederation is significant for a deeper understanding of what is meant by a federal Europe.' In this regard Daniel Elazar, one of the most eminent thinkers on federalism, also noted in relation to the EU that 'a proper theory of this *new-style confederation* is still lacking, (…).'[10]

In part this relative neglect is due to the highly negative image of confederalism.[11] Generally confederalism is perceived as more of a theoretical category than a realistic option, the Jamaican bobsleighing team in constitutional theory so to speak. Yet in fact confederal theory and the EU have a lot

7 It was not just in the earliest beginnings, furthermore, that the term federation has been used. Besides the famous Humboldt speech of 12 May 2000 by Joschka Fischer titled 'From Confederacy to Federation', Delors, for instance, openly spoke about the 'future federation' in his speech for the European Parliament in 1990 ('The Commission's programme for 1990'. Address by Jacques Delors, Strasbourg, 17 January 1990. Bulletin of the European Communities Supplement 1/90.) In 1970 Pescatore also stated that the Community had been taken to 'the boundaries of federalism' Pescatore (1970), 182.

8 See for instance A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2010), 2: 'Numerous congruities of EU primary law and national constitutions emerge in a functional comparison, particularly when viewed through the lens of comparative federalism.', or R. Schütze, *European Constitutional Law* (CUP 2012), 78: 'the European Union's constitutionalism therefore must, in the future, be (re)constructed in federal terms.'. Further see Schütze, (2009), 1096, A. Dashwood, 'The Relationship between the Member States and the European Union/ Community', 41 *CMLRev* (2004), 355, Schönberger (2004), 81, C. Schönberger, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism.' 19 *European Review of Public Law* (2007), 61, Burgess (2006), J. Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' 14 *European Law Journal* (2008), 389, A.W. Hieringa and P. Kiiver, *Constitutions Compared* (Intersentia / Metro 2012), 53.

9 Burgess (2009), 30. Also see Elazar, (2006), 9: 'Western Europe is moving towards a new-style confederation of old states through the European Community (…).', and Watts (1998), 121-122: '(…) the European Union after Maastricht, which is basically a confederation but (…) has some features of a federation.' Generally see also D.J. Elazar, *Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements* (Rowman & Littlefield 1998).

10 Elazar (2006), 53-4. For a major early contribution exploring the confederal model and the EU see M. Forsyth (1981).

11 De Witte (2012), 50-51.

to offer each other.[12] Besides its descriptive 'fit',[13] confederalism may also be normatively appealing for the EU.[14] It allows a flexible form of voluntary constitutional union that both respects the authority and identity of its constituent members whilst achieving a tolerable level of effectiveness.[15] It does so, furthermore, whilst avoiding two of the most problematic requirements for full federation: a single European people and EU statehood.[16] Although it certainly poses sufficient problems of its own, confederation, therefore, forms an interesting halfway point between independence (or complete heterarchy) and complete (federate) union.[17] As a result the confederal form is a logical model to apply to the EU,[18] an entity that seemingly straddles

12 Cf supra Burgess, and Elazar (2006), 51: 'With the emergence of permanent multinational 'communities,' of which the European Community is the prime example, we are now witnessing a revival of confederal arrangements.'

13 A. Moravcsik, 'Federalism in the European Union: Rhetoric and Reality' in: K. Nicolaïdis and R. Howse (eds) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001), 165: 'the confederal structure of the EU' and p. 176: '(…) in comparative perspective the EU polity appears more confederal than federal'. Lenaerts (1990), 206 describes the EU as a confederation with centripetal forces.

14 Cf also Von Bogdandy (2000), 28 and 52. Especially pluralist values as tolerance are inherent in the confederal system. Cf. J.H.H. Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg', *Harvard Jean Monnet Working Paper* 10/00, Cambridge, Mass. (2000). A characteristic that also provides a logical fit with art. 4(3) TEU.

15 See in this regard also the qualification by Moravcsik of the EU as 'an exceptionally weak federation' which at the same time is 'qualitatively different from existing federal systems' and 'a particular sort of limited, multilevel constitutional polity'. An updated confederal model could fit this bill. Moravcsik (2001), 186-187.

16 See on these points below chapter 10 section six.

17 In this regard the insistence of Schütze to categorize confederal systems as international (also in the American debates on the federate constitution) is not correct. Confederations form *constitutional* systems, and stand in-between international organizations and federate states. This was also clearly perceived during the American Confederation, where the states, for instance, were excluded from having independent external relations and a central army was created and placed under the control of the centre. Something clearly going beyond a mere international agreement. Since the Confederation does exist as a middle ground this also removes a large part of the urgency he claims for his dichotomy between the international and federate understanding of the EU. A dichotomy largely based on the statist views of Jellinek, which he himself qualifies as legal 'reasoning' between quotation marks. See Schütze (2012), 54 et seq.

18 Elazar (2006), 14: Confederalism 'offers possibilities for linkages beyond the limits of the conventional nation-state'. Also see Lenaerts (1990), 262 and 247, who remarks on some elements of the EU as 'characteristic of a confederal constitutional structure.' Further see A.A.M. Kinneging, 'United we stand, divided we fall, a Case for the United States of Europe', in: A.A.M. Kinneging (ed) *Rethinking Europe's Constitution* (Wolf Legal Publishers 2007), 54. Generally see: F.K. Lister, *The European Union, the United Nations and the Revival of Confederal Governance* (Greenwood Press 1996).

the national and the international, as well as the statist and the pluralist divide.[19]

In turn, the EU may force us to reconsider our assessment of confederalism in general.[20] If the EU can be understood as confederal at some level or in some part, why has it not yet collapsed or developed into a federation, often seen as the only two options for the famously unstable confederal form? [21] As will be examined, changing circumstances as well as constitutional innovations in the structure of the EU may have addressed many of the key weaknesses associated with the confederal form. The resulting confederal model may deserve to be freed of the 'stigma of weakness and instability which derives from the historical examples of confederations'. Rather a modern conception of confederalism may be precisely the tool we need to 'find a more specific concept that describes an organization such as the EU in positive terms (beyond the lame *sui generis* description)', and more generally to conceptualize government in an age of globalization.[22] In a time where authority is increasingly exercised at multiple levels and outside the framework of the state, the ugly duckling of constitutional theory may actually come into its own: It might be time for a confederal comeback.[23]

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19 Rosas and Armati (2010), 3. Confederalism thereby further fills in Weiler's remark, but takes away the mystery of the EU as a 'middle creature': 'The European Community itself has no direct parallels in the international legal order. It is an entity which comes between, and in some respects straddles, the classical intergovernmental organization and federation. (J.H.H. Weiler, The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle' in: J.H.H. Weiler, *The Constitution of Europe: Do the New Clothes have an Emperor?* (CUP 1999), 130 et seq. Also compare the assessment by Stone Sweet and Sandholz: 'different areas of Community power are located within a spectrum between pure Intergovernmentalism, where policy is located in the Member States on a classical confederation, and supranationalism, here the locus of policy shifts upward.' (who mistakenly equate supranationalism with federalism) A. Stone Sweet and W. Sandholtz, 'European Integration and Supranational Governance' 4 *Journal of European Public Policy* (1997), 297. See on this distinction between the national and the international also part II chapter 9 explicating the distinction between internal and external sovereignty.

20 D. J. Elazar, 'From statism to federalism: a paradigm shift' 25(2) *Publius: The Journal of Federalism* (1995), 5 even claimed the EU as the new paradigm of federalism in the modern globalized world. Also see M. Burgess, '*Comparative Federalism in Theory and Practice*' (Routledge 2006), also seeing the EU as a new federal model.

21 As the dinosaurs of constitutionalism, Confederations did not seem able to survive the arrival of nationalism and nation-states. Confederations as the Holy Roman Empire or the weak confederation that followed it, the leagues between Italian and German cities, the United Provinces or the Helvetic Confederation either fell apart or became more centralized states.

22 De Witte (2012), 50-51.

23 See in this regard also his positive evaluation of Dashwoods term 'constitutional order of states', which comes remarkably close to a confederation: a link between states that remain independent states, but also bring them under a constitutional framework that exceeds the international. In traditional confederations, however, this constitutional status was more obvious as the confederation traditionally took over the external representation of the collective.

Even if not sufficient in itself, furthermore, confederal theory may play a constructive role in larger 'hybrid' theories, which approach the EU as a mixture of existing forms of government. For example there is the conception of the EU as a 'hybrid'[24] between a confederation and a federation,[25] or related notions such as a 'Federative

Association',[26] a 'Union of States and Peoples',[27] a 'federation of sovereign States',[28] a 'decentralised system of multilevel governance',[29] 'a federation of States',[30] a 'polity of States and Peoples',[31] a 'Supranational Federation',[32] or the idea of a '*Staatenverbund*' as suggested by Kirchhof[33] and later adopted by the German *Bundesverfassungsgericht*.[34] The notion of confederalism may also be of special interests for notions of constitutional pluralism,[35] seeing how a confederal system logically entails multiple centres of constitutional authority.[36] All of these attempts try to pinpoint the EU in the conceptual space between existing forms of government. As such they may all benefit from a more developed confederal understanding of the EU.

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24 Cf already F.E. Dowrick, 'A Model of the European Communities' Legal System', 3(1) *Yearbook of European Law* (1983), 169.

25 Cf. for instance R.L. Watts, *Comparing Federal Systems* (McGill-Queens University Press 1999), 69: '(…) the European Union, itself a hybrid which is predominantly confederal in character but has some of the characteristics of a federation (…).' Or on p. 18 '(…) the most significant contemporary confederation, the European Union'.

26 A. Rosas, *The European Union as a Federative Association*, Durham European Law Institute European Law Lecture 2003, available at their website.

27 A. Arnull et al. (eds), *A Constitutional Order of States?: Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011).

28 A. Dashwood, 'The Relationship between the Member States and the European Union/Community', 41 *CMLRev* (2004), 355.

29 Rosas and Armati (2010), 91.

30 Schütze (2009), 1105 and Schütze (2012), 49.

31 W. van Gerven, *The European Union, A Polity of States and Peoples* (Hart Publishing 2005).

32 Von Bogdandy (2000), 27.

33 P. Kirchhof, 'Der deutsche Staat im Prozeß der europäischen Integration', in: J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts*, VII (CF Müller 1993), 879 et seq.

34 BVerfGE 89, 155 (1993) *Maastricht Urteil* paras 183, 229 and 231. Also see D. Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court', 46 *CMLRev* (2009), 1799.

35 See, for instance, N. Walker, 'The Idea of Constitutional Pluralism', 65 *The Modern Law Review* (2002), 317, M. Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice', 36 *CMLRev* (1999), 351 or M. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 501.

36 It especially fits with notions of multilayered constitutionalism as developed for instance by Pernice who borrows the term 'Constitutional federation' from Eijsbouts and Thym. I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: Constitution-Making Revisited?', 36 *CMLRev* (1999), 703 or I. Pernice, 'Multilevel constitutionalism in the European Union' 27 *European Law Review* (2002), 511, and W.T. Eijsbouts 'Classical and baroque constitutionalism in the face of change (Review essay)' 37 *CMLRev* (2000), 218.

Alternatively, some may even be unmasked as more fashionable labels for the unpopular brand of confederalism.[37]

2.2 Why the American Confederation?

Yet why, within confederalism, focus on the confederal roots of the US? For clearly there are several other comparators of great interest such as Switzerland, Germany or Canada.[38] And clearly rather significant differences exist between the EU and an 18th century American confederation.

At the same time, and in addition to the simple necessity of demarcation in itself, the Articles are one of the most significant, typical and recent examples of a confederal system.[39] What is more, the American example contains several points of specific, and even unique, comparative interest to the EU. Five of these points must be briefly set out, as these also underlie the approach taken.

First, there are clear similarities in treaty provisions and constitutional structure. In this regard Burgess even states that: 'We have shown that as a federal union of states and citizens [the EU] stands conceptually in a long line of descent stretching back at least to the 1781 Articles of Confederation in the USA, but we have also suggested that it is the harbinger of a distinctly new category of confederal-type unions.'[40] A detailed comparison between the two may therefore help to identify the precise modifications from the classic to this modified confederal model.

In fact, when studying the Articles of Confederation it is hard not to immediately appreciate these similarities. Although the Articles will be introduced in more detail below, two examples suffice to illustrate this point. To begin with there is the second paragraph of the Articles:

> 'Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.'

37 De Witte (2012). Especially as Lisbon only seems to have 'increased the federal complexities and ambiguities' of the EU framework, see P. Dann, 'The Political Institutions', in: A. Von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd edn., Hart Publishing 2010), 273.

38 Especially the Restored Swiss Confederation (1815-1848) is interesting in this regard, as it aimed to combine the original, organic and grass-roots Swiss confederal system with some of the rationalization later imposed by Napoleon in the 'Mediation Constitution', but the United Provinces of the Netherlands or the German Bund of 1815 also provide interesting comparators.

39 Forsyth (1981), 71.

40 Burgess (2006), 247.

A provision which bases the Confederation on the same principle of attribution so central to the nature of the EU.[41] In addition, remarkable similarities exist regarding the four freedoms and citizenship, often proclaimed to constitute the heart of the EU acquis:

> 'To better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, *paupers, vagabonds, and fugitives from justice excepted*, shall be entitled to *all privileges and immunities of free citizens* in the several States; and the people of each State shall free *ingress and regress* to and from any other State, and shall enjoy therein *all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof* respectively, (…).'[42]

Replace paupers, vagabonds and fugitives with the more politically correct (and broader) 'economically inactive people', and one has the original free movement rights of the EU. The general right of equal treatment for all free inhabitants even approaches the notion of a Union citizen.[43] Partially as a result of these similarities in underlying logic and structure, the Confederation was also plagued by some of the same structural problems as the EU is today. Key weaknesses in, for instance, decision-making, enforcement or the capacity to adapt the confederal system itself to increasingly apparent flaws thereby form interesting material for comparison.

Second, *finding solutions* to these confederal problems became the subject of profound contemporary analysis by some of the great minds of the time such as Madison, Hamilton, King, Dickinson, Patterson, and Franklin. Analysis that retains much of value today. Besides some deep reflections on confederal rule in general, many interesting proposals were developed to improve the system. Some of these intended to 'fix' the problems inherent in the confederal system. Others aimed to devise a new scheme to replace the confederation altogether. Both are of interest to students of the EU. Several will look rather familiar.[44]

Third, the Articles, and the constitutional theory they inspired, helped shape the federate constitution that eventually replaced the American Confederation. A federate constitution that was to a large extent designed to

41 See art. 4 and 5 TEU.

42 Art. IV Articles of Confederation.

43 Cf art. 9 TEU, art. 18-22 and 26 TFEU, as well as the classic description of this 'fundamental status' in case C-184/99 *Grzelczyk* [2001] ECR I-6193.

44 See especially the Randolph (or Virginia) Plan, the Patterson Plan and the Hamilton Plan, in McDonald (1968), 121, 130 and 139, or the plan by Rufus King which proposed a 'US of two speeds' for a sub-confederation that could move forward, where for instance Rhode Island was blocking progress. (Jensen (1970), 406).

correct the confederal weaknesses.[45] It is no coincidence that many of the federate innovations are direct opposites of their confederal predecessors.[46]

As a result, the story of the American confederation provides us not just with one, but with *two* comparative reference points to situate the EU between: the confederation on the one hand, and its federate replacement on the other. Two elaborate and relatively recent specimens which also help us to delineate, however tentatively, the *conceptual spectrum* between confederal and federal forms of government more generally.[47] In turn, this enables us to plot the trajectory of the EU's evolutionary development along this spectrum: is the EU, for instance, gradually evolving in a federate or confederate direction (or both at the same time), what is driving any such evolution, is it desirable, and if not can it be corrected? A dynamic object like the EU, after all, requires a dynamic understanding as well as conceptual space to develop in the future.

Fourth, comparisons with the *current* federate system in the US are popular, and often used to support or attack a wide range of positions on the EU.[48] A better understanding of the confederate background may serve to better inform and evaluate such comparisons with the US federation, seeing how the current system is inextricably bound up with its confederal roots.[49]

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45 A.C. McLaughlin, 'The Background of American federalism' 12 *The American Political Science Review* (1918), 239.

46 This is not to claim that the federate constitution was a coherent, analytical unity rather than a compromise between political and ideological rivals. Franklin provides a clear and apt warning in this regard advising us not to understand the formation of the constitution 'like a game of chess, methodically and consciously played.' It was more like a game of dice, with so many players, 'their ideas so different, their prejudices so strong and so various, and their particular interests, independent of the general, seeming so opposite, that not a move can be made that is not contested.' Similarly, Madison, arguing against the national bank during the first Congress stated: 'It is not pretended that every insertion or omission in the Constitution is the effect of systemic attention. This is not the character of any human work, particularly the work of a body of men' (2 Annals of Congress 1899 (1791). In general on the coherence also see Gordon S. Wood, *The Creation of the American Republic* (University of North Carolina Press 1969), 593. Nevertheless, even if a compromise, a single system was created, and the aim of this compromise still was to remedy the weaknesses of the Articles without fully unifying.

47 For the benefits of such spectra over static definitions see N. Jansen, 'Comparative Law and Comparative Knowledge' in: M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (OUP 2006), 317.

48 Cappelletti, Seccombe and Weiler (1986), Burgess, (2009), 26, Lenaerts (1990).

49 Also for those rejecting the standard comparison to the current US system as 'a sort of paradigm towards which (…) the rest of civilized mankind are forced to march with unresting feet.' (D.A.O. Edward, 'What kind of Law Does Europe Need? The Role of Law, Lawyers and Judges in Contemporary European Integration', 5 *Columbia Journal of European Law* (1998), 2). Backtracking the American marching route actually opens up refreshing side paths not taken in *the* US. In any case a comparison can act more modestly, in the words of G.S. Wood, 'to get some perspective on (…) society and to criticize it'. c) Wood (1969), viii.

Fifth, and last, the example of the Articles also covers the *process* of moving from confederation to federation.[50] It provides us with rare experience of a voluntary, designed, and well-documented transition between a confederal and a federate system.[51] What and who drove this remarkable constitutional innovation, and how was it achieved? Procedural experience that again pertains to the dynamic of EU integration itself: does the EU, for example, contain some of the elements which instigated, shaped and enabled federation in the US?[52] And if not, what conclusions may be drawn from this?

In sum, sufficient reasons exist to justify an expedition to the rather obscure confederal roots of the United States. The Articles provide us with ample knowledge and ideas for an EU trying to discover what it is and should be.[53] Knowledge, furthermore, that should be equally of interest to those who support a federal future of the EU, and to those who reject such a federal solution and are looking for alternative answers.[54]

3 Specific aims and hypotheses

As already indicated in the introduction, the general comparative aim of this thesis will be further deconstructed and specified along the way. At this point it should first be stressed that the aim of the proposed comparison is emphatically *not* to propose a straightforward, exclusive qualification of the EU as a classic confederation. This already because attaching a single label and then defending its exclusive relevance simply is not a constructive approach for a complex and moving target like the EU.[55]

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50 Especially since the EU, as the US, enjoys the historically rather rare luxury of rationally designing its own constitution, making the comparison with (con)federalism as 'a system of government based on choice and design rather than accident or force' of additional interest. (Elazar, (2006). Xv).

51 J. Madison, A. Hamilton and J. Jay, *The Federalist Papers* (originally published between 1887 and 1788, Penguin 1987), No. 1: 'for the first time in history, society can determine its own organization based on deliberation and choice, rather than the accidents of history.'

52 A distinction must here be made between the notion, or element, of process inherent in federalism and the more singular process meant here, namely that of shifting from a confederate to a federate polity. This shift may be partially caused by the processes inherent in federal systems, but does form a separate, more significant step.

53 The open finality of the EU, noted by Fisher in his 2000 Humboldt speech, is far from settled, as has again been illustrated by the failure of the Constitutional Treaty and the paranoia that a flag could evoke.

54 See the discussion of the pluralist approach to the EU below in chapter 8 section 5.

55 Such an approach furthermore would amount to a form of methodical exceptionalism, directly violating the essence of ordinarism itself. See chapter 1 section 4. For the intimate connection between typologies and the general aim of a study also see D. Grimm, 'Types of Constitutions', in: M. Rosenfeld and A. Sajó (eds) *The Oxford Handbook of Comparative Constitutional* Law (OUP 2012), 99.

The confederate prism aims to be just that: a lens that offers one instructive perspective and conceptual toolkit to approach the EU with.[56] The immediate aim, therefore, is to use the Articles as a contrast fluid, highlighting the degree to which the EU shares in the core characteristics of the American confederation, and where the EU deviates from them, primarily by incorporating the US federal modifications.[57]

Such an exercise does not reject the possibility that, at another level of analysis, the EU can be usefully understood as a unique polity, for instance by combining elements of different forms of political organization. Factually delineating where the EU incorporates confederal or federal elements, where it blends the two, and which effects this may give rise to, in fact fully fits with such a view. Even if the EU is to be understood as such a unique blend, after all, it is still instructive to isolate the different single-malts, so to speak, that make it up, and see if and how they go together.

In line with these aims the central, descriptive hypothesis of part I is that the EU has combined a confederal basis with several of the key federate modifications underlying the US transition from a confederation to a federation. As a consequence it can be usefully understood as an *modified confederal system*.[58]

If this hypothesis is confirmed, several further questions become pertinent. First, the *explanatory potential* of the confederal prism. Second, what are the *possibilities and limitations* of such a – modified – confederal system? Are there any specific weaknesses, for instance, that restrict its 'carrying potential'? Vice versa are there perhaps specific strengths that should be exploited? These questions, all of a descriptive nature, lead to a third category of more forward looking questions which combine descriptive and normative elements: is a (partially) confederal form *sustainable and desirable*? Can it, for instance, support the increasing demands of deepening integration? This especially for a Union now asked to deal with challenges as the sovereign debt crisis, or the cocktail of nationalism, populism and immigration-issues facing the EU through its Member States?

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56 Lenaerts (1990), 206, who describes American constitutional history as a 'conceptual reference'. Also see Burgess (2009), 27: 'Indeed the sheer pace of European Integration since the ratification of the Single European Act in 1987 has unquestionably revived the fortunes of the federal idea.'

57 As such this thesis must respectfully but forcefully disagree with those holding that 'one can eliminate any comparison with the US as inherently futile exercises in comparing the incomparable.' (Lord Mackenzie Stewart, 'Problems of the European Community – Transatlantic Parallels', 36 *International and Comparative Law Quarterly* (1987), 183.

58 Cf in this regard also Van Middelaar (2009), 17 and the three 'language games' he describes.

Regarding these further questions the aim of this thesis must be even more modest than with the actual comparison itself. The goal is solely to tentatively explore them, and to illustrate how a confederal approach may be of use in making such fundamental questions more intelligible, and may ultimately contribute to a framework to coherently address them.

After discussing the confederal *form* in this way, part I will then engage the equally informative yet challenging comparison of the *process* via which the US made the transition from a confederal to a federal constitution. Why and how did the US make this constitutional leap of faith, and what insights could be gleamed from this experience for the 'ever closer union' today? Seeing how this procedural comparison faces even larger obstacles than the substantive one, the sole aim here is to selectively highlight some elements that may be informative for the EU, fully acknowledging the high context-dependence of individual process-elements.

4 Comparative methodology: Comparing apples and I-pads?

As indicated, part I of this thesis is based on a double comparison between the EU, the American Confederation, and its evolution into a federation. A comparison that first establishes the key modifications that jointly transformed the American Confederation into a federation, and subsequently compares the EU against these key modifications. An approach that primarily relies on the method of (constitutional) comparison. A method that has proven it can provide new and constructive insights, but also one that faces significant challenges and needs to be handled with care. Let us start with these challenges, before we turn to the general methodology of constitutional comparison and the specific comparative design of this thesis that aim to address them.

4.1 Caveats and limitations: The inherent hubris of comparison

For clearly the project outlined above faces considerable challenges, which need to be avoided, addressed or at least recognized.[59] Challenges that to a large extent are inherent in any attempt at comparison.[60] Chief amongst these is the problem of comparability itself. Is constitutional comparison not impossible due to the unbridgeable historical, contextual and intellectual

59 See also Introduction, section 4.2. above.

60 See for an overview V. C. Jackson, 'Methodological Challenges in Comparative Constitutional Law' 28 *Penn State International Law Review* (2010), 319, C. Saunders, 'Towards a Global Constitutional Gene Pool', 4 *National Taiwan University Law Review* (2009), 5-12, G. Frankenberg, 'Comparing constitutions: Ideas, ideals, and ideology – toward a layered narrative', *International Journal of Constitutional Law* (2006), 439, and classically O. Kahn-Freund, 'On Uses and Misuses of Comparative Law', 37 *Modern Law Review* (1974), 1.

chasms that divide systems?[61] A challenge that rises to glaring proportions for the proposed comparison. Differences between the EU and a short-lived 18th century American Confederation are deep, abundant and usually highly significant.[62] Why compare the EU to a union of (former) British colonies forged in the middle of a war for independence? A union struggling to survive[63] in a world very different to our own in vital terms such as social organization, politics, technology, economy, geography, or public beliefs.[64] Establishing the relevance of apparent similarities or differences is, to put it mildly, complicated by such disparities.

Secondly, such disparities become especially problematic in light of the high context-dependence of constitutional systems.[65] Constitutions do not exist in a vacuum but are intimately connected to the context in which they need to function.[66] Studying them in isolation might then be compared to trying to study fire without oxygen. The problem of context-dependence is especially acute for a comparative analysis which focuses on constitutional design and institutions.[67] Even assuming that such a focus has independent value,[68] it may lead one to loose sight of the vital importance of context that determines the functioning and meaning of constitutions in the actual world.[69] Causality may, for instance, be too easily assumed between a constitutional element and historical outcomes, or informal rules and

61 See amongst the many scholars that caution against these risks, or even perceive them to be insurmountable, G. Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' 26 *Harvard International Law Journal* (1985), 411 or P. Legrand, 'The Impossibility of "Legal Transplants"' 4 *Maastricht Journal of European and Comparative Law* (1997), 111.

62 J. Habermas, '*So Why Does Europe Need a Constitution?*' (Hamburg lecture of 26 June 2001). 3. Also see J. Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution"' 1 *European Law Journal* (1995), 303.

63 A difference that nevertheless raises a question on a potential similarity: could emerging and declining nation-states have similar constitutional (overarching authority) needs?

64 See for an overview, also for the differences per State, R.R. Beeman, *The Varieties of political Experience in Eigtheenth-Centrury America* (University of Pennsylvania Press 2006). For the classis assessment of the US shortly after independence through the eyes and mind of Tocqueville see A. de Tocqueville, *Democracy in America* (translation H.C. Mansfield and D. Winthrop, University of Chicago Press 2002). For a further description of the Confederation and the confederate period also see section 5 below.

65 See for instance Jansen, (2006), 306.

66 On the special status of constitutions also see A. Harding and P. Leyland, 'Comparative Law in Constitutional Contexts', in: E. Örücu and D. Nelken, *Comparative Law* (Hart Publishing 2007), 319-322.

67 For a clear warning on constitutional comparison see for instance J.H.H. Weiler and J.P. Trachtman, 'European Constitutionalism and Its Discontents', 17 *Northwestern Journal of International Law & Business* (1996-1997), 355.

68 See on this importance, for instance, M. Loughlin, 'Ten Tenets of Sovereignty' in N. Walker (ed) *Sovereignty in Transition* (Hart Publishing 2006), 62-63.

69 For this reason some authors, such as Legrand, would rather see comparative attempts as a risk, only obscuring real knowledge which should look at the deeper underlying culture. P. Legrand, 'European Legal Systems Are Not Converging', 45 *International and Comparative Law Quarterly* (1965), 52, 56.

conventions that influence and complement the formal constitution may be missed.[70] A hazard that is especially relevant for the proposed comparison because of the importance of non-structural components in federalism, which cannot be reduced to a set of institutions alone.[71] On the other hand, the proposed comparison has the benefit that one of its legs, the comparison between the US Confederation and its transformation to a federation, stands *within* the same American society and context, at least to a very large extent. As indicated earlier, this also allows us to establish and study the constitutional modifications that together effected this transformation more purely. Nevertheless the chosen approach must take care to remain sensitive enough to non-institutional factors that can nevertheless have a tremendous impact, such as social conventions, economic circumstances, the influence of specific individuals such as Monnet, Washington, Beyen, Madison, De Gaulle, Jefferson or Delors, or let alone the unpredictable effects of 'events'.[72]

The challenges of incomparability and context are, furthermore, aggravated by the historical dimension of the comparison and the non-statal nature of the EU. As to the historical dimension, it is difficult enough to agree on what actually happened, let alone on what past events contain in the way of general truths or lessons. [73] The non-statal nature of the EU further complicates matters as much of the American constitutional discourse, as well as constitutional theory in general, did develop in a statal context. Although this challenge is less relevant to a confederal approach, which concerns itself with a constitutional bond between states, the relevance of other statal constitutions and constitutional discourse can, therefore, not automatically be presumed.[74]

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70 S.E. Finer, V. Bogdandor and B. Rudden, *Comparing Constitutions* (Clarendon Press 1995), 2-5.

71 Elazar (2006), 67. Even Wheare, within his more institutional approach, also analyzed the 'prerequisites of Federal Government.' (K.C. Wheare, *Federal Government*, (4th edn., OUP 1964) chapter 3. Livingston even claimed that 'The essence of federalism lies not in the constitutional or institutional structure but in the society itself.' W.S. Livingston, *Federalism and Constitutional Change* (Clarendon Press 1956), 2.

72 Cf. Macmillan's famous answer when asked what represents the greatest challenge for a statesman: 'Events, my dear boy, events'. More contemporaneously, the economic crisis is leading European integration into venues that were hardly imaginable a short while ago. See in detail chapter 13.

73 Cf. Gordon S. Wood, *The Purpose of the Past* (Penguin 2008), 196 et seq. and 293 et seq.

74 Cf the challenge raised by Gunther Teubner: 'Is constitutional theory able to generalize the ideas it developed for the nation state and to re-specify them for today's problems?' G. Teubner, 'Fragmented Foundations: Societal Constitutionalism beyond the Nation State', in: P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010), 328. On the use of constitutional discourse for the EU further see: G. de Búrca and J.H.H. Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012).

Thirdly, the issues concerned are covered by a broad range of disciplines and sub-disciplines, such as legal history, economic history, political science, comparative constitutional law, European law and constitutional theory, to only name some central ones. For reality is not divided into disciplines, even if human knowledge must increasingly be. The comparison also includes different legal systems, traditions and social contexts. Yet true bilingualism, let alone bilegalism and biculturalism, must largely remains an aspiration. It is important, therefore, to be aware of the limits and myopic tendencies of ones own discipline and background, professionally, culturally and socially.[75]

Lastly, there is the problem of selection and generalization of results. As already noted, the US example is only one amongst many other instructive and relevant federal systems.[76] Canada, Germany, Switzerland, Belgium, or the United Provinces of the Netherlands, to name but some, also provide useful insights, or have even directly served as models during the development of the EU.[77] Even within the US example, furthermore, the proposed comparison focuses on one specific period in time within the long and dynamic existence of the US federal system.[78] Consequently the comparison proposed can never claim anything approaching exclusivity, completeness or comprehensiveness. Equally this specific focus also affects the potential to draw more general conclusions based on any outcomes found.

These limits, and more can easily be further specified, affect the potential scope and value of the proposed comparison. At the very least any apparent similarities found must be assessed with care.[79] Nevertheless it is still claimed that useful comparison is possible, and that the US example is

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75 Very critical of the possibilities for an 'outsider' to grasp the necessary perspective of an 'insider', see P. Legrand, 'Comparative Legal Studies and the Matter of Authenticity', 1 *Journal of Comparative Law* (2008), 365.

76 Especially considering the, to some extent, separate or distinct European tradition of federal theory. See for an overview of this distinction generally M. Burgess and A-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993). This more European strand, for instance, is more concerned with the notion of subsidiarity. (R.L. Watts, (1998), 120.

77 T. Börzel and T. Risse, 'Who is afraid of a European Federation? How to constitutionalise a Multi-Level Governance System' *Harvard Jean Monnet Working Paper*, no. 7/00, T. Börzel and M. Hosli, 'Brussels Between Berne and Berlin: Comparative Federalism Meets the European Union' 16 *Governance* (2003), 179 et seq, 13, or C. Church and P. Dardanelli 'The Dynamics of Confederalism and Federalism: Comparing Switzerland and the EU', 15 *Regional and Federal Studies* (2005), 163.

78 See amongst the many analyses on the development of the US system: J.F. Zimmerman, *Contemporary American Federalism: The Growth of National Power* (Leicester University Press 1992), D.J. Elazar, *The American Mosaic: The Impact of Space, Time and Culture on American Politics* (Westview 1994), or D.B. Walker, *The Rebirth of Federalism: Slouching towards Washington* (Chatham House 1995).

79 Watts (1999), 2, and M. Tushnet, 'The Possibilities of Comparative Constitutional Law' 108 *Yale Law Journal* (1999), 1307.

especially relevant and instructive in this regard.[80] A claim based on the relevance of the American experience set out above, as well as on the established methodology and practice of constitutional comparison, to which we must now briefly turn.

4.2 The practice and methodology of constitutional comparison

For despite its challenges, constitutional comparison is an established sub-field of comparative law and constitutional theory, as is comparative federalism.[81] At least dating back to Aristotle's comparative analysis of constitutions,[82] and despite long periods of relative inactivity,[83] constitutional comparison even forms a 'newly energized field in the 21st century'.[84] One that has much to offer in general to a globalizing and interdependent world in need of restructuring and reconceptualization. In the words of Heringa and Kiiver it may even be 'crucial in the particular context of the creation and development of international organizations.'[85] Van Bogdandy equally finds that 'New dimensions open up for comparative constitutional scholarship due to European Integration (…).[86]

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80 See also Watts (1999), 21-22. Not only is it the most 'enduring' federation, but 'Virtually all subsequently attempted federations have taken some account of the constitutional design and operation of the United States (…)' which makes it an 'important example' and 'an important reference point in any comparative study of federalism.'

81 See for constitutional comparison in general, amongst others, Hieringa and Kiiver (2012), , M. Rosenfeld and A. Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012), T. Ginsburg and R. Dixon, *Comparative Constitutional Law* (Edward Elgar 2011) or Finer, Bogdandor and Rudden (1995). For Federalism see, for instance, E.A. Freeman, *History of federal government in Greece and Italy* (Macmillan, 1893, 2nd ed, as reprinted by BiblioLife from the original in 2012), Burgess (2006), L. Thorlakson 'Comparing federal institutions: Power and representation in six federations', 26 *West European Politics* (2003), 1, as well as the more detailed discussion below.

82 Who even then dared to state that: 'Let us remember that we should not disregard the experience of ages; in the multitude of years these things, if they were good, would certainly not have been unknown; for almost everything has been found out, although sometimes they are not put together…' Aristotle, '*The Politics*', (CUP 2002) Book II, 5. 42-4, p. 37-38. For a further application of his theory to the EU see also A. Cuyvers, 'The Aristocratic Surplus', in: A.A.M. Kinneging (ed), *Rethinking Europe's Constitution*, (Wolf Legal Publishers 2007), 117. Tushnet locates the advent of modern comparative constitutionalism at the drafting of the American federate constitution. M. Tushnet, 'Comparative Constitutional Law', in: M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006), 1226.

83 Comparative constitutional law, distinct from comparative private law, was basically only revived in the 1980's, largely due to Canadian developments and the need to draft new constitutions in Central and Eastern Europe, as well as in South Africa.

84 Ginsburg and Dixon (2011). 1, Rosenfeld and Sajó (2012), 1.

85 Hieringa and Kiiver (2012), 1.

86 A. von Bogdandy, 'Comparative Constitutional Law: A Contested Domain', in: M. Rosenfeld and A. Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012), 26.

Fortunately this new relevance and opportunity can build on past experience and at least some established methodology to deal with the inherent methodological and even epistemological, problems of constitutional comparison.[87] At the same time there obviously is no single methodology for all things comparative, nor is any methodology uncontested or without flaws.[88] Rather it is already part of comparative methodology to first establish what kind of comparison is desired and for what purpose, as this will determine how such a comparison should be designed, and how to address the comparative flaws as best as possible. Let us first, therefore, distinguish the kind of comparison envisioned here, or in other words *to what end* the confederal comparison is being made, before we look in more detail at the specific methodology and design of the comparison itself.

4.2.1 The epistemic interest: To what end are we comparing?

The term 'epistemic interest' is gratefully borrowed from Nils Jansen, as it usefully distinguishes between the aim of a comparison and its method.[89] It clarifies that the underlying decision on *why* it is interesting to place the EU on a spectrum between confederation and federation, on why 'this matters', is not methodological. It is based on the assumptions and expectations set out above on the usefulness of confederalism for the EU.

Our epistemic interest here, and therefore the end of our comparison, is to improve our understanding of the constitutional nature and functioning of the EU, and more specifically to establish to what extent the confederate-federate dimension may be of use in this regard.[90] The comparison between the American Confederation and Federation, and the subsequent comparison of the EU against the differences between these two systems, thereby forms a kind of heuristic tool. One that helps both to better understand the spectrum between confederate and federate systems and the place the EU occupies on this spectrum.

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87 On this point the object of this thesis is not to directly contribute to this methodological debate, or to offer specific methodological solutions, but rather to illustrate how the proposed comparison is based on existing methods and practice.

88 Grimm (2012), 99. Typical of the methodological difficulties of comparison is the impressive discussion, dismantling and attempted reconstruction of functionalism by Michaels. In this contribution he incidentally but emblematically notes on two other contributions how they contain 'brilliant critiques' on existing methods, but then become 'much weaker' when they try to come up with alternatives. In comparison as well it is easier to be a food critic than a master chef. R. Michaels, 'The Functional Method of Comparative Law', in: M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP, 2006), 353.

89 Jansen (2006), 313, 317-18.

90 An objective that admittedly is based already on several assumptions about confederalism and its usefulness, including normative ones. Cf. Jansen, (2006), 313.

It is towards this epistemic aim that the comparison must therefore be tailored. Now on one level this means the comparison is used here as the classic method to take an external perspective on one's 'own' system, and to perceive it as less unique and less logical than one might otherwise do.[91] At the same time the proposed comparison also aims to make more general claims about (con)federalism and the EU. Certainly to this end it must rely on the existing comparative methodology to ensure that the comparison is actually capable of achieving these ends. Methodology that, especially in the field of comparative constitutional law, is still under construction, but at least does offer several different approaches, the two strongest and most suitable of which will be utilized here to the extent possible.

4.2.2 Five approaches to constitutional comparison

Generally speaking five 'broad classes of methodological approach' can be distinguished in comparative constitutional scholarship: classificatory, historical, universalist, functional and contextual.[92] Let us start with what our comparison is *not*.

Firstly the confederal comparison proposed is not historical. It is not interested in examining any 'genetic' or 'genealogical' connections between the EU and the American comparators.[93] In other words, it does not examine, nor claim, that the EU developed out of American confederalism or was directly shaped by it. Nor does it examine or claim an explicit or even accidental 'migration' of American elements into the EU system.[94] The aim is to establish similarities and differences between the systems and to study their explanatory value, not to trace any similarities back to the US experience.

Equally the proposed comparison is not normative universalist. It does not aim to establish universal 'principles of ordered liberty' or 'theories of a just society.'[95] Although it aims to establish some general insights into modern confederalism and the EU, it does not purport to provide universal guidelines on how all constitutions should be organized, or to suggest a Kantian-like ideal for world order.[96] Even though the findings on confederalism may potentially be of use for the discourse on global constitutionalism, they do

91 V.C. Jackson and M. Tushnet, *Comparative Constitutional Law* (Foundation Press 1999), 145-146.

92 Here we follow the recent, and of course not exclusive, categorization provided by V.C. Jackson 'Comparative Constitutional Law: Methodologies', in: M. Rosenfeld and A. Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012), 54-55.

93 Idem, 58.

94 Cf. S. Choudry, 'Migration As a New Metaphor in Comparative Constitutional Law', in: S. Choudry (ed) *The Migration of Constitutional Ideas* (CUP 2006), 13.

95 A.E.D. Howard, 'A Traveler From an Antique Land: The Modern Renaissance of Comparative Constitutionalism' 50 *Virginia Journal of International Law* (2009), 41.

96 See also Burgess (2006), ch. 1 for a discussion of this universalist normative trend specifically within comparative federalism.

not claim any intrinsic necessity or superiority of the confederal form.[97] Rather, the aim of the comparison is explicitly also to explore the limits of the confederal form, and to asses the necessary prerequisites for a stable and effective confederal polity.[98]

Lastly, our primary focus is also not contextual. As described by Jackson 'scholarship in this vein does emphasize either the ways in which particular institutional contexts may limit the ability to draw conclusions from the practices of other systems, or the expressive functions of constitutions or constitutional law within particular national contexts.'[99] As will be clear from the 'normalist' approach underlying this thesis, the proposed comparison is precisely aimed towards establishing points of useful comparison, not towards further ballooning the *sui generis* ego of the EU.[100] Whilst trying to remain sensitive to the context and its obvious relevance, the main focus will therefore be on relevant similarities and differences in the constitutional systems compared, and not on their unique contexts. A focus which also brings us to the two related approaches to constitutional comparison that this thesis does belong to: classificatory and functional.

4.2.3 A classificatory and functional approach

Classificatory comparisons generally focus on 'large structural issues', and primarily aim to classify their objects of study into more general categories such as presidential versus parliamentary systems, or federal versus non-federal systems.[101] As Jackson also notes: 'some classificatory studies identify new and emerging categories of constitutional systems or phenomena. The literature on European constitutionalism has some of these characteristics (…).'[102] In line with this comparative approach this thesis precisely aims to establish a structural comparative framework along the confederal-federate axis, and to classify the EU within this framework. A descriptive and classificatory objective, which subsequently shares elements of the closely related form of a *functional* comparison.

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97 Cf. R. MacDonald and D. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff 2005) or J. Dunoff and Joel Trachtman (eds), *Ruling the World?: International Law, Global Governance, Constitutionalism* (CUP 2009).

98 Cuyvers (2012).

99 V.C. Jackson (2012), 67.

100 See Introduction, section 4.1.

101 V.C. Jackson (2012), 57.

102 Idem.

Functionalist approaches currently form the dominant method within (constitutional) comparative research.[103] In the words of Tushnet, another leading authority, 'Functionalism claims that particular constitutional provisions create arrangements that serve particular functions in a system of governance. Comparative constitutional study can help identify those functions and show how different constitutional provisions serve the same function in different constitutional systems.[104] The current research primarily resembles one specific functionalist 'technique' that can be labelled as *conceptual functionalism*. This is 'a form of analysis that overlaps with the classificatory category: scholars hypothesize about why and how constitutional institutions or doctrines function as they do, and what categories or criteria capture and explain these functions, drawing examples from some discrete number of systems to conceptualize in ways that generate comparative insights or working hypotheses (…).'[105] Conceptual functionalism is an established method, as Jackson adds: 'some of the best work in comparative constitutional law is done in this vein.'[106]

In line with this methodology, the confederal comparison developed here draws examples from two systems to establish criteria and categories to understand and analyse the nature and functioning of the EU: How does the EU compare with our confederate and federate baselines, and can its position on this spectrum help explain its peculiar evolution and characteristics? Can we develop some general hypotheses on the strengths and weaknesses of such mixtures of confederate and federate elements?[107] A comparison which focuses on the function of these constitutional structures, especially in the federal function of combining and balancing shared central rule and autonomy of the subparts,[108] but is also a-typical of functionalism in its rather broad and general scope, as opposed to a more narrow focus on more limited functions and case law.[109]

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103 Idem, 62.Cf however also R. Michaels who describes it as 'both the mantra and the *bête noir* of comparative law.' He rightly points out the many tensions and problems within the overarching concept of functionalism. (Michaels (2006), 340.)

104 Tushnet (1999), 1228. For a detailed analysis of several sub-forms (rightly or wrongly) brought under the umbrella of functionalism, and some of which the current comparison also admits to blending, see Michaels (2006), 345 et seq.

105 Jackson (2012), 63.

106 Idem.

107 At the same time this very limited number of comparators is also a limit to the functional nature of the comparison, partially bringing it within the category of a detailed case study. See strongly on this point Tushnet (1999), 1266. To a certain extent this limited focus, and the difficulties this provides for formulating general conclusions, however, is counterbalanced by the already established and well-developed functional framework of federalism and the clear value of the American experience for its development.

108 Cf A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2010), 2: 'Numerous congruities of EU primary law and national constitutions emerge in a functional comparison, particularly when viewed through the lens of comparative federalism.'

109 Michaels (2006), 342.

Conceptual functionalism explicitly embraces both descriptive and normative objectives. As outlined above the confederal comparison indeed contains both. It explores descriptive questions on the qualification of the EU, but also more normative ones, for instance whether a confederal EU indeed contributes to certain outcomes or objectives deemed normatively desirable, or whether it should be seen as viable and desirable in the longer run.

Although clearly not forming ideal types of the methodologies, the confederal comparison developed here, therefore, primarily follows a classificatory and conceptual functionalist approach. Established, though far from perfect, methods that focus on constitutional structure, institutions and general categories and doctrines to compare constitutional systems.[110] Before moving on to the question of how to structure and design our specific comparison, however, it is first necessary to explicate and justify three of the core assumptions and instruments that underlie and enable a classificatory and functional comparative approach: the assumption of comparability, the existence of general categories for such comparability, and the independent value of institutions and constitutional structures. Elements which also play an important role precisely in designing the actual comparison.

4.2.4 Core assumptions: The possibility of comparison and overarching categories

The most fundamental assumption underlying classificatory and functional comparison, and perhaps even all knowledge, is the comparability of different objects. Individual examples may be brought under more general and abstract categories (or *tertium comparationis*) in which they share to a sufficient degree or intensity, and may hence be compared, classified and in that sense 'known'.[111] Instead of sixty-four unique entities, each creating unique oscillations of pressure through molecules and standing on billions of unique small objects we observe a herd of cows contently mooing on a field of grass and a farmer yelling. With Hayek it may perhaps be argued that such forms of abstract knowledge are in a sense 'less' than comprehending each particle of the universe in its own uniqueness. They may be necessary short-cuts for the highly limited human mind.[112] At the same time this does not remove the use or feasibility of creating such more overarching and abstract categories, and using them to compare individual objects.

Of course from comparing cows to comparing constitutional systems is quite a leap. Yet the fundamental challenge is the same: are constitutional systems not so unique so as to prevent comparison? Is comparing the one to the other not as comparing being male to being female, or comparing

110 G. Frankenberg, 'Comparing constitutions: Ideas, ideals, and ideology – toward a layered narrative', 4 *International Journal of Constitutional Law* (2006), 445-446.

111 N. Jansen (2006), 310.

112 F.A. Hayek, *The Constitution of Liberty* (Routledge 1960), especially chapters 2 and 3.

the famous apples and oranges? Are they not, in fact, incommensurables and therefore incomparables?[113] It is precisely to overcome such difficulties, and therefore allow comparison, that the methodology of comparison entails creating and applying general concepts and frameworks. For even if not removing the underlying epistemological problem of incommensurability, the problems facing comparison may be drastically reduced by specifying the particular focus of a comparison, thereby connecting it to an overarching yardstick, or what Chang calls a 'covering value' to which both can relate.[114] Put more simply, once a covering value is taken, say vitamin content, comparing apples and oranges is no longer a problem. We can conclude that 'comparison is no longer elusive (…) oranges are better than apples with respect to preventing scurvy.'[115] Equally the comparison between being male or female looses its mystery when specified to reproductive capacities or the average age at which the prefrontal lobes reach full maturity. Comparisons which no one who has ever witnessed the miracle of birth or taught a group of first year students will have difficulty in making.

As Glenn, also referring to Chang, indicates therefore: comparison is possible whenever items can be situated on a continuum of information.' And: 'Making comparisons therefore requires a search for the appropriate enabling information, to overcome initial incommensurability or ignorance. How this search is conducted will depend on the circumstances.'[116]

The proposed comparison takes place precisely on such a 'continuum of information', namely the federal principle and the continuum between confederation and federation.[117] Federalism focuses on the specific function of combining 'self-rule with shared rule.'[118] As such it provides abstract, general insights on compound constitutional systems, explicitly

113 For a general exposition on incommensurability see J. Raz, *The Morality of Freedom*, (Clarendon Press, 1998), ch. 13. For a discussion concerning comparative law see H.P. Glenn, 'Are Legal Traditions Incommensurable?' 49 *The American Journal of Comparative Law* (2001), 133.

114 R. Chang, 'Introduction', in: R. Chang (ed), *Incommensurability, Incomparability and Practical Reason* (Harvard University Press 1997), 6.

115 Idem.

116 Glenn (2001), 143.

117 Federalism is a standard category in comparative constitutional research. In addition to the literature already cited above, especially the work of Burgess, Elazar, and Watts, see for instance D. Halberstam, 'Federalism: Theory, Policy, Law', in: M. Rosenfeld and A. Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012), ch. 27, Ginsburg and Dixon (2011), ch. 20, T.O. Hueglin and A.Fenna, *Comparative Federalism* (University of Toronto Press 2010), Jackson and Tushnet (1999) ch. VIII, or N. Dorsen et. al., *Comparative Constitutionalism* (Thomson West 2003), ch. 4.

118 D.J. Elazar (ed) *Self-Rule/Shared Rule: Federal Solutions to the Middle East Conflict* (University Press of America 1984).

aiming to transcend specific specimens.[119] Insights that are valuable for studying other, per definition not identical, systems.[120]

In this way the federal principle also illustrates a second key instrument for functional comparison: a selection of general principles, categories and doctrines which has been developed over time. Categories such as presidentialism, parliamentarism, bicameralism, devolution, monarchy, citizenship, or judicial review which allow us on the one hand to trace and delimit comparable elements in different constitutions, and on the other to further develop such categories and with them our general understanding and knowledge of constitutional structures.[121]

Even within a federal focus, furthermore, comparisons can build on a further set of general functional categories developed to classify and analyze constitutional systems.[122] These are categories as the executive, legislative or judicial function, rules of adoption, amendment, accession or secession, representative systems, or the locus of sovereignty or delegation of authority.[123] Again we can sensibly compare how different constitutions functionally organize change, how they structure the legislature, or where sovereignty is formally located.[124]

Lastly, and in addition to the assumption of comparability via overarching concepts and categories, functionalist comparisons also rely on the independent relevance of institutions such as constitutional structures or law itself.[125] Without separating constitutional structures from their context, it is assumed that they can be usefully studied separately.[126] An assump-

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119 In this sense federalism might precisely be so interesting for comparison because it somewhat approaches the idea of 'epistemological functionalism', allowing for a less essentialist and teleological approach which is also more sensitive to the differences within multiple forms and solutions within federalism and the different problems they address. See Michaels (2006), 355.

120 For a convincing comparative application of US federalism to the EU in this regard see Lenaerts, (1990), 220.

121 Obviously it is not claimed that these categories are uncontested or unproblematic, only that they provide some relatively shared framework for comparison. See for an overview of the problems attached to such categorization Saunders (2009), 7.

122 Tushnet (2006), 1240. At the same time, warning against the risk of 'fictitious neutrality' of such categories see Frankenberg (1985), 411.

123 See amongst many others, Hieringa and Kiiver (2012) or Finer, Bogdandor and Rudden (1995). Cf also Frankenberg (2006), 442, 457: 'A careful tracing of the constitutional structures—notably human rights and organizational provisions— contained in the global repertoire comes first and comes easily, since what you will find appears in virtually any constitutional document.'

124 See for instance R. Dixon, 'Constitutional amendment rules: a comparative perspective', in: T. Ginsburg and R. Dixon (ed), *Comparative Constitutional Law* (Edward Elgar 2011), 96 and F.H. Hinsley, *Sovereignty* (CUP 1986), 126 et seq.

125 Michaels (2006), 365.

126 Watts (1999), 15.

tion that seems justified by previous research as well as by plain reality.[127] The American example, for instance, provides one clear illustration of this independent relevance and impact of institutions: the American context and society did not change overnight in 1789, yet the American constitution did. A constitutional and institutional change, therefore, that had an independent impact, even before the civil war.

4.3 Designing the confederal comparison

The proposed comparison between the EU and the confederal origins of the US can, therefore, rely on existing methods, concepts and categories. Within these methods, however, a comparison must of course be carefully designed. Crucially, the vast comparative field between the EU and the US must be further delineated and structured to allow for an ordered and systematic comparison. At the same time this structuring must be based on objective criteria, so as to avoid, even inadvertently, a subjective focus on those elements that support a specific outcome.

For these reasons the confederal comparison will be structured around sixteen specific modifications deemed fundamental by key founding fathers at the time for transforming the confederation into a federation. Modifications, which included the supremacy of federal law, the establishment of one sovereign people underlying all public authority, the creation of a strong federal executive with the capacity to physically enforce the national will. Together these modifications, which fall within established functional categories for comparison and have been selected on the basis of an objective criterion, form a structured comparative grid, allowing us to systematically compare the different systems.

The sixteen key modifications will, furthermore, be intentionally considered at the actual moment of transition. Although later developments in the US federate system can sometimes be taken into account, the aim is to look at the US experiences and debates at this transitional *Sternstunde*, still unaffected by the particular developments in the US federate system since.[128] This to preserve as clear and pure as possible the transition from the confederal to the federate system, and to reduce to a certain extent the

127 See J. March and J. Olsen, *Rediscovering Institutions, The Organizational Basis of Politics* (Free Press 1989), for instance at 17 or P. Craig, 'The Nature of the Community: Integration, Democracy, and Legitimacy', in: P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (OUP 1999), 41.

128 Such as the Civil war, the development and dominance of political parties, industrialization, and the birth of the bureaucratic welfare state, to name some of the most central ones (I thank professor M. Shapiro of Berkeley Law School for a highly illuminating discussion on these elements in the development of the US system). The flip side, of course, is also that it robs our model of having been tested and adapted to these important developments for a constitutional system.

distorting influence of the unique American context influencing constitutional development since.

Focussing on these sixteen key modifications also allows the analytical knife to cut both ways; we simultaneously examine where the EU retains some of the structural weaknesses plaguing the Articles, *and* to what extent it has already incorporated some of the key solutions to them underlying the US federation. As such this allows us to simultaneously situate the EU between, or outside, the confederal and the federate poles of our spectrum. The outcome of this point by point analysis will then be subsumed into three central propositions on the EU constitutional order, after which the explanatory power and consequences of these propositions for the strengths and weaknesses of the EU will be analysed and tested against both the theory and reality of the EU.

All in all this methodological framework aims to structure and design the confederal comparison, to the extent possible, so as to avoid the major pitfalls comparison inherently faces, and to preserve the value and validity of any conclusions reached. As such it knowingly accepts the limits of comparison, both in light of its potential rewards and in light of the lack of alternatives. Equally it accepts, and perhaps even hopes, that some of its contributions may come from *bricolage* rather than structured functional comparison.[129] The ideas and concepts to understand and shape our new reality must come from somewhere. A sentiment nicely captured by a Ronald Watts, a leading comparative scholar, where he states that: 'as long as these cautions are kept in mind, there is a genuine value in undertaking comparative analyses. Indeed, many of the problems we face in Canada are common to virtually all federations. Comparisons may therefore help us in several ways. They may help to identify options that might otherwise be overlooked. Thy may allow us to foresee more clearly he consequences of particular arrangements advocated. Through identifying similarities and differences they may draw attention to certain features of own arrangements whose significance might otherwise be underestimated. Furthermore, comparisons may suggest both positive an negative lessons; we can learn not only from the successes but also from the failures of other federations and the of mechanisms and processes they have employed to deal with problems'[130]

129 Tushnet (1999), 1229, 1285-1303. A 'method' he describes as the 'assembly of something new from whatever materials the constructor discovered.' Even though Tushnet primarily had constitutional interpretation in mind, the concept seems relevant to structural comparison as well, especially in the refreshing way it 'brings the historical contingency of all human action to the fore.' Even the drafting of the US Constitution, after all, hardly met strict methodological requirements, yet choices had to be made.

130 Watts, (1999), 2.

Before we start to explore the American confederation and its comparative value, however, one more preparatory step is in order to further structure and inform this comparison, which is to outline the key concepts and terminology used throughout this thesis.

5 Concepts and terminology: Specific and general concepts used

The notions of federalism, federation and confederation play a central role in the proposed comparison. Before progressing any further it is useful, therefore, to establish some working definitions of these concepts.

Considering the comparative aim and method of this thesis the terms confederal and federate will often have a clear and specific meaning. As long as we are engaged in directly comparing the EU against the US example the term 'confederal' refers to the system under the Articles. Similarly, whilst comparing, the term 'federate' refers to constitution of 1787 and the specific modifications it introduced.

Both the Articles and the 1787 constitution are clear and uncontested specimens of a confederation and a federation. [131] They do, of course, not exclusively or exhaustively represent these categories. A fact that must be taken into account when extrapolating any conclusion to the concepts of federalism more generally. In addition, this also makes it necessary to describe up front which *general conceptions* of federalism will be used. This not just to prevent confusion where these terms are used more generally, but also to allow us to frame the outcomes of our specific comparative exercise, and to relate its outcomes to these concepts more generally.

5.1 Terminology: General conceptions used

Establishing such general definitions is, of course, complicated by the conflicts and confusion surrounding these concepts. Federalism deals with multifaceted questions of political organization, has many normative implications, and represents a long and rich past.[132] As a consequence its concepts are as complex and contested as they are interesting and useful.[133]

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131 Watts (1998), 121 .Cf also the entry on Federalism in the Stanford Encyclopaedia of Philosophy 'Thus many would count as confederations the North American states during 1776-1787, Switzerland 1291-1847 and the present European Union – though it has several elements typical of federations.'

132 See, for instance, R. Davis, *The Federal Principle: A Journey Through Time in Quest of a Meaning* (University of California Press 1978).

133 Vague here meant in the technical sense of second-order vagueness, preventing one to even clearly delineate the area of vagueness, and therewith the ultimate extension of the concept itself. See T. Endicott, 'Vagueness and Legal theory' 3 *Legal Theory* (1997), 37.

Perhaps not surprisingly the terminology of federalism has therefore been used and abused in many different ways in discussions on the EU, often regrettably blurring debates as to whether the EU is, or should become, 'federal'.[134]

Fortunately, despite the conflicts and confusion, some rather conventional definitions exist that are commonly accepted for general use. That is, a rather general consensus seems to exist on at least several of the core elements constituting these concepts. The scope and strength of this consensus, furthermore, seems sufficient for our comparative purposes, especially as it reinforces and specifies these definitions by building on two concrete examples. When *generally* discussing (con)federalism, therefore, this chapter refers to these generally accepted and uncontroversial conceptions or descriptions of federalism, without implying that any 'watertight compartments' exist between them.[135]

In line with this orthodoxy, and following prominent authorities such as King[136] and Elazar,[137] the conceptual framework used first makes a distinction between *federalism* generally, and specific forms of federal polities such as a *federation* or a *confederation*.[138]

Federal*ism* thereby relates to the overarching theory, or set of political principles, underlying federal polities. Perhaps such federalism is best grasped through its aim: allowing 'people and polities to unite for common purposes yet remain separate to preserve their respective integrities.'[139] In Elazars well-known shorthand it thus tries to combine self-rule with shared rule. As he puts it more casually whilst capturing the tension inherent in this aim, federalism entails 'wanting to have one's cake and eat it too.'[140]

134 See for example the famous, but highly vague notions of confederalism and federalism in Fischers 2000 Humboldt speech, and the responses usually assuming a full federation.

135 Burgess (2006), 24-25.

136 P. King, *Federalism and Federation* (Johns Hopkins University Press 1982).

137 Elazar (1995) and (2006).

138 A further distinction could be made based on whether one sees federalism as a normative notion advocating federal principles, or as a genus term, describing all specific forms of federal government. If one accepts the first, normative, term it becomes useful to introduce a further concept, that of *federal political systems*. This concept would then be the descriptive, general category of all political systems utilizing federal principles. For our purpose, however, this distinction seems superfluous, as it can be fully accepted that the notion of federalism has both a normative and a descriptive function. For the distinction see: R.L. Watts, 'Contemporary views on federalism', in: B. de Villiers (ed), *Evaluating Federal System*s (Martinus Nijhoff 1994), 1 et seq.

139 Elazar (2006), 33.

140 For his famous shorthand formula of self-rule and shared rule also see Elazar (1984).

As such it implies both centralizing authority to allow (more) effective government at the central level, whilst constitutionally safeguarding a certain amount of autonomy for the constitutive parts.[141] This entrenched authority and autonomy of the parts, furthermore, cannot derive from the central government but has to flow from a higher source. Otherwise it would be reclaimable by the centre, which would undermine the federal nature of the system.[142] As we shall see in part II this is one of the elements that creates such an interesting relation between federalisms and sovereignty.

Deriving from the Latin word for covenant '*foedus*', federalism, furthermore, has the additional dimension of political organization based on covenant: government willingly and consciously agreed upon between several entities. In contrast to theories emphasizing organic growth or conquest, it is a model of constitutional *choice*.

5.1.1 Federation

The term 'federal' subsequently refers to any polity conforming to 'federalism' in this general sense. The terms federation (or federate) and confederation (or confederate) refer to specific forms of federal polities. [143] Regarding the notion of a *federation* Elazars definition provides a useful starting point as a relatively uncontested lowest common denominator: 'A federation is a polity compounded of strong constituent entities and a strong general government, each possessing powers delegated to it by the people and empowered to deal directly with the citizenry in the exercise of those powers'.[144]

This definition contains most of the key element generally used in definitions of federations. It can be made more selective, without introducing much more controversy, by combining it with several of the definitions given by other main authorities whilst leaving out the outlying criteria these might contain.[145] Taken together in such a way the following elements are then customarily given as constitutive of a federation: (1) A *compound* polity consisting of a central government and several constituent entities, (2) which are both *constitutionally* enshrined as they both (3) posses powers

141 Cf also the typical regional powers listed by Heringa and Kiiver (2012), 49-50.

142 See in this regard also chapter 9 section 5 on the notion of sovereignty and its relation to federalism.

143 To complicate things several sub-species, especially of federations, can be distinguished, and different ways to categorize these sub-species are possible as well. Cf for instance R.P. Nathan, 'Defining modern federalism', in: H.N. Scheiber (ed.), *North American and Comparative Federalism: Essays for the 1990s* (University of California Press 1992), 89 et seq, or Watts (1998), 124. For our purposes the generic category of federations and confederations, however, suffices, as they all share in the core components our comparison focuses on.

144 Elazar (2006), 7. Also see the discussion on popular sovereignty in this light in chapter 2 section 2.1. and chapter 8 section 5.

145 Watts (1998), for instance, requires the powers to tax directly, which is not required by most other definitions.

delegated to them directly by *the* people, and consequently (4) can both act directly on those people.[146] Implicit in most definitions, but explicit in, for instance, that of King, is that (5) the combined whole takes the form of a *sovereign state*.[147] Lastly, as it divides the power and safeguards the autonomy of the different governments, (6) a central role is played by a *written, supreme constitution*, and therefore usually also by the court (7) that may interpret it.[148] It is to this slightly extended definition of Elazar, or at least collection of definitional elements, that this chapter refers when speaking about federation outside a specific comparative context.

5.1.2 Confederation

A *confederation* also forms a compound entity under a common government, albeit a far less integrated one, where the constituent parts remain primary and no single people underlies the different governments. In the brief definition of Forsyth a confederation is 'a union of *states* in a body politic' as such it represents 'the intermediary stage between the *inter*state and the *intra*state worlds (…).[149] The key characteristic is that the different parts are not subsumed in, or brought under, a single superior or sovereign authority. Instead, the central authority remains dependant on the constituent parts.[150] Where this chapter generally uses the term confederation outside of a specific comparative context, it therefore refers to the following core elements: (1) a *constitutionally* structured union (2) between states[151] (3) in which these states transfer the exercise of significant public authority wholly or partially to a central authority,[152] (4) without taking away the core of the enti-

146 King (1982), 77, Elazar (2006), 7, Watts (1998), 121, 124, Lenaerts (1990) 253.

147 King (1982), 77; 'an institutional arrangement, taking the form of a sovereign state, and distinguished from other such states solely by the fact that its central government incorporates regional units in its decision procedures on some constitutionally entrenched basis' Burgess (2009), 29, also includes the requirement of statehood: 'all federations are composite states that constitute a single people', as implicitly does Elazar (2006), 40.

148 Watts (1999), 7.

149 This in contrast to a federation which is a 'union of individuals in a body politic'. Forsyth (1981), 7 (my italics).

150 Elazar (2006), 7, who defines a confederation as a polity whereby 'several pre-existing polities joined together to form a common government for strictly limited purposes, usually foreign affairs and defence, which remained dependent upon it constituent polities.'

151 Cf also Elazar (2006), 40 'the relatively loose linkage of polities that retain their sovereignty within a permanent league'.

152 See in this regard already Pufendorfs insight that the difference between a confederation and a mere treaty bond is that in a confederation the parties 'make the exercise of certain parts of the supreme sovereignty depend upon the mutual consent of their associates.' As translated in Forsyth (1981), 82.

ties' individual sovereign status.[153] The result is a polycentric constitutional framework, without a central nucleus of supreme authority or sovereignty.[154] This does not mean, of course, that the confederal centre cannot have significant powers or overrule the constituting parts in one or more areas.[155]

The boundary between a federation and a confederation is obviously not as clear as such exercises in definition imply.[156] At the same time the concepts do seem to capture a very real and qualitative difference, also historically, between the two forms. The boundaries between the two, or perhaps even the possibility of hybrid forms, therefore raise interesting questions, especially for a borderline case as the EU. Questions on these boundaries therefore explicitly underlie the proposed comparison. Exactly by placing the EU between two examples we might get a better grasp of such boundaries, and thereby improve our understanding of the EU whilst perhaps simultaneously helping to further develop the general consensus on these contested concepts.

5.1.3 Member people

Unrelated to the distinction between federation and confederation, it is nevertheless useful to also clarify the concept of a member people that figures prominently in this thesis. As both the concept of membership and that of a people can have strong normative connotations it is important to stress that the notion of a member people is used here in a very thin sense. The idea of membership solely relates to the question of EU membership as determined by the EU Treaties.[157] In line with our confederal approach, furthermore, and with the secondary nature of EU citizenship, the definition of who belongs to 'the people' in a Member State is wholly left to the national

153 Cf also article 1 of the pact constituting the restored Swiss confederation of 1815: 'Les XXII cantons *souverains* de la Suisse, (…) se réunissent, par le présent Pacte fédéral, pour leur sûreté commune, pour la conservation *de leur liberté et de leur indépendance* contre toute attaque de la part de l'étranger, ainsi que pour le maintien de l'ordre et de la tranquillité dans l'intérieur'. Or art. 1 of the *Wiener Schlussakte* (1820) finalizing the German Bund: 'Der deutsche Bund ist ein völkerrechtlicher Verein der deutschen *souverainen Fürsten und freien Städte*, zur Bewahrung der Unabhängigkeit und Unverletzbarkeit ihrer im Bunde begriffenen Staaten, und zur Erhaltung der innern und äußern Sicherheit Deutschlands.' in Cf also M. Jensen, *The Articles of Confederation* (University of Wisconsin Press 1970), XIX, 109 and chapter VII: key issue was 'the location of ultimate political authority, the problem of sovereignty.' (p. 161). Also see Lenaerts (1990), 256, note 224 and 262-263. For a detailed discussion of sovereignty and its relation to a confederal set up see part II of this thesis.

154 The essential effect of this locus of sovereignty for the nature of the organization was also felt by politicians after the American Revolution. They saw a choice between: 'a sovereign state, or a number of confederated sovereign states" (John Adams to Patrick Henry, June 3 1776, in Burnett, *letters*, 1: 471).

155 See in this regard the discussion in chapter 10, section 8 on confederal supremacy.

156 Burgess (2009), 30.

157 Cf art. 1, 49 and 50 TEU.

level.[158] As a result the concept of a 'member people' as used in this thesis refers to those same people that have been hailed and recognized since the Treaty of Rome, and elevates these entities to the place promised to them by the (almost) every treaty since.[159]

5.2 Terminological shifts and traps

Some last terminological warnings are in place before we engage with our comparison proper. Most importantly for our comparison are some shifts in the use of the *terms* federal and confederal over time.

First, the terms 'federal' and 'confederal' were only truly separated conceptually in the 19th century, long after the adoption of the second US constitution.[160] Before this time, the entire continuum from confederal to federal was customarily seen as one concept, and both words were used interchangeably.[161] The Articles of Confederation, for instance, were described as a federal system by contemporaries. One result of this is the enduring double use of the term federal to indicate both a federal system in the strict sense (a federation), and the complete range of non-unitary systems.[162]

Second, in the context of the American debate on the confederation and its replacement the use of terminology is even more specific – and confusing. Originally, the term 'federal' was used to signify the *confederal* system of the Articles. Federalists, therefore, were initially the supporters of full state sovereignty, which they saw as the essence of the confederation. They generally opposed any strengthening of the central power, and regarded the new constitution as a coup that would destroy the freedom of the states

158 Art. 9 TEU and art. 20 TFEU.

159 The preamble of the Rome treaty already spoke of 'an ever-closer union among the peoples of Europe.' Even more interestingly the second paragraph of the preamble refers to the Member States as 'their countries', i.e. the countries of the member peoples, whereas art. 137 EEC held that the Assembly would 'consist of representatives of the peoples of the States brought together in the Community (…).' The preamble of the Single European Act talks of 'the democratic peoples of Europe', and that of the Maastricht Treaty on European Union of deepening 'the solidarity between their peoples while respecting their history, their culture and their traditions' as well as repeating the desire to 'to continue the process of creating an ever closer union among the peoples of Europe.' Amsterdam also consistently speaks of the 'peoples' in the European Union. Nice does not mention the people at all. Even the Constitutional Treaty, perhaps the most unifying in its aims and understanding of the EU (see for instance art. 1 speaking of 'the will of the citizens and States of Europe'), retains its basis in multiple peoples. Its preamble, for instance, still speaks of 'the peoples of Europe'. See for instance art. I-3 or III-280.

160 Kinneging (2007), 40. Of course what we now term confederal government, and the analysis of those governments, long predates this separation. See for instance Elazar (2006), 51 or Forsyth (1981), 82.

161 Madison, for instance, in his preface to the notes on debates in the Convention uses both the terms federal and confederal to describe the Articles of Confederation.

162 A confusion that underlies part of the disagreement over whether the EU is already 'federal' or not.

under the Articles.[163] Those which advocated a stronger centre, and later supported the new constitution, were originally called *nationalists*. In fact, at the beginning of the Philadelphia Convention the proponents of centralization openly described themselves and their proposals as nationalist.[164]

During the Convention, but especially during the public debate following it, however, the 'nationalists' confiscated the term 'federal'. In a clever and a historically phenomenally successful example of terminology theft, they attached this label permanently to the new and fundamentally different system devised by them.[165] Although quantification is impossible, this move increased the legitimacy of the proposed constitution and was of great use in the intense debate over the constitution, where the former federalists were now forced to operate as '*anti*-federalists'.[166] Clearly the new usage of 'federal' stuck, and was eventually enriched by the term of confederation, to again appropriately separate the two concepts. When dealing with contemporary sources, however, it is important to keep the original meaning and entanglement of these two terms and concepts in mind.

With these methodological and terminological preliminaries behind us, we can now start the actual exercise of delving into the confederal roots of the United States. So let us now meet the black sheep of American constitutional history.

6 The confederal cradle

This section will develop the comparative grid introduced above, and thereby lay the groundwork for the more specific comparison in chapter 3. For that purpose it introduces some background as well as the structural elements necessary for that comparison. It starts with the sequence of events leading up to the Confederation (5.1) and the status of the colonies after

163 See chapter 2 section 2.1 below. A view strongly linked to the radical ideology underlying the revolution itself. This ideology demanded democracy as close to the citizen as possible, and generally was highly distrustful of any authority. See for an overview: Gordon S. Wood, *The Radicalism of the American Revolution* (Random House 1991).

164 Jensen (1970), 14. As Randolph put it during the Philadelphia Convention: 'The true question is whether we shall adhere to the federal plan, or introduce the national plan.' Where the 'federal plan' was the existing *confederation*. (Madison Notes on the Convention Saturday June 16th in Committee of the Whole, 1787). Also see McDonald (1968), 138.

165 A tactic that proved very effective. See M. Diamond, 'What the Framers Meant by Federalism', in: R.A. Goldwin (ed), *A Nation of States* (2nd edn. Rand McNally 1974). Perhaps the proponents of a stronger EU should start calling themselves nationalists.

166 The 'Federalist' papers naturally provide a key example of the success of this approach. A similar trick seems to be taking place with populists claiming terms as freedom, liberalism and free speech and by supposedly protecting the Christian, non-Muslim roots of our western civilization by banning forms of religion and speech disagreeable to it.

independence (5.2). Subsequently a short summary of the Articles will be given (5.3) followed by a brief overview of the main challenges facing the Confederation, its success and failures in meeting these challenges, and the difficulties in assessing that record (5.4). Lastly, the key innovations devised in Philadelphia will be set out and clustered. These innovations were deemed essential to remedy the weaknesses of the Confederation, and ended up transforming the US into what we have since learned to call a federal system (5.5).

6.1 The road to confederation

After years of increased tension and ever more open rebellion, the colonies declared independence from Great Britain in 1776. [167] Actual fighting was over in 1782,[168] and the final treaty of peace, acknowledging independence signed in 1783.[169] Already before declaring independence, however, the American states[170] considered some form of collective political framework necessary,[171] and work on such a framework was started.[172] As a result, the

167 See for the well known events such as the tax disputes, the intolerable acts, the tea parties, and the, Boston Massacre, which lead up to the Declaration of Independence as well as for their actual relevance and context: Wood (1991) as well as Gordon S. Wood, *The American Revolution* (The Modern Library 2003).

168 On 19 October 1781 British General Cornwallis surrendered at Yorktown. This was the last major battle, but fighting continued on a lesser and decreasing scale until 1782.

169 On 3 September 1983 the Treaty was signed in Paris. This formally ended the war and determined the (vast) lands hence formally belonging to the former colonies. It somewhat euphemistically stated that 'It having pleased the Divine Providence to dispose the Hearts of the most Serene and most Potent Prince George the Third, by the Grace of God, King of Great Britain, *France*, and Ireland, Defender of the Faith, Duke of Brunswick and Lunebourg, Arch-Treasurer and Prince Elector of the Holy Roman Empire etc.. and of the United States of America, to forget all past Misunderstandings and Differences that have unhappily interrupted the good Correspondence and Friendship which they mutually wish to restore;' For the US, to end the unhappy misunderstanding, John Adams, Benjamin Franklin and John Jay were present. The Treaty of Paris was ratified by Congress on 14 January 1784. Separate treaties were signed with Spain and France, and more provisionally with the Netherlands as well.

170 I.e. New Hampshire, Massachusetts-bay Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

171 As in Europe, many plans for some sort of Union between the Colonies had been proposed earlier. These started with the plan of William Penn in 1698, but especially increased after the beginning of the eighteenth century. None of these plans, however, had much impact. Also, there had been a brief New England Confederation, which also proved of limited consequence. (Jensen (1970), 107). These earlier plans before the Declaration of Independence were also different in the sense that they all included a continuing link with Great Britain. Of these especially the Franklin draft, based on the Albany convention of 1754 is of interest, as it formed some sort of proto-confederation under British authority. The plan was, however, firmly rejected by the British crown. History might otherwise have looked very different…

172 The Dickinson Committee had already been established on June 12, 1776.

declaration of independence was accompanied by a resolution that a confederation should be formed.[173] A first draft for a confederal constitution was presented by the Dickinson-committee on July the 12th of 1776; 8 days after the declaration of independence had been signed. The draft ran into problems,[174] however, and only on 15 November 1777 was a revised text sent to the thirteen states for ratification.[175] In true confederal style, all states needed to ratify before the Articles would enter into force.[176] Maryland, however, for several reasons only ratified on 1 March 1781. Considering the fact that most states ratified much earlier, and the rather significant challenges facing the new nation, the confederation already *de facto* functioned well before this last ratification, albeit through the institutional framework of the Continental Congress developed during the revolution. As of March first, 1781, however, the United States formally became a confederation of thirteen *sovereign*[177] states.[178]

6.2 The Sovereign States

The sovereign status and self-image of the states must be emphasised since it is important for the constitutional development in the period and its comparability to the EU. To the states their mutual sovereignty was self-

173 Also, most states, when allowing their delegates in the Continental Congress to vote for declaring independence, also allowed them at the same time to vote for the formation of a confederation.

174 NB Dickinson was the leader of the conservatives already during the Continental Congresses, which convened before in 1774 and 1775. The drafting Committee also had a strong conservative majority general. Not surprisingly, therefore, the Dickinson draft was more in line with conservative preferences for a stronger, more centralized government. It was subsequently 'radicalized' by Congress to better suit more radical sentiments and respect full state sovereignty. Jensen, (1970), 82, 127.

175 A second draft, amended by Congress, had been on the table from August 20, 1776.

176 The later federate constitution, on the other hand, only needed 9 out of the thirteen states to ratify to enter into force, albeit it only between the signatories.

177 Later efforts to deny this fact in support of a pro-centre interpretation of the federate constitution aside. See especially H. van Tyne: '"Sovereignty in the American Revolution" An Historical Study' 12 *American Historical Review* (1907), 529, 539 et seq, who concludes that: 'facts, too numerous to be gainsaid, can be cited to show the opinion of state legislatures, state conventions, and individuals in the states as to the actual political independence and sovereignty of the state.' His analysis is supported by both Jensen and Wood, two leading authorities on the period. Jensen (1970), 162, and Wood (1969), 58, 356. Cf also Madison in his preface to the debates in the Convention, 'A Sketch never Finished nor Applied', p. 4, who also italicized the term 'independent states' when describing the 13 colonies.

178 Even though the States were quite small by current standards. Estimates of population differ (and the states were not even sure on this point themselves), yet the following rough estimates can be given for 1775: New Hampshire, 100.000; Massachusetts, 350.000; Rhode Island, 58.000; Connecticut, 200.000; New York, 200.000; New Jersey, 130.000; Pennsylvania, 300.000; Delaware, 30.000; Maryland, 250.000; Virginia, 400.000; North Carolina. 200.000, South Carolina, 200.000, Georgia, 25.000. (E.B. Greene and V. D. Harrington, *American Population before the Federal Census of 1790* (Columbia University Press 1981), 7 et seq.

evident,[179] and the Articles explicitly confirmed it.[180] It is, therefore, thoroughly mistaken to understand the 'United States' at that time as anything close to a the relatively centralized entity it is today. Myths about virtually identical colonies,[181] guided by a pre-existing image of an American republic, emerging from their struggle against Britain as a unified whole are utterly anachronistic.[182] In 1776 most colonies had already existed for a long time. Virginia, for instance, went back 169 years, more than many an EU Member State. During this time the states had developed clear, individual identities.[183] After independence the former colonies remained independent political entities,[184] nationalistic in spirit, jealous of their sovereignty,[185] and led by elites dependent on their local power base.[186] Significant conflicts of interest, furthermore, existed between the states on issues such as slavery, trade, agriculture, and claims to the vast stretches of 'empty' land to name but a few central ones.[187] The British had even stopped some armed conflicts between the states, and the prevention of future warfare was a very real objective of the Articles.[188] The states also differed significantly in size,

179 Whether they really *were* sovereign naturally depends on ones definition of sovereignty, and the application of this definition to the historical situation. On this point see extensively section II.

180 Article II of the Articles of Confederation.

181 Wood (1969), 58, 356 et seq. Although naturally there were several ties that bound them together, especially the link with Great Britain. Perhaps the awkward statement of John Adams captures it, who said that the colonies 'differed in Religion, Laws, Customs and Manners, yet in the great Essentials of Society and Government, they are al alike', unfortunately leaving out which 'great Essentials' are left once all those mentioned are taken away. (Adams to Abigail Adams, July 10, 1776 in L.H. Butterfield (ed), *Adams Family Correspondence vol. II* (Belknap Press Harvard 1963).

182 Jefferson himself, for instance, stated: 'we are so impressed by the diversity that union seems almost beyond the verge of possibility' A.C. McLaughlin, *The Confederation and the Constitution* (Collier-MacMillan 1971), 42.

183 The first colony, Virginia, was established already in 1607, the youngest one, Georgia, in 1733. By 1776 many states were even older than the actual European nation-states when concluding the Treaty of Rome, although these nation-states obviously contained territory and peoples with a much longer history.

184 Seven of the thirteen states, for instance, enacted the declaration of independence *as national legislation* so as to ensure its legal effect. (Wood (1969), 356). Also, the level of communication between the states should not be overestimated. For example, the declaration of independence was known in Paris, almost as soon as in Charleston, and even a man as informed as Madison wrote to Jefferson in 1786: 'Of affairs in Georgia I know as little as of those in Kamkatska.' McLaughlin (1971), 41-2.

185 Van Tyne (1907), 531 et seq.

186 Jensen, (1970), 56. 'in spite of social, racial and economic affinities and the cohesive force of the British connection, they [the colonies] had become practically independent political entities. Each delegate thought of his own colony as his country, as an independent nation in its dealings with England and with its neighbours, with whom relations were often as not unfriendly.'

187 McLaughlin (1971), 119 et seq. Naturally, many of these issues eventually contributed to the outbreak of the Civil War.

188 Jensen (1970), 56, 91, 117, 163, and especially 333-336.

population and wealth, Virginia being leading in all categories, especially over small states like Rhode Island.

At the time of independence ideas of a unified American republic were, therefore, not just considered by most as contrary to the nature of a republic itself,[189] but as factually impossible.[190] Claims that Europe cannot be compared to the American experience because, unlike the US, Europe forms such a diverse group of polities must, therefore, fall victim to the anachronistic assumption underlying it.

6.3 Brief overview of the Articles

The sovereign status of the states also permeated the institutional set-up of the Articles. The central organ of the Confederation was Congress, in which each state had an equal vote, but could send between two and seven delegates to exercise that vote. Congress decided most issues by a qualified majority of nine states, including even the decision to go to war. For some decisions, such as amending the Articles, unanimity was required. There was no distinct executive, yet a 'Committee' sat during recess to oversee implementation. No judiciary was created, although Congress could play a semi-judicial role in some cases. The bureaucratic body of the Confederation was minimal.

The three main objectives of the Articles were the 'common defence', safeguarding the 'liberties' and republican form of government in all the states, and the 'mutual and general welfare', which required an internal market and trade agreements.[191] These objectives matched the main common concerns of the states at the time. Foremost amongst these was of course keeping at bay the 'evil empire'.[192] Related to this was the aim of receiving recognition on the international scene, allowing the states to garner political, military and financial support abroad, and finding new trading partners.[193] Internally, furthermore, the relations between the states

189 Wood (1991), A.C. McLaughlin, *A Constitutional History of the United States* (Appleton-Century 1936), 91 et seq.

190 In fact Gordon Wood, one of the central authorities on the creation of the United States actually concludes that 'what is truly remarkable about the Confederation is the degree of Union that was achieved.' Wood (1969), 359.

191 Art. III of the Articles of Confederation. Also see the circular letter accompanying the draft articles to the States on this point.

192 Although many of the leading individuals had tried to prevent a final break with Great Britain, only becoming revolutionaries where this turned out to be inevitable, and even then not excluding a reunion with Great Britain after it would have seen the error of its ways. Van Tyne (1907), 538 et seq.

193 And then especially in trade and finance: in the densely regulated economy of those times, free trade being virtually non existent, the US very much needed trade rights with for instance France, Holland and Spain, but also with Great Britain who remained the largest trade partner.

needed to be regulated now that the overarching framework of British authority had been removed. Within the states as well, an important layer of government had disappeared.

To achieve its aims the Confederation was given specific competences. The most far-reaching concerned warfare and external relations. Congress was, amongst other things, allowed to declare war, maintain an army and a navy, and conduct the waging of war. It could also conclude all forms of treaties, for instance on trade. In addition, internal barriers to trade were not allowed and Congress could bindingly requisition money from the states. Congress nevertheless did not have the power to tax or to regulate internal trade. A very strict doctrine of attribution was followed, not allowing for implied competences. Although the States were bound by the Articles there was neither an explicit supremacy clause nor general direct effect.

6.4 A successful failure: Challenges and difficulties of assessment

The Articles did not have a long, and most certainly not a very glorious life. Formally entering into force in 1781, they were replaced already on March 4th, 1789 by the federal constitution.[194] During this brief existence, the Confederation was often professed to be a failure, and dysfunctional as a constitutional framework. Its rather unfortunate role in subsequent US history primarily showcased it as the necessary evil out of which the immaculate perfection of the constitution could grow. This simplistic role of the constitutional ugly duckling stuck, and has prevented the constitutional period from being fully appreciated and utilized.[195]

Only judging the Articles by evolutionary standards, they were indeed a complete failure. Not even making the ten year mark is rather unimpressive for a constitution.[196] For a proper appreciation of the Articles, and to isolate the comparative lessons in confederate organization they entail, it is, however, necessary to *unbundle* the different type of failures and their separate causes. This unbundling needs to distinguish several layers.

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194 See on the precise date of transition (and the questions surrounding it) V. Kesavan, 'When did the Articles of Confederation Cease to be Law' 78 *Notre Dame Law Review* (2002), 35, and G. Lawson and G. Seidman, 'When did the Constitution Become Law? *Boston University School of Law Working Paper Series on Public Law and Legal Theory* (2001) No. 01-07.

195 This is not to deny the many shortcomings. Cf McDonald (1968), 3-5: by 1783 Congress 'had fallen into disgrace' yet equally: 'There was no general discontent with the state of things – certainly not as much as partisan propaganda and long-cherished myth depicted.'

196 Even though some constitutions have won some renown and influence without ever having entered into force, such as the remarkable French Montagnard constitution of 1793, which was ratified but never entered into force. On *average* furthermore, constitutions only 'endure' 19 years. See T. Ginsburg, 'Constitutional Endurance', in: T. Ginsburg and R. Dixon, *Comparative Constitutional Law* (Edward Elgar Publishing, 2011), 112 et seq.

First, politics and propaganda must be separated from actual analysis of the functioning of the Confederation. As most losers, the confederation is largely known through the eyes of its victors. History has commonly embraced the horror picture of the Confederation that was so effective in promoting the switch to a more centralized system. This is not to say that there is no truth in those accounts, which there is abundantly, or that the eventually victorious federate system was not ingenious, which it is. When dealing with these accounts, however, it should be taken into account that these now revered 'founding fathers' were also active and very eloquent politicians on a mission.[197]

Second, evaluating the Confederation requires agreeing on the relevant standard for judging, a step often ignored. The bad reputation of confederations certainly has a lot to owe to the fact that they have commonly been judged by the same standards as centralized states. Obviously confederations will have difficulties achieving equal levels of effectiveness. Yet such a high standard seems unwarranted and unfair, particularly because the advantages of the confederal form, such as its respect for the autonomy of its members and its flexibility, need to be factored in as well. The calculus between these confederal advantages and weaknesses must be made for each different context individually, and in certain circumstances may lead to a different overall evaluation.

Third, and as far as possible, intrinsic and 'external' causes need to be unbundled. Due regard should be given to the challenging context in which the Articles were required to function when judging the intrinsic strength and functioning of the Confederation. Challenges that remained formidable, even after the defeat of the most powerful empire in existence. To begin with a new nation had to be constructed after a combination of rebellion and civil war.[198] A task that had to be achieved with very little revenue, huge war debts, and a forced economic adjustment to existence outside the British trade system.[199] Internally there were major conflicts of interest between often radical and unstable states, no longer checked by the frame-

197 Jensen (1970), 1, Wood (1969), 562-3. For a more radical, and heavily criticized, focus on the less glorious interests of the Founding Fathers also see C.A. Beard, *An Economic Interpretation of the Constitution of the United States* (The Free Press 1986).

198 McLaughlin rightly emphasizes this element: it should not be forgotten that more than a third of the population in America supported the British. These were strongly loyalist, often fighting alongside the forces of the Empire. Furthermore, a large part was largely neutral, not caring very much for independence either. The direct ending of the war, therefore, saw a large out flux of, usually wealthy, qualified and sorely needed, loyalists, and many of those problems common after a civil war like lingering hatred and returning refugees. McLaughlin (1936) and (1971).

199 Although the depth of the recession and economic problems are disputed. Some research actually suggest quite an increase of wealth, even though there was a major shortage of specie and other monetary problems were rife as well. Jensen (1970), 225 et seq.

work of the empire. Added to this was an unpaid and disgruntled army, at points coming close to a coup.[200] Externally the Confederation was financially dependant on France and the Netherlands, whilst its lands and trade interests were covetously ogled by Great Britain and Spain.[201]

Complicating matters even further was the radical revolutionary ideology that had taken root in many states.[202] Generally this rejected centralized power, whilst strongly promoting as direct and unlimited democracy as could be conceived. As theory was put into practice an increasing number of states became unbalanced, some of them to the point of civil uprising. Such states not only hindered the functioning of the Confederation, but also blocked necessary amendments to the Articles, as they refused to increase central power.[203]

Circumstances, in short, that would form a challenge to any constitutional system, let alone to one still inventing itself. During its time, however, the Confederation did function, and managed several vital feats. It ended the war with Britain on very favourable terms,[204] prevented the states from 'going it alone', and settled several land disputes over the vast western lands that the United States had acquired with independence.[205] Disputes that could well have lead to civil war and disintegration on the entire conti-

200 R.R. Beeman, *Plain, Honest Men: The Making of the American Constitution* (Random House 2010), ch. 1, R.H. Kohn, 'The Inside History of the Newburgh Conspiracy: America and the Coup d'Etat', 27 *William and Mary Quarterly* (1970), 187.

201 There were significant quarrels, for instance, concerning navigation rights on the Mississippi with the Spanish, trade rights dispute with the British, including disputes concerning Canada and the manning of border forts, as well as a dispute over trapping and selling of fur, an important source of income.

202 Van Tyne (1907), 532.

203 See especially the fate of amendments to increase the revenues of Congress discussed in chapter 2, section 2.3. The parallel to the recent US Congress refusing to increase taxes by one cent despite a looming credit default obviously comes to mind, certainly considering the role played by the Tea Party republicans. In a sense these are indeed returning to the early days of American Union, although these were not as glorious as they seem to think…

204 Even though many of these successes were to a large extent due to superb individual performances of men like Franklin and Jay, and were more often than not achieved by violating their mandates (!), these diplomatic successes were achieved for the Confederation.

205 See for a good overview P.S. Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Indiana University Press 1987), especially 44 *et seq*.

nent.[206] Also, contrary to earlier beliefs, for American citizens the Confederate period was generally an optimistic one, marked by increasing prosperity and rising confidence.[207]

Another success, easy to overlook with the current prominence of the US, is the remarkable success in 'branding' the 'United States'. At the time there was no such entity in the minds of its own inhabitants or in that of other nations. The Confederation seized the opportunity to project an image of one United States both internally and abroad. Assisted by anti-British sentiment, the new nation was quickly recognized by major powers of the time, and was able to create a place at the table internationally.[208] The external existence and recognition of the US in turn assisted the internal understanding of one American republic as well. Importantly this allowed the federalist to frame the debate within the US as one over why the confederal constitution was failing the United States, instead of why there should be a United States. One could wonder, after all, why a failing cooperation should lead to a more far-reaching one, instead of the states going their own separate ways. For many failures there were under the Articles as well, and these did overshadow the successes.[209]

6.5 'The failure of this our current government'

The most thorough and analytical contemporary overview of these weaknesses was Madison's 'Vices of the Political System of the United States'.[210] Madison wrote his overview in preparation for the Philadelphia convention. It was based on a general analysis of confederal government, and tried to isolate the reasons behind the recurring failures of confederations.

206 This issue long divided the Confederation, first blocking ratification, and then its further development. The settlement reached truly paved the way for the development of the US and the federate constitution as well: all titles to the unsettled lands were given to Congress. These lands were to be surveyed and sold by the Confederation in a suitable way, allowing for new states to be created on them. This compromise achieved three crucial goals with one blow. First a dangerous bone of contention was removed. Second, new states could be created on an equal footing with the original ones and no one state would become so big as to overshadow the others. Third, the sale of western lands provided the United States with an independent source of income. The benefit of this compromise was largely reaped by the Federation, but the hard compromise was reached during the Confederation. By 1786, Congress had full title to almost all disputed lands.

207 Wood (1969), 48, supporting Jensen on this point: M. Jensen, *The New Nation: A History of the United States During the Confederation – 1781-1789* (Vintage Books 1965), 347 et seq.

208 An interesting contextual difference with the EU, where the Member States were already recognized and represented externally.

209 Kinneging (2007), 44-45.

210 J. Madison, 'Vices of the Political System of the United States' (1787).

The resulting overview was instrumental in drafting the 'Virginia plan' for the Philadelphia convention, which in turn had a direct and significant influence on the constitution eventually adopted. Besides this direct impact, the views expressed in the analysis informed the debates at Philadelphia more generally, as its conclusions were apparently shared by the majority of delegates who signed the new constitution. In addition to its analytical strength, therefore, the overview also represents a more widely shared view on the weaknesses of the Articles, and the federal modifications deemed necessary to remedy them. As such it forms a very instructive tool to structure and focus the proposed comparison between the two systems. For that reason the more detailed comparison below will focus on those weaknesses deemed key to the 'failure' of the Articles, and the solutions adopted to remedy them.

Madison noted eleven different 'vices', which for our purposes can be summarized in the following core weaknesses.[211]

First, there was a general lack of power in the centre and a matching lack of compliance in the states. Second, partially as result of non-compliance, and due to its inability to tax or lay imposts, the finances of the Confederation were deplorable, further debilitating the Confederation.[212] Congress thus lacked sufficient 'energy'<I> <XI>to define and promote a common interest, and create any 'output' legitimacy.[213] Third, after independence many

211 Madison named the following eleven vices: 1. Failure of the States to comply with the Constitutional requisitions; 2. Encroachments by the States on the federal authority; 3. Violations of the law of nations and of treaties; 4. Trespasses of the States on the rights of each other; 5. Want of concert in matters where common interest requires it; 6. Want of Guaranty to the States of their Constitutions and laws against internal violence; 7. Want of sanction to the laws, and of coercion in the Government of the Confederacy; 8. Want of ratification by the people of the articles of the Confederation; 9. Multiplicity of laws in the several States; 10. Mutability of the laws of the States; 11. Injustice of the laws of the States.

212 At one point, secretary of finances Morris even declared that the system was at the very brink of financial disaster (1783 letter of Morris) and Washington had to shorten marches of the army because they literally had no shoes, and sometimes no clothes either. In 1786, for instance, after New York had refused yet another amendment designed to improve the financial powers of Congress, a Committee of Congress in a public letter to New York flatly described 'present critical and embarrassed situation of the finances of the United States(…)' (McDonald (1968), 49) and Member of Congress Rufus King stated in a letter that 'You, my dear friend, must know our Situation, as fully as I do, who am a daily witness of the humiliating condition of the Union. You may depend on it, that the Treasury now is literally without a penny.' (Rufus King to Lebridge Gerry, New York, June 18, 1786 (McDonald (1968), 46).

213 Madison (Vices), 5, 8.

states became increasingly radicalized[214] and unstable.[215] Congress was not able to counterbalance them, or to protect the different elites threatened by this radicalization.[216] Fourth, the lack of competences to regulate trade was preventing an efficient internal market, and thwarted the external powers of the Confederation.[217] Lastly, and crucially, all attempts to reduce these flaws by empowering the centre had stranded on distrust, state interests, and the requirement of unanimity.[218] The effect of these accumulated problems was significant, and in the words of one of the foremost students of the period 'by the middle eighties Congress had virtually collapsed.'[219]

Interestingly the perceived *scale* of this failure allowed the Articles a last great achievement: by accumulating responsibility for near all the problems of the time, the Articles provided an enormous impetus and direction for

214 This even though almost all of the new state constitutions provided for a senate, explicitly in recognition of the need for an aristocratic element in Government so the 'contemplative and well informed' and the 'wise and learned' could check he people of which 'few [are] much read in the history, laws or politics'. An aristocratic hope already evident from the choice for the title of 'senate'). Wood (1969), 209. In most states, however, these upper houses were to weak to really balance the more directly democratic lower houses. Cf on this point Jefferson in his '*Notes on Virginia*'. W. Peden (ed), *Notes on the State of Virginia* (University of North Carolina Press 1955), 119-120.

215 Madison (4, 6, 9, 10, 11). Wood (1969), 467: It was 'the corruption and mutability of the Legislative Councils of the States', the 'evils operation in the States' that actually led to the overhaul of the central government in 1787.

216 McDonald (1968), 5. As Madison commented on his discovery of popular despotism 'It is much more to be dreaded that few will be unnecessarily sacrificed to the many.' (Madison to Jefferson, Oct. 17, 1788, Boyd (ed), *The Papers of Thomas Jefferson XIV* (Princeton University Press 1950).

217 Madison (1, 2, 3, 7). Cf already Washington in his Circular letter to the Governors of the States of June 8, 1783: 'That unless the States will suffer Congress to exercise those prerogatives, they are undoubtedly invested with by the Constitution, every thing must very rapidly tend to Anarchy and confusion. (…) That there must be a faithful and pointed compliance on the part of every State, with the late proposals and demands of Congress, or the most fatal consequences will ensue.' (Note that in the US the Treaty nature of the Articles was in no way a problem for calling it a constitution.) See also McDonald (1968), 40 and 73. Further see Lenaerts (1990), 234. who also compares with Switzerland, where lack of powers over trade was a central problem. He quotes Justice Joseph Story in 1833 on the functioning of the Confederation: '(The) want of any power in Congress to regulate foreign or domestic commerce deemed a leading defect in the Confederation. This evil was felt in a comparatively slight degree during the war. But when the return to peace restored the country to its ordinary commercial relations, the want of some uniform system to regulate them was early perceived.'

218 So great even was this sentiment that Rhode Island refused to grant more powers to Congress lest it become tyrannical whilst that same Congress was still in the middle of the war of independence against Great Britain! Indeed in some states, Rode Island being a good example, revolutionary ideology was threatening to take itself to a – presumed logical – extreme, bordering on naïve anarchism.

219 Wood, (1969), 464.

constitutional change.[220] The key question became how to remedy the problems underlying the Confederation. This provided a focus and limited the bandwidth of the debate to a point that allowed agreement on a more centralised constitution. The Articles thereby played a key role both in the process and substance of the 'miracle at Philadelphia',[221] in what perhaps could be called the Phiddipides syndrome of confederations.

7 Reversing confederalism: The federal modifications

As mentioned above the essence of federalism is contested. Our specific purpose here, however, is to highlight those modifications in the constitutional structure of the US that by contemporary consensus were deemed essential for remedying the failures of the Confederation. These modifications had to serve the seemingly incompatible objectives of creating an effective centre and respecting the autonomy of the states. As a result they brought forth the current American Constitution, and with it the modern federate system. As such they are relevant for the understanding of federalism and especially interesting for a 'supranational' entity in constitutional *dubio* like the EU. Several of the federate modifications, furthermore, will look rather familiar to students of EU law.[222] Here only a brief outline of these modifications is given, detailed discussion is reserved for the discussion per modification in the next chapter, so as to prevent tedious repetition. It is thereby instructive to distinguish four – obviously interrelated – clusters of modifications: 1) modifications of the foundations of the polity, 2) modifications relating to competences, 3) structural modifications, and 4) institutional modifications, including representational ones.[223] This catego-

220 See also below chapter 5 for a more detailed overview of the procedural road to federation.

221 The representatives saw it as their task to remedy the problems under the Confederation, see J. Madison, *A Sketch Never Finished or Applied* (1830-1836), as included in Madison's Preface to The Debates in the Federal Convention of 1787, 13 'a hope that so select a Body would devise an adequate remedy for the existing and prospective evils so impressively demanding it' and p. 16 'Such were the defects, the deformities, the diseases and the ominous prospects for which the Convention were to provide a remedy, *and which ought never to be overlooked in expounding & appreciating the Constitutional Charter the remedy that was provided*'

222 It should also be noted that many of these modifications obviously resulted from compromise, and were assembled from several more 'pure' plans. Pure plans that hold much interest of themselves such as the Dickinson draft, the Randolph plan, the Pinkney plan or the Hamilton plan proposing a unitary state. The Jefferson plan, and above all the Patterson plan are especially interesting for the present comparison as they suggested a stronger confederal union instead of federation. All these plans, and their different versions, are available via: http://avalon.law.yale.edu.

223 Cf also Schütze (2009), 1077 for a similar subdivision, though the division here predates this publication.

rization does not claim any form of necessity or exclusivity, yet does assist in structuring our analysis and comparison.

7.1 Fundamental modifications

The first cluster contains the most *fundamental*, truly *foundational* modifications, which directly affected the nature of the polity. First and foremost amongst these was the *creation of one American people* in which all sovereignty ultimately resided. The constitution contained and conveyed the will of this supreme entity. From this one sovereign source, power could then be distributed to the different governments.

The second fundamental shift empowered the central government to *use force* against the states when necessary. Although it could not be the standard method of enforcement, the *possibility* of force was seen as necessary to ensure compliance, and thereby to ensure that federal rules would truly have the character of law. In addition to this quest for effectiveness, the right to use force also normatively underscored the authority of the whole over the parts. Especially considering the fear of tyranny and the radical democratic ideology of the time, this certainly was a fundamental change. It altered the nature of the relation between the states and the central government.

Third, and observing American politics today probably more far-reaching than the right to send in the National Guard, was the right to tax. Removing the financial dependence of the centre on the states, the federal government was given the power to directly tax US citizens, as well as the right lay imposts. A power that again confirmed the fact that there was one American people, which directly owed *civic duties* towards the federal government, and did so independent of the state they happened to belong to.

Fourth, constitutional amendment became possible by a qualified majority. This effectively took away state control over the compact binding them, further subsuming them into one political community. A majority of other states could now change even the most fundamental rules of the game against the will of one or more other states.[224]

Lastly, and related to the rules for amendment, the constitution introduced a crucial system for the accession of new, fully equal, states that would be formed in the future, and contained, albeit implicitly, a rejection of secession, which was later determined through civil war.

Together these modifications fundamentally altered the nature of the polity constituted. They also underpinned the further modifications made, including the second cluster of what can be labelled *structural* modifications, seeing how they affected the structure of government and governing.

224 Except for the interesting exception that each state would retain two senators, see art. V US Const.

7.2 Structural modifications

As a first structural modification, the central government was to generally act *directly* on the citizens, and no longer primarily through the states. The central government, furthermore, was to be a fully *separate government*, no longer working trough the states alone, but possessing its own organs and institutional capacity.

Second, and following from the creation of one supreme people, the Constitution, all central legislation and all treaties became the 'supreme law of the land'. Their force would no longer rely on a good faith obligation of the States to uphold them, as it did under the Confederation.[225] This reliance on supremacy also reflected a far greater reliance on the use of law as the cornerstone of political organization. Although the capability of using force was deemed necessary, as we saw above, at the same time the insight was embraced that repeated use of force cannot support a stable polity, certainly not in a compound entity. In times of normalcy law and not force should be the instrument of government.

This central role for law is also evident in the second fundamental function of supremacy: the supremacy of the Constitution over the central government itself. Such complete supremacy of a legal document over a democratic government was a major innovation.[226] It is important to appreciate this double role of the law, which both fitted the ideology of the enlightened revolution, but also provided a necessary building block for a federate system and tempered the radical preference for direct democracy.

7.3 Increased competences and implied powers

The third cluster of modifications increased the competences of the federal government.[227] Not surprising, considering the core weakness of the Confederation on this point, the most important new power concerned the regulation of commerce. The federal government received the, by now infamous, power to 'regulate Commerce with foreign Nations, and *among the several States*, and with the Indian Tribes.'[228] The federal government at the same time retained its exclusive external and war competences.

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225 Obviously an indirect dependence remained to the extent that the statal governments need to implement or uphold federate law.

226 In 1777, for instance, the parliaments of New Jersey, Georgia and South Carolina automatically assumed that they could change their state constitutions through ordinary legislation. (Wood (1969), 274).

227 See Art. I sec. 8 Us Const. The power to tax was of course also an increase in powers, yet due to the fundamental shift this entailed is has been placed in the cluster of foundational modifications. No findings or conclusions of this chapter, however, rest on this qualification.

228 Art. I sec. 8 Us Const.

Crucially, furthermore, a much broader doctrine of implied powers was explicitly introduced via the 'necessary and proper clause', vastly expanding the competences of Congress by linking objectives and competences.[229] Although the principle of attributed power was maintained, it was, therefore, significantly softened, again removing one of the central causes of paralysis in the Confederation.

7.4. Institutional modifications and the system of representation

The changes in foundation, structure and powers obviously required institutional modifications. At the same time the cluster of institutional modifications adopted also strengthened and consolidated the other modifications.

Obviously, a full institutional comparison, including a detailed analysis of how each institution was set up, their place within the larger institutional framework, and how they functioned in practice, is beyond the scope of the current research. In line with our overall approach, this section will focus on three key institutional modifications to the confederal system deemed vital to remedy its failures and allow a federate system to come into existence and function.

The first modification concerns the *representational scheme*, and how this was translated into the composition and operation of the *legislature*. This branch was made permanent and based in Washington. It would no longer be state politicians travelling to participate in the central government. In addition it became bicameral. The House of Representatives directly and proportionally represented the people at the federal level. A modification that anchored the assumption of one sovereign American people into the political and legislative process. Counterbalancing this shift, the Senate, especially before the 17th amendment, represented the states. Reflecting their former sovereignty, and providing political and institutional protection for the states, each state was guaranteed an equal number of two senators.

Second, and in a complete reversal of the confederal model, a very strong *central executive* was created with the office of the President. Besides the President's role in checking and balancing the other branches, this office was intended to guarantee effective execution and implementation. The introduction of such a strong *personal* executive head was a remarkable development in light of the radical fear of tyranny and the recent ousting of the British monarchy.

229 Idem, Congress was empowered: 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'

Last, but certainly not least, a *federal Supreme Court* was established. Aimed to remedy the general lack of compliance, and mirroring the central role envisioned for the rule of law, this court should ensure compliance both from the states and the centre. Crucially, however, this also meant that conflicts between the centre and the states, for instance on the limit of competences conferred, would therefore be decided by a court belonging to the federate centre. This created a typical *judicial kompetenz-kompetenz* at the federate level, and further strengthened the legal component in the federate system.[230]

7.5 A comparative grid

These modifications, especially when put together, transformed the constitutional system of the US. Jointly they secured the central aims of guaranteeing sufficient power and energy in the centre to govern, ensuring compliance from the states, yet preserving some level of statal autonomy.[231] Furthermore, even the short overview given above clearly indicates to those familiar with the EU system the many parallels with the EU, which has already incorporated several of these elements wholly or partially. The central role of supremacy and direct effect, and their interplay with a supreme court are the obvious case in point.

The next chapter will go into a more detailed, point by point, analysis of these sixteen federal modifications highlighted for comparison. A comparative exercise that forms the raw comparative material for the further analysis and propositions on the constitutional nature and functioning of the EU provided in chapter 4.

230 J. H. Choper, R. H. Fallon, Yale Kamisar and S. H. Shiffrin, *Constitutional Law* (10th edn. Thomson 2006), 15 et seq.

231 *Federalist Papers* No. 10.

2 The Confederal Comparison

1 Introduction: A point by point comparison

With the groundwork in place, this chapter carries out a detailed comparison. Per key modification, the EU will be set against the confederal system of the Articles on the one hand and the federate counterpart that replaced it on the other. In this way, the EU will be located between, or outside, the spectrum that lies between these two poles.

The chosen approach contains one imbalance, which must be addressed here before we engage with the comparison proper. In our comparison the US is represented by two points, capturing the dynamic development of this polity from a confederation to a federation. The EU, on the other hand, is presented as a single point, even though it has experienced several transformations itself.[1]

Acknowledging this limitation it is nevertheless believed justified to take the EU as it stands at the time of writing as the default point of comparison. It is this current EU which we most want to comprehend. In addition, some of the points being compared have remained relatively stable over the course of the EU's development. Even so, partially to compensate for this imbalance, and to prevent working from too one-dimensional an understanding of the EU, relevant developments within the EU will also be included in some of the individual points of comparison. This especially where essential evolutions of the EU along the confederal – federal spectrum would otherwise go unnoticed. The relative increase in the federate structural elements of the EU, for instance, forms one such essential evolution.

In terms of order this comparison follows the four clusters of modifications defined above. It first looks at the fundamental modifications, then to the structural ones, followed by the modifications to competences and the key institutional changes. Based on this concrete, systematic comparison, chapter four will then assemble these specific findings into three more general comparative propositions, and explore their explanatory power for the EU.

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1 See classically J.H.H. Weiler, 'The Transformation of Europe' 100 *Yale Law Journal* (1991), 2403. For a more recent overview: P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (2nd ed. OUP 2011).

Before we set out on this substantial comparative exercise, however, an additional note to the reader is in order. The following chapter provides a highly structured, point by point comparison. For those specifically interested in this detailed comparison this chapter hopefully holds much of interest. For those who are primarily interested in the overall picture that emerges from the comparison, the exercise ahead may be less elating. The rigorous structure followed, furthermore, although required to support the validity of the comparison itself, may risk evoking a certain *longueur*. Where such symptoms are indeed likely to occur, difficult as it may be to believe, the reader is referred to the general summary in section six of this chapter. This summary has consciously been written so as to allow, to the extent possible, such a reading strategy, as have the following chapters. Alternatively, the modular design of this chapter also allows for a cherry picking approach.

2 Foundations: Fundamentals of the constitutional systems compared

Five key foundational modifications were highlighted above. Scoring the EU against these five modifications is especially important to establish how the EU compares to our confederate and federate baselines on the level of constitutional fundamentals. This subsection therefore compares the EU with these baselines on the issues of ultimate foundation of authority, use of force, taxation, amendment, secession and enlargement.

2.1 Foundations: Ultimate foundation of authority

Our first, and most fundamental, modification concerns the ultimate foundation of authority. Where is such authority located, and how does it 'flow' throughout the constitutional orders compared?

2.1.1 We the peoples

The Articles expressly respected the sovereignty of its Member States. Even though the Union was to be 'permanent', the states were not to be dissolved into the new entity, but remained the primary body politics,[2] and *loci* of original authority.[3] They did not transfer ownership of sovereign powers, so

2 Wood (1969), 355, the Confederation was not even seen as a threat in this regard.

3 A fact bewailed by more nationalist proponents in complaints that could be copied verbally by proponents of a stronger European political integration. Compare the Federalist Fisher Ames: 'Government is too far of to gain the affections of the people. What we want is not a change in forms. We have paper enough blotted with theories of government. The habits of thinking are to be reformed. Instead of feeling as a Nation, a State is our country. We look with indifference, often with hatred, fear and aversion to the other States' (Fisher Ames to George Minot, February 16, 1792 in *Works of Fisher Ames*, Seth Ames (ed.) Boston 1854, 1: 113).

to speak, but only *delegated* a limited right of use.[4] The Articles were explicitly concluded *by* the 'Delegates of the States' and "*between* the states of New Hampshire (…) and Georgia.' They were, therefore, not based on one overarching authority, and respected the autonomy of the states as well as their normative superiority. No single American people was assumed or created.

Within the states, furthermore, ultimate authority remained located in the separate peoples. Popular sovereignty and rather direct democracy were, in fact, two of the major shifts brought about by the American Revolution. Authority no longer originated in a king or a state – where the people could be granted some representational rights as a class – but in the people, who could then delegate it. An understanding that has since become almost automatic, if not without its complications, yet truly was a revolution at the time.[5]

In the Confederation, moreover, this idea was linked to a revolutionary variant of the republican ideal. This ideal stressed the importance of small political communities, and very direct participation by the citizens in politics. Consequently it challenged the situation under the British Empire, and resisted the creation of a large, central and distant authority within the US that would take the place of London. In no way, therefore, did the Confederation, claim to create anything like one American people. In line with the ideals of the revolution, the Confederation was there to protect the freshly conquered sovereignty of the peoples, not to threaten their self-government or ultimate authority.

As a result, the *flow of authority* within the Confederation was very clear as well. The People had delegated powers to the states, and the states had delegated some of these powers to the Confederation. The explicit retention of state sovereignty therefore should also be understood as an explicit retention of the people's sovereignty.

4 For the conceptual problem underlying this question – is it a division of sovereignty – see further below and especially part II on sovereignty.

5 The ultra-dominance of the legislature in many state constitutions of the time was a direct application of this philosophy, for what could ever restrain the will of the sovereign people? For a further discussion and overview of the prominence of popular sovereignty in EU Member States see further below chapter 7 section 2 and chapter 10 section 6.

2.1.2 *We the People*

In a truly fundamental shift, the federal Constitution relocated ultimate public authority in the, newly 'created', American People.[6] A shift captured by the rightly famous '*We the People*'.[7]

This shift developed and confirmed the notion of popular sovereignty developed during the revolution and the Confederation. The people should be the *fons et origio* of all public authority.[8] That sovereignty, however, was now placed in a *single people*.[9] The many sovereign peoples of the Confederation were merged into one sovereign entity.[10] In return, the previously

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6 Cf Van Middelaar (2009), 126, also quoting Patrick Henry, one of the great anti-federalists: 'Who authorised them to speak the language of, *We, the people*, instead of *Whe, the States*? (…) The people gave them no power to use their name.' Patrick Henry, speech of 4 June 1988 during the Virginia ratifying convention, in: B. Bailyn (ed) *The debate on the Constitution. Federalists and Antifederalists speeches, articles and letters during the struggle over the ratification* (New York 1993), 595-597.

7 Even if this was a non existent entity at the time, see below chapter 9 section 5. Also, not too much stock should be put in the language itself: until very last days of the convention the text still was 'we delegates of the states' until a last minute change by the Committee of style. Nevertheless it rightly captures one of the key shifts brought about by the Constitution.

8 See also E.S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (Norton 1988), for instance on 281, and Burgess (2006), 11.

9 This is an essential element of a federation, Burgess (2009), 29: 'Diversity notwithstanding, all federations are composite states that constitute a single people'. Of course one could argue that *de facto* this single sovereign only became a certain reality after the civil war, yet this does not alter the normative and constitutional claim of the US federation that it was based on one sovereign. Interestingly, however, before the civil war the term confederacy was also still in use to describe the US. (Cf. Forsyth (1981), 4, 41).

10 Wood (1969), 473. Madison also found it 'a fundamental point that an individual independence of the States is utterly irreconcilable with the idea of an *aggregate sovereignty*'. S.J. Boom, 'The European Union After the *Maastricht* Decision: Will Germany Be the Virginia of Europe?' 43 *American Journal of Comparative Law* (1995), 208. Judicially, see, for instance, *Carter v. Carter Coal Co.*, 298 U.S. 238, 296 (1936) ('[T]he Constitution itself is in every real sense a law—the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. 'We the People of the United States,' it says, 'do ordain and establish this Constitution.' Ordain and establish! These are definite words of enactment, and without more would stamp what follows with the dignity and character of law.'); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ('Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.' (emphasis added)); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ('That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. . . . The principles . . . so established are deemed fundamental. . . . This original and supreme will organizes the government, and assigns to different departments their respective powers.' (emphases added)).

sovereign peoples of the states received a constitutionally protected 'semi-sovereign' status, inter alia protecting the democratic process within their respective states.[11]

Two important further consequences flowed from this modification. First, the flow of authority was reversed. Authority now flowed top-down, from the people *directly* to both the federal and the state governments.[12] The federal government, therefore, also came to rest directly on the people.[13] It received a separate and independent authority, no longer relying on an intermediate authority and legitimacy via the states.[14] Second, and even more far-reaching, this federal authority normatively trumped the authority of the states. The federal Government, after all, represented the *whole American* people.[15] The states only represented one sub-part of this supreme

11 CF Madison (Sketch), 16 describing this shift where the Peoples of the states 'acting in their original & sovereign Character' were to be brought together in one people. At this point, therefore, I disagree with Schütze, who solely focuses on the fact that ratification of the US constitution rested on the separate peoples in the states. Yet he ignores that, first, it were the peoples directly who ratified via special delegates, and second, that these peoples were to be subsumed into one entity after ratification. In fact, therefore, he describes the confederal reality *before* ratification, not the federate one willingly accepted by the people after ratification. Schütze (2009), 1077.

12 D.J. Elazar, 'Federalism v. Decentralization: The Drift from Authenticity', in: J.L. Mayer (ed) 'Dialogues on Decentralization' 6 *Publius* (1976), 9-19, Elazar (2006), 41, '(…) Americans understood sovereignty to be vested in the People. The various units of government – federal, state, or local – could exercise only delegated powers. Thus it was possible for the sovereign people to delegate powers to the general and constituent governments without running into the problem of which possesses sovereignty except in matters of international matters or the like. In matters of internal or domestic governance it was possible to avoid the issue except when political capital could be made out of it. (…) By creating a strong overarching government, it was possible to aspire to the same goals of political unification and integration as the Jacobin state, but by removing sovereignty from the state as such, and lodging it with the people, it was possible to arrange for power sharing and to set limits on governmental authority. Out of these two shifts there were developed what we have come to know as modern federalism.'

13 I disagree therefore with those holding that the sovereignty of the single American people was not clearly presumed in the Constitution, but who argue alternative sovereignty arrangements. For instance, some defend that sovereignty was divided between the people of the nation as a whole and the separate peoples of the states. See in this vein for example J. Goldsworthy (2006), 427, who at the same time also recognizes himself that 'most of Madison's contemporaries did not agree that the Constitution divided sovereignty. It was widely believed that 'the people' , who had supposedly enacted it, retained ultimate sovereignty and superintending authority over the all organs of government.' (424).

14 Elazar (2006), 35.

15 Wood (1969), 532: 'Madison saw clearly that the new national government, if it were to be truly independent of the states, must obtain 'not merely the assent of the Legislatures, but the ratification of the people themselves' for 'only a higher sanction than the Legislative authority could render the laws of the federal government paramount to the acts of its members.'

entity, even if these sub-parts enjoyed some special constitutional protection under the Constitution due to their former sovereign status and history.[16]

The shift from multiple peoples to one sovereign American people was considered vital for the transition from a confederation to a federation, and formed the normative basis for many of the further modifications discussed below.[17]

2.1.3 We the peoples and/or states?

The question which foundation EU authority has, can have, or should have is greatly contested.[18] At the same its does seem common ground that the EU is currently not based on a single European People.[19] As the Preamble famously declares, the Treaties aim to 'continue the process of creating an ever closer union among the *peoples* of Europe.'[20] Under article 4(2), furthermore, the Union is obligated to respect the equality of all Member States, as well as their national identities.[21] Independent statehood, moreover, is a for-

16 Please not that this does not deny the identity and independent political existence of the states and their peoples. It is only that they no longer form the ultimate sovereign bodies. See for a very sharp discussion of this distinction, as well as the 'dualism of political existence' that forms the 'essence' of a federation, C. Schmitt, *Constitutional Theory* (trans. J. Seitzer, Duke University Press 2008), 388 et seq.

17 Patrick Henry at the Virginia ratifying convention 'The question turns, sire, on that poor little thing – the expression, We, the *people*, instead of the *states*, of America." (…) States are the characteristics and the soul of a confederation. If the states be not the agents of this pact, it must be one great, consolidated, national government of the people of al the states' (Wood (1969), 526).

18 See for further discussion and suggestions chapter 10, section 6 below.

19 See also R. Schütze (2009), 1079, and J.H.H. Weiler, 'Prologue: Global and pluralist constitutionalism – some doubts', in: G. de Búrca and J.H.H. Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012), 13.

20 Also see the preamble of the TFEU, which consistently refers to 'peoples', as well as art. 1 TEU par. 2 and art. 3(1), which make it the aim of the EU to 'promote peace, its values and the well-being of its *peoples*.' Also, although it represents 'the Union's citizens', the European parliament seats are divided per Member State (art. 14(2)) TEU). The importance of this fact is evidenced by the strong resistance to the limited 'Europeanization' of this system proposed under the Duff plan, which would create several 'pan-European' MEP's. See the Proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976, INI/2009/2134.

21 It is also interesting in that regard that art. 2 TEU proclaims that the EU is *founded* on several *principles* common to the different peoples, not so much on these peoples themselves. Art. 1 TFEU thereby *founds* the Union on the Treaties, i.e. the *agreement* or reciprocal promises, of the different constituent parts.

mal requirement for membership,[22] and the EU remains, at least formally, based on several international treaties concluded by its Member States.[23]

EU citizenship perhaps best captures the secondary normative claim of the EU on the individual and the member peoples as a whole: 'Citizenship of the Union shall be additional to and not replace national citizenship.'[24] The EU, therefore, not just refrains from claiming a single people; it explicitly embraces the contrary aim of protecting the plurality of its peoples.[25] The Treaties have also been very consistent in respecting such individuality.[26] Despite the increasing authority and reach of the EU, the successive treaties have always recognized diversity as one of the key values of European integration.[27]

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22 Art. 49 TEU.

23 This of course not to deny the potential of creating a statal constitution by means of a treaty, such as for instance in Germany. Yet it is in this sense at least that the Member States remain Masters of the Treaties, a title given much more content and weight by the German Constitutional Court, see especially its *Maastricht Urteil* of 12 October 1993, BVerfGE 89, 155 and its *Lissabon Urteil* of 30 June 2009, BVerfGE, 2 BvE 2/08 paras. 231 and 298. On these German cases see extensively chapter 9, section 4.4.

24 Art. 9 TEU. Also see art. 20 TFEU. Even though 'destined to be the fundamental status', it remains subordinated to citizenship of a Member State. See case C-184/99 *Grzelczyk* [2001] ECR I-6193, par. 31.

25 Also, under its own core values and principles, including democracy and the right to self-determination, the EU is bound to respect these different peoples, unless they themselves voluntarily decide to merge into one European people. Also see art. 1 and 4(3) TEU, requiring respect for national identities, and the reference to the UN charter, which in turn refers to the right to self-determination of a people. See further below chapter 10, section 3.2.

26 Cf however, the proposals made during the Convention to have a European wide referendum as part of the ratification of the Constitutional Treaty. A clear attempt to base the EU directly on some form of a European collectivity, which logically was rejected. An interesting intermediate suggestion was not to have one European ratification, but to have the different national ratifications on one day. (See the proposal made orally by Austrian representative Farnleiter during the debates in Convention of 25 April 2005).

27 The preamble of the Rome Treaty already spoke of 'an ever-closer union among the peoples of Europe', whereas art. 137 EEC held that the Assembly would 'consist of representatives of the peoples of the States brought together in the Community (…).' The preamble of the Single European Act spoke of 'the democratic peoples of Europe', and that of Maastricht of deepening 'the solidarity between their peoples while respecting their history, their culture and their traditions' as well as repeating the desire to 'to continue the process of creating an ever closer union among the peoples of Europe.' Article B of Maastricht, furthermore, also confirmed the primary status of Member State nationality, as did the duty to 'respect the national identities of its Member States' in article F. the Treaty of Amsterdam also consistently speaks of the 'peoples' in the European Union. Nice does not mention the people at all. Even the Constitutional Treaty, perhaps the most unifying in its aims and understanding of the EU (see for instance art. 1 speaking of 'the will of the citizens and States of Europe'), retains its basis in multiple peoples. The preamble, for instance, still speaks of 'the peoples of Europe'. See, for further examples, also art. I-3 or III-280.

The absence of a single people is further evidenced by the apparent need for *alternative* foundations for EU authority: as no single people are available, and the existing ones must be respected, the question logically becomes how to base a polity on multiple *demoi*.[28] Conversely more cynical accounts can simply point out that either the EU has to create a single people, or should abandon any aspirations of becoming democratic and legitimate.

The conclusion that the EU is not based on one European people does not deny existing interconnections between the peoples such as shared history, values or long term interests. Nor does it claim anything about the future potential for the development of a European people. Similarly the conclusion that the EU is not based on a single people does not deny the increasingly direct connection between the EU and the individual.[29] Even though it remains a secondary status,[30] EU citizenship has developed spectacularly, and increasing rights accrue to this 'primary status'. [31] Different attempts have also been made to increase the direct political involvement of EU citizens, from a directly elected European Parliament to a citizens' initiative.[32] Most fundamentally the lack of a single European people does not deny the possibility of a stable, popular, and democratic foundation for the EU. As part II of this thesis will develop, a confederal model can contribute precisely to constructing such a basis for the EU from multiple *demoi*, and through a secondary though direct link with these multiple peoples.

The limited claim at this point, however, is only that currently no single EU *demos* exists. Nor, furthermore, does the EU even *claim* such a basis.[33] Consequently, the EU has not incorporated this most fundamental federate modification, which underlies the entire US federate system. On this point it remains in the confederal hemisphere, *based* as it is on the delegation of

28 J.H.H. Weiler, 'European democracy and its critics: polity and system', and 'To be a European citizen: Eros and civilization', in: J.H.H. Weiler *The Constitution of Europe: Do the New Clothes have an Emperor?* (CUP 1999), 264, 324, and especially 344 et seq.

29 See also chapter 10 section 3 and chapter 12 on this confederal link between the EU and the individual.

30 See however cases C-369/90 *Micheletti* [1992] ECR I-4239 and C-135/08) *Rottmann* [2010] ECR I-1449 on the limits imposed by EU citizenship on the rights of Member States to grant or especially to remove national citizenship, and thereby EU citizenship.

31 See for a spectacular recent example the judgment in *Zambrano* where to protect citizenship rights even the scope of EU law was broadened, at least arguably so, to include a purely internal situation. See cases C-34/09 *Zambrano* [2011] ECR I-1177, as well as its rapid containment in cases C-434/09 *McCarthy* nyr. and C-256/11 *Dereci and others* nyr.

32 See for a further discussion chapter 10 section 3 and 6.

33 An important fact also for those pointing out that the 'American People' were a fiction at the time the federal constitution was adopted. Even if true, this still leaves the vital difference that the EU does not even make the same normative claim, the obvious factual question aside if it would be realistic, or desirable, for it to do so in the foreseeable future.

powers by separate, distinct, and normatively superior entities.[34] Not surprisingly, therefore, just as the Articles, the consecutive Treaties have always been concluded by national delegates, and between the states, and never by 'We the people.'

2.2 Foundations: The use of force against the States?

Our second foundational modification concerns the use of force against Member States: may the centre use force where necessary to ensure compliance by unruly states?

2.2.1 The use of force under the Articles

Although the Articles granted far-reaching military powers to Congress, these were only to be used for the 'common defence' of the states against external aggression.[35] In line with the enduring sovereignty and normative superiority of the states, the Confederation had no power to use force against disobedient states.[36] Even though Congress could appoint many of the highest officers, one could furthermore doubt whether any of the militias that formed the US Army at the time would have intervened in another state against the will of that state, let alone that militias would have turned against their own state.[37] Something that of course remained a factor for a long time even under the federal constitution.[38]

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34 A conclusion that is not affected by the direct involvement of the people at the EU level, for instance via the European Parliament. This involvement does not change the *foundation* of EU authority, nor does it cross any confederal lines.

35 Art. III of the Articles of Confederation.

36 Cf. also art. II of the Articles of Confederation. Nor, it should be added, did it have the capacity. Even during Shays rebellion, which was felt and reported as a real threat, the Confederation could not act. Rather, it had to rely on a private force of 4.400 men assembled by Massachusetts governor James Bowdoin, and paid for with 20.000 dollars he had managed to raise from private donors. A rather embarrassing episode which greatly alarmed those desiring a stronger central government. See for a particularly energetic description of Shays rebellion, which formed a real catalyst for further centralization, Beeman (2010), 18.

37 Van Tyne (1907), 540. On the other hand in the German Bund the Diet did have the power to intervene militarily in a Member State to restore peace and order, *and* as an ultimate remedy to enforce confederal rules. A power which it effectively used several times. See art. 26 and 31of the *Wiener Schlussakte*, but also contributed to the end of the Bund in the Austro-Prussian war of 1866. It should also be noted that such enforcement was easier against smaller members in the Bund because of the overwhelming relative power of two of its members: Austria and Prussia.

38 Famously Robert E. Lee in 1861 rejected command of the Union army after Virginia had declared its independence by stating that he was 'a Virginian first'. As he later wrote to his sister in a letter of 20 April, 1861: 'With all my devotion to the Union and the feeling of loyalty and duty of an American citizen, I have not been able to make up my mind to raise my hand against my relatives, my children, my home. I have therefore resigned my commission in the Army, and save in defence of my native State, with the sincere hope that my poor services may never be needed, I hope I may never be called on to draw my sword.'

2.2.2 *Force as a necessary federate backbone*

In another fundamental modification the federate government was given precisely the power to *enforce* federal law, if need be by '(…) calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.'

This power was deemed vital by men like Hamilton, who believed that ultimately there could be no law without the backing of force. To create a system based on law, therefore, the use of force needed to remain a very real option. The right of the centre to use force against the States also underscored the normative superiority of the federate government and of the whole over the parts. [39] It illustrated that even the militias, who were (and as the National Guard are) organized at State level, owe a higher duty of loyalty to the whole.[40] Consequently, even though force was not intended to be frequently used, granting a right to use force significantly impacted on the nature of the political union.

2.2.3 *The use of force in the EU*

It is at this point not even imaginable that the EU would be able to 'call forth' the British army, or even the *légion étrangère,* where a Member State violates EU law, even though some EU officials might undoubtedly desire it at times. The EU clearly does not have the competence, the capacity, nor the authority to use force against Member States.[41] It has to make do with an expeditionary force of lawyers, judges and civil servants.[42]

As a result, EU enforcement depends heavily on general obedience to law and the Member States' own apparatus for enforcement. Even when itself enforcing, the EU either acts through another legal act (be it a decision or a judgment), or relies on a Member State.

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39 During the Convention Madison even proposed and defended a plan that entailed the creation of a unitary state, fully obliterating the states. In his view 'The general power, whatever be its form if its preserves itself, must swallow up the state powers. Otherwise it will be swallowed up by them. …two Sovereignties can not co-exist within the same limits.' Considering the development of the central government in the US one could say he was not completely wrong. (McDonald (1968), 141).

40 A claim obviously challenged, and defeated, during the civil war.

41 See, however, the failed European Defense Community Treaty, which would have brought all troops, with some minor exceptions, under supranational control (art. 1, 8, 9 and 10), whilst wearing European uniforms! Art. 38 of the EDC, furthermore, also envisioned the development of a political counterpart to the army which would be able to constitute '(…) one of the elements of an *ultimate Federal or confederal* structure, based upon the principle of the separation of powers and including, particularly, *a bicameral representative system*.' (my italics). Cf further below chapter 4 section 2.1. on this failed experiment, which was nevertheless signed by six, and ratified by four Member States!

42 As will be discussed below, this type of force might also be more effective and suitable for the purposes of the EU. See chapter 4 section 4 and chapter 13 section 3 for the particular challenge of the EMU crisis in this regard.

One interesting, and increasingly important, exception to this image of EU enforcement concerns the *financial* power which the Commission, and the EU more generally, have gathered through managing large financial schemes. Although still dependent on Member States to reclaim or repay any sums paid, the Commission, either solely or jointly with other institutions, can have the power to grant or not to grant any subsidies or to cancel payment of any sums due. This financial power is an interesting addition to the institutional power of enforcement, and increases in importance alongside the financial clout of the EU.[43] The 2012 conflict between the Commission and Hungary over the amendment of the Hungarian constitution provides a clear example. In that conflict cancelling subsidies seemed to have more (direct) effect than, for instance, infraction procedures or the distant threat of an article 7 TEU procedure.[44] Similarly the financial dependence of, for instance, Greece or Ireland, or any Member State that will have to rely on EU or EU related multilateral aid, greatly increases the leverage of the EU.[45] Interestingly, this financial power has also been an important means for the US federate government to increase its power. It can use financial incentives, for instance, to influence state actions, even where under the federate scheme it is not allowed to intervene directly through legislation or executive commands. Such 'enforcement through subsidies' was, on the other hand, not an option for the Confederation because it lacked sufficient resources.

Despite this added financial control, however, it must be concluded that, as far as the internal use of force is concerned, the EU clearly falls within the confederal camp as well. The consequences of this difference between confederate and federate organization of force are not that visible in the day to day functioning of polities. The federate government, as hoped by the founders, almost never has to use force.[46] EU law as well is generally obeyed even without a credible threat of force. The consequences for the ultimate nature and functioning of the polity, however, are significant, and will be further discussed below in our general discussion of the comparison in chapter five.[47]

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43 See in this regard however section 2.3. below on the relatively small budget of the EU. Equally political institutions that are dominated by the Member States, such as the European Council or the Council, may be reluctant to use, or normalize, such forms of pressure.

44 Press release IP/12/24 of 17/01/2012, and the very rapid finding of a violation by the ECJ in C-286/12 *Commission v. Hungary* [2012] nyr.

45 Or whoever *de facto* controls the award of aid and the formulation of the precise conditions. See for a detailed discussion below chapter 13 on the EMU crisis.

46 At least not against the states. Also, federate force has been used at some crucial junctions, most obviously during the civil war, but for instance also during the desegregation where the national guard was nationalized.

47 The absence of the right to use force also forms a key reason why the EU cannot be seen as a state. Cf for the vital role of force in this regard, including his references to Max Weber, Von Bogdandy (2000), 37.

2.3 Foundations: Taxation and the generation of revenue

The third foundational modification concerns the right to tax or to otherwise generate independent revenue. A vital power as it empowers the centre financially, and creates a direct link between the individual and the centre on a key political issue: money.

2.3.1 The problem of revenue under the Articles

The Confederation was not allowed to levy taxes or lay imposts. All such direct sources of revenue remained the exclusive domain of the states. Congress was allowed, however, to requisition money from the states or to borrow sums externally, including by issuing bonds.[48] These methods, however, proved completely inadequate.[49] At one point, secretary of finance Morris declared that the system was at the very brink of financial disaster, and Washington had to shorten marches because the soldiers literally had no shoes. [50]

First and foremost this financial failure was caused by the states' persistent refusals to comply with the (binding) requisitions, despite ever more desperate and even emotional entreaties from Congress. The States did pay some money, but always far less then needed, and just enough to keep the

48 These confederal bonds might provide one interesting argument on the potential introduction of Eurobonds, also in light of the case law of the BVG.

49 In 1786, for example, Congress only received approximately $371.000, whereas on 1 January 1787 $577.000 was due in interest on outstanding loans alone! As was stated in Congress this was even too little 'for the bare maintenance of the federal government on the most economical establishment, and in times of profound peace.' In 1789 only the foreign debt exceeded $10.000.000, whereas the arrears of interest on the total debt exceeded $11.000.000.000. McLaughlin (1971), 65. Madison (Sketch), 8 talks about a 'calamity' and impending 'catastrophe'.

50 Morris, previously Superintendent of Finance of the Confederation, informed Congress that: 'all the money now at our command, and which we may expect from the States for this two months to come, will not do more than satisfy the various engagements which will by that time have fallen due. (…) we can have no right to hope, much less to expect the aid of others, while we show so much unwillingness to help ourselves. It can no longer be a doubt to Congress that our public credit is gone. It was very easy to foresee that this would be the case, and it was my particular duty to predict it. This has been done repeatedly. I claim no merit from the prediction, because a man must be naturally or wilfully blind who could not see that credit can not long be supported without funds.' (Robert Morris to Congress, 17 March 1783, in F. Wharton, (ed), *The Revolutionary Diplomatic Correspondence of the United States* (US Government Printing Office 1889), 6:309-310.

system from collapsing.[51] In this way the system of requisitioning, although perhaps not inherently flawed, failed to function.[52]

In turn, the lack of internal revenue frustrated the only other source of 'income' of Congress: borrowing. The new republic received massive financial support from France and the Netherlands, and issued many bonds. Soon, however, it was unable to pay the interest, let alone the principle. Since there was no alternative, Congress nevertheless ordered representatives abroad to keep on borrowing, without any foreseeable revenues to pay for such loans. It was largely French aid, and afterwards the trust of Dutch bankers in the long term solvency of the United States, that kept Congress afloat.[53]

Repeated attempts were made to address this financial weakness in the Articles. Despite passionate and skilled arguments from figures as Hamilton, Madison and King, [54] – arguments that could, and sometimes even have been used almost verbatim by the European Court of Justice – these proposals were all rejected.[55] The solution most often proposed, which must sound rather familiar to the EU lawyer, was to allow Congress to lay a 5% impost to generate its own stable income. At one point this proposal almost

51 In 1786, for instance, after New York had refused yet another amendment designed improve the financial powers of Congress, a Committee of Congress in a public letter to New York flatly described 'present critical and embarrassed situation of the finances of the United States (…). Rufus King, a delegate to Congress, stated in a letter that 'You, my dear friend, must know our Situation, ad fully as I do, who am a daily witness of the humiliating condition of the Union. You may depend on it, that the Treasury now is literally without a penny." (Rufus King to Lebridge Gerry, New York, June 18, 1786 (McDonald, 1968, 46, 49).

52 Especially see E.J. Ferguson, *The Power of the Purse: A History of American Public Finance, 1776-1790* (University of North Carolina Press 1961), 1-69.

53 The Dutch bankers at one point started buying all US debt they could find, and continued credit where no interest had been paid in quite some while. In the last five years Dutch bankers, for instance, lend a total sum of $2.296.000 to Congress. A gamble on the eventual success of the American enterprise that in the end paid off. McLaughlin (1971), 65.

54 Wood (1969), 111, Jensen (1970), 128 and 174.

55 Preventing expansion of powers via 'interpretation' was, on the other hand exactly the aim of radicals. A sentiment that might not be unfamiliar to those rejecting the 'revolution by interpretation' of the ECJ was worded by Drayton, when he insisted on a clause in the Articles ensuring literal interpretation, so that no one could use the so called 'spirit of the law' to expand powers of Congress. For when people start looking for the spirit of the law, what they find is 'the result of their good or bad logic; and this will depend on their good or bad digestion; on the violence of their passions; on the rank and conditions of the parties, or on their connections with Congress; and on all those little circumstances which change the appearance of objects in the fluctuating mind of man.' The central role of legal interpretation both under the later US constitution and in the EU proves the correctness of this power of the 'spirit' but unfortunately for those who reject it, also its necessity if constitutional systems are to function. (Jensen (1970),186).

made it, yet was sunk by Rhode Island, which feared a 'tyrant' were Congress to be given an independent income.[56]

As Cicero already remarked, however, 'the veins of war are infinite money'. Within that analogy, Congress was forced to fight the entire British Empire with severe thrombosis. As a result, the army was not paid for dangerously long periods, a *coup d'état* not far away at some points.[57] The most dramatic moment in this regard undoubtedly was the 'Newburgh Conspiracy' where it seems that to a large extent it was only the personal authority and charisma of General Washington that prevented a military coup or rebellion. The history of the U.S. would probably have looked very different had he followed the encouragement of some, including later founding fathers, to use his control of the army to establish a more effective central government by force.[58]

With no money to even pay the army during a war Congress clearly lacked the resources to effectively perform other tasks. The weak financial position of the Confederation logically became a major source of frustration and discontent, and a strong argument against the Confederation and the confederal model.

2.3.2 Taxation and revenue in the Federation

Again the federate modifications led to a complete reversal. In addition to the powers already found in the Articles, the federate government received broad competences to raise revenue. These included the right to establish direct taxes.[59]

> "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, (…); but all Duties, Imposts and Excises shall be uniform throughout the United States;"[60]

Considering the importance attached to taxation – the rejection of taxation without representation had played an important role in justifying the revolution – this new, general competence of the federation again underscored the more centralized nature of the polity created.

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56 Rhode Island was then joined by Virginia which retracted its support, since it was afraid the proposal would benefit the North at its detriment. Even such limited proposals as giving Congress an income for 25 years only failed as well, as did attempts to give a broader interpretation to the existing competences under the Articles.

57 Beeman (2010), 20 et seq.

58 Kohn (1970), 187 and R.H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* (Free Press 1975), 17-39.

59 L.H. Tribe, *American Constitutional Law* (2nd edn. The Foundation Press 1988), 318.

60 Choper, Fallon, Kamisar and Shiffrin (2006), 112 et seq.

2.3.3 The generation of revenue in the EU

The EU does not have the power to tax its citizens directly. It does, however, have 'financial autonomy' in the sense that it has 'own resources'. [61] By far the largest part of EU income, however, comes from a direct levy on the *Gross National Income* (GNI) of Member States.[62] Not surprisingly, seeing that money is directly concerned, even this limited autonomous financial position of the EU did not come easy, but is the outcome of several battles.

The ECSC had financial autonomy from the start, as it could raise levies under article 49 ECSC. With the Merger Treaty this autonomy was partially lost. The EEC was primarily financed by contributions from the Member States.[63] In 1971 the first 'Own Resources Decision' entered into force.[64] This reintroduced three primary means for the EU to generate its 'own' resources: customs duties, agricultural levies and 1% of the VAT levied by the Member States.[65] Parallel to these own resources the Member States also contributed directly to balance the budget, the EU not being allowed to run a deficit.[66]

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61 Art. 311 TFEU. See for the current system: Council Decision 2007/436 on the system of the European Communities' own resources, *OJ* (2007) L 163/17. In line with the fundamental importance of the system for generating revenue, these decisions must be approved by the Member States in accordance with their respective constitutional requirements.

62 GNI is defined as 'Gross (or net) national income (at market prices) represents total primary income receivable by resident institutional units: compensation of employees, taxes on production and imports less subsidies, property income (receivable less payable), (gross or net) operating surplus and (gross or net) mixed income. Gross national income (at market prices) equals GDP minus primary income payable by resident units to non-resident units plus primary income receivable by resident units from the rest of the world. See Council Regulation 2223/96 on the European system of national and regional accounts in the Community *OJ* (1996) L 310/1, point 8.94.

63 Art. 20 EEC. Also see P.J.G. Kapteyn, A.M. McDonnell, K.J.M. Mortelmans and C.W.A. Timmermans (eds), *The Law of the European Union and the European Communities* (4th revised edn, Kluwer Law International 2008), 350.

64 Council Decision 70/243 *OJ* (1970) L 94/19.

65 Additional revenue is generated via fines or the income tax on EU officials. This accounts for less than 1% of the EU budget.

66 Now see art. 310(1) TEU.

Due to several circumstances, especially the exploding costs of compulsory agricultural spending, this system, as well as an expanded version under the second Own Resources Decision of 1985, did not yield sufficient revenue.[67] To close this gap the Delors I Package was adopted in 1988.[68] Embedding the EU's finances in medium-term financial frameworks of five to seven years, this package also modified the system for generating the EU's own resources.[69] For instance, the ceiling for financial resources was set by a fixed percentage of the EU's GNI.[70] Most importantly, a vital new resource was adopted, namely a direct levy on each Member State based on its GNI.[71] For 2010, for example, the EU budget was €141.5 billion. 12% of this money came from customs and sugar levies, 11% from VAT, and 76% out of direct contributions[72] based on GNI.[73]

Despite its significant development, therefore, the EU is still overwhelmingly financed by direct contributions from the Member States, even if these are now called 'own resources'. The additional elements of the EU's own resources, furthermore, are collected by the Member States, albeit as agents of the Union.[74] In a sense the term 'own resources' can be confusing in this regard. From the constitutional perspective it is better understood as 'legally owed to' the EU in the sense that from the moment the EU's financial claim has been determined the EU is entitled to these funds, and any tinkering with them violates the EU's rights and financial interests.[75]

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67 Council Decision 85/257 *OJ* (1985) L 128/15. In addition the system created too big an imbalance between Member States that mostly imported agricultural products, and those that had a large agricultural sector which profited from EU subsidies. This discrepancy, for instance, led to the infamous British refund. (See for the first application art. 3 of Council Decision 85/257 *OJ* (1985) L 128/15.

68 See Commission communications '*The Single European Act: A New Frontier for Europe* (COM (87)100 Final), and *Report on the Financing of the Community Budget* (COM (87)101 Final). See also L. Kolte, 'The Community Budget: New Principles for Finance, Expenditure Planning and Budget Discipline' 25 *CMLRev* (1988), 487.

69 These frameworks are now explicitly mentioned in art. 312 TFEU.

70 Until 2013 this percentage is 1.24%, see art. 3 of Council Decision 2007/436 .In addition the maximum contribution of VAT-based own resources has been reduced from 1.4% to 0.3%, and Member States were allowed to keep 25% of the relevant levies as collection costs.

71 Art. 2(1)(c) and 2(5) of Council Decision 2007/436.

72 For comparison, in 1988 the direct contributions accounted for 11% of revenue.

73 For those counting, the other 1% came, as mentioned above, from other sources such as fines on undertakings for violating EU competition rules, and an income tax on EU civil servants. The EU budget is available via: http://ec.europa.eu/budget/biblio/publications/publications_en.cfm#budget.

74 C.-D Ehlermann, 'The Financing of the Community: The Distinction between Financial Contributions and Own Resources' 19 *CMLRev* (1982), 571 et seq.

75 See for instance case C-96/89 *Commission v. Netherlands* [1991] ECR I-2461.

Revenue generation of the EU, therefore, comes much closer to that of the Confederation than that of the federate government. It largely depends on direct contributions and collection efforts from the Member States, whereas the EU is not allowed to levy direct taxes, except on its own staff.[76] Interestingly a part of EU income is even generated exactly along the lines originally envisioned by Dickinson, as well as by later proposals to safeguard revenue for the American Confederation: via a percentage of imposts supplemented by direct levies. As in the Confederation the EU, therefore, is ultimately dependent on the Member States for its income. Consequently, it also is threatened by national interest maximization, especially in times of recession, and has to deal with – recurrent – political battles over who needs to pay how much.[77]

Nonetheless the financial situation of the EU is far better than that of Congress. This is only the case, however, because, unlike under the Articles, the EU Member States by and large comply with their financial obligations. The EU has, in that regard, not so much modified the confederal system, but has managed to make the confederal system work. Obviously it should be noted that the system is not without its problems, and more importantly that the EU has not had to carry the financial burden of fighting the most powerful empire in the world. As a result the EU budget 'only' accounts for 1.13% of the combined GNI of the Member States. Compared to the percentage of GDP that the average western welfare state controls, this is marginal.[78] Either significant increases in the expenditure of the EU, for instance due to incorporation of stability mechanisms or increased military costs, or any lon-

76 Proposals have of course been made to grant such a right, for instance during the negotiations on the Maastricht Treaty (Kapteyn & Verloren van Themaat (2008), 366), or by the Commission ('Financing the European Union, Commission report on the operation of the own resources system, (COM (2004)505 Final). On 9 August 2010, furthermore, Commissioner Janusz Lewandowski stated to the German Financial Times that he thought the time might be ripe for a direct EU tax, for instance on aviation or financial transactions. A plan for a financial transaction, or Tobin, tax has already circulated for a while and gained momentum in the European Parliament in the beginning of 2011. (non-legislative report on 'Innovative financing' by Greek Socialist Anni Podimata which was backed by Parliament's Economic and Monetary Affairs Committee in 1 February 2011and the European Parliament resolution of 10 March 2010 on financial transaction taxes (P7_TA(2010)0056). None of these plans seems likely to lead to concrete results however. On EU taxes already see furthermore S.R.F. Plasschaert, 'Towards an Own Tax Resource for the European Union? Why? How? And When? *European Taxation* (2004), 470 and P. Cattoir, *Tax-Based EU Own Resources: An Assessment, European Commission, Taxation Papers* Working Paper no. 1/2004) (Luxembourg, Office for Official Publications of the European Communities, 2004), as well as the discussion on EMU in chapter 13 section 3 and 4.

77 The British 'rebate' and the Dutch demands are cases in point, see Art. 3-5 of Council Decision 2007/436.

78 J. Habermas, *The Post-national Constellation* (MIT Press 2001), 58 et seq.

ger period of concerted non-cooperation and non-payment by the Member States could seriously undermine the financial functioning of the EU.[79]

2.4 Foundations: Amendment

The fourth foundational modification concerns the process for amendment. Another fundamental issue as it determines how the rules of the game itself may be changed, and who needs to agree.

2.4.1 Unanimous amendment of the Articles

As a 'league' between sovereign states the Articles could only be amended by unanimity. No amendment was valid 'unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislatures of every State.'[80] This arrangement reflected the sovereign equality of the states. It also ensured that, though they had delegated certain powers, these powers still rested on their sovereign consent, and could only be altered with that same consent. The blocking power this provided to states was, furthermore, freely used. The small state of Maryland, for instance, blocked several proposed amendments to the Articles even where all other states supported them. Rhode Island, not a major power either, felt free to do the same.[81] The situation of the states thereby resembled that of individuals bound by a contract: they are bound by their promise, but their consent is required to alter the terms of the contract. A requirement that both protects them against one-sided changes by the other parties, yet also 'traps' all parties into the terms of the agreement unless a change can be unanimously decided. [82]

79 If such a situation would occur, furthermore, the EU would probably not be able to, like the Confederation, to borrow large sums internationally, also seeing how it needs to balance the budget. Although no explicit competence exists for the EU to borrow funds, however, the EU has borrowed before, mainly in relation to the facility to help Member States with balance of payment difficulties (Reg. 332/2002) and the Ortoli facility (see last Council Decision 87/182 (*OJ* (1987) L 71/34), which has not been used after 1991. All of these measures were based on art. 352 TFEU, which therefore might also offer possibilities for further activities in this direction. For a discussion of the European Stability Mechanism (ESM) and its predecessors, via which Member States underwrite financial obligations to collectively raise funds via the market, see chapter 13, section 2.

80 Art. XIII of the Articles of Confederation.

81 Madison (Sketch), 11.

82 On the need for flexibility and the 'healing faculty' of amendment see also Wood (1969), 34, 533 and 613.

2.4.2 A federate process for amendment by majority

Article V of the federate constitution significantly modified the rules for amendment, again reflecting the move from multiple peoples to one American people:

> 'The Congress, whenever *two thirds* of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall *call a convention* for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of *three fourths of the several states*, *or by conventions in three fourths thereof*, as the *one or the other mode of ratification may be proposed by the Congress*; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.'[83]

The States are constitutionally protected by a requirement of supermajority and by some substantive limitations on amendment. Yet only three fourths of the States need to ratify in order to amend the Constitution. As a result the basic rules of the Union can be altered against the explicit will of a State or its population.[84] Even more far-reaching, Congress can choose for an amendment process via public conventions. In this way Congress can sidestep the state legislatures completely, and rely directly on the American People, albeit that for this purpose the people are still divided per state. The next step, i.e. amendment where three fourths of the people as a whole support such amendment, was not taken.

Once part of the federate whole, therefore, a State no longer resembles a party to a civil contract. Rather it resembles an individual who has become a citizen of a single polity: it has rights and privileges within that polity, yet the basic rules of that polity can be altered against its will. In this important sense they have become *subject* to a polity and within the limits of the constitution to the majority which may change the basic rules.[85] In a way this involves the truly political surrender of liberty in the pre-political sense in order to become part of a political community.[86]

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83 Especially note the interesting power given to Congress to opt for a ratification by the people directly via conventions in each State. An option which further underscores the direct basis of the federate government in the people. At the same time this principle was not taken so far as to allow Constitutional amendment by three-fourths of the People as a whole, indicating the tension between respecting the states, and the concept of one American people.

84 Wood (1969), 532.

85 As Madison noted: 'the true difference between a league of treaty, and a Constitution' was the difference between 'a system founded on the legislatures only, and one founded in the people' (Wood, 1969), 533.

86 See on this point more specifically the discussion of Rousseau and the federalist logic below in chapter 9, section 5.

In this sense also, the amendment process can be said to form a *litmus test* for political organizations. Obviously formal rules should not overshadow the political and social realities in which such amendment rules function. Yet a non-unanimous amendment procedure does entail a fundamental acceptance by each member of the polity, be they states or individuals, that the basic rules of the polity may be altered against their will.[87] By accepting amendment by some form of majority a distinct body politic is created, one that can act and transform without consent of each party concerned. By entering into the Federation, the states, and their sovereign peoples, made this fundamental step, and, in return for certain safeguards and influence in the political process, subjected themselves to a new, mutable body politic.[88]

2.4.3 Amending the EU Treaties

Even though the Lisbon Treaty contained some interesting nibbles around the edges, the fundamental requirement of unanimity for treaty amendment still stands.[89] Just as in the previous Treaties the members of the EU have not been willing to subject the basic rules of the polity to the will of the majority. [90]

After Lisbon, five types of Treaty change must be distinguished. Art. 48 TEU retains the traditional procedure requiring unanimity and ratification by each Member State. To this provision Lisbon has added, in principle, the standard use of a convention method.[91]

Art. 48(6) adds a 'simplified' procedure, only applicable to part three of the Treaty.[92] Yet this procedure still requires unanimous ratification by all the Member States. Thirdly, modelled after article 48(6) TEU, there are some specific simplified amendments, or powers that could be equated

87 Cf for the EU De Witte (1995), 145.

88 Also see chapter 9 section 5 below.

89 See art. 48 TEU. Also see De Witte (2012), 34-35, including footnote 38.

90 M.P. Maduro, 'The importance of being called a constitution: Constitutional authority and the authority of constitutionalism' 3 *International Journal of Constitutional Law* (2005), 348. Cf also the discussion by Van Middelaar (2009), 170 et seq, tracing how attempts during the European Convention to achieve amendment by some form on majority failed, though he also indicates the less visible, and highly modest, shifts towards more 'collective' amendment.

91 Very different from US conventions, these are based on the model of the convention for the drafting of the EU constitution, and are concerned with the drafting, not the ratification of the amendments. See further below chapter 5 on the process of federation.

92 See for an interesting interpretation on the scope of art. 48(6) TEU and the concept of expanding competences the judgment by the full court in case C-370/12 *Pringle* [2013] nyr. One could wonder whether a less formal understanding of competence enhancement might not have been in order here.

with amendment.[93] Again, however, almost all of these require unanimity.[94] Several, especially when they entail an increase in competences, also require ratification by the Member States.

Fourthly there are the general bridging procedures of art. 48(7) TEU, which have a form of reversed ratification as any national parliament may object and stop the amendment.

Fifthly, there are the specific bridging procedures. These should be separated into procedures where national parliaments have a blocking power[95] and those where they have no such power.[96]

Lastly, there is the ever-intriguing article 352 TFEU. This provision allows the adoption of measures that prove necessary to attain one of the objectives of the Treaty, yet for which the (rest) of the Treaties have not provided the necessary powers. Such measures also require unanimity in the Council, but no ratification in the Member States. Now formally art. 352 TFEU does not provide an amendment procedure. It forms part of the existing system of delegation of powers, and grants a competence to the EU where its conditions are met. At the same time art. 352 TFEU does introduce a further measure of 'open-endedness' to the competences of the Union. After all it provides a competence precisely in those cases where the Treaty, or at least all other parts of the Treaty, do not provide for one. As such it

93 Being art, 42.2 TEU (defence), art. 25.2 TFEU (Extension rights citizen Union), art. 64 (3) TFEU (Reducing Acquis capital), art. 77(3)TFEU, Art. 83(1), art. 86 (4) (which is a very interesting one as true amendment seems involved), Art. 98 and 107 TFEU allowing to scrap an article, Art. 126(14) TFEU protocol on excessive deficit to be replaced by unanimous Council decision, art. 129(3-4) (Protocol on Statute of ECB, parts may be amended via ordinary procedure), art. 218.8 TFEU (Accession ECHR), art. 223.1 (Uniform procedure election EP), art. 262 TFEU (IP rights), art. 281 (Statute of the Court of Justice, protocol changed by ordinary procedure), art. 308 TFEU (statute of the European investment bank, which is a protocol, may be amended by the Council), art. 311 TFEU (own resources of EU). Some converse situations exist as well, where a piece of secondary legislation is given Constitutional protection. See art. 346(2) TFEU and art. 355(6) TFEU where the territorial scope may be changed with regards some of the external territories.

94 Except for art. 129(3) and (4) TFEU, and art. 281 TFEU.

95 Art. (31(3) TEU (CFSP), art. 81(3) TFEU (special procedure family law may be transformed into ordinary legislative procedure).

96 Art. 153(b) TFEU, (special procedure may be changed to ordinary procedure by unanimous Council decision), art. 192 (2) (Environment, the Council may, unanimously and on a proposal from the Commission, declare the ordinary legislative procedure applicable), art. 312(2) TFEU (the European Council may change the unanimity requirement for the multi-annual framework to QMV), art. 333 TFEU (where the treaty normally requires unanimity, the Council may unanimously decide that in case of closer cooperation only QMV is required).

treated by some, including the *Bundesverfassungsgericht*, as a limited form of amendment as well.[97]

Over its development the EU has, therefore, introduced some flexibility in its rules for amendment.[98] Especially some 'procedural' steps, such as a transition to QMV in certain prescribed fields of competence, can now be taken without a full amendment process. Unanimity is, nevertheless, virtually always required for any amendment, whereas more substantial Treaty reform will always require unanimous ratification by all Member States as well. It should also not be forgotten that all 'lighter' procedures for amendment, such as the bridging procedures, are based on formal, unanimous and ratified Treaty amendments themselves, and are quite specific.

As such, it should be wondered why a two-stage procedure for shifting to QMV, – 'only' requiring a unanimous decision of the Council in the second stage but based on an ordinary Treaty amendment in the first stage – protects the powers of the Member States any less than a one-stage procedure where the decision to switch to QMV is made directly. As long as the simplified procedures only concern very specifically delineated steps, and do not provide a more open-ended power to change the Treaty and increase competences, such simplified procedures do not fundamentally alter the requirement of unanimity for changes to the constitutional foundation of the Union. In fact one could say that all these 'lighter procedures are in fact more stringent and arduous forms of two-tier amendment, requiring first a full and formal Treaty amendment, and then, in addition, a unanimous Council decision.

On the whole, therefore, the EU has maintained a requirement of unanimity for amendment. A situation that also matches the absence of a single and supreme European body politic, such as a European people, to justify amendment against the will of a Member State or a member people.[99] As long as that body politic is not assumed or created, simplification of amend-

97 See especially its *Lissabon Urteil* of 30 June 2009, BVerfGE, 2 BvE 2/08. On the other hand also see Opinion 2/94 *Accession to the European Convention on Human Rights* [2006] ECR I-929, and the limits imposed by the Court of Justice therein. Further see Weiler (1999), 54-55.: 'No sphere of the material competence could be excluded from the Community acting under art. 235.'

98 Such variation in the rules for amendment are quire common in federal systems, especially where different rules apply to changes that affect the federal division of power and changes that do not and therefore have a lesser impact on the overall system. See for instance the five different procedures for amendment in the *Canadian Constitution Act 1982* (sections 38 to 49).

99 Maduro (2005), 348 and p. 353. See also A. von Bogdandy, 'The Preamble', in: B. de Witte (ed), *Ten reflections on the Constitutional Treaty for Europe* (Robert Schuman Centre for Advanced Studies 2003), 4 and 6.

ment procedures can only work around the edges of unanimity, but never cross the Rubicon of amendment by qualified majority.[100]

Consequently it can only be concluded that on the point of amendment the EU again falls more into the confederate camp, although modifications have been made.[101] As a result the process of Treaty change can be particularly burdensome, and seems to have become ever more so as the Union expanded.[102] The recent Lisbon Saga is a stark reminder. Time wise it took more than a decade, especially if on sees Nice as the *de facto* starting point. In terms of legitimacy and popularity the cost might have been even more impressive.[103] In a Union with so many members, the 'protection' that unanimity supposedly grants to the Member States demands an increasing toll in the form of deadlock, compromise and decreased legitimacy.[104]

Nevertheless, the *overall effects* of this principally confederal system for amendment seem to have been far less restrictive for the development of the EU than they were for the American Confederation. Over the past years the EU has developed impressively, adapting far better than the Articles to new challenges and developments. As will be discussed further below, it seems that several other modifications to the EU system, on a less fundamental level, may have 'compensated' in this regard. Elements such as the broad doctrine of implied powers, including the use of article 352 TFEU and its predecessors, as well as the role of the Court of Justice with its teleological interpretation of the Treaties.[105] The American Confederation lacked most of these compensatory mechanisms. Clearly this raises interesting questions on, amongst other things, the necessity of more flexible amendment procedures, the viability and legitimacy of modified confederal system, or whether the federate rule of modification by majority is actually as pivotal for practice as it is for theory and self-perception.

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100 On the flip side, this of course also means that amendment by majority, if ever adopted, would be a fundamental step. It would imply the existence of some European polity, some body politic with sufficient authority over the different member peoples to change the basics of political organization against their will. A point that should be taken into consideration by those who all too easily wanted to circumvent the Irish no by pointing to the overwhelming majority of EU citizens that 'supported' Lisbon (or had not had a chance to express opposition).

101 Also see Van Middelaar (2009), 148 et seq. for the role of the middle space in this regard.

102 Cf the 'joint decision trap' in F. Scharpf, 'The Joint Decision-Trap: Lessons from German Federalism and European Integration', 66 *Public Administration* (1998), 238.

103 M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts' 45 *CMLRev* (2008), 617.

104 On the limited protection unanimity offers see further below, chapter 12 section 2.

105 Cf Watts (1999), 102-104 on the common role played by federal courts in this regard.

2.5 Foundations: Secession

Two specific forms of amendment form the last two foundational points to be discussed, being the possibility of secession and the rules for enlargement. The comparison will first look at secession: can a state secede from the compact formed, or has it fully and irreversibly merged with a larger body politic, granting a right to the larger body to refuse any part the right to secede?

2.5.1 The possibility of secession under the Articles

The Articles did not discuss secession. On the one hand, therefore, one could argue that secession was hence allowed, especially as art. II of the Articles held that each state retained '(…) every power, jurisdiction, and right,' which was not 'expressly delegated'. A right of exit would also fit with the sovereign status of the states.

On the other hand, the Articles were titled the 'Articles of Confederation and *Perpetual* Union', and art. XIII of the Articles determined that '(…) the Union shall be perpetual (…)', supporting the argument that secession was not allowed.[106]

No state, however, tried to secede, so we have no legal or political determination to authoritatively settle this question. On the other hand there was the related legal question whether a group of states could leave the Confederation to jointly form a federation, and if they could do so even where not all states ratified the new constitution. Subsuming yourself in a new Union, the obligations of which are incompatible with the obligations under the Articles, should after all be qualified as a form of secession. In Philadelphia it was agreed that the new federate constitution could indeed come into force after ratification by nine states only. A rule which implicitly assumed the right of these nine states to secede, and indicates that, at least for this purpose and for this majority, secession was deemed possible. A conclusion that is especially noteworthy because the Articles expressly prohibited the states to join other Unions. [107]

106 In the last section, describing the ratification by the states, the word perpetual is repeated three times. Two times because the full name of the Articles are repeated, one time reaffirming the language of art. XIII of the Articles.

107 Of course one could read the draft Constitution as already constituting a treaty between the states. Alternatively one could construe the rules for amendment agreed in the draft Constitution as a separate agreement in parallel to the draft constitution. This separate agreement would than have granted a right of secession which did not exist before, and for the limited purpose of forming a federation only. These are both, however, rather unlikely readings, also because the states were only formally bound by the Philadelphia draft, or any part thereof, after ratification, and hence accession to the new Union. The delegates at Philadelphia also did not have any formal power to conclude such a 'side agreement' on accession.

The majority transition to a federation, together with the emphasis on state sovereignty in the Articles and the fact that in the latter days of the Confederation many states no longer sent delegates and violated the Articles at will therefore suggest that ultimately little could or would have been done if a state had chosen to secede. As with amendment, furthermore, there was no higher body politic to prohibit secession, or to legitimate the use force to prevent a state from seceding. Taking into account both the Articles and the context in which they functioned, it would therefore seem reasonable to assume that secession was legally possible, even though the political consequences that actual secession would have entailed are difficult to ascertain.

2.5.2 The eventual impossibility of secession under the federate Constitution

Instead of secession all states ultimately ratified the federal constitution. As such they all, reciprocally, ended their membership of the Confederation to become part of the United States.[108] The new constitution did not expressly deal with secession either. Nor did it, in fact, declare itself to be perpetual, as the Articles did.[109] A far stronger and more centralized Union was created, however. One which was no longer based on the states but on one sovereign American people.

As the will of this sovereign people, furthermore, the Constitution was the supreme law of the land. Art. IV, s. 3 thereby prohibited the creation of new states within existing states, as well as states joining together into one new state without consent of Congress. This indicates that Congress at least had the exclusive competence to decide in cases of splitting or merging of states. Section 4 of article IV, furthermore, stated that:

'The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.'

A provision that gives direct power to intervene, even militarily, in the internal organization of a state where 'republican' government was threatened, or in any event the central government considered it to be. In addition, Art. V required all members of the state legislatures, as well as all state executive and judicial officers to be bound by oath or affirmation to the *federal constitution*, underscoring that their loyalty to the whole surpassed that to the part.

108 Kesavan (2002), 35, and Lawson and Seidman (2001).

109 Although it is directed at 'posterity' as well, indicating a long term intention.

Without presuming in any way to settle this heatedly debated issue,[110] on balance these provisions seem to suggest that a right to secession was not expressly envisioned under the Constitution. As is well known, however, this question was ultimately decided by force.[111] With the southern States' claim to secession defeated, a national understanding of the constitution triumphed. Incidental claims and hopes aside, it is now clear that states cannot legally secede, or at least that the United States, representing a unified American people, have the right to prevent any one part of separating from the whole.[112]

2.5.3 Secession from the EU

Since Lisbon the right of a Member State to secede is explicitly acknowledged in art. 50 TEU:

> '1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
>
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
>
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, *failing that*, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.'[113]

110 See for a highpoint, both theoretically and rhetorically, the debate between D. Webster and J.C. Calhoun. Here Calhoun provided a highly refined defense for a confederal reading of the Constitution, even though in the end the more federate understanding of Webster better reflected and informed reality, and also seemed to require less legal and conceptual creativity. See for the arguments of Webster: E. Everett (ed), *The Works of Daniel Webster* (Little, Brown and company 1853), especially p. 328-346 and 464-486. For Calhoun see R.K. Crallé (ed), *John C. Calhoun: Works* (Appleton and Co 1968), especially 1-36 and 113-138.

111 For the later legal assessment by the US Supreme Court that the States indeed did no have the right to secede see the judgment in *Texas v. White*, 74 U.S. 700 (1869).

112 Tribe (1988), 5 et seq.

113 One interesting, admittedly theoretical, question here is what the effects would be of a national court finding the accession itself in violation of the national constitution an annulling that act of accession.

Not only is this right unequivocal, it is ultimately unilateral: even where no agreement is reached, a Member State can secede. The remaining Member States cannot prevent withdrawal by endlessly blocking a secession-treaty.[114]

It is of course accepted that any such immediate withdrawal is unlikely. Most fundamentally continued membership cannot and does not rest on legal obligation alone. It must primarily rests on the many benefits that membership brings and the costs that an exit would entail. Even where a Member State would like to secede, furthermore, it would have every interest in carefully negotiating its post-secession relation to the EU and its market. Lastly one should also not underestimate the sheer legal complexity of secession.[115] At the same time this does not take away the ultimate authority of the individual Member States to unilaterally secede where they are willing to assume the costs and risks. Even the period of two years required by Article 50 TEU can be relativized in that regard; the EU will simply have very little options where a Member State announces its immediate withdrawal. It would have to fall back on the traditional instruments of international law to sanction any perceived violation of Article 50 TEU.

What is more, Article 50 TEU only formalizes and details the already existing right to secede under the previous Treaties.[116] Even though the Treaty did not mention it, and though the EU has also been established for an unlimited period,[117] it would have been inconceivable for the EU to keep a Member State inside the Union against its will, let alone to use force to prevent secession.[118] Lack of army, police and legitimacy aside, such action

114 See for further arguments on the – ultimately – unilateral nature of this right also J. Herbst, 'Observation on the Right to Withdraw from the European Union: Who are the 'Masters of the Treaties'?' 6 *German Law Journal* (2005), 1755 and A.F. Tatham, '"Don't Mention Divorce at the Wedding, Darling!': EU Accession and Withdrawal after Lisbon', in: A. Biondi, P. Eeckhout and S. Ripley (eds), *EU Law After Lisbon* (OUP 2012), 128, especially on 152. For a more limited, but also less convincing, reading of Article 50 TEU see A. Lazowski, 'Withdrawal from the European Union and alternatives to membership', 37 *European Law Review* (2012), 527, who does seem to rely on unilateral withdrawal as an intended and necessary threat to prevent secession negotiations from stalling, yet then rejects the possibility of such unilateral withdrawal. The simple fact remains that Article 50 TEU does provide for a two year period, which period looses all relevance and meaning under the interpretation suggested by Lazowski.

115 See for an overview and discussion of these many difficulties Lazowski (2012), 523.

116 A right of exit was also assumed in paragraph 55 of the *Maastricht Urteil* of the *Bundesverfassungsgericht* (BVerfGE 89, 155). Equally Greenland was allowed to leave the European Community after it acquired home rule from Denmark. See F. Weiss, 'Greenland's Withdrawal from the European Communities' 10 *European Law Review* (1985), 173. Further see supra note 366.

117 Art. 53 TEU.

118 Note however, that an explicit provision for secession was discussed for the Treaty or Rome, but rejected. See Van Middelaar (2009), 226.

would directly violate the EU's own foundation in the right to self-determination and the prevention of war.[119]

On the possibility of secession, therefore, the EU again conforms to a confederal set up. It grants an explicit right to secede, which is a right no federation explicitly recognizes, let alone in such a unilateral way.[120] As the Confederation, therefore, the EU does not form a united body politic, superior to the Member States. The basic rules of association may not be altered except by unanimity, and the whole does not have the power to keep the parts within the Union against their will. The EU is not supreme over the Member States when it comes to fundamental political authority. This also leaves the Member States with one form of 'ultimate authority': leaving the EU. Practically limited and unappealing as this may be, it is important for the ultimate nature of the polity.[121]

2.6 Foundations: Expanding the Union

The last foundational modification in our comparative grid concerns the accession of new members to the Union. Interestingly, all three polities under comparison here envisioned some form of enlargement. They did not consider their geographical scope at the time of creation as permanent, but aimed to expand, albeit of course under very different circumstances and with different aims.

2.6.1 Accession under the Articles

Art. XI of the Articles provided for the accession of new states to the Confederation:

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119 Art. 2 and 3(5) TEU. On the other hand an interesting (if theoretical) conundrum would perhaps occur where the decision by a Member State to withdraw would go against the explicit desire of a majority of its own citizens (and still European citizens). In that regard one could even wonder if such a violation of their EU citizenship rights could trigger an art. 7 TEU procedure, taking away that states right perhaps to exercise its right under art. 50 TEU, at least under EU law, a *Rottmann* case writ rather large so to speak, perhaps linked to the independent 'substance' of EU citizenship recognized in *Zambrano* (see cases C-135/08 *Rottmann* and C-34/09 *Zambrano*). This question closely relates to the underlying question on the relation between the Member State and it people, as will be further discussed in part II on confederal sovereignty.

120 Watts (1999), 108. In 1998, however, the Canadian Supreme Court did recognize a 'right' for Quebec to secede, albeit not unilaterally, and leaving the precise requirements rather vague.

121 As the example of Czechoslovakia shows, furthermore, despite its unique context, is the rapidity with which decisions to separate can be taken. Cf. Watts (1999), 31-32. The increasing discussion on a 'stay or go' referendum in the UK also underscores the political relevance and energy of this option. An energy that, as in Czechoslovakia, may be hard to contain once released. See on the increasing role of such referenda as a symptom of the confederal system developed in the EU further below part III.

> 'Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.'

Canada, still a British Colony at the time by the way, received an open invitation, which it never accepted. All other applicants needed the support of at least nine existing states. This clause especially envisioned new states that would be formed on the vast unsettled lands. Once settlements would have reached a sufficient size, they could apply for statehood and membership.[122] A possibility that relates to one of the most crucial achievements of the Confederation, the land ordinance.[123] In this ordinance it was decided that all western lands were *transferred to the central government*, and could be developed into new states.[124] This required a significant sacrifice from 'landed' states such as Virginia that had claims stretching all the way to the West Coast. It enabled the development of the United States as we know it, with a multitude of states, none of which, furthermore, has become so dominant as to upset the federal functioning of the Union.[125] Even so no new states were formed during the life of the Confederation.

2.6.2 Accession under the Federation

The land ordinance also formed the basis for the federate rules on accession. Article IV s.3. determined that Congress could allow new states into the Union. This clause specifically envisioned new states being constituted by settlers of the western lands that had been ceded by the states to the central government under the Confederation. It was a fundamental step to allow these territories to develop into full and equal States, and not as some type of federate lands under the ultimate control of the original thirteen states.[126]

Congress only needed a normal majority to allow a new state into the Union, and no ratification by the existing States was needed at all. Accession thereby became easier by eliminating the QMV requirement under the Articles. It also became an exclusive competence of the central government, with only the Senate representing the States, even though the accession of

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122 P. S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States 1775-1787* (University of Pennsylvania Press 1983).

123 McDonald (1968), 76.

124 Cf in this regard also the importance of shared and co-governed lands for the stability of the old Swiss Confederation and the United Provinces of the Netherlands, as discussed in Forsyth (1981), 21, 30.

125 Although the differences between states in terms of economy, size, and population can be enormous, for instance looking at the difference between California and Wyoming.

126 The political consequences, and the future importance and political power of the West that this entailed were perceived and accepted. One could draw a tentative, comparison here with the accession of new states into the EU, and the attempt to include permanent safeguard clauses, *de facto* violating some of the core principles underlying the polity itself. Cf. C. Hillion, *You cannot have your cake and eat it!: the limits to Member States' discretion in EU enlargement negotiations* (Inaugural lecture Leiden University 2006).

new States would obviously impact on the position and power of existing States within the Union.[127] The possibility for accession has been actively used, Hawaii becoming the fiftieth state on August 20th, 1959.

2.6.3 Accession to the EU

As for the EU, the consecutive Treaties have always envisaged the accession of new members.[128] An option that has been intensively used, and has had a major impact on the nature and development of the EU.[129] It has now grown from six to twenty-seven members, Croatia probably soon to be the 28th.[130]

'Unsettled' lands being in rather short supply these days, accession always concerns an existing, established state.[131] Any state that wishes to join may request membership from the Council.[132] The Council must then decide by unanimity on such a request, consult the Commission, and receive the assent of an ordinary majority of the European Parliament. If these requirements are met, an accession agreement will be negotiated with the applicant, the Commission usually taking the lead in these negotiations. Any agreement reached needs to be ratified unanimously by all the Member States.[133] Consequently, membership requires a unanimous Council decision,

127 Further strengthening the federate nature of accession, as well as affirming accession as a process covered by the Constitution and under the jurisdiction of the Supreme Court, see *Coyle v Smith*, (1911) 221 US 559, as discussed in Hillion (2011), 214.

128 Art. 237 of the Treaty of Rome already held that 'any European state may apply to become a member of the Community'. It is interesting though that this option might have been included an a rather accidental, or at least casual, manner. On drafting the Schuman declaration Monnet remarks 'For a time, undoubtedly, I thought that the first step towards a European federation would be union between these two countries only [France and Germany], and that the others would join later. Finally, that evening, I wrote on this first version that the Authority would be 'open to the participation of the other countries of Europe.' (Monnet (1978), 296.

129 See for an overview and analysis, including of the 'enlargement fatigue' the may have arisen by now, C. Hillion, 'EU Enlargement', in: P. Craig and G. De Búrca (eds): *The Evolution of EU Law* (2nd edn,. OUP 2011), 187 et seq.

130 On 30 June 2011 accession negotiations with Croatia were closed, on 7 November 2011 the accession Treaty was signed and accession is foreseen for 1 July 2013.

131 Statehood actually being one of the requirements for membership. Interestingly, however, the EU does try to exert a similar influence on the acceding state to acquire a 'republican' government through the criteria for accession and the monitoring by the Commission of *inter alia* rule of law demands. On the effectiveness however see: D. Kochenov, *EU enlargement and the failure of conditionality: pre-accession conditionality in the fields of democracy and the Rule of Law* (Kluwer Law International 2008).

132 See, reaffirming this notion even in the face of impressive enlargement to the East, the 1992 European Council Conclusions (*EC Bulletin 6-1992*,1.4.) together with the conditions established for such accession in Copenhagen the next year. See also K.E. Smith, 'The Evolution and Application of EU Membership Conditionality', in: M. Cremona (ed), *The enlargement of the European Union* (OUP 2003), 105 et seq.

133 Art. 49 TEU.

a majority of the European Parliament, and unanimous ratification of the accession treaty by all the Member States. Increasingly, furthermore, proposals are made in several Member States to require a (binding) national referendum in the case of enlargement.

Even though interesting and important changes have been made to the process for accession since Rome, including the inclusion of the European Parliament, the expansion of the role of the European Commission and the addition of more substantive criteria for membership including the development of an entire pre-accession strategy and accession-partnerships, the process for accession has always required unanimous agreement at the EU level, and subsequent ratification by all Member States.[134] A far heavier process than under the Confederation and the Federation, and clearly not as centralized as accession to the Federation.[135] Even though the Treaty mechanism for accession only forms the tip of a procedural iceberg, and even though the institutions are heavily involved, accession ultimately remains a process dominated by the Member States,[136] each one having a veto at numerous stages in the procedure.[137]

134 Cf art. 237 of the Treaty of Rome (EEC), as well as art. 205 of the EAEC.

135 Here one may even note a certain imbalance in the process. From the perspective of the acceding state the process may well seem more federate. It is expected to meet a wide range of far-reaching and relatively non-negotionable criteria. Equally it must undergo at least some form of *submission to the process* of accession set by the EU that could be perceived as federate in nature. In any event the process of accession is somewhat removed from a 'normal' negotiation between formally equal sovereign parties. At the same time the existing Member States retain their confederal right to block accession even after the federate process has been accepted and completed by the candidate state. There is no federate central authority that can guarantee membership. In a sense the existing Member States thereby have the best of both worlds: a near federate procedural submission of the candidate, and a confederal control over accession to boot. An imbalance that of course also reflects the power imbalance between a unified block of states and a single candidate.

136 Hillion (2011), 199 et seq, 208.

137 For example, accession is now subdivided into 35 separate chapters. Both the opening and the closing of each chapter requires unanimity. In addition, Member States now also need to unanimously approve the relevant benchmarks for negotiations on each chapter, and need to unanimously evaluate their fulfillment. These decisions alone, therefore, already provide over 140 individual points, depending on the specific number of benchmarks, in the accession negotiation where each Member State can block any accession. For further examples see Hillion (2001), 206 et seq. Note however, that accession to the ECSC was less burdensome than accession to the E(EC) or EU, albeit still more burdensome than acceding to the the Confederation. Article 98 ECSC 'only' required a unanimous vote from the Council with the consent of the High Authority. Equally Article 116(1) of the Treaty establishing the European Political Community also did not require separate agreement of the Member States, but only their unanimous consenst within the Council of National Ministers, as well as a proposal from the European Executive Council and the Parliament of the Community. A more federate and centralized procedure for enlargement that matched the political ambition of this failed treaty.

All the same, the Confederation, the Federation and the EU all had an explicit goal to peacefully expand on 'their' continent by incorporating additional polities, something not often seen in 'normal' states.[138] Although it no longer seems to wish to expand, the Federal constitution of the US has the least burdensome and most centralized procedure, requiring no consent from its States. This again underlines the fundamental shift to one nation and one body politic. New members give up their own sovereignty and are subsumed in the larger whole. Something exemplified, for instance, by the accession of California and Texas. Both gave up independent statehood, and became part of the American polity, and the American People. The Confederation showed a reverse picture: principal authority resided in the states, which pooled this authority to a limited extent in the central government. As such the states, via their *representatives* in Congress, decided on enlargement, with a more stringent requirement of QMV applying.

In the EU, the procedure for accession is even more burdensome than under the Confederation. Member States have a far greater influence with a score of veto's along the way. EU institutions are equally capable of blocking accession, although their independent role within accession also forms one more federal element in the entire process.[139] As with amendment and secession, therefore, on this fundamental point the EU predominantly remains in the confederal side of the spectrum. Since accession forms an amendment of the Treaty, often changing the position of each Member State and the overall balance within the EU, it is not surprising that the same basic rules apply to enlargement as to amendment.[140] Nevertheless this procedure for accession again underscores that there is no unified body politic, and that the Member States remain the primary repositories of the Member People's sovereignty.[141]

138 Even though the US currently no longer have real intentions of expanding, and the EU is discussing, and perhaps, approaching, its ultimate limits as well.

139 Also note in this regard what Hillion has termed a 'creeping (re)nationalization of the procedure' of enlargement, and the different ways in which the 'state-centrism' of the enlargement process 'as enshrined in the Treaty' has further been 'inflated in practice.' Hillion (2011), 187-188.

140 Although the role of the institutions is now much more pronounced and elaborate in the context of accession than it is in the context of amendment.

141 As new members will not be subsumed into an overarching and primary federate Union, but be included in a confederal Union that might be significantly altered by that accession, such more stringent procedures might also be expected On the possible impact of accession to the EU in this regard see G. Majone, 'Unity in Diversity: European Integration and the Enlargement Process' 22 *European Law Review* (2008), 457, who for instance goes into the possibility of subgroups developing (470 et seq).

2.7 *Sub-conclusion foundational modifications*

Combining the individual comparisons on these foundational modifications one clear conclusion can be drawn: on the fundamentals the EU scores much closer to the confederal system under the Articles than to the US federate system. It lacks the ultimate normative authority of one people as it is based on the consent of multiple peoples and their states. It does not have the right to use force, tax, or amend its own constitutional charter by majority. On the points of secession and enlargement it is even more state-oriented than the US Confederation was, albeit that especially in the context of accession EU institutions have assumed a central position as well.[142] Clearly no federate leap has yet been taken on these foundational points.

3 Structural elements and modifications: Direct, separate and supreme government

The second category to be compared concerns those modifications grouped here as 'structural'. Continuing the format established above, the EU will be compared against three such structural modifications relating to legal *supremacy*, *direct effect* and *separate* government. Considering their interrelation, supremacy and direct effect will be discussed together. As will be seen, on these structural points, which of course carry fundamental implications, the EU has gone much further in incorporating the federate modifications.

3.1 *Structure: Legal supremacy and direct effect*

The first structural modifications concern the nature and effect of central laws. Can such laws be directly invoked within the legal orders of the states, and/or do they trump national laws when invoked? Questions that are not wholly unfamiliar to debates on EU law.

3.1.1 *The lack of legal supremacy and limited direct effect in the Confederation*

Confederal law lacked the attributes of general direct effect and absolute legal supremacy. Article XIII of the Articles did determine that:

> 'Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State (…);'

142 This also in the context of pre-accession. This role has certainly added a federate element to these fields, for instance by empowering these institutions to actively engage with state building in candidate members, though it has not removed the ultimate, and resurgent, control of the Member States in these matters. Cf Hillion (20110), 193 et seq.

Clearly the states were legally obligated to respect the Articles and the acts of Congress. The Articles did *not* however, grant general direct effect or legal supremacy to confederal law, nor was there was a central court that could do so.[143] Attempts in Congress to establish general direct effect and supremacy, either through interpretation or amendment, failed. This despite the fact that the *notions* of supremacy and direct effect, even for an 'external' legal source, were known, and in some cases also applied. The Dickinson draft, for instance, had explicitly proposed to grant legal supremacy to the Articles.[144] Some states, furthermore, did recognize the peace treaty with Great Britain as the 'supreme law of the land.'[145] The same status, however, was not to be accorded to the Articles.

It is important to note, however, that the absence of general direct effect and supremacy did not mean that the Articles never operated on the citizens directly, that the notion of direct effect was unknown, [146] or that the Confederation never had the last word.[147] Congress, for instance, was competent to establish '*rules* for deciding in all cases, what captures on land or water shall be legal and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated.'[148] In addition, Congress alone could grant 'letters of marque and reprisal', appoint 'courts for the trial of piracies and felonies committed on the high seas', and for 'receiving and determining finally appeals in all cases of captures.'[149] Congress could also settle certain claims between individuals, determine the value of alloy and coin, harmonize standards of weights and measures and directly regulate for the armed forces.[150] All measures that directly affected individual citizens.[151]

143 Interestingly the Union of Utrecht, underlying the United Provinces of the Netherlands, did allude to some form of supremacy where it declared in art. 23 that any act violating the confederal pact would be 'null, void and invalid' (*Ende zoeverre yetwes by yemande ter contrarie gedaen ofte geattenteert worde, tzelve verclaren siluyden van nu alsdan nul, egeen ende van onweerden*). In reality, however, and probably also related to the lack of a court and a sufficiently strong rule of law, this supremacy did not develop. Cf also Forsyth (1981), 34.

144 Jensen (1970),174. The New Jersey plan later proposed by Patterson at Philadelphia also explicitly granted supremacy to what would remain Confederal Law, see further below.

145 Cf Jensen (1970), 279-281.

146 Wood (1969), 460.

147 Backer (2001), 224 (noting that even more 'international" organizations than the EU have received the power to 'directly affect an individual', traditionally reserved to national sovereign powers.

148 Art. IX Articles of Confederation.

149 Art. XI Articles of Confederation.

150 Art. IX Articles of Confederation.

151 See for the explicit recognition of this direct effect also Federalist Paper no. 33.

These forms of direct operation and directly applicable rules might be limited, but demonstrate that a confederal system is not incompatible with the concept of direct effect (or supremacy) as such. This *possibility* for direct effect and supremacy, hallmarks of supranationalism, in a confederal system must be stressed. For, put differently, it shows how confederation and Intergovernmentalism do not coincide, *nor are confederation and supranationalism mutually exclusive*.[152] The, often implicit, equation in EU discourse between federate and supranational, and confederal and intergovernmental is, therefore, wrong and misleading.[153]

Nevertheless these limited areas of direct effect under the Articles generally left implementation at the mercy of the states. Since many of these lacked efficient executives as well, and since the short term interests of the states often prevailed over more long term and shared interests of the Confederation as a whole, the Articles suffered from a severe 'compliance-gap'. This gap even existed where the Confederation could claim direct effect or supremacy based on an exclusive competence.[154] As a result, state laws could, and did, violate confederal law without legal sanction in the state.[155] An effect aggravated by the absence of central or state courts upholding the obligation to 'inviolably observe' the Articles. The effects on the functioning of the Confederation were quite devastating, and, within the limited value of a historic counter-factual, rather support the reasoning of the European Court of Justice in its seminal cases on the European legal order.[156]

152 McDonald (1968), 135. The Patterson plan also proposed direct effect within a confederal US: 'And according to this plan, it may be exerted on individuals as well (…).' Patterson even saw the aristocratic advantages of such direct effect: 'With proper powers Congress will act with more energy & wisdom than the proposed National Legislature; being fewer in number, and more secreted & refined by the mode of election' (Debates on Saturday June 16 1776 in Committee of the whole).

153 Cf for instance Maduro (2006), 512.

154 Wood (1969), 356 remarks: 'Congressional resolutions continued to be mere recommendations which the states were left to enforce.'

155 Especially the very important peace treaty with Great Britain, providing British with the right to collect pre-war debts and protecting them from confiscation. See famously the Rutgers vs. Waddington case, where Hamilton himself acted as advocate.

156 Compare Lenaerts (1990), 254 quoting Holmes: 'I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperilled I we could not make that declaration as to the laws of the several states.' (Oliver Wendell Holmes, *Collected Legal Papers* 295-296 (1920).

3.1.2 *The supreme law of the Federation*

The lack of state-compliance and effectiveness were two of the major charges against the Confederation.[157] The federate constitution therefore provided for an absolute supremacy of federal law as well as direct effect.[158] It made sure to leave little doubt on this point:

> 'This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the *supreme law of the land*; and the *judges in every state shall be bound* thereby, anything in the *Constitution or laws of any State to the contrary notwithstanding*.'[159]

Federal law was to be 'supreme', invalidating any State laws that might conflict with it, and State judges were 'bound' to directly apply federal law.[160] No state constitution could alter this hierarchical relation, furthermore, as this supremacy was based on the authority of the people and the Constitution directly, and did not derive from the States.[161] A fact again highlighting the superiority of the central constitution over the statal ones.[162]

Supremacy and direct effect also were two tools in the broader shift towards a reliance on law and courts as the primary mechanism for regulation and enforcement.[163] Both during the Confederation and in the Convention, many had stated that the only way to ensure compliance from the States was by force and direct threat of force. This led to far-reaching and some-

157 See also Federalist Paper 15: 'The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist. Though this principle does not run through all the powers delegated to the Union, yet it pervades and governs those on which the efficacy of the rest depends.'

158 Wood (1969), 547.

159 Art. VI. Cf also the supremacy clause in art. I-6 of the Constitutional treaty, legally apparently as redundant as its deletion from Lisbon, if politically significant in the sense that current practice apparently could not be made explicit, and needed to camouflaged and hidden away in Protocol 17.

160 Also see art. III. Sec. 2 US Const. Further see J. E. Nowak and R.D. Rotunda, *Constitutional Law* (7th edn, Thomson 2004), 374 et seq. and Hamilton in Federalist Paper No. 15.

161 This does not mean, of course, that the principle was never challenged, or never had to be defended by the US Supreme Court. See for an explicit defense along lines of effectiveness not unfamiliar to EU lawyers the 1816 case of *Martin v. Hunter's Lessee* 14 US (1 Wheat) 304 (1816).

162 On the crucial importance of this constitutional supremacy in federations see Watts (1999), 99. Also see Boom (1995), 177.

163 Tribe (1988), 23. Cf also Hamilton in Federalist Paper No. 16: '(…) if it be possible at any rate to construct a federal government capable of regulating the common concerns and preserving the general tranquillity, (..) It must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of the courts of justice.'

times draconic proposals to grant the central government extensive powers to use force.

Gradually, however, and despite the failure of the states to honour their legal obligation under the Articles, the conviction grew during the debates in Philadelphia that law, not force should be the primary means of enforcement.[164] A reliance on force as a standard tool of enforcement could never be stable in the long run. It would only antagonize states, and place the central government in the same position as the British had been before. The solution, therefore, was more law, and law that would rule supremely and directly within the state legal orders.[165]

3.1.3 Legal supremacy and direct effect of EU law

Clearly supremacy and direct effect have become hallmarks of the EU legal order.[166] *Van Gend & Loos*[167] and *Costa E.N.E.L*[168] have achieved near mythical status as the alpha and omega of the EU legal order. A status that befits their often circular logic.[169] Generations of students across the globe have been united through their canonical formulae and their *Baron von Munchausen* like role of lifting the EU legal order up by its own bootstraps. They have provided endless inspiration for scholars, lawyers and judges alike.[170]

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164 Even though, as discussed above, the possibility to use force as a last resort was still deemed absolutely necessary.

165 Federalist paper No. 16, De Tocqueville (2002), 40. This approach was of course also inspired by the general experiment of subjecting government to law, which included creating a constitution which was itself superior to the federal government, and could be upheld by the courts. Once this step was taken, law ruling supreme over state governments was much less of a leap.

166 See for one among several classics B. de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order', in: P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (OUP 1999), 209 et seq, or the updated version in P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (2nd ed. OUP 2011), 324.

167 Case 26/62 *Van Gend en Loos* [1963] ECR 1.

168 See Case 6/64 *Costa v E.N.E.L.* [1964] ECR 585.

169 Most centrally the need for direct effect and supremacy is derived from the independence and uniqueness of the EU legal order, yet this legal order is independent and unique precisely *because* it claims supremacy and direct effect. Equally a system of preliminary rulings is perfectly compatible with a reality in which national courts only have an international law obligation to respect EU law. For a more detailed discussion of supremacy in a confederal model see below chapter 10, section 8.

170 See for a very interesting selection of views and analyses of these cases the different contributions in M.P. Maduro and L. Azoulai (eds) *The Past and Future of EU Law: The Classics of EU law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010), especially see P. Pescatore, 'Van Gend en Loos, 3 February 1963 – A View from Within', 1, B. de Witte, 'The Continuous Significance of *Van Gend en Loos*', 9, F.C. Mayer, '*Van Gend en Loos*: The Foundation of a Community of Law', 16, and of course D. Halberstam, 'Pluralism in *Marbury* and *Van Gend*', 26, as well as N. Fennely, 'The European Court of Justice and the Doctrine of Supremacy: *Van Gend en Loos; Costa v. ENEL; Simmenthal*', 39, and I. Pernice, '*Costa v. ENEL and Simmenthal*: Primacy of European Law', 47.

At least from the internal perspective of EU law, or even more precisely, from the position formally adopted by the Court of Justice in its case law, EU law has absolute supremacy over all national law, including national constitutional law.[171] A view that has been recently reaffirmed in Opinion 1/2009:

> 'It is apparent from the Court's settled case-law that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the European Union legal order thus constituted are in particular its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.'[172]

Where the specific requirements are met, furthermore, EU law also applies directly.[173] Consequently, a large part of EU law can be directly relied upon in national courts, and trumps all national law, up to and including entrenched constitutional norms. [174] In fact EU law even goes so far as to indirectly establish effective remedies at the national level,[175] reversing national court hierarchy and setting aside *res judicata* of administrative decisions.[176]

At the same time both the scope and the basis of supremacy is challenged by all national supreme or constitutional courts. Although supremacy is generally applied in day-today practice,[177] absolute supremacy on EU terms is not

171 See Case 6/64 *Costa v E.N.E.L.*, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, Case 106/77 *Simmenthal* [1978] ECR 629 or case C-213/89 *Factortame* [1990] ECR I-2433. See also J.H.H. Weiler (1991), 2413, claiming that the relation between national law and Community law is 'indistinguishable from analogous relationships in constitutions of federal states.'

172 Opinion 1/09 [2011] ECR I-1137, par. 65.

173 Case 26/62 *Van Gend en Loos*, Case 41/74 *Van Duyn* [1974] ECR 1337, case 43/75 *Defrenne* [1976] ECR 455, case 152/84 *Marshall* I [1986] ECR 723, case C-91/92 *Faccini Dori* [1994] ECR I-3325, case C-201/02 *Delena Wells* [2004] ECR I-723, and case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG*, [2010] ECR I-365. See S. Prechal, *Directives in EC Law* (OUP 2005), for an overview of the different regimes and requirements for direct effect. In comparative perspective to the US see Lenaerts (1990), 208, 212. et seq.

174 Case 106/77 *Simmenthal*, case C-213/07, *Michaniki* [2008] ECR I-9999.

175 See Case 33/76 *Rewe* [1976] ECR I-1989, case 14/83 *Von Colson* [1984] ECR I-1891, case C-213/89 *Factortame*, and case C-271/91 *Marshall II* [1993] ECR I-4367.

176 Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, case C-43/01 *Gambelli* [2003] ECR I-13031, and case C-234/04 *Kapferer* [2006] ECR 1-2585.

177 G. de Búrca, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 454.

accepted.[178] Estonia probably comes closest to such a position,[179] followed by Belgium[180] and The Netherlands.[181] In all other states the courts generally base primacy of EU law on the consent of the Member State.[182] Primacy is subsequently limited to the scope of that consent, and therefore to the scope that the national constitution allows for consenting to EU supremacy.[183] A logic that leads to a protected status for the constitution itself,[184] or at least its core provisions.[185] For where the national constitution does not allow the

178 Chalmers, Davies and Monti (2010), 190.

179 For Estonia see the conclusion of the Constitutional Chamber of the Supreme Court of Estonia in the Euro Decision, Opinion No. 3-4-1-3-06 of 11 May 2006, par. 16, available in English translation at: http://www.nc.ee, as well as par. 1 of the Estonian Supplementing act that does formulate certain fundamental principles.

180 For Belgium see the famous early position of the Belgian *Court de Cassation* in Cour de Cassation (Belgium), 27 May 1971, *S.A. Fromagerie franco-suisse 'Le Ski'* (1971) RTD eur 495, granting inherent supremacy to international law, and therefore EU law. A line it has held since then (*Court de Cassation*, 9 Nov. 2004, Pas., 2004, 1745 and *Court de Cassation*, 16 Nov. 2004, Pas., 2004, 1802). This line has also been generally followed by a second Belgian highest court, the *Conseild'Etat*, albeit with different reasoning (Conseil d'Etat Case 62.922 of 5 November 1996 (Orfinger). J.T., 1997, 254). Yet now a third court, the Belgian *Cour Constitutionnelle*, which developed out of the Courd'arbitrage in 2007, has chosen a different line. More in line with other constitutional courts it holds that ultimately the validity of EU law derives from the Belgian constitution, and can thus be limited by it. (*Cour Constitutionnelle* 16 October. 1991, No 26/91 and *Cour Constitutionnelle*, 3 February 1994, No 12/94). A tension between highest courts that for now simply continues to exist.

181 For the Netherlands see *Hoge Raad*, 2 November 2011, LJN AR1797, R.O. 3.6, *Hoge Raad* 1 October 2004, LJN AO8913 and *Raad van State* 7 July 1995, AB 1997, 117.

182 For an overview of the classic national case law see A. Oppenheimer (ed) *The Relationship Between European Community Law and National Law: The Cases Vol I and II* (CUP 1994 and 2003).

183 From some recent examples see the Czech Constitutional Court, Pl. ÚS 19/08, 26 November 2008 *Lisbon I*, and Pl. ÚS 29/09, 3 November 2009 *Lisbon II*, the Hungarian Constitutional Court, Decision 143/2010 (VII. 14.) AB, of 12 July 2010 *Lisbon Treaty*, the German *Bundesvefassungsgericht* in BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil*, the Italian Corte Costituzionale, Decision No. 348 and No. 349, 24 of October 2007 confirming the *controlimiti* doctrine, the Conseil constitutionnel, Decision 2004-2005 DC of 19 November 2004, *Traité établissant une Constitution pour l'Europe*, Conseil constitutionnel, Decision 2600-540 DC of 27 July 2006, *Loi transposant la directive sur le droit d'auteur*, or the Spanish Constitutional Court Declaration 1/2004 of December 13 2004 on the Constitutional Treaty, (BOE number 3 of 4 January 2005), See for a further discussion of supremacy and a potential confederal solution to these conflicting claims below chapter 10, section 8.

184 See for instance the ruling of the Polish Constitutional Court of 11 May 2005, K18/04 on Polish accession to the EU, or the Constitutional Court of Lithuania in joined cases No 17/02, 24/02, 06/03 and 22/04, judgment of 14 March 2006.

185 De Witte (2011), 356, who adds: 'Everywhere the national constitution remains at the apex of the hierarchy of norms, and EU law is to trump national law only under the conditions, and within the limits, set by the national constitution.' For a legislative expression of this logic see the new European Union Act of 2011, including its perhaps ineffective but highly symbolic 'sovereignty clause' in art. 18. See P. Craig, 'The European Union Act 2011: Locks, limits and legality' 48 *CMLRev* (2011), 1881.

government to violate fundamental rights or to limit the democratic process, such powers can also not have been delegated to the EU.

Both sides are clearly trying hard to prevent a direct conflict, which in itself can be seen as something valuable.[186] Nevertheless this 'plural' understanding of supremacy itself, if we take the positive view, must be taken into account when comparing the supremacy and direct effect of EU law to the US experience.[187]

De Witte's discussion of the 'two dimensional' character of supremacy in the EU captures this distinction. As the puts it, supremacy is 'a legal reality only to the extent that national courts accept their 'mandate'. The practice shows that this acceptance, so far, is selective and generally based on the national courts' own constitutional terms.

> *'The latter fact continues to distinguish Community supremacy from analogues federal principles. In federal states, the relation between central and Member State law is a matter for federal constitutional law. (…) the reason for this is the uncontested primacy of the federal constitution which allocates the powers between the two levels. In contrast, the claim of the autonomous validity of European Community law is not (yet) widely accepted, and the EC Treaty is not undisputedly granted supreme legal authority by the courts and political institutions of the Member States.'*[188]

Even though more than a decade old, this statement still captures the reality within the EU today.[189] A reality that ultimately goes back to the simple fact that the US Constitution has the normative authority to grant supremacy, whereas the EU treaties have not.[190] Although supremacy and direct effect are therefore accepted, and appear surprisingly effective in the day-to day functioning of the legal order, they rest on a different basis, are not grounded in a federate judicial system, and are far less secure than in the

186 See however the recent *ultra vires* ruling by the Czech Constitutional Court in *Landtova*, which does create an open conflict with the ECJ: judgment of 31 January 2012, *Landtova* Pl. ÚS 5/12, with an insightful discussion by J. Komarek, 'Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires' 8 *European Constitutional Law Review* (2012), 323.

187 In this regard the apparent need to remove the explicit recognition of supremacy from the Constitutional Treaty, and relocate it, in more technical terms, into a non-binding protocol 17 speaks volumes as well.

188 De Witte (1999), 209 et seq.

189 For a more recent defense see De Witte (2012), 45, also pointing to the lack of a system of separate federal courts in the EU, and the lack of a right of appeal against national judgments for violation of EU law. It is suggested here, and will be further discussed below, that the doubts De Witte has in equating this EU primacy with 'federal' primacy precisely conforms to the confederal nature of this primacy, whereas De Witte implicitly takes into account federate states alone when discussing the 'federal' notion of supremacy.

190 See also S. Douglas-Scott, *Constitutional Law of the European Union* (Pearson 2002), 257.

US federation.[191] Declaration 17 of the Lisbon Treaty on the supremacy of EU law nicely captures this duplicity. On the one hand the case law of the Court of Justice on supremacy is expressly accepted. On the other hand this acceptance could not be retained in the Treaty itself, and had to be tucked away in a non-binding declaration and obfuscated by legal lingo to secure ratification.[192]

The apparent paradoxes surrounding supremacy, and the contribution that confederalism can make to unravelling them, will be discussed in more detail in part II. At this point it suffices to conclude that, despite the weaker basis of EU supremacy, the EU system far exceeds the confederate system under the Articles. The American Confederation did not come near the level of supremacy and direct effect the EU enjoys in practice, even though the notions of supremacy and direct effect as such are not fundamentally incompatible with a confederal set-up.

3.2 Structure: Separate versus merged government

Related to the issues of supremacy and direct effect was another crucial structural difference between the US Confederation and the Federation, namely that between separate versus merged government. Would the central government be constructed from elements taken from the national systems, or would it receive a completely separate government at the federal level?

3.2.1 Merged government in the Confederation

The Confederation used a completely merged system: Congress consisted of representatives of the states, and only had a very limited institutional and bureaucratic capacity. As a result it governed through the states, forming one joined governmental structure. Again this institutional dependence on the states was seen as one of the key weaknesses of the Confederation: how can one control something one depends upon?

3.2.2 Separate government in the Federation

To address this structural weakness, the founding fathers decided to underpin federate supremacy and direct effect with an even more fundamental re-conceptualization of the political order. The central government would

191 This leads De Witte to the claim that 'the principles of direct effect and supremacy, as presently formulated and accepted, continue to confirm the nature of EC law as that of a branch of international law, albeit a branch with some unusual, quasi-federal, blossoms.' A statement that seems to skip the intermediate constitutional option of a confederal system.

192 Cf. art. I-6 of the Constitutional Treaty which simply stated that 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.'

become a completely separate and independent government instead of being grafted onto the State governments.[193] The federate government was based on the people directly, and would act on them directly, without the States as intermediaries. The State and the centre were to be separate governments, dealing with different issues, but over the same citizens.

In an impressive reversal of classic theory and traditional attempts to unify authority in one ruler, state or government, the citizen were made subjects of *two governments*. In turn, both these governments were based on the ultimate sovereignty of those same citizens collectively.[194] This American innovation in popular sovereignty and government will be extensively discussed in part II of this thesis where a potential further, and confederal, evolution of this merger between sovereignty and federalism is suggested. Here it suffices to establish that the state and federal governments could not be reduced to each other. An approach that rejected a straightforward hierarchy between *governments*.[195] Instead it took as its organizational principle co-equal governments, both directly governing the people, yet in different spheres of political activity.[196]

As a result, and as will be further discussed below, the federate government received an independent executive, its own Washington-based legislature, and a separate federate judiciary that would exist alongside the system of State courts. The federation thereby almost became the mirror-image of the system under the Articles, boasting a separate and not a merged government.

3.2.3 Separate or merged government in the EU?

Compared with these two examples the EU predominantly forms a merged system. Although it has stronger, more powerful and 'separate' institutions such as the European Parliament, the Commission, and the European Court of Justice, its overall character is more merged, especially when the quanti-

193 Despite this basic principle the governments of course collide and interact in practice.

194 The contemporary orthodoxy, which saw such multiplicity as a constitutional anathema, is nicely stated by Hutchinson in his case for unlimited and supreme authority of the British parliament over America: 'It is impossible there should be two *independent* Legislatures in the one and the same state' (McLaughlin (1918), 234. Of course, as we saw above, the US system is not truly in this sense, as both legislatures answer to the one supreme authority of the people.

195 A question that, crucially, is distinct from that on supremacy of legal rules where the two orders overlap. Separatism structurally aims to prevent such overlaps in the first place, primacy comes in since, especially in a modern system, preventing such overlap is simply impossible, no matter how one designs the functional lines.

196 See for example Ableman v. Booth, per C.J. Taney, 21 *Howard* 506, 516 (1859) emphasizing this separatism: 'The powers of the general Government and of the Sate, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres'. Further also see Lenaerts (1990), 207 who speaks of a dual constitutional structure.

tative aspects and relative power of the different institutions are taken into account. The merged institutions of the European Council and the Council of Minsters, for instance, play a key role within the institutional framework of the EU.[197] Also, the Union does not come close to the institutional and bureaucratic capacity of its Member States. The EU relies heavily on the Member States' executive capabilities, where the federal government was deliberately given its own, powerful executive. Judicially speaking the system is more merged as well. National courts take the brunt of European law cases,[198] despite the existence of central European Courts.[199] The preliminary question procedure epitomizes this merged approach.[200] Direct European jurisdiction is far more limited, as stringent requirements for a direct appeal have been maintained,[201] and no circuit of distinct EU courts exist.[202]

197 See J. Werts, *The European Council* (John Harper Publishing 2008). Cf also W.T. Eijsbouts, 'De Raad van Opperhoofden. Over het regeringsstelsel van de Unie', in: A.K. Koekkoek (ed), *Bijdragen aan een Europese Grondwet.* (Tjeenk Willink 2000), 59.

198 See in this regard also Opinion 1/09, and the importance attached by the ECJ to its connection with, and thereby control over, national courts in the interpretation of EU law.

199 With the introduction of direct effect the American system was, of course, *de facto* also merged judicially. In fact it was this judicial linking of the systems that provided the legal nexus and means of enforcement, with the separation more on the executive and legislative fields. The point here is that the EU is more merged than the US *even* on the judicial point.

200 The ECJ itself describes this as a cooperative arrangement with the national courts. Formally the ECJ can only give guidance on the interpretation of EU law, but is not allowed to decide the actual case at hand, which remains up to the referring court. It is true that in practice the ECJ can, and often does, practically indicates the desired outcome of a case by providing a very specific interpretation of EU law that is already fact-specific. Yet even when the ECJ does so, the national court always retains the last word in the actual case, which cannot be appealed outside the system of national remedies. The *Gesualdo* judgment of the Italian supreme court nicely illustrated both these points: despite increasingly clear hints from the ECJ that the Italian regulation of games of chance was below European par, the Italian supreme court merrily concluded the Italian legislation was justified under EU law. See A. Cuyvers, Case note to: Joined Cases C-338/04, C-359/04 and C-360/04, *Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio*, 45 *CMLRev* (2008), 515.

201 Case 25/62 *Plaumann* [1963] ECR 95, case C-50/00 P *Unión de Pequeños Agricultores* [2002] ECR I-6677) and case C-263/02 P *Jégo-Quéré* [2004] ECR I-3425. Lisbon has broadened the standing of individuals, albeit in a very limited way. For instance art. 275 TFEU and 263 TFEU fourth paragraph now also allows direct actions by non-privileged applicants against a regulatory act which is of direct concern to them and does not entail implementing measures. These improvements, however, certainly do not address the problems of limited standing as indicated by the General Court and AG Jacobs in *UPA* and *Jégo-Quéré* and academics more generally. For guidance on these additions now see case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, nyr.

202 Of course State courts under the federate system also form a very important part of the federate judiciary since they are obligated to apply federal law as well. Direct effect and supremacy in this way undercut the notion of separatism as far as the judiciary is concerned, yet it is difficult to see how this can be avoided without disintegration of the system.

The relatively merged nature of EU government is also visible in the EU legislative instruments, especially in the directive. Although it has certain separate elements, the European system is therefore usually depicted as a multilevel system of governance: it is one multilayered, merged system of interlinked governments rather than multiple separate ones.[203] At the same time the EU has incorporated far more and far stronger elements of separate government than the American Confederation.

3.3 Sub-conclusion structural modifications

Looking at the structural modifications as a whole the EU has incorporated certain federate techniques, whilst retaining the confederal basics. The EU, for instance, has almost fully incorporated the daily reality of direct effect and supremacy, even though these lack the strong federate basis and are not intrinsically incompatible with a confederal set-up. The more fundamental federate foundation of a fully separate European government based directly on the people, however, has not been adopted. As a result the system operates directly on the people but is not directly based on them, nor backed by its own separate level of government. This is not a novel point of course, but an important one for understanding the structural strengths and limitations of the EU. After all, tension between foundation and structure can only be expected in such a situation, as will be further explored below.

4 The authority of the centre: Objectives, attribution and specific competences

A third cluster of modifications relates to the authority allotted to the central government. Modifications which again played a central role in the US transformation into a federation as they aimed to remedy another of the key weaknesses of the Confederation: a lack of competence and authority at the central level. Three elements in this field were deemed central to ensuring an energetic federal government, and are therefore especially relevant for our comparative exercise. These were (1) the *objectives* for which powers were conferred, (2) the doctrine of *attribution* under which powers were conferred, and (3) the *specific competences* granted to the central government. Two specific competences that were particularly important in the US transition will be focussed on here, being the external and war competences on the one hand, and the power to regulate commerce on the other.

203 See for instance Craig (1999), 16 et seq.

4.1 The authority of the centre: Objectives

We first turn to the main objectives of the different unions. These objectives indicate the primary ends of the different unions: to what end were they established. In addition, it is important to establish the relation between these objectives and the actual authority granted to the centre to achieve them.

4.1.1 Objectives under the Confederation[204]

The Confederation had three main objectives.[205] First and foremost there was the 'common defence'. Primarily this objective concerned the struggle against Great Britain, yet there also were other actual or potential enemies such as the Indians, the Barbary States and the Spanish. The last were formally allies as long as the war with Great Britain lasted As soon as Britain had been defeated, however, Spanish interests directly clashed with those of the United States in such areas as trade, navigation rights on the Mississippi or claims to land on the American continent.[206]

The second objective was to safeguard the 'liberties' and republican form of government of the states by preventing conflicts between the states or civil revolts. An objective that reflected the unease about the radicalization in several states, as well as the fact that, without overarching British control open conflict between the states had become a very realistic prospect.[207]

Third, and also very importantly, the Confederation served the objective of 'mutual and general welfare', meaning especially trade and economic development.[208] After all, by separating from Great Britain the states had

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204 Obviously a rather formal understanding of 'objectives' is followed here, seeing how other even conflicting and non-explicit objectives will have been pursued by different relevant parties at different times. For the purpose of this constitutional comparison, however, the discussion of objectives will nevertheless focus on the formal objectives recognized by the constitutional arrangements themselves, accepting the limitation this implies.

205 Art. III Articles of Confederation. Also see the circular letter accompanying the draft Articles to the States on this point: 'More than any other consideration, it will confound our foreign enemies, defeat the flagitious practises of the disaffected, strengthen and confirm our friends, support our public credit, restore the value of our money, enable us to maintain our fleets and armies, and add weight and respect to our councils at home and abroad.'

206 Jensen (1965), 154 et seq.

207 See above chapter 1, section 5. In this regard, one could also say that one implicit aim of the Confederation was to expand, and settle the western lands ceded to the US under the terms of the peace treaty. An aim that was later taken up by the federation as well. See Onuf (1987) and Jensen (1970), 211 et seq.

208 Note that these objectives are very similar to the ones in the preamble of the later federate Constitution, which was not so much concerned with changing the objectives, but the *methods* of guaranteeing these aims.

broken with their biggest customer, and found themselves on the wrong side of the Empires global trading system. Considering the heavy regulation of international trade routes at the time, the states needed a united external policy to acquire new trade rights internationally. They also needed to develop their internal market as much as possible. In light of these needs and objectives it is hard not to enjoy the similarities between article IV of the Articles, and the four freedoms so central to the *acquis*, as well as the functionalist understanding between economic ties and peace it displays:

> *'To better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.'*[209]

Update the 'paupers, vagabonds and fugitives' to whoever we want to exclude today, and one approaches an 18th century equivalent of the four freedoms and the concept of a Union citizen.[210] Creating an internal American market to allow a free flow of the means of production was, therefore, one of the key aims of the Confederation. Not coincidentally Adam Smith had just published his 'Wealth of Nations', a theory the US elite was very much aware of.[211]

No specific clauses on positive integration were, however, included. Also, despite their wording, the Articles did not establish an effective customs union, or a full prohibition on statal tariffs and customs.[212] To make matters worse the states found many ways to circumvent the rules in the Articles, actively trying to protect their own traders and manufacturers.[213] For, as outlined above, these prohibitions were not protected by notions of supremacy and direct effect, nor was there any central institution capable of effectively enforcing them. The creation of an internal market did, therefore, form one of the objectives of the Confederation, albeit an unsuccessful one and clearly secondary to the military objectives.

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209 Art. IV of the Articles of Confederation.

210 Compare also art. IV sec 2 of the later federate Constitution, which is very similar, supporting the assumption that the intention of the Confederation to create a an internal market was similar as well. As no significant public entitlements existed at the time there was also no need to protect states from external burdens.

211 F. McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (University Press of Kansas 1985), 97 et seq.

212 Art. VI of the Articles of Confederation.

213 Wood (1969), 403 et seq.

4.1.2 Objectives under the Federation

Interestingly the objectives of the federate constitution, concise as they are, largely resemble those of the Articles. The Preamble provides a summary:

> 'We the People of the United States, in Order *to form a more perfect Union*, establish *Justice*, insure *domestic Tranquillity*, provide for the *common defence*, promote the *general Welfare*, and *secure the Blessings of Liberty* to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.'

Generally the constitution aimed to form a more perfect Union, and one that would at least be better than the Confederation. The further aims of 'domestic Tranquillity', 'common defence' and 'general Welfare' all match the objectives of the Articles. Indeed the central aims remained the same: keep the enemies at bay, stimulate the economy and prevent conflicts between the States.[214] It were the constitutional instruments to achieve these aims that were changed. As the peace treaty with Great Britain had already been signed when the Federation was formed, however, the internal objectives had logically become more central as well, which may partially explain the further, more individual objectives that were added: establishing 'Justice' and 'securing the Blessings of Liberty'.[215]

As the Confederation, furthermore, the Federation also had the more implicit objective of expanding. As discussed above, art. IV s. 3 provided an explicit procedure for accession, reflecting the clear will to expand by the creation of new, republican, states in the unsettled lands. Generally, therefore, the objectives of the federation did not differ that much from the objectives of the Confederation. It was actually because of the importance of those objectives that a more perfect Union had to be formed.

4.1.3 Objectives of the EU

The objectives of the EU are not as concisely formulated. Especially when one takes the preambles into account, as well as all Treaty articles that contain or imply some form of programme or larger aim, a very long list of objectives takes form. Some of these objectives are rather general, such as the aim to 'to promote peace, security and progress in Europe and in the world', or to contribute to 'peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the

214 See also art. IV s. 4 US Const. still guaranteeing a republican form of government and protecting the States against domestic violence.

215 Obviously these objectives also served other purposes, such as preventing some of the perceived injustices and tyranny by the masses during the Confederation or the rhetorical purpose of convincing people that a large polity was actually conducive to individual liberty.

rights of the child (…).' Others are rather specific for a constitutional aim, such as striving for 'price stability' or promoting 'tourism'.[216]

In general, however, it is possible to isolate several primary objectives to which all other, more secondary or instrumental objectives, contribute. These objectives have also remained relatively stable over time. Historically the two paramount – and functionally linked – objectives in this regard have been peace and prosperity.[217] Increasing wealth and well-being in a Europe ravished by war through the progressive development of an internal market, and, partially by creating that market, prevent future conflicts from deteriorating into war. The internal market, therefore, formed one of the central, albeit instrumental, objectives of the EU, as it linked both the peace and the prosperity objectives.

By now it can be said that the focus on preventing (armed) conflicts between the Member States has gradually retreated, whereas economic objectives have become more central within the EU.[218] At the same time other non-instrumental aims have been increasingly embraced, such as the environment, the Area of Freedom Security and Justice, and increasingly the need to form one block externally.

Sometimes it seems the EU even tries to fully recast itself as a fundamental rights organization, usually when in search of increased legitimacy. The gradual introduction of the Charter can be seen in this light, just as the far-reaching reasoning and rhetoric of the Court of Justice in cases as *Kadi*, *Zambrano* or *N.S*.[219] Optimistic scholarship can then try to build on both these developments, such as for instance through the probably intentionally wishful idea of a 'reverse Solange' check.[220] Such approaches, however, primarily tend to illustrate the significant tensions between such natural law like ambitions and visions of the EU and the more down to earth basis of the EU itself.[221] Perhaps cynically so, but the fact that the text of the Charter had eventually to be removed from Lisbon, and replaced by a reference with the same legal effect, at least does not seem to bode very well for those relying on the legitimizing effect of fundamental rights for the EU. Of course in a

216 Preamble TEU, art. 3(1) TEU and art. 195 TFEU.

217 Or in the words of art. 3(1) TEU: to 'promote peace' and 'the well-being of its peoples.' NB: The two World Wars are no longer directly referred to in preambles.

218 See more generally below chapter 3, section 2 on the internal focus of the EU.

219 Joined cases C-402/05 P & C-415/05 P *Kadi I* [2008] ECR I-6351, case C-34/09 *Zambrano*, and case C-411/10 *N. S. and others* nyr.

220 A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei and M. Smrkolj, 'Reverse Solange–Protecting the essence of fundamental rights against EU Member States', 49 *CMLRev* (2012), 489.

221 For a further discussion of this tension see A. Cuyvers, 'The Kadi II judgment of the General Court: the ECJ's predicament and the consequences for Member States' 7 *European Constitutional Law Review*, (2011), 481.

less high-brow manner such human rights aims can also be seen as simply a broader, or better, understanding of 'well-being' but clearly they have a different undertone than the more economic objectives of old.[222]

Enlargement *per se* furthermore, is not mentioned as an explicit objective. Nor, however, is a clear limit established of how far EU enlargement should go. Obviously the possibility of further enlargement, as in the case of the US, does seem to imply at least an implicit desire to enlarge to a certain degree.

Comparing the objectives of the EU with our US examples, two main conclusions stand out. First, the EU objectives are developed in much more detail and at the same time include more far-reaching and even global aims. Second, looking at these objectives as a whole, the EU *primarily* focuses on two of the three aims pursued by both the US Confederation and the Federation: preventing conflicts between the states and increasing prosperity. Especially compared to the Confederation these internal aims are far more central. At the same time the EU clearly has external objectives, and even increasingly so. Achieving its internal objectives, furthermore, also contributes to its external relevance; the stronger Europe is internally, the more weight it will carry externally. Yet the EU does not have the external focus on *military and defence* that formed such a central objective of the Confederation. As such the centre of gravity within the EU, as far as objectives are concerned, is far more internal.

Since the Federation in this regard also had an increased focus on the internal objectives one could be tempted to conclude that the EU is more 'federate' in its objectives. At the same time the federation *combined* the internal and the external, which should not be ignored. It took over the impressive external objectives and competences from the Confederation, and added a reinforced internal dimension to them.

For a more complete picture, however, it is necessary to also address the way in which the different systems attributed powers to the centre, or in other words how they enabled the centre to achieve its objectives. Before looking at specific competences it is therefore useful to first consider how the principle of attribution was and is applied in the three different constitutional systems compared.

222 More complex is the question whether *integration itself* does, or should, form an objective of the EU. See in that regard the preamble to the TEU proclaiming the resolve to 'continue the process of creating an ever closer union among the peoples of Europe' and 'IN VIEW of further steps to be taken in order to advance European integration'. This does seem to imply that integration itself is an objective, although intentionally leaving open what in turn the objective or *finalité* of that integration itself should be.

4.2 *The authority of the centre: Attribution*

None of the three systems compared granted a *kompetenz-kompetenz* to the central government. Rather they all relied on a form of attribution. The central government only has those powers attributed to it. As will be seen, however, the doctrines used to determine the powers attributed differ significantly, and these differences have a considerable impact on the nature and functioning of the systems under comparison.

4.2.1 *The narrow doctrine of attribution in the Confederation*

In the Confederation Congress only had those powers attributed to it by the states. All other powers remained at the state level:

'Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation *expressly* delegated to the United States, in Congress assembled.'[223]

Under the Articles, furthermore, the importance attached to the so recently acquired sovereignty translated into a very strict interpretation of power-conferring provisions.[224] Most importantly, *any* doctrine of implied powers was rejected as anathema to state power and the idea of attribution itself. Construing competences this strictly had a major structural impact on the Confederation. Not only did it limit its powers, it also prevented the Confederation from adapting to changing circumstances. Any deviation from the strict letter of the Articles required amendment, and hence unanimous consent.[225] Unanimity that proved impossible to reach on all the important issues.[226] The attempt to improve the finances of the Confederation provides an instructive example of this problem.[227]

In addition, there was no Court to authoritatively interpret the Articles, let alone to push the envelope where political deadlock occurred. The lack of a court, of course, also meant that Congress could have significantly expanded its own powers without any check at the confederal level. Had Congress started to develop its own institutional interest and desire for increased power, this could have formed a risk for the states. Such a confederal '*esprit de corps*' did not materialize, or at least was not strong enough to overcome

223 Art. II of the Articles of Confederation.
224 McLaughlin (1971), 119 et seq.
225 Clearly this limited interpretation rested on the will of the states themselves: no organ in the Confederation could have stopped Congress from adopting legislation based on an implied powers doctrine. Such legislation, furthermore, would only have required the support nine states. No such majority did not exist, however, and if it had it is doubtful whether the other states would have accepted it.
226 See above section 2.4.1. on amendment under the Articles of Confederation.
227 See further below for a specific comparison on the point of income and financing.

direct state interests and the deeper unwillingness to empower Congress. Institutional safeguards such as the requirement that all delegates formed part of their own state legislature, and could not be continuously re-elected to Congress undoubtedly contributed to this situation.

As a result, even though the Confederation had objectives not unlike those of the Federation, the competences of Congress were severely limited by the restrictive, and almost hostile, theory of attribution applied. Competences were construed narrowly, and based on the text of the Articles alone, rather than on the objectives they were supposed to achieve. As objectives did not translate into powers, achieving those objectives, let alone adapting to new circumstances, became difficult.

4.2.2 A broad doctrine of attribution in the Federation

The federate constitution directly dealt with this confederal problem in two ways. First, as described above, the federate government was no longer based on the States, but on a direct delegation of authority from the sovereign people.[228] The question no longer was *if* a power had been delegated, but *to whom* the people had delegated it.[229] As a result, the states had no 'stronger' claim to competences, even though residual power remained with the states.[230]

Second, and with hindsight crucially, article 1, section 8, last paragraph of the Constitution explicitly incorporated an implied powers doctrine. It provided that Congress would have the power:

> 'to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.'[231]

Already at the time of drafting this addition was rightly considered to be vital for the success of the new constitution.[232] Only a normal legislative majority would be required both to decide on the existence of a competence, and to exercise it. Any decision could of course be subject to scrutiny by the newly created Supreme Court, yet the existence of implied powers as

228 Choper, Fallon, Kamisar and Shiffrin (2006), 55 et seq.

229 See on this important point amongst many others: B. Neuborne, 'The Myth of Parity' 90 *Harvard Law Review* (1977), 1105, P.M. Bator, 'The State Courts and Federal Constitutional Litigation' 22 *William and Mary Law Review* (1981), 605, S.D. O'Connor, 'Our Judicial Federalism' 35 *Case Western Reserve Law Review* (1984), 1, M. Shapiro, 'Jurisdiction and Discretion' *New York University Law Review* (1985), 543, and Tribe (1988).

230 Watts (1999), 39.

231 Nowak and Rotunda (2004), 138 et seq.

232 Something acutely perceived by opponents and proponents of the clause. Hamilton therefore vehemently defended this clause during the Convention, and in Federalist Paper No. 44 Madison declared that the Constitution would be a dead letter without it.

such could not be denied. What is more, such federate judicial scrutiny also meant that the ultimate decision on competence lay with the centre and not the states, and with a judicial instead of a political organ.[233]

In addition to any specific competences it received, therefore, the new federal government was above all allowed a broader interpretation of its competences, and access to an implied powers logic to boot.[234] As the later use of the commerce clause and the necessary and proper clause proves, this was a very significant change in the constitutional fabric, far outweighing most explicit additional powers granted.[235]

4.2.3 Attribution in the EU

Like the American Confederation the EU is based on the continuing authority of its individual members, and only has those powers attributed to it by them.[236] Articles 4(1) and 5 (1) and (2) TEU together provide the following formulation of the principle of attribution:

> '1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.
> (…)
> 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
> 2. Under the principle of conferral, 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*. Competences not conferred upon the Union in the Treaties remain with the Member States.'

Attributed powers are subdivided into three categories. They are either exclusive, shared, or complementary. Exclusive competences are the most far-reaching, and leave Member States with no residual competence. In areas of shared competence the Member States retain the right to act, albeit

233 Choper, Fallon, et al. (2006), 15 et seq., Tribe (1988), 195 Also, transferring decisions on the scope of federal powers to a judicial and federal organ only seems to increase powers, especially implied ones. This because it takes the decision out of the political arena and into a legal one, which seems more amenable to central powers, and usually *can only marginally check* the federal legislative judgment that an (implied) powers exists. Competences are thus boosted by the margin of appreciation left by the judiciary to the legislator. Lastly, legal logic is also unlikely, on its own, to withdraw a competence once given.

234 *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). Also see Tribe (1988), 298 et seq. and Federalist Paper No. 44.

235 Nowak and Rotunda (2004), 157 et seq. The crucial importance of implied powers was also described my Madison in 1800 'It must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers' (James Madison, Report on the Alien and Sedition act, January 7, 1800 in: J. Rakove (ed) *James Madison: Writings* (Library of America 1999), 643.

236 D. Chalmers, *European Union Law* (CUP 2007), 140. Also see chapter 9, section 7on the notion of delegation and sovereignty in the EU.

within the limits of pre-emption and Union loyalty. Complementary competences, on the other hand, only give the EU a limited capacity to act, and especially leave Member State competences largely intact.[237]

Interestingly the Treaties directly place conferral in the context of subsidiarity, proportionality and the objectives of the Treaties. The first two concepts, more typical for European than US federalism,[238] aim to limit the use of conferred powers.[239] At the same time, however, different from both the US Confederation and Federation, attribution is directly linked with the objectives of the EU. This link between objectives and competences is further developed through art. 352 TFEU:

> 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.'

Besides an interesting legal and ontological conundrum,[240] article 352 TFEU further links objectives with competences. It thereby creates a form of residual competence to ensure that objectives can be realized.[241] As such it displays a far greater concern for effectiveness than the very strict principle of attribution applied under the Confederation. The EU system thereby comes much closer to the federate approach to attribution with its necessary and proper clause, as is underlined by the requirement in article 352 TFEU that the EU may act where this is 'necessary' to achieve one of its objectives.[242]

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237 R. Schütze, 'The European Community's Federal Order of Competences A Retrospective Analysis', in: M. Dougan and S. Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009), 63.

238 Watts (1999), Elazar (2006).

239 Obviously these are in themselves complex an contested concepts, and notoriously complex to operationalise legally. Cf P.J.G. Kapteyn and P. VerLoren van Themaat, '*Introduction to the Law of the European Communities*' (3rd edition, Kluwer 1998), 233 et seq.

240 It can be defended that the provision both contains a certain logic of implied powers, and rejects it, for if there truly is an inherent doctrine of implied powers, 352 TFEU is not necessary. In that sense it straddles the Confederal – Federal divide by allowing the federate centre access to the instrument of implied powers, yet limiting this access by a confederal requirement of unanimity. Also, the provision claims to cover cases not provided for by the Treaty, yet is itself part of the Treaty.

241 A. Dashwood, 'Article 308 as the Outer Limit of Expressly Conferred Community Competence', in: C. Barnard and O. Odudu (eds) *The Outer Limits of European Union Law* (Hart Publishing 2009), 35 et seq.

242 See however also the attempt to at least somewhat limit the potential this opens up in Declaration No. 41 on art. 352 TFEU. For example art. 352 TFEU is not to be used in relation to such lofty aims as 'promoting peace'.

Art. 352 TEU in fact even goes one step further, as the text of the necessary and proper clause only refers to the *powers* of the federal government, not the objectives.

Perhaps even more importantly, as in the US Federation, in the EU the scope of the attributed powers is determined by a central court. Similar to the US Supreme Court, the Court of Justice has here played a vital role. Often applying a strong teleological approach, and linking a logic of effectiveness with the objectives of the Treaty, its case law has generally resulted in broad competences for the Union.[243]

The Courts approach to article 114 TFEU, the old article 95 EC, provides a clear example. Considering the objective of creating an effective internal market, competence to regulate this market is already accepted by the Court where there is an actual or potential obstacle, now or in the future to any of the fundamental freedoms. A threshold that is not difficult to reach.[244] Under a similar logic the Court has found that external competence exists where this is necessary for the effectiveness of an internal competence, albeit under strict conditions.[245] Further, in an area as sensitive as criminal law, the EU was allowed to demand criminal sanctions where this was 'essential' to ensure the effectiveness of EU rules, even where no explicit competences to do so existed at that time.[246] Perhaps the best illustration of just how attuned the case law of the Court is towards effectiveness and achieving EU objectives, however, is provided by the *Tobacco* saga: The *one* tobacco judgment where the Court 'drew a line', and not even a very strict one at that, became an instant classic. The eagerness with which this rather unimpressive limit to EU competences was anointed into the EU hall of fame only underscores the expansive approach normally followed in determining EU

243 Douglas-Scott (2002), 261.

244 Cf amongst many others Case C-491/01 *British American Tobacco* [2002] ECR I-11453, par. 60, case C-434/02 *Arnold André* [2004] ECR I-11825, par. 30, case C-210/03 *Swedish Match* [2004] ECR I-11893, par. 29, or joined cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451, par.28. Measures are not allowed, however, on a 'mere finding of disparity between national rules'.

245 See joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279 as well as Opinion 1/76.

246 Case C-176/03 *Commission v Council (Ship Source Pollution I)* [2005] ECR I-7879. The EU is not competent, however, to determine the 'type and level' of criminal sanction. See case C-440/05 *Ship Source Pollution II* [2007] ECR I-9097 par. 70. After Lisbon the EU has, however, received further, and more explicit, competences in the field of criminal law. See especially art. 82-86 TFEU.

competences.[247] A conclusion that does not involve a normative rejection of this approach, for it has probably been of vital importance for the effectiveness and survival of the EU, but that does question the portrayal of the Tobacco case law as a serious limit to EU competences.

Another clear example of the Courts approach, and of the use of objectives to determine competences, is provided by the Kadi-I saga.[248] Here the question was whether the EU, under the pre-Lisbon situation, had the competence to implement sanctions against individuals not in any way related to a state government.[249] The Advocate General supported a very broad interpretation of article 301 EC, reading into this provision a general competence to sanction individuals.[250] The General Court took a different approach, allowing such individual sanctions jointly under articles 60, 301 and 308 EC, whereby art 301 EC was used to 'import' an objective from the second pillar into the first pillar, which could then create a competence under article 308 EC (now article 352 TFEU).[251] The Court of Justice did not agree with such importation. Instead it invented the notion of an 'implicit underlying objective': although article 301 EC did not provide the *competence* to sanction individuals, it did provide the implicit *objective* to do so. Via article 308 EC, now article 352 TFEU, this 'implicit underlying objective could then become a competence.[252]

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247 Case C-376/98 *Tobacco Advertising I* [2000] ECR I-8419. The Court of justice annulled a directive on tobacco advertising, holding that it exceeded the competence of the EU under then art. 95 EC. The actual grounds for this finding, however, were quite specific. By removing some rather minor parts, such as the prohibition on ashtrays, the second tobacco advertising directive could be accepted in the second tobacco case (C-380/03 *Tobacco Advertising II* [2006] ECR I-11573). At the same time that the Court established this 'limit, furthermore, it also accepted the far more important and sweeping rule that an EU measure may be wholly based on art. 114 TFEU if it pursues a certain minimum (or threshold) of market harmonization. This also where a very significant, or even predominant, part of the measure concerns public health. A line of reasoning that clearly reflects a primary concern on effectiveness, and thereby significantly reduces the limiting effect of art. 165(5) TFEU).

248 For a further analysis of the legal basis discussion see A. Cuyvers, 'Tussen Scylii en Charybdii: terrorisme, rechtsbescherming en de verhouding tussen rechtsordes in Kadi', 58 *Ars Aequi* (2009), 155.

249 The old art. 301 EC only mentioned sanctions against third countries, which could include sanctions against individuals linked to the government of those countries, but in at least the view of the General Court and the Court of Justice could not directly support sanctions against individuals generally. Case C-376/10 P *Tay Za v. Council* nyr.

250 See par. 13 and 16 of his opinion, finding that art. 60 and 301 EC jointly provide a sufficient legal basis.

251 Especially see paras 120. 130 and 133 of the then Court of First Instance in case T-315/01 *Kadi I* [2005] ECR II-3649.

252 Joined cases C-402/05 P and C-415/05 P *Kadi I*, par. 226. It should also be noted that after Lisbon formally we no longer have separate first or second pillar objectives, widening the reach of art. 352 TFEU in a way that might not be wholly covered again by art. 352(4). See also Rosas and Armati (2010), 22.

As these examples illustrate the principle of attribution in the EU, especially as developed by the Court of Justice, is far more conducive to central competences than the one used under the Articles. The combination of an effectiveness-driven interpretation of competences, an implied powers logic and general legal bases such as art. 114 or 352 TFEU bear a far higher resemblance to doctrine of attribution under the necessary and proper clause or the commerce clause, the engine behind so much federate development in the US.[253]

From our limited comparison, it results, therefore, that the EU has incorporated to a very high degree the federate modification of a more liberal theory of attribution. In any case it is far removed from the very strict doctrine of attribution that was applied under the Articles. One additionally interesting conclusion in that regard is that, especially in the EU, a more liberal theory of attribution can also bring objectives into play. As soon as a more teleological interpretation is followed, objectives start creating competence. This sometimes even to the *Kadi* extreme where it seems a certain objective, together with a desire for effectiveness, means a competence will be found somewhere. Clearly these underlying theories of attribution must also be kept in mind when comparing the specific competences set out next.

4.3 The authority of the centre: Specific objectives

For having compared the objectives and the general doctrine of attribution used, we can now turn to two of the specific competences that played a central role in the US transition from a Confederation to a Federation: the competences concerning war and the regulation of commerce.

4.3.1 The Confederation and the war focus

To reach its objectives, and under the strict principle of attribution described above, the Articles delegated several competences to the Confederation. The most far-reaching were the war-related competences. Congress received the exclusive power of deciding on war and peace, [254] to build a navy, to determine the size of land forces and to make binding requisitions on the States to supply their share of these forces.[255] In addition, the Confederation could

253 Choper, Fallon, Kamisar and Shiffrin (2006), 87 and 91. Further see T. W. Merril, 'Towards a Principled Interpretation of the Commerce Clause', 22 *Harvard Journal of Law and Public Policy* (1998), 31, and D. McGimsey, 'The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element loophole', 90, *California Law Review* (2002), 1675. Different from the US, however, the EU has less effective political counterbalances.

254 Except in the case of self-defence against attack or immanent threat of attack, see art. VI Articles of Confederation.

255 The states were obligated to raise, cloth and equip these forces, but the costs these actions were borne by the United States jointly.

regulate these forces, appoint all non-regimental officers in the army and the navy and all regimental officers over Colonel. Crucially Congress also directed the actual operations of these forces.[256]

Regarding the funding of the Confederation, the Articles determined that each of the states should carry a part of the confederal costs 'in proportion to the value of all land within each State.'[257] Congress was given the competence to set the mode of valuation of this land. As discussed above, however, Congress was *not* allowed to directly levy taxes or collect such moneys due. Determining the method of taxing, and collecting the revenue remained the exclusive competence of the states.[258] Congress was, however, allowed to borrow money and issue bonds on the credit of the United States.

Both the war competences and the capacity to borrow funds were complemented by significant exclusive competences in external relations more generally. Congress had the exclusive right of concluding treaties and of sending and receiving ambassadors. This right was supported by a complete prohibition for the states to enter into any international agreements, or any treaties amongst themselves for that matter, without the express permission of Congress.[259] Formally, therefore, the States did not even have a shared external competence left, [260] even though these obligations were violated as well.[261] Treaties concluded, at least those concerning the vital area of duties and imposts were binding on the states, and at least legally limited their internal competences.[262]

In line with their internal market objectives, the Articles gave Congress the exclusive power to regulate the 'alloy and value' of the *coin* struck by the Confederation or the States.[263] Crucially, however, this did not cover the right of the states to emit *paper money*, one of the most contentious political issues of the time.[264]

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256 Art. IX of the Articles of Confederation.

257 Art. VIII of the Articles of Confederation. This was an important point of contention during the drafting of the Articles, the landed provinces preferred population or other sources of income to be included as well in the calculation, but eventually compromised on this point.

258 Art. VIII, s.2 of the Articles of Confederation.

259 Art. VI of the Articles of Confederation.

260 These extensive external competences did not lead to a kind of reversed *ERTA* logic: Congress did not receive internal powers where external powers had been exercised or where these powers were necessary for the effectiveness of the external competence. The strict attribution doctrine prevented any such inroads into state powers, and there was no central court to invent it.

261 Van Tyne (1970), 540.

262 Art. VI s. 3 Articles of Confederation. As indicated above, compliance was, however, low.

263 Art. IX Articles of Confederation.

264 See further below.

The Confederation, therefore, received sweeping military and external competences. Competences that match, and in some cases exceed, those given even too many modern-day federations. These competences were in line with the overriding need to win the war and establish the United States internationally. The *internal* competences of the Confederation, however, were very limited. They were not even really elaborated upon, even taking into account the concise writing of the time.[265] From the revolutionaries' perspective, however, even these limited internal competences of the Confederation were quite a leap already. Firstly, having just relieved themselves of one 'tyrant', there was little enthusiasm for creating a domestic one.[266] This sentiment was reinforced by the radical ideology of the revolution, which included a strong distrust of all central authority[267] and near total faith in democracy as direct and close to the citizen as possible.[268]

Second, as indicated above, most States had enjoyed large degrees of freedom and self-rule under the Empire, and had developed very strong identities. The Confederation was there to protect and assist the States, not to replace them.

Thirdly, the States were deeply divided on many important issues, and significant conflicts of interest existed. Slavery, trade versus agriculture, and claims to the vast stretches of 'empty' land to name but a few central ones.[269] Partially as a result, a deep distrust remained between several individual states. A strong central government either required settling these issues, or trusting the new centre to settle them. Neither proved possible directly after independence. As a result, the confederate period and the transition to the federate constitution can largely be described as a struggle over these issues between different groups, and their eventual settlement in Philadelphia.[270]

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265 To compare: The text of the US Constitution as adopted at Philadelphia has 4484 words. The *table of contents* of the consolidated EU Treaties already contains 2.439 words. After the Lisbon effort at simplification the Treaties themselves, including protocols and declarations an in the English language version, use 117.695 words.

266 Jensen (1970), 109 and 124. Linked to this general fear of centralized power, was also the fear that any central power would be dominated by Virginia, a.k.a. as the 'big knife' at that time, and by far the biggest state.

267 For a closer description of the roots and content of this ideology, as well as illustrative examples of it, see Wood (1969), for instance on. 18 et seq, as well Wood (1991). For a discussion of the ideas and ideologies in the states see Beeman (2006), especially ch. 6, 7 and 8.

268 This was at least the ideology of those describing themselves as 'patriots' or 'revolutionaries'. As will be discussed below, many powerful elite groups in society, not strong supporters of revolution to begin with, feared this ideology, and tried hard to temper it. The struggle between these camps is one of the central themes throughout the entire confederal period, Jensen (1970), 16, 117, 161.

269 Naturally, many of these issues eventually contributed to the outbreak of the Civil War.

270 See further below chapter 5 on the process of federation.

Fourth, it had been exactly the British regulation of commerce and the levying of taxes and imposts that lay at the heart of the Colonies' public defence of rebellion; no taxation without representation.[271] Giving the Confederation powers that had been deemed worthy of a revolt against Great Britain, so shortly after that very rebellion, was not a very popular option.

These limited competences of Congress did indeed safeguard the powers of the states. Yet they also severely limited the functioning of the Confederation, especially as there was no easy way to adapt or expand these powers where this proved necessary for effectiveness. Two key gaps in the competences of the Confederation primarily contributed to the 'deplorable' functioning of the Confederation: The inability to regulate trade, and the inability to secure an independent and sufficient income.

For even though the Articles did prohibit certain restrictions to the internal market, they did not grant any positive powers to regulate trade, or to achieve 'positive' integration, to use EU lingo. The Dickinson draft of the Articles had included greater trade competences, but these hade been removed by supporters of a weaker confederation.[272] Later on conservatives also tried to grant further competences to Congress but failed.[273]

Combined with the general compliance deficit, this lack of competence meant the Confederation could not prevent increasing protectionist behaviour, which blocked the internal market and spawned conflicts between the states. At one point, for instance, Connecticut taxed imports from Massachusetts at a higher rate than British products![274] In addition, the inability to regulate internally was seriously interfering with the capacity of the US to conclude and observe trade agreements *externally*. A problem that significantly harmed the standing of the new polity internationally. Serious as these problems were, however, the financial situation of the Confederation, as described above, was even more problematic. Not surprisingly these two weaknesses were in the front of the founding fathers' minds at Philadelphia.

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271 This section will not even attempt to settle the question what the 'real' causes of the revolution were, be they economic, ideological, class driven or a mix. Yet it is a fact that the *public defence* of the Colonies, as eventually formulated so powerfully in the Declaration of Independence, was based on inalienable rights, and the right of representation when taxed. See for different analyses or emphases on the 'real' causes: Beard (1969), R. Beeman, S. Botein and E. C. Carter II (eds), *Beyond Confederation* (University of North Carolina Press 1987), McDonald (1985), or Wood (2003).

272 Jensen (1970), 139 and 178.

273 Jensen (1970), 111. 128 and 174.

274 Madison (Sketch), 14.

4.3.2 The Federation: Combining the internal and the external

To create an efficient government, the power to regulate trade and to generate income were therefore deemed necessary for the federate government. The Virginia plan fully included these powers,[275] and they became the two central modifications in the field of specific competences. The increased powers to tax and generate revenue were already discussed above in light of their fundamental importance.[276] The power to regulate trade externally *and* internally was granted through the famous commerce clause:

> 'To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes'[277]

These powers proved to be especially broad when combined with their extensive interpretation under the necessary and proper clause discussed above.[278] The external and war competences of the Federation were extended as well, most importantly to maintain a standing army. The powers to declare war and to conclude treatises remained with the centre, and were vested in Congress, the President and the Senate respectively.

The central government, therefore, received a significant increase in specific competences, as well as more leeway to determine the ambit of these competences.[279] The greatest increase in competence, however, certainly with hindsight, concerned the power to regulate commerce internally. As a result the federation retained its dominant external powers, yet complemented these with more general internal powers.[280]

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275 In fact, the first draft of this plan went one significant step further and gave a general legislative competence to the central government.

276 The increased income of the federal government thereby also had a further, indirect effect on its powers: it acquired enough revenue to engage in non-regulatory activities, i.e. measures directly concerned with redistribution and public spending. Something the EU can only do to a far lesser degree due to its relatively minor income. Compare in this regard the distinction made by Majone in G. Majone, *Regulating Europe* (Routledge 1996) as well as Craig (1999), 42.

277 Compared to the Articles, several other powers were also added, such as the powers to establish uniform rules for naturalization and bankruptcies, to promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries, to constitute Tribunals inferior to the supreme Court, and to fully legislate for the newly created District of Washington.

278 Choper, Fallon, Kamisar and Shiffrin (2006), 55, 65 et seq. See for instance the Lottery case (*Champion v. AMES*) 188 U.S., 23 S.Ct. 321, 47 L.Ed. 492 (1903) and Hou*ston, East & West Texas RY, v. United States* (Shreveport Case) 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed 1341 (1914). Also see: R.L. Stern, 'The Commerce clause and the national economy', 1933-1946, 59 *Harvard Law Review* (1946), 645 for the boost during the New Deal.

279 A development that the 10th amendment could not stop, weakly formulated as it is.

280 Cf on this internal shift from the external confederal tradition also Forsyth (1981), 68.

4.3.3 The EU and the internal focus

How does the EU compare? To answer this question this section will not outline all of the competences of the EU in detail. This would require too much space and is not necessary for our comparative exercise. Rather the focus will be on comparing the EU against the overall picture concerning competences established above for the Confederation and the Federation. For this purpose it is especially useful to jointly consider the three key competence modifications underlying the transition from the confederate to the federate constitution: the control of trade, the external and war competences and the way these were affected by the concept of attribution used.

4.3.3.1 The regulation of trade: A federal centre of gravity

The internal market lies at the heart of the EU. Even if not normatively, although even that could be defended, it does so at least in terms of competences, both qualitatively and quantitatively.[281] It is the area where the EU has some of its most far-reaching powers. Many other fields, furthermore, come within the ambit of EU law via the link or logic of the internal market. As long as there is a potential effect on the internal market, after all, EU law kicks in either through negative integration or because legislative competences are triggered.[282] A process, for instance, via which many essential social services have been drawn into the internal market, such as energy, postal services, health care, social housing or public transport.[283] Another clear example of the snowball of a genuine internal market is the free movement of workers. Starting with the right to take up work, this eventually requires harmonization of diploma's, social benefits, rights for family and dependents, access to social services and even the grant of political rights.[284]

In legislative terms the EU has received a very broad competence to regulate the internal market after the introduction of article 95 EC, now article 114 TFEU by the Single European Act. As discussed above the threshold to trigger this competence is relatively low, and the Court is generally rather

281 See below chapter 3 section 2 for a more detailed discussion of this claim.

282 For the legislative competence to be triggered all further criteria as laid out in the Courts case law must clearly be met as well. See Case C-376/98 *Tobacco Advertising I*.

283 See, as typical examples for this dynamic case C-179/90 *Porto di Genova* [1991] ERC I-5889, case C-320/91 *Corbeau* [1993] ECR I-2533, case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, case C-280/00 *Altmark* [2003] ECR I-7747, case C-83/01 P *Chronopost* [2003] ECR I-6993, joined cases C 264/01, C 306/01, C 354/01 and C 355/01 *AOK-Bundesverband* [2004] ECR I 2493, case C-567/07 *Sint Servatius* [2009] ECR I-9021, or the so called Golden Share cases: C-367/98 *Commission v. Portugal* [2002] ECR I-4731, C-483/99 *Commission v. France* [2002] ECR I-4781 and C-503/99 *Commission v. Belgium* [2002] ECR I-4809. For a further discussion of the dynamic intended see P.J. Slot, M. Park and A. Cuyvers, 'Diensten van algemeen (economisch) belang nader beschouwd', *Markt en Mededinging* (2007), 101-112.

284 See for a more detailed discussion and the case law chapter 3, section 2.

willing to accept that a link with the internal market exists.[285] The EU possesses several other market related regulatory and legislative competences as well, for instance on competition law, customs, EMU, and in special fields such as fisheries, agriculture, transport, consumer protection and energy. As discussed above, furthermore, these legal bases have been given a very wide interpretation as well, with the Commission and the Court of Justice focussing on the need to effectively achieve their underlying objectives.

As a result, the internal market competences of the EU resemble those of the Federation far more than those of the Confederation, even though the Confederation also had the explicit *objective* of establishing an internal market.[286] Especially the resemblance between the expansive interpretation of the commerce clause under the necessary and proper clause, and the very broad interpretation of article 114 TFEU under the 'effectiveness' approach of the ECJ is striking in that regard.[287] Combined with the inherent broadness of concepts as trade or 'the market' – it is difficult to find something that will not potentially, now or in the future have an effect on trade – these competences have had a decisive effect on the overall competence of these entities. Both the structure of the competence, and the focus of this key EU competence, therefore strongly follow the federate modification on this point.

On the other hand, the internal market in the EU also relies heavily on negative integration, and thereby on the Court of Justice, as often no political consensus can be reached to support positive integration. This important role of negative integration forms an important confederal element, albeit one squarely within the field of the internal market. These strong and broad prohibitions maintain a certain minimal level of integration for which no political agreement is necessary, and which, more importantly, cannot be lowered via ordinary legislation. In that way, they show a lack of political trust, a need to fall back to a legal structure where no political agreement can be reached.[288] These confederal elements are strengthened by the requirement of qualified majority for legislation and unanimity for Treaty amendment, emphasizing the importance of the Member States, and causing the fall back option of negative integration to be relied upon more often. Different from the Articles, however, these prohibitions underlying negative

285 Case C-380/03 *Tobacco Advertising II*.

286 Von Bogdandy even went as far, already in 2000, to state that 'In the context of the aforementioned competencies, the Union can hardly be distinguished from the central level of a federal state.' Von Bogdandy (2000), 33.

287 Clearly many differences can be identified as well, yet the mechanism itself is very similar: the creation of an almost *pseudo-kompetenz-kompetenz* out of a trade power due to the fact that every subject matter can be made to relate to trade in some way or degree,

288 See below chapter 3, section 2.4.2. for a more detailed analysis of this function of negative integration in a confederal system.

integration have actually functioned in the EU, largely due to the Court of Justice and the reception of its case law in the Member States.

Despite these limited confederal elements, the market related competences of the EU are significant, and on the whole certainly come much closer to the federate modifications than to the far more limited powers of the Confederation in this field. Something that cannot be said about the more limited external and military competences of the EU.

4.3.3.2 The relative absence of war and defence competences

The external dimension of the EU is rapidly expanding, and forms a challenging new frontier for EU law. The establishment of a President of the European Council with external responsibilities, a High Representative and the European External Action Service provide clear illustrations, even if they also show the sensitivity of this field and the desire of the Member States to retain control. [289] The external clout and status that a functioning internal market provides externally, furthermore, should also not be underestimated. In this sense the role that the EU may play in preserving or enhancing the external status, especially for some of the larger Member States, certainly forms one of the elements in promoting and supporting EU integration.

Nevertheless, the centre of gravity for EU competences remains internal and market orientated, especially if compared with our US examples. This internal focus stands out even more clearly in the area of defence. The EU does not come close to the military objectives or competences of the either the Confederation or the Federation.[290] Be it due to the protective shield provided by that same US Federation and NATO, the different European attitude towards defence and the military, the method and path of European integration after two world wars, or to the many other reasons that might have contributed to its internal focus, the EU never did develop a strong military dimension.[291] The different attempts to increase the level of military and

289 See respectively art. 15(6), 18 and 27(3) TEU, as well as Council Decision 2010/427 of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJ* [2010] L 201 p. 30. For a detailed overview and analysis of the EEAS see: S. Blockmans and C. Hillion (eds), EEAS 2.0 *A legal commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service* (SIEPS and EUI 2013), available at: http://jura.ku.dk/pdf/nyheder/2013/eeas20/.

290 Furthermore, even though art. 42(7) TEU contains an obligation of mutual assistance in the case of attack, this does not require direct military engagement, but only the duty to provide aid and assistance. The EU, on other words, does not even form a defensive military alliance. See the House of Lords, European Union Committee, *The Treaty of Lisbon: an impact assessment* (London, HL, 10th Report, session 2007-08, 2008), points. 7.113-7.117.

291 Although, especially with today's eyes, the European Defense Community, which was one ratification away of becoming a reality, entailed an astonishing level of integration, including even European uniforms!

defence integration faltered. The European Defence Community proposed by Pléven failed when the French National Assembly did not ratify it.[292] The WEU, which went back to the 1948 Brussels Treaty, never truly developed either and formally seized to exist on 30 June 2011.[293]

More military cooperation, partially replacing the WEU, is of course developing, partially due to the necessity of cutting military spending.[294] Lisbon also increased the capacity of the EU in this field, and, more importantly, envisions more far-reaching cooperation in the future. Amongst other things it points to a future 'common Union defence policy', which 'will lead to a common defence, when the European Council, acting unanimously so decides.[295] The common security and defence policy further entails military cooperation whereby Member States make military capabilities available to the Union.[296] In addition a European Defence Agency is to be set up, coordinating the military capability and development of Member States.[297]

Despite these military competences, most of which depend on possible decisions in the future by the way, and the gradually increasing external competences of the Union, the EU does not come close to the total external and especially military competences of even the Confederation. Competences which included the power do declare war, raise an army and direct its operations. The Federation, as we saw, could even deploy these troops against unruly states. The EU does not have such powers, nor is it conceivable that it would develop such powers anywhere in the foreseeable future.

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292 See R. Dwan, 'Jean Monnet and the Failure of the European Defence Community' 1 *Cold War History* (2001), 141.

293 See the Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, signed in Brussels on 17 March 1948 by Belgium, France, Luxembourg, the Netherlands and the United Kingdom, as well as the statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty, Brussels, 31 March 2010.

294 In a letter of 2 September 2011, for instance, the foreign ministers of France, Germany, Italy, Poland and Spain asked High Representative Ashton to: 'Examine all institutional and legal options available to Member States, including permanent structured co-operation, to develop critical CSDP capabilities, notably a permanent planning and conduct capability.' The UK position is, however, diametrically opposed. UK foreign Minister Hague said, for instance: 'I have made very clear that the United Kingdom will not agree to a permanent operational HQ. We will not agree to it now and we will not agree to it in the future. That is a red line.' See http://euobserver.com/13/113569.

295 Art. 42(2) TEU. In that case the Council shall 'recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.'

296 Art. 42(3) TEU. See art. 43 and 44 TEU for further details on what type of missions are envisioned.

297 Art. 45 TEU.

4.4 Sub-conclusion: An interesting mix of central authority

Assembling the larger picture on objectives, attribution and competences an interesting blend appears. At the structural level the EU has incorporated several important federate modifications. Most importantly its doctrine of attribution and the purposeful interpretation of competences by the ECJ come much closer to the Federation than to the Confederation. The EU utilizes an implied powers doctrine, combined with the extra possibilities that Article 352 TFEU offers. Through these channels its many objectives amplify its competences in a way that would have been completely unacceptable in the Confederation. Not surprisingly, these modifications played an important role in the development of the EU. Just as in the US Federation, they allowed it to develop, achieve its objectives, and adapt far better than the Confederation.

The EU also comes much closer to the Federation as far as internal powers to regulate commerce are concerned. Even though the Confederation also had the explicit *objective* to create an internal market, and even contained some prohibitions that resemble the four freedoms, it did not have any *competences* to achieve its internal economic objectives, nor an effective system to enforce them.

In its turn, however, the EU clearly does not come close to the external competences of the Confederation, let alone to those of the Federation. The EU thereby emerges as something like a *mirror-image of the Confederation*: both cover one side of the competences awarded to the Federation. This is interesting as confederal systems historically were generally more concerned with the external than with the internal dimension of government. This does not mean that the EU necessarily has more or less far-reaching powers than the US Confederation. After all the power to wage war is highly significant. Yet it is so in a very different and less day-to-day manner than the competence to create and regulate an internal market.

In any event the EU has not been given the *combination* of internal and external powers that were granted to the US Federation. Interestingly this also means that the *development* of the EU is to a certain extent the mirror-image of that of the Confederation as well. Supporters of the Confederation tried to expand the powers of Congress to regulate the economy, seeing how these internal powers were important to effectuate the external objectives and competences of the Confederation. The EU, on the other hand, is gradually seeking its way to more and more coherent powers externally, as these also relate to its internal objectives, and become increasingly important once a far-reaching internal cooperation has been established. As in the Confederation, however, also granting the 'other half' of competences increasingly threatens the confederal nature of the polity, and the constitutional counterweight offered by the fact that Member States so far retained the 'other half' of competences.

The consequences of this reversed focus of the EU as compared to the Confederation will be discussed further in the analysis below. Before we try to establish such consequences, however, it is important to also compare the institutional system within which these competences are to be exercised, and the degree to which the EU has incorporated federate modifications in the institutional dimension as well.

5 Institutional modifications

Having compared the key foundational, structural, and competence modifications underlying American federation, this section will look at three key institutional modifications. First, the modifications concerning the representational scheme, and how these were translated into the structure and functioning of the legislature. Second, the federate introduction of a powerful central executive. Third and lastly, the creation of a supreme central court.[298] Jointly these three modifications were instrumental in strengthening the institutional system of the American Federation. They addressed several vital weaknesses of the Confederation, and brought the institutional structure of the Federation in line with its new and strengthened foundation.

5.1 Institutional modifications: Representation and the legislature

The first institutional modification concerns the representative scheme as institutionalized in the legislature. This was one of the main battlegrounds in Philadelphia. Any modification on this point was understandably seen as vital for the functioning and nature of the Union to be established.

5.1.1 Representation and the Confederal legislature

The institutional structure of the Confederation was limited. It reflected the revolutionary belief that centralized power, non-elected elites and especially executives were sources of tyranny.[299] For these reasons the legislature should be predominant, and even that body should be kept on as short a popular leash as possible. In addition true republicanism required government as close to the citizen as possible, meaning as much power as possible should remain with the states. Reflecting these views, the institutional structure of the Confederation was dominated by Congress, which in turn was dominated by the states.

298 As the Confederation did not have a central bank, and the Federation only established a central bank in 1791, the European Central Bank falls outside the scope of our comparison. This increasingly central institution will, however, be included in our overall assessment, and especially in our discussion of the EMU crisis, and obviously forms an interesting federate element in the EU.

299 Wood, (1991), Beeman (2006).

The single chamber of Congress was made up of *annually* appointed 'delegates' from the states. Congress convened for several months per year starting the first Monday of each year, and elected its own president.[300] As 'sovereign equals' each State had one vote in Congress. The vote was cast by the majority of its delegates present. States could send between two and seven delegates, and each determined the way in which its own delegates were selected. No person, however, could serve as a delegate for more than three years in any period of six years, so as to prevent a tyrannical oligarchy from developing. Legislative proposals could be made by any delegate, only requiring one other delegate to second it.

Consequently, delegates really were representatives of their state, and not holders of a personal mandate. A position reaffirmed by the right of each state to replace any of its delegates whenever it so desired, and the practice of providing delegates with written instructions.[301] John Adams described Congress as 'not a legislative assembly, nor a representative assembly, but only a diplomatic assembly.' Randolph for his part even stated that: 'They have therefore no will of their own, they are a mere diplomatic body, and are always obsequious to the views of the states.'[302]

It should be noted, however, that despite their status as representatives, it could matter greatly which individuals sat in Congress. The limited means for transportation and communication of the time, combined with the inherently limited hold of written instructions over a determined mind, meant that delegates did have considerable discretion.[303] Also, the parliamentary *modus operandi* of Congress – for instance the tradition of breaking up in smaller subcommittees to prepare proposals, which were then debated and amended in a plenary session – allowed for persuasion and the winning over other delegates. *A fortiori* one strong delegate could have a decisive influence *within* his own delegation.

300 Art. V Articles of Confederation.

301 A practise, however, that must also be appreciated against the quite general practise in the state assemblies of constituents providing their representatives with written instructions, which were generally considered binding. The North Carolina, Pennsylvania, and Vermont Constitutions, for instance, even explicitly allowed such binding instructions for their own members. Wood (1969), 190.

302 Van Tyne (1907), 542.

303 Especially where the delegate was a major figure in his home state, and where the instructions themselves sometimes left important decision up to the discretion of the representative to get the best result possible. See for example the crucial debates on the settlement of western lands, as described by Onuf (1987).

One effective individual could therefore have a significant influence.[304] In this way, Congress was an interesting blend of a meeting of state representatives and a parliamentary assembly. Structurally it was more like the Council of Ministers or COREPER, yet it often operated more as a Parliament.

Congress held the full legislative power vested in the Confederation. Despite the emphasis on sovereign equality, and contrary to common assumptions about confederations, *most issues in Congress were decided either by normal majority or by a qualified majority of nine States*.[305] Even fundamental decisions such as engaging in war, concluding alliances, coining or borrowing money, raising land and naval forces, appointing the Commander in Chief or appropriating money from the states could be taken by a majority of nine out of thirteen. The decision to admit new states only required a normal majority.[306]

Roughly 70% of the votes was, therefore, required to legislate on most core issues, whilst a blocking minority required at least five States. Consequently the confederate system in itself did not require too obstructive a majority for decision-making.[307] Yet in practice it turned out that blocking minorities were (too) easily formed along different political lines such as North versus South, or landed versus unlanded factions.

5.1.2 The federate modifications to the legislature and the system of representation

In contrast to the Articles, the institutional framework of the Federation was more geared towards ensuring energy and effectiveness in the centre. Fear of tyranny and loss of State sovereignty were still influential forces at Philadelphia, but they were no longer as pervasive and all determining.[308] In addition, as discussed above, the federate government became a separate government, meaning it could no longer incorporate state institutions in its design. As a result the institutional framework of the Federation was much

304 Burke, for instance, singlehandedly ensured the defeat of several proposals, and ensured that the second article of the Dickinson draft was altered to emphasize the sovereignty of the states.

305 Art. IX Articles of Confederation.

306 Art. XI Articles of Confederation.

307 Note that, for instance, the Swiss Diet under the Restored Swiss Confederation of 1815 could also act via qualified majority on multiple issues. The Inner Council of the Diet in the German Bund, a body which utilized a weighted voting system, could even decide on many issues by a simple majority. Decision making by majority can, therefore, not be seen as a federate element in itself. A conclusion which also further illustrates how confederalism is often supranational in character, and should not be mistaken for or confounded with Intergovernmentalism.

308 For the interesting mix of reasons underlying this shift, see chapter 5 below on the procedural aspects underlying the US transition towards a federation.

more elaborate and powerful.[309] A choice that, in turn, shifted attention to the creation of controlling mechanisms at the federate level: checks and balances became necessary to prevent these powerful institutions from abusing their newfound powers, and to provide some kind of safeguards for the states.

The institutional arrangements that were designed to achieve these aims, and their actual development over time, form a fascinating study by themselves. They have been analysed extensively, and unlike those of the Confederation, are very well known. As indicated earlier, the discussion here focuses on those elements most relevant for our comparison: the modifications to the representational scheme and the organization of the legislature. Both of these were seen as essential in remedying the weaknesses of the Confederation. At the same time these modifications had to safeguard a sufficient degree of autonomy for the states. The inherent tension between these aims formed one of the main bottlenecks at Philadelphia, and could well have sunk the entire undertaking. A Compromise was reached, however, incorporating some of the key balancing exercises underlying the federate legislative structure.

First, a bicameral Congress was established. Following one of the central compromises in Philadelphia, the lower house, called the House of Representatives, was based on proportional representation: one man one vote. A system that greatly favoured the more populous states. Representatives were directly elected per congressional district for a term of two years. The purposely brief term would keep Representatives on a short popular leash to their district. A measure that was designed to safeguard a certain level of republicanism even in such a centralised government. At the same time the representation per district also undermined the capacity to make a coherent stand in the House *as a state*. Each state was effectively divided in multiple factions per district whose interests would not always overlap.[310]

In return, the smaller States,[311] received recognition in the upper house, the Senate. Each state was guaranteed two senators regardless of population.[312] The compromise was more subtle than that however. The lower

309 Tribe (1988), 209 et seq, as well as Federalist Papers, no. 48, and Works of Alexander Hamilton 76, 80-81 (Hamilton 1851).

310 Federalist Papers No. 10.

311 In coalition with proponents of a more aristocratic constitution: senates had been one of the central bulwarks in the states against radical democracy See below chapter 5, section 3 on the 'anti-democratic' forces in Philadelphia, as well as McDonald, (1968).

312 This of course became one of the standard solutions to the inherent tension in federations between regional equality and individual equality. See generally P. King, 'Federation and Representation', in: M. Burgess and A-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993), 94 et. seq. The two senators per state not coincidentally is the one truly entrenched state right in the constitution.

house, for instance, received more powers regarding the purse, re-tilting the balance of power somewhat again towards the more populous States. In turn the Senate was given important powers in the field of external relations. Senators, however, would not cast one vote per state as first proposed. Instead they would cast their vote individually and independently of each other, altering the state-focussed representational nature of this chamber, and of the senators. States were not to be indivisible entities that spoke with one voice.[313]

Senators, furthermore, were not to be direct representatives of the State administrations. They became elected officials with an independent mandate, forming part of the separate federate government.[314] To that end Senators were elected by their State legislatures for a period of *six* years. Besides their role of safeguarding the federate autonomy of the States, this long period of office also reflects a second function of the Senate. It was to serve as a more stable buffer against the politics of the day. As a more aristocratic chamber, with older, more experienced members, who by their longer term were more isolated from daily politics, the Senate would balance the perceived democratic excesses of the confederal period.[315]

At the same time their long immersion in Washington, especially if they served more than one term, also meant that senators had time to become part of a truly federate elite. They could develop a certain loyalty to the central government, also because their own powers and fortune were bound to it.

Congress became the central legislative organ. Except for budgetary issues both chambers received the right of initiative and amendment, and both needed to give their consent before any proposal could become law. Importantly, ordinary majority became the rule for most legislative decisions. With a separate direct government the requirement of a qualified majority was no longer seen as required or justified.

One further important modification was made by the inclusion of the executive in the legislative process. Congress was to be legislatively checked by the new institution of the President, who was given the power to veto any piece of legislation. A veto that could again be overturned by a two-thirds

313 As well as – inadvertently – opening up the way for party politics in the senate. This further affected the nature of the Senate by making it less of a state-representative organ, and more of a party political one with a strong state-focus. Imagine for instance two, or more, representatives in the Council of Ministers, where voting rights would be determined by national political weight multiplied by EU voting weight. A thought experiment that also clearly highlights the difference between representing states and peoples.

314 Cf in this regard, however, also the *Bundesrat* system, which comes much closer to the EU system.

315 For a more detailed analysis of this aristocratic counter-coup in Philadelphia see chapter 5, section 3 on the anti-democratic revolution.

majority of Congress.[316] A legislative modification related to the objective of creating a sufficiently effective executive that would not be completely dominated by the legislature.[317]

5.1.3 The EU legislature and system of representation

As with the institutional framework of the Federation, the rather special system of the EU has been the subject of much research.[318] Again, our discussion here will be limited to those parts most relevant for the specific comparison made here.[319]

The EU does not have an institution comparable to the Confederal Congress, nor does it have any institution approaching its dominant position. The legislative functions and powers of this organ have been spread over the Council of Ministers, the European Parliament and the European Commission. Since Lisbon, furthermore, the European Council has, both formally and more dominantly, entered the legislative field in the broad sense.[320] The result might appear as rather clear parallel with the bicameral solution of the Federation, even including a legislative role for the executive. This parallel is, however, deceptive.[321] Due to the way in which this split has been designed and has developed, the end result conforms much stronger to the confederal system.

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316 In addition Congress was of course checked by the new Supreme Court, which could enforce the constitutional limits on the federal government. An innovation that reflects another major shift away from the paradigm of the legislature as the unlimited source and holder of authority to that of a legally limited government.

317 Rakove (1996): 'Having stripped executives of power during the Revolution and Confederation period, the Constitution's drafters struggled to reconstruct a sufficiently energetic executive through painful steps, against opponents who continued to express suspicion of over powerful executives. As Rakove sees it, the only unifying 'first Principle' was 'the desire to enable the executive to resist legislative encroachments.'

318 Generally see Kapteyn and VerLoren van Themaat (2008), 181-311, Chalmers (2007), 86-130, D. Curtin and T. Heukels (eds), *The Institutional Dynamics of European Integration. Liber Amicorum Henry G. Schermers* (Martinus Nijhoff 1994), J.H.H. Weiler, 'European Models: Polity, People and System', in: P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (Kluwer 1998), ch. 1, M. Westlake, '"The Style and the Machinery": The Role of the European Parliament in the EU's Legislative Process', in: P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (Kluwer 1998), ch. 5, F. Scharpf, P. Schmitter, and W. Streeck, *Governance in the European Union* (Sage 1996), P. Pierson, 'The Path to European Integration: A Historical Institutionalist Analysis' 29 *Comparative Political Studies* (1996), 123, R. Keohane and S. Hoffmann (eds), *The New European Community: Decision-making and Institutional Change* (Boulder1991).

319 This chapter will, therefore, also not set out the familiar system of the EU separately.

320 See for a clear assessment Editorial Comments 'An ever Mighty European Council' 46 *CMLRev* (2009), 1383. Also see the detailed discussion of the EMU crisis in this regard below in chapter 13.

321 Although potentially instructive, this observation also does not intend to make any normative statement on whether the EU *should* copy the bicameral American solution.

5.1.3.1 The Council of Ministers

To start with the Council of Ministers, the institution that might resemble the Senate in the sense that it represents the Member State interest, and counterbalances the more 'European' worldview of the European Parliament and the Commission.[322] Although the Council shares these functions with the Senate, its composition and nature are more confederal in nature.[323] Very different from Senators, who – very intentionally – were made independent and integral parts of the *national* government for six years, ministers remain truly embedded in their national system.[324] Clearly their national position differs, but all of them *derive their power solely from their national office*. In addition they tend to be firmly embedded in their national structures. For instance, ministers usually operate in some form of cabinet in their home state, depend on a national political party for re-election or re-appointment, and are controlled by their national parliament, provided it manages the apparently difficult technique of controlling their executives' Brussels operations.[325] It will largely be their national media, furthermore, that shapes their image in these primary national arenas. Not only do they, therefore, have a professional obligation to represent the interests and viewpoints of their Member State,[326] they also have strong political incentives to do so. The ties that bind overwhelmingly lie at the national level.[327]

In fact, ministers are even more closely bound to their Member State than the confederal delegates to Congress were, even taking smart pones out of the equation. Although delegates also sat in their state assemblies, received instructions, and could always be recalled from their part-time confederal function, they were elected for a year and often served consecutive terms. As such, during sessions of Congress their primary status was

322 Cf art. 16(2) TEU stating that the Council consists of one 'representative' per Member State, holding that the minister must be authorized to 'commit the government' and 'cast *its* vote'. Also see Rosas and Armati (2010), 80.

323 Also in light of the heavy involvement of national bureaucracies in the sub-levels of the Council. For an overview of these groups see the list annexed to Council document 5869/10 REV 1, of 11 February 2010, POLGEN 11, leading up to COREPER. See art. 16(7) TEU, and M. Westlake and D. Galloway, *The Council of the European Union* (3rd edn, Harper Publishing, 2004), 201, stating that 'COREPER is 'one of the most powerful organs within the European Union's institutional structure.'

324 In this sense the EU system comes much closer to the German federal solution in the *Bundesrat*. Also see chapter 12 on the necessary adaption of national constitutional roles to participation in the EU.

325 See however the House of Lords Select Committee as a noteworthy exception, providing scrutiny and analysis at a very high level. See for instance their thorough analysis of the Lisbon Treaty *'The Treaty of Lisbon: An Impact Assessment* (London, HL, 10th Report, session 2007-08, 2008).

326 Schütze (2009), 1084.

327 In this regard COREPER provides an interesting, though relatively small, counterweight of individuals who, though depending on national mandates, are Brussels-based.

that of a delegate.[328] They were, for this period, *part of a confederal institution*.[329] For ministers, their functioning in the Council is of a more secondary status, though increasing in terms of time and impact. Also the parliamentary process of Congress differed strongly from the functioning of the Council, which procedurally comes closer to a traditional negotiation between states, albeit within the framework of a supranational organization.[330] An effect that is strengthened by the fact that there is only one representative per state, instead of the potential seven in Congress.[331] Winning over the majority of a delegation is not a possible tactic in the Council. The *form* of Congress, therefore, to a certain degree controlled the *functioning* of the delegates, in a way that the Council does not.

The use of qualified majority voting (QMV) and weighted voting are two further institutional components that significantly impact on the nature of the Council, and thereby the EU. There has been a gradual increase in the use of QMV, up to the point where, with some important caveats, it could now be described as the default option.[332] A development often cited as prove for the uniqueness of Europe, and the move away from intergovernmentalism and confederalism. As we saw, however, QMV also was the norm in the Confederation, even for some extremely far-reaching decisions. Decisions that, if entrusted to the European level at all, would certainly carry a requirement of unanimity in the EU. The QMV requirement in the Council, furthermore, is far removed from the ordinary majority, which is the rule in both the House and the Senate, and even applied to sever-

328 For the significant impact that this can have, also compare the development of Commissioners, who even if Eurosceptic at arrival, tend to become more pro-integration during their term, if only already because their position and responsibilities requires them to. Not only where one sits, but also where one lives, listens and lunches determines where one stands.

329 COREPER forms an interesting exception to this rule, and the significant power of this group can be seen as an important modification to the confederal scheme. This body of permanently Brussels based representatives forms a powerful EU institution capable of making many decisions. On the bond that can develop between members, even representatives of national interests as in COREPER, from extended cooperation and the EU perspective, consider the parting speech of French Ambassador Boegner in 1972. A fierce Gaullist, after 11 years in COREPER he stated 'J'ai aimé ce Comité, M. le Président, comme nous l'aimons tous. Je dirai comme un marin aime son bateau, comme un paysan aime son champ ou sa vigne, comme quelque chose à laquelle nous sommes attachés de toutes nos fibres et je dirai par notre nature même.'J-M. Boegner, 3 February 1972, accessible via www.ena.lu. [last accessed April 1 2012].

330 Despite the formal requirement of QMV, for instance, the Council usually strives for consensus. Dann (2010), 247.

331 This also is a very significant difference with the US Senate. Having two 'representatives' per State, especially if these are elected by the people, opens the way for much more politics Also it should not be forgotten that in the US political parties were developed first, and only then was the mode of election for Senators altered.

332 See art. 294 TFEU, now aptly called the 'ordinary legislative procedure', which requires QMV.

al decisions under the Articles. Adding the requirement of unanimity on some points, the QMV element of the institutional framework more closely resembles the Confederation than the Federation. That is, one of the hallmarks of supranationalism in fact corresponds more to a confederal, than a federal set-up.

The asymmetric voting weight in the Council, on the other hand, complicates the picture and is one point where the EU deviates from the Articles and incorporates at least part of a federate modification.[333] The Confederation clung to sovereign equality despite significant differences between its members. The federate compromise allowed for proportional representation in the House, but maintained parity between the States in the Senate. The EU, on the other hand, has introduced forms of proportional representation in both the Council and the European Parliament.[334] This can be seen as both a federate and a confederal element: on the one hand it shows a larger degree of political surrender, so to speak, by the smaller states, somewhat resembling a federate bond. On the other hand, it shows a very high concern for the status and relative power of each state, more resembling a confederal logic. In a sense, one could say that the weighing makes the EU more federate for smaller states, and less federate for larger ones. An effect that is offset in part, by other institutional elements such as the requirement of unanimity for some decisions, and the more federate surrender by large states to the Commission and especially the European Court of Justice.

Except for the mixed effect of the asymmetrical voting, therefore, the Council rather strongly resembles the Confederate model. A finding that is especially interesting in light of the rather strong position of the Council, and its subsequent effect on the EU as a whole. For the relative dominance of the state-oriented Council itself is another clear confederal element, one that only has been strengthened by the increased role of the European Council.[335] The new role for the European Council, and the strong way in which this role has been taken up so far, sometimes even seeming to reduce the Council of Ministers, the Commission and the European Parliament into mere executing authorities, has clearly increased the confederal element

333 Art. 16 TEU.

334 Historically this also made sense: for a long time the Council of Ministers was clearly the dominant institution, so that more power in the European Parliament would never have compensated the larger states for the relative loss of power in the Council. The very powerful position of the House, in other words, made the compromise possible in the US. This would imply that only where the European Parliament would become much stronger, could a more Senate-like organization of the Council become acceptable to the Member States.

335 Within the EU this dominance need hardly be explained. For a more detailed discussion of the power of the European Council see Werts (2008).

in the EU institutional framework.[336] More even than through its formal powers,[337] the European Council can be seen as part of the EU legislator by the indirect control it has over the Council of Ministers,[338] which is composed of individuals that are generally under the control of the head of state, or at least the cabinet, nationally, and over the Commission through its agenda setting capabilities.[339]

5.1.3.2 The European Parliament

The European Parliament more resembles Congress in working methods and parliamentary nature.[340] Though the primary status of MEP's is linked to the centre, even stronger so than was the case for confederal delegates, clearly many differences exist as well.[341] MEP's, for instance, represent the people of their Member States,[342] and not their governments.[343] They are elected directly by the people, hold a personal mandate, cannot be recalled, and have one vote each.[344] Most of all, the European Parliament is far from

336 One could see this development as a conferral correction: the increased power of the European Parliament, once combined with the power of the European Commission and the increased scope and impact of European law itself, caused the Member States to introduce a more powerful confederal institution, directly imbued with the political power of Heads of States. In the longer run, however, such a move may end up only increasing the federalization / central authority of the EU. For it also means that the Heads of State have themselves become *parts of the EU framework*. Especially where national parliaments are increasingly incorporated as well, and national courts already are, this means the EU is slowly incorporating more and more of the national institutional framework. The responsibility shouldered by Merkel in the Euro crisis could be seen as an example of such a development. See also Dann (2010), 264-65, and Werts (2008), 197 et seq. The fact that the European Council now even has Rules of Procedure governing its operation further illustrates this development or assimilation, See European Council Decision 2009/882 of 1 December 2009, *OJ* (2009) L 315/51.

337 See for instance art. 82(3) and 88(3) TEU directly involving the European Council in the legislative procedure.

338 Dann (2010), 263. See further below the detailed discussion of the EMU crisis in chapter 13.

339 Rosas and Armati (2010), 76, who regard it as 'neither a legislative body' which at the same time has become '(…) the pinnacle of the framework it once eschewed.'

340 As Congress, for instance, the European Parliament also conducts much of its work in smaller committees. See R. Corbett, F. Jacobs and M. Shackleton (eds), *The European Parliament* (7th edn, John Harper Publishing 2007), 126 et seq.

341 Westlake (1998) and P. Craig, 'Democracy and Rule-Making within the EC: An Empirical and Normative Assessment' 3 *European Law Journal* (1997), 105.

342 Different see Schütze (2009), 1086, who does claim that the EP represents a European people as a whole.

343 Also see art. 2 and 3 of Decision 2005/684 on the single statute or MEP's *OJ* (2005) L 262/1, holding that MEP's 'shall not be bound by any instructions.'

344 Art. 14 TEU. Granting each national group of MEPs a weighted vote for their nation would be one option: that would, however politicize the EU on a national level, and block the development of parties. Also it would lead to a winner takes it all system in the European Parliament, with the minority doing little, except perhaps campaign in their Member States for the next chance. This clearly is les ambitious politically and more confederal as a model, but comes closer the perception of representing the people.

the dominant institution that Congress was, both due to limits in its own power and its encapsulation by powerful other institutions.[345]

As the House, the European Parliament is to a certain extent based on proportional representation. Crucially, however, the European Parliament is degressively proportional, granting a minimum of six representatives to the smallest states and a maximum of ninety-six to even the largest.[346] As a result inhabitants of smaller states are significantly overrepresented when compared to inhabitants of the largest states. A lack of one-man-one vote that has attracted significant criticism, most notably from the German *Bundesverfassungsgericht*.[347] In any event the proportional representation in the European Parliament does not go as far as in the House, but retains a certain confederal, statal focus.

The European Parliament ordinarily votes by regular majority, giving one vote to each MEP and not to each state. The election of MEP's is determined by the Member States, some following a district system, some using national lists. The House, however, is fully based on a district system, which has a significant impact on the nature and functioning of this institution. It further weakens the statal focus, which is still far more prominent in the European Parliament. In addition, due to the two-year term its members are up for virtually constant re-election and are bound closely to their local interests.

The House, furthermore, has certain key institutional powers that the European Parliament lacks, such as the right of initiative, including in budgetary matters.[348] Most importantly, however, Congress as a whole forms the whole legislative power only subject to a reversible veto by the executive. The legislative power in the EU is far more bound up with the other branches. The European Parliament therefore does not compare with the House. And although there was no clear counterpart in the Confederation, this *relatively* weaker role of the European Parliament in the EU also adds to an overall confederal element in the legislature.

345 This is not to deny its significant influence, especially compared to its days as a mere Assembly. Influence which might well exceed that of some national parliaments (Dann (2010), 255).

346 Art. 14 TEU.

347 For a detailed analysis of the BVG decisions on this point see below chapter 8, section 4.4.

348 Except on budgetary issues the Senate also has a right of initiative. Budget proposals may only come from the House, a deliberate limitation on the Senate that was a part of the Philadelphia Compromise. For the strengthened powers of the European Parliament on the budget, see art. 314 TFEU, especially 314(7)(d).

5.1.3.3 The European Commission

The third institution in the legislative process is the Commission. At least in most fields of EU competence this institution is armed with an exclusive right of initiative.[349] The Commission also holds some very limited direct legislative competence,[350] and, in practice much more importantly, may be delegated (quasi-)legislative powers by the Council.[351] It has also been given a role in the process for Treaty amendment.[352]

In its legislative capacity the European Commission has no confederal counterpart, since Congress had a full right of initiative.[353] Under the federate set-up, however, the executive was also given a role in the legislative process, especially with the presidential veto. The Comparison does not go very far however, and it cannot be said that the EU incorporated this modification as such. The American executive was very differently composed with the one elected President who, with no right of initiative only received a limited veto.[354] The Commission on the other hand received the exclusive right of initiative, which also removed this core legislative power from the Council and the European Parliament.[355] The Commission was, therefore, largely given a role at the beginning of the legislative process. Although it can withdraw its proposal, it received no veto power at the end of the EU legislative process.[356]

The innovative nature of the Commission, at least in its legislative capacity, is therefore also born out by our current comparison.[357] In addition, however, the confederal prism might explain and put into context that innovation. With the rather strong confederal nature of the Council noted above, something of a counterpart was needed to control the Member States. Especially in the beginning with a very weak European Parliament which could

349 Art. 17(2) TEU and 294(2) TFEU. The Commission may withdraw or amend its proposals during the legislative procedure, and the Council may only deviate from the text of the Commission proposal by unanimity. (art. 293 TFEU).

350 Art. 106(3) TFEU and art. 45(3)(d) TFEU.

351 Art. 290-291 TFEU. These power can be very broad, but may not concern the 'essential elements of an area.'

352 Art. 48 TEU.

353 Even though the Committee of the States, as the European Commission, could be delegated powers, including some legislative powers.

354 In practice the President can of course suggest legislation, or even have it introduced on the floor via through allied Members of Congress.

355 Although both the veto and the right of initiative can be seen as blocking powers: both can prevent any legislation from being adopted, but cannot ensure their adoption.

356 An interesting exception now exists to this general rule under Article 27(3) TEU, where the consent of the Commission is required for the Council to adopt its decision on the organisation and functioning of the European External Action Service.

357 Also see J. Temple Lang, 'How Much do the Smaller Member States Need the European Commission/ The Role of the Commission in a Changing Europe' 39 *CMLRev* (2002), 315.

not play the role of the House, and without knowing how the Court would assert itself. Since there could be no strong central executive either,[358] a more federate element in the legislative process was needed to stabilize the constitutional structure.[359] At the same time, this central element should not become too powerful. In a more confederal style it, therefore, only received a negative power, to withhold a proposal.[360] Additionally it was to be composed in a very confederal manner, with Commissioners being appointed by each state, and larger states even receiving more than one Commissioner in the beginning. Even though these Commissioners have to be 'objective' and independent this set-up is there for a reason.[361]

The Commission can, therefore, be usefully understood as an attempt to infuse a certain controlled amount of federate power into the overall structure, thereby counteracting the confederal elements. With the empowerment of the European Parliament, the European Court of Justice, the European bureaucracy and the European Central Bank, the Commission may by now, however, seem one of many federalizing elements. This evolution within the institutional structure and balance of power within the EU, and how it relates to the confederal – federate spectrum, will be further discussed below. For from the confederal perspective the simultaneous ascendancy of the European Council, the increasing powers of the EU, the strengthening of the European Parliament and the apparent squeeze on the role of the Commission might all be logically related.

On the whole, however, especially looking at the post-Lisbon situation, the EU forms a blend of confederal elements and federate modifications. The representational scheme remains largely in the confederal spectrum. Not just because there is no central people to represent at the EU level, but also because the representation of the Member States has not been incorporated into a separate, central institution as the Senate, and because the European Parliament, despite its direct election, still represents citizens per Member State. The requirement of QMV, furthermore, is no proof of federalization either. In fact it more resembles the situation under the Articles. At the same time, the legislative institutional framework far exceeds that under the Articles, and both the Commission and the European Parliament are permanent

358 See section 5.2. below.

359 Kapteyn and VerLoren van Themaat (1998), 195 et seq.

360 With of course an additional steering power: it decides how the proposal will first be formulated and framed, all later amendments requiring political agreement between multiple parties.

361 All attempts to reduce the Commission so far have therefore stumbled on the importance that Member States apparently place on 'their' Commissioner. An importance that, for that reason alone, should be taken seriously. See in this regard the attempts, from Nice to Lisbon, to reduce this to a more manageable number. Lastly, the reduction envisioned by art. 17 (5) TFEU was postponed by the European Council (Presidency Conclusions of 11 and 12 December 2008, par. 2, EU Council 17271/08).

Brussels-based institutions, providing a truly central input in the legislative process, with the Commission even *representing* the central interest.

5.2 Institutional modifications: The executive

Before we draw more general conclusions on the institutional qualification of the EU between our confederate and federate poles, however, we must also take into account the other two modifications concerning the executive and the judiciary. The next sections will compare the EU with the impressive executive modifications that took place: From virtually no central executive the United States introduced what, to many contemporaries, must have resembled a republican king.

5.2.1 The weak executive under the Articles

The Articles intentionally did not create a strong, separate executive. The executive branch was still too strongly associated with monarchy and tyranny. Reliance was placed on the states as the primary executive.[362] Some form of administration had to take place, however, and, since Congress only convened for several months per year, the periods in between sessions needed to be covered as well.[363]

For these reasons, the Articles allowed Congress to set up a 'Committee of the States' (the Committee).[364] Initially it would only sit during recess, but the Committee soon became permanent.[365] It consisted of one delegate from each state, its president to be appointed by Congress. Congress could, and did, delegate far-reaching powers to the Committee, including making binding requisitions from the states in terms of money, troops and naval forces.[366]

Importantly, the Articles also allowed Congress to establish 'such other committees and *civil officers*' as it deemed necessary. Congress could then delegate part of its powers to these Committees and officers. Under this procedure a form of administration was created. The central offices were the

362 As discussed above many of the states did not have separate executives either, or certainly not very strong ones.

363 Jensen (1970), 361-362.

364 The position of the executive had been better under the Dickinson draft, which had envisioned a stronger and permanent Committee, more akin to the European Commission now.

365 Jensen (1970), 135-139.

366 See art. X of the Articles of Confederation. Those powers of Congress requiring a majority of 9 in Congress could not be delegated.

Treasury, the State department and the War department.[367] The Confederation did, therefore, have some form of an administration, and at least in law had the powers to develop it further. The administration created during the Confederation even formed the basis for that of the later Federation, which simply took over the existing people and structures.[368]

Clearly this administration was not nearly as elaborate as modern day bureaucracies – Treasury had 15 civil servants – but this should also be seen against the general background of government in those days.[369] Compliance was very limited however, and the weak executive power of the Confederation was seen as one of its core weaknesses.

5.2.2 The powerful executive in the Federation

The impressive arsenal of powers combined in the presidency more than illustrates the determination with which the executive flaws of the Confederation were addressed.[370] As pointed out by opponents of the Constitution, and internally admitted by its proponents, the presidency certainly approached some monarchs in power, if not in nature. The President received an impressive array of competences indeed.[371] Powers enhanced by the fact that the President became the head of a full-blown, and entirely separate federate government. The historical coincidence that the first president to-be was already a given in the figure of Washington undoubtedly helped in establishing such a strong executive.

As a result of this executive upgrade, the federate government no longer had to rely solely on the States for execution. This not only isolated the federate government from any ill will, but also from incompetence in the states. For most state governments lacked efficient executives of their own, generally having been designed from forceful yet untested revolutionary first principles. It actually was the federate bureaucracy that would later form

367 A development that is similar to that in the United Provinces, where the States-General could delegate powers to committees made up of one representative per Province, together with the *Greffier* and the Counsellor Pensionary (*Raadspensionaris*). The primary committees established in this manner concerned foreign affairs, finance and the navy. In the United Provinces, however, the *Council of State* and the *Stadtholder* formed additional executive and governing bodies.

368 Jensen (1970), 348.

369 It may also be related to the experience under the British Empire, which had a tradition of governing its colonies with a remarkably low number of, usually very highly educated, elite civil servants.

370 Privately even strong nationalists/federalists admitted that there existed 'a preposterous combination of powers in the President and the Senate' (Edward Carrington to Jefferson, Oct. 23, 1787, Boyd (ed) *Jefferson Papers* XII, 255). At the same time the creation of a strong, personal, presidency was one of the major victories of the federalist during the convention.

371 See art. IV US Const.

the model for improving the executive organization of many states. Besides circumventing national executives, the federate government therefore also played a part in creating an effective bureaucracy at the statal level, further improving the effectiveness of the overall system.

In the original design, the President was to be elected by an electoral college. A deliberate attempt to make him responsive to the people yet at the same time somewhat isolate him from too direct a democratic influence. Also, it was assumed that the general public would simply not know the relevant candidates. It would consequently be best for them to elect a middleman who did, and who could choose for them.[372]

His popular election also meant that the President did not depend on the states for legitimacy. His authority derives directly from the whole of the American People. In fact he is the only single elected official who is elected by the people as a whole, and therefore boasts a legitimacy that trumps that of any other elected official individually. The Federate institutional scheme thereby not only went from uni-polar to multi-polar, it also based the different poles on different, yet fully representative footings.

Combining the separate federate government with the array of powers vested in the executive, the scene was also set for a large, permanent bureaucracy to be developed at the central level. As everywhere, with the advent of the modern state, this bureaucracy and the executive expanded significantly.

5.2.3 The executive in the EU

The executive branch is the one where the EU has remained most visibly confederal.[373] The structural similarities with the Confederation are especially strong and interesting here.

Firstly, and most importantly, as the Confederation, the EU has a relatively weak executive. Its own executive capacity, except in the case of the CFSP, is largely located in the European Commission.[374] As a watchdog

372 Currently the delegates commonly pledge to follow the results of the general election, and in 30 states they are obliged by law to do so. The directness of the election is further tempered by the 'winner takes all' system applied in most States, which means that the majority of the voters in one State get to award all the electoral votes, in one way leaving the minority unrepresented.

373 For an analysis tracing the American and the German model of Executive Federalism in the EU, see R. Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' 47 *CMLRev* (2010), 1385.

374 Some executive powers may be conferred on the Council. See art. 291 TFEU, as well as artt. 24 and 26 TEU. The Council also has the task of overseeing the Stability and Growth Pact, see art. 126 TFEU. In addition, special agencies and specialized bodies may be established. In the area of the CFSP furthermore, one can see a certain 'brussalization' of the national executives, which can be seen as a sort of federal capacity building at the national level.

of the *acquis*, the Commission acts as a first line enforcer, especially in the field of anti-trust.[375] It also controls Member State compliance, assisted by complaints from concerned parties, and can start infringement procedures, potentially ending in a fine being imposed by the ECJ.[376] In addition the Commission executes and oversees many EU programs, including important subsidy schemes.

The Commission, however, has a very limited institutional capacity, certainly considering the vast area that needs to be covered. In addition, the Commission does not have a police, an army, or other means to actually enforce. It either acts through another legal act (be it a decision or a court case), or must rely on a Member State.[377] Even this limited capacity, of course, far exceeds the extremely inadequate capacity of the Confederation, which approached zero. Yet overall the EU largely depends on the Member States for execution.[378] The Member States have to execute and enforce the overwhelming part of EU law. [379]

Second, the composition of this main executive organ shows clear similarities with the Confederation. As the Committee, the Commission consists of one member per state, and acts collectively as the executive to which further powers can be delegated.[380] The Committee as found in the Articles, furthermore, was a deliberately weakened version of the one envisioned by the original draft of the Articles. The Committee Dickinson originally envisioned was stronger and even more comparable to the European Commission. His draft proposed a permanent Committee consisting of one delegate per state, which would decide by normal majority of seven. It would foremost be a type of war-department coordinating the war against Britain, but would also oversee regular execution and coordinate with the States.[381]

375 Art. 17(1) TEU, art. 101-107 TFEU.

376 art. 258-260 TFEU. Also see art. 7 TEU, where the Commission plays a role.

377 An interesting exception to this is the financial power the Commission has gathered through managing large financial schemes. Although still dependent on Member States to reclaim any sums paid, the Commission can have the power not to grant or pay out any more sums. This financial power is an interesting addition to institutional power, one that is also used by the US federate government to gain influence where competences might fall short. The Confederation did not have this option because it lacked sufficient resources.

378 Lenaerts (1990), 232, 237, and K. Lenaerts, 'Regulating the Regulatory Process: 'Delegation of Powers' in the European Community', 18 *European Law Review* (1993), 27.

379 Chalmers, (2007), 348 et seq., D. Curtin, *Executive Power of the European Union* (OUP 2009), esp. chapters 2, 4, 5 and 6.

380 Art. 17(3) TFEU and art. 290 TFEU. These power can be very broad, but may not concern the 'essential elements of an area.'

381 Art. XIX of the Dickinson draft.

Obviously many important differences exist as well. The Committee, for instance, consisted of delegates, and not of individuals specifically selected as independent Commissioners. No requirement of independence existed for Committee-members. The Committee also did not have the general 'watchdog' function in the way the Commission does, nor were the powers delegated to it as extensive. Furthermore, the Committee, being formed out of delegates, was not designed as clearly as a distinct institution, balancing out Congress, the way that the Commission does with the Council of Ministers and the European Parliament.

Most of all, however, the Committee was not given the opportunity to really establish or proof itself.[382] What is especially interesting, however, is that the Confederation had the internal *capacity* for institutional development to support a more active confederal executive, and that his capacity was envisioned along the same structural lines as in the EU. Legally, nothing prevented the Committee, with its subcommittees, to develop into a prototype of the European Commission. It lacked, however, certain key resources, such as supremacy and direct effect backed by a court, a stronger institutional position such as the exclusive right of initiative, an independent term of 5 years, clearly pre-defined legal powers, and above all stronger political support.

As a result, the European system, though similar in some regards, is far more effective and stable than the confederal one. One interesting, and largely confederal, innovation that should not be overlooked in this regard, furthermore, is the extensive use of committees and agencies.[383] The executive capacity, and reality, of the EU is strongly determined by such forms of cooperation. In a sense these intermediate forms of executive powers could be seen as a confederal means of increasing executive power without needing to create a separate or fully central executive authority. Rather the executive capacity if the Member States is coordinated and somewhat controlled. Despite the risks and weaknesses, this use of intermediate executive forms is very interesting, and could form one further tool in stabilizing the confederal form more generally. As such an analysis of these forms from the confederal perspective could be highly interesting, even though it can only be highlighted here.

At the same time the EU also strongly differs from the federate modifications. The EU executive simply cannot compare to the vast powers and separate government controlled by the executive in the US. No institutions equivalent to the US President exists in the EU. The newly created 'President'

382 H.A. Johnson, 'Towards a reappraisal of the Federal Government 1783-1789' 8 *American Journal of Legal History* (1964), 316.

383 Curtin (2009), 105 et seq., Chalmers (2010), 117 et seq.

of the European Council, for instance, does not even begin to compare to the powers of the US presidency,[384] nor does the President of the Commission.[385]

The EU, therefore, has not incorporated the federate executive modifications. Structurally and institutionally the executive organization of the EU remains in the confederal spectrum. At the same time the EU is clearly more effective, also as far as enforcement is concerned, than the Confederation. Rather than incorporating a federate modification, it seems the EU has managed to increase the effectiveness of a confederal set-up, partially through intermediate executive forms, of course acknowledging the many limits and weaknesses that remain. The EU has created mechanisms to coordinate and utilize the national systems in existence, rather than creating its own executive capacity, and ultimately supporting it with the right to use force. A system that obviously relies heavily on the effectiveness and compliance of national executive infrastructure, yet for a confederal system operates rather effectively.[386] At the same time the effectiveness of EU law has obviously been greatly enhanced by one of the key federate modifications that was taken over: a central court.

5.3 Institutional modifications: The judiciary

The third and last key institutional modification compared here concerns the central judiciary. A modification again shows a radical shift from the confederate to the federate system, and one that has had a major impact on the functioning of the federate system. A modification also that is of obvious interest to the EU.

5.3.1 The (absent) judiciary in the Confederation

The Confederation all but lacked a judicial power. Congress did hold some limited judicial competences.[387] It was the court of last resort in 'all disputes and differences now subsisting or that hereafter may arise *between two or more States* concerning boundary, jurisdiction or any other causes whatever.'[388] Importantly, this jurisdiction explicitly included disputes about land granted by two or more states to different individuals, a major

384 Art. 15(6) TEU. Note in this regard that the Dutch version uses the term '*voorzitter*' (chairmen), which is useful as aversion had arisen to the idea the there would be an 'EU President'.

385 Art. 17(6) TEU.

386 See in more detail below the analysis on the EU and rule by law in chapter 3 section 4.

387 This was in line with the radical ideology of the time, where more and more state legislatures, as highest authorities and 'voice of the people', were taking over judicial tasks. Faith in direct republican rule and distrust of elites was outweighing fear of the legislature, and the need to control power via separation and checks.

388 Art. IX Articles of Confederation.

source of disputes at the time.[389] No separate confederal court, however, was established to oversee the interpretation of, or compliance with, confederal law.

The procedure for the judicial function of Congress, furthermore, was very construed, and rather resembled international arbitration. Each state could bring a case before Congress, which would then order the states to appoint 'commissioners or judges (…) by joint consent.' Where parties could not agree Congress would select three candidates from *each* of the states. Parties were then allowed to alternately strike out one name until thirteen names were left.[390] Out of these thirteen, seven were then selected by lot. The tribunal thus constituted could then 'finally determine' the dispute by a majority of at least five.[391] A final and binding ruling could also be given *in absentia*. Judgements became part of Congress' proceedings. This procedure was used, albeit not frequently, and was useful in preventing escalation in some very contentious cases.[392]

The absence of any further judicial institutions not only meant that there was no court to ensure compliance, but that there also was no organ outside of Congress to authoritatively interpret the Articles. This for instance where Congress itself disagreed over the scope of its own powers or the content of certain obligations. As a result there also was no authoritative guidance for state courts, or state political institutions on their obligations under the Articles. As is well known this situation was about to change quite dramatically under the federate constitution.

5.3.2 The essential judiciary in the Federation

The creation of a Supreme Court was a crucial federate modification, certainly with hindsight. Obviously it is also one of particular interest for the EU. The lack of any supervision, as well as the lack of an institution that could authoritatively interpret the Articles, was seen as another major flaw of the Confederation. Together with the shift towards the notion of a government *under* the law, and the conception of a constitution as a legal bond on all public power, a Court was seen as a logical and necessary part of the federate government. Some proposals, especially Hamilton's, had gone further and had wanted to give the centre and with it the Supreme Court, a negative on all State laws, but this was seen as unnecessary and as going to far.[393]

389 See Johnson (1964), 323 et seq.

390 Where one of the parties would not cooperate, the secretary of Congress would strike out the names for them, so the case could move forward.

391 N.B. the Articles say nothing about the law applicable to the dispute.

392 Jensen (1965), 327 et seq.

393 Proposals that were more in line with the British tradition of the House of Lords.

The Supreme Court was the only federal court established directly by the Constitution. It derived its power and legitimacy directly from that constitution. Going against republican practice in the States, the justices were to sit 'during good behaviour', and not to be re-elected at regular intervals. A significant step, especially when considered together with the enormous increase in authority of these justices. The justices, furthermore, were to be selected by the President. They were therefore selected by the central government and not by the States.[394] The only State check was to require the consent of the Senate.[395]

That the Supreme Court, and the lower federal courts that were to be established, would supervise the States and nullify any state laws that conflicted with the supreme federal law seems to have been intended. At least from the federate logic of a government under law exercising powers delegated by the people, the possibility of constitutional review seems to follow quite logically.[396] Originally 'intended' or not, it hardly needs to be said that in the 1803 judgment in *Marbury v. Madison* constitutional review was adopted, and has played an important role in the American constitutional model ever since.[397] Many significant changes and adaptations to the constitutional model, for example, occurred via constitutional interpretation. The Court has also played an important part in the constantly shifting balance between state and federate powers. As such the Supreme Court has fulfilled a crucial role in providing, developing, ad guarding the legal framework so important for federate systems.[398]

5.3.3 The judiciary in the EU

The Judicial branch is clearly the branch where the EU has gone furthest in incorporating federate modifications. [399] A development that has been vital for the nature and functioning of the EU, and forms one of its key innova-

394 Tribe (1988), 244. A system that still, therefore, allowed for significant political influence. An effect that only increased with the way the Court developed, and the introduction of the two party system, as the hearings of Bork and more recently justice Sotomayor attest.

395 Art. II, sec. 2 US Const.

396 Note, however, that the US Supreme Court did not have access to the debates in the Convention until after the 1820's when the notes by Yates were published. Only in 1840, furthermore, were the reliable, notes by Madison published. All early cases were, therefore, necessarily decided on a very limited access to the 'original understanding' of the constitution.

397 Nowak and Rotunda (2004), 6 et seq., Choper, Fallon, Kamisar, and Shiffrin (2006), 1 et seq.

398 Elazar (2006), Watts (1999).

399 'The Change in the status of the Court has been enormous, so that today it more closely resembles the equivalent institution of a fully fledged federation (for example the United States Supreme Court or the German BundesVerfassungsGericht) than any other institution of the Community' T.C. Hartley *Constitutional Problems of the European Union* (Hart Publishing 1999), 12. Cf also J. Rinze, 'The Role of the European Court of Justice as a Federal Constitutional Court', *Public Law* (1993), 426.

tions compared to the standard confederal model.[400] Historically confederal systems relied on forms more akin to arbitration and structured negotiation than adjudication: The old Swiss Confederation, the United Provinces and the early German confederation, for instance, all primarily relied on forms of arbitration rather than real adjudication.[401]

The European Court of Justice might not be a Supreme Court in the strict sense.[402] It only has a very limited direct jurisdiction, and formally stands in a cooperative relation with the Member State courts. At the same time it is a very powerful central court, generally obeyed by national courts, controlling a body of law that, at least from its own perspective, trumps all national law.[403]

As we saw the Confederation completely lacked this judicial element, as well as an effective executive. This meant that the political process alone was responsible for compliance and interpretation. The flip side of this was that all conflicts or disagreements over the Articles *became political*. The question, for instance, whether Rhode Island had met its financial requirements was to be decided by Congress. A process that allowed for political bargaining, and brought the self-interest of other states who had failed to pay in full into play. This reliance on self-policing failed, and created free-rider and prisoners-dilemma like incentives to violate obligations. The fate of the Stability and Growth Pact, or the application of article 7 TEU, form EU examples of this problematic confederal dynamic where no stronger mechanisms for compliance and interpretation exist. [404]

400 Cf amongst many others, K.J. Alter, *The European Court's Political Power* (OUP 2009), J. Komarek 'Federal Elements in the Community Judicial System – Building Coherence in the Community Legal Order' 42 *CMLRev* (2005), 9, J.H.H. Weiler, 'The Least Dangerous Branch: a retrospective and prospective of the European Court of Justice in the arena of political integration', in: J.H.H. Weiler, *The Constitution of Europe: Do the new clothes have an emperor?*, (CUP 1999), 188, A. Barav, 'Omnipotent Courts' in: D. Curtin and T. Heukels (eds), *The Institutional Dynamics of European Integration. Liber Amicorum Henry G. Schermers* (Martinus Nijhoff 1994), 265, or J.H.H. Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' 26 *Comparative Political Studies* (1994), 510.

401 Forsyth (1981), 44. The later courts that developed in the German Bund, furthermore, were rather ineffective as courts, as also noted by Madison in his analysis of confederal government.

402 Art. 19 TEU.

403 See in this regard also the more confident qualification in A.M. Donner, 'The Constitutional Powers of the Court of Justice of the European Communities', 11 *CMLRev* (1974),127.

404 See art. 126 TFEU, as well as further below chapter 13 for an application of the confederal approach to the EMU crisis.

The ECJ therefore strongly resembles the federate modification, with the Member States not only legally binding themselves through a legal document, but also granting a *central* institution the *judicial kompetenz-kompetenz*, so to speak, to authoritatively interpret that document. [405] Some confederal qualifications, however, need to be made.

First the Court does not have the same direct inherent jurisdiction as the US Supreme Court. The EU Treaties place specific limits on the jurisdiction of the Court. [406] Second, the composition of the Court shows some confederal undertones. The right of each Member State to select its judges for the ECJ and the General Court, as well as the relatively short term for judges as opposed to their appointment for life in the US are clear confederal elements. Even if these elements are cancelled out by the professionalism of the judges and the micro-cosmos of the Court, they remain a clear reminder of the status of the Member States, and the importance of nationality.[407] A fact the new selection committee cannot alter, although it can at least impose a quality threshold on national choices.[408]

Third, there is the privileged standing for Member States, including the right to intervene or request a grand chamber.[409] Fourth, and lastly, the growing challenge, at least theoretically, to the supremacy of EU law by national supreme courts, and the resulting 'dialogue' between the ECJ and national courts, is a further confederal judicial element. As was discussed above, the supremacy claim of the EU does not have the same federate basis as the one of the US. The role of the ECJ, therefore also differs, and to an extent includes the assignment to convince the national courts to accept its lead, and to keep them on board so to speak. The dialogue that now exists between the ECJ and the national courts, after all, is difficult to imagine between a federate Supreme Court and state courts. Something that again reflects the fundamental confederal elements retained by the EU.[410]

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405 Lenaerts (1990), 263 who sees giving a Court the power to umpire between federal units as a constituent part of federalism, just as Watts (1998). Further see P.R. Dubinsky, 'The Essential Function of Federal Courts: The European Union and the United States Compared' 42 *American Journal of Comparative Law* (1994), 295.

406 Its jurisdiction is furthermore limited in some regards, such as by Art. 24(1) TEU, art. 269 TFEU, art. 275 TFEU, 276 TFEU, as well as by the limited rights of standing for individuals.

407 Art. 19(2) TEU. See on the other hand relativizing the effect of this method of appointment F. Jacobs, 'Advocates General and Judges in the European Court of Justice: Some Personal Reflections', in: D. O'Keeffe and A. Bavasso (eds), *Judicial Review in European Union Law, Liber Amicorum Lord Slynn, vol. I* (Kluwer Law International 2000).

408 Art. 255 TFEU. See also P. Kapteyn, 'Reflections on the Future of the Judicial System of the European Union after Nice', 20 *YBEL* (2001), 188-189.

409 Art. 263 TFEU.

410 See further below chapter 10, section 8 for a more detailed analysis of supremacy from the perspective of confederalism and confederal popular sovereignty.

In any event and despite these confederal elements, it is beyond doubt that the EU has almost fully incorporated the federate modification of a central, supreme judiciary. A modification that has had a major impact on its functioning, and is generally seen as having been vital for its survival and development.

5.4 Sub-conclusion institutional modifications

Even from the necessarily brief and selective overview provided above, it is obvious that the EU institutional scheme far exceeds that of the Confederation.[411] At least in complexity and elaborateness it more resembles the federate constitution, having multiple distinct institutions dividing and connecting branches and mutually checking each other. A conclusion is only strengthened when the increasingly central European Central bank and the federate Monetary Union it presides over is added to the equation.[412]

A closer comparison, however, shows that as far as the nature and focus of the institutions discussed are concerned, strong confederal elements still exist in between these significant federate elements.

The executive has remained most clearly confederal, though it has been empowered compared to the virtually absent executive of the Confederation. Despite retaining a fundamentally confederal nature, furthermore, the EU executive has managed to achieve a relatively high level of effectiveness. It was partly enabled to do so by the most federate branch of the EU institutional framework, the judiciary. With the European Court of Justice the EU has almost fully incorporated the federate judicial modification that also proved so crucial in the US itself.

411 See for instance G. de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis', in: P. Craig and G. de Búrca (eds), *The Evolution of EU law* (OUP1999), 55 et seq. In fact historically confederations seem to have been generally underdeveloped institutionally. Both the Swiss Confederation and the German Bund, for instance, only had one formal institution in the form of the Diet (general assembly). The high level of institutionalization of the EU may, therefore, also be seen as a separate modification in itself. Cf also Forsyth (1981) p. 32.

412 See on the federal nature of the monetary union already the language of the Werner rapport in 1969, para 30, explicitly calling the ECB federal 'Considering the political structure of Community and the advantages of making existing central banks part of a new system, the domestic and international monetary policy-making of the Community should be organized in a federal form, in what might be called a European System of Central Banks (ESCB).'

The modifications to the legislature discussed here show more of a blended system, which combines confederal and federate elements, especially in the European Parliament.[413] Elements often quoted in support of the 'federal' nature of the EU, such as the use of QMV or the Council as an 'EU Senate', however, are not that federate at all. Rather these elements match the confederal scheme under the Articles.

Overall the legislative structure of the EU, and the representational scheme it contains, remains predominantly in the confederal sphere, also because there simply is no central people to federally represent at the EU level.

6 The Confederal Comparison: Overview and conclusions

Before further analyzing the results of our comparison it is useful to briefly combine and summarize our findings above. What is the combined conclusion on the constitutional DNA of the EU when compared against our sixteen (con)federate markers?

To begin with, none of the five fundamental modifications discussed were taken over. The EU is not based on a single people, and it may not use force or levy taxes. Amendment by majority it not possible, but secession is. Some other modifications have partially taken over the constitutional *function* of these foundational modifications, such as pseudo-amendment of the Treaty via judicial interpretation, or the effective levying of money from the Member States. Nevertheless, as far as its foundation is concerned, the EU has remained fully in the confederal camp.

The structural modifications compared provide an almost reverse picture: supremacy and direct effect have been taken over, even if the character of supremacy is different in the EU than it is in the US Federation. These two elements form pillars of the EU legal order. They have also allowed the EU to embrace the rule of law as a key instrument just as in the US Federation. The more fundamental federate foundation of a fully separate European government based directly on the people, was however not adopted. Rather the EU relies on a merged system, and, therefore, on the Member States' internal institutions to a very large degree.[414] As a result the system operates directly on the people but is not directly based on them, nor backed by its own separate level of government. This is not a novel point of course, but an important one for understanding the structural limitations and problems

413 Burgess (2009), 41: '(…) the existing institutional channels of the EU that represent the Member State governments, such as the Council of Ministers and the European Council that constitute the confederal dimension of the European project. The EU, we are reminded, is a political, economic, social and legal hybrid that is characterized by a combination of federal, confederal, supranational and intergovernmental features.'

414 See for instance Craig (1999), 16 et seq.

of the EU. After all, tension between foundation and structure can only be expected in such a situation, as will be further explored below.

The third cluster concerned the objectives and competences of the polities compared. Assembling the larger picture within this cluster, an interesting blend appears. First we saw that, as far as objectives were concerned, the EU differs from both the Articles and the US Federation through its dominant focus on internal objectives, and its relative lack of external and military ones. As it were especially these external and military competences that dominated the objectives of the Confederation, this leaves the EU, on balance, more on the federate side.

Second, and crucially the EU doctrine of attribution and the purposeful interpretation of competences come much closer to the Federation than to the Confederation.[415] The EU utilizes an implied powers doctrine, combined with the extra possibilities that art 352 TFEU offers.[416] Through these channels its many objectives amplify its competences in a way that would have been completely unacceptable in the Confederation. The important role this grants to the objectives, in addition to the actual power conferring clauses, can almost be seen as another federate modification in itself. Not surprisingly these modifications played an important role in the development of the EU. Just as in the US federation, they allowed it to develop, achieve its objectives, and adapt far better than the Confederation.

Thirdly, regarding specific competences, the EU also comes much closer to the US Federation as far as its internal powers to regulate commerce are concerned. Even though the Confederation had the explicit *objective* to create an internal market, and even contained some prohibitions that resemble the four freedoms, it did not have any *competences* to achieve its internal economic objectives, nor an effective system to enforce them. The EU does wield these competences, and does so in a way that strongly resembles the commerce clause and the necessary and proper clauses.

At the same time, however, the EU clearly does not come close to the external competences of the Confederation or the Federation. Despite the increasing relevance of the external for the EU, its centre of gravity remains internal. Interestingly the EU thereby emerges as something like a *mirror-image* of the Confederation: both cover one side of the competences awarded to the Federation. This is additionally interesting as confederal systems historically were generally more concerned with the external than with the internal dimension of government. Crucially this means that the EU does not necessarily have more or less far-reaching powers than the US Confederation. After all the power to declare and wage war is a rather significant one. Yet it is so in a very different and less day-to-day manner than the competence to create and regulate an internal market.

415 Douglas-Scott (2002), 261.
416 Dashwood (2009), 35 et seq.

At the institutional level three major modifications were highlighted in the legislature, the executive and the judiciary. The judiciary thereby formed the most clear and most far-reaching federate modification in the institutional structure of the EU. A completely separate court has been established, which has developed into a central and influential actor within the EU. The establishment of a Court is intimately related to many of the other federate modifications, and in fact largely responsible for several rather important ones.[417] Different from the US, however, this central court was not supported by its own branch of 'federal' courts.

The Executive, on the other hand, remained predominantly confederal. Although more developed than under the Confederation, it does not even approach the federate executive created under the President. In addition it largely remains dependent on the executive capacity of the Member States.[418]

The legislature presented a more mixed picture. As far as the decisional system is concerned the increased use of QMV in fact fully remains within the confederal prism, whereas the central role of state representatives in the decision-making process does so even more. The introduction and gradual empowerment of the European Parliament, especially after the introduction of direct elections, in turn forms an important modification. Even if degressively proportional, it creates a direct link between Member Peoples and the EU. In general, however, the decision-making is still dominated by the Council, Commission, and now increasingly the European Council.

This also brings us to the *representational scheme*, which was one of the key bones of contention in Philadelphia. Here the overall result seems more confederal. The European Parliament again forms a major innovation from the Confederation. Even leaving the confederal elements of the European Parliament aside, however, the overall balance of representation far more rests on statal representation than the more 'national' scheme developed in Philadelphia. Especially the strong influence of the Council of Ministers, and increasingly the European Council, are relevant in this regard. Where in the US Federation even the State vote was given to a federate institution with independent individuals, these EU institutions consist of direct state representatives whose European powers depend on their national roles. Different from the European Parliament, furthermore, their consent is always required for any act to become law. The representational scheme thereby directly reflects the lack of a single European people. This is a fundamental difference with the national scheme developed in Philadelphia, where not only one man one vote was introduced for the House, representing full political equality of all American citizens, but even the statal representation

417 See further below chapter 3, section 4 on the rule by law and the role of the ECJ in this regard.

418 Aided by direct effect and supremacy, that enlisted individuals and national courts to ensure the proper application of EU law. See also P. Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC law' 12 *Oxford Journal of Legal Studies* (1992), 453.

was subsumed in a federate institution. Especially nothing like the European Council, now gaining prominence, was created in the US. Instead, a powerful central executive was included in the federate legislative process. Overall therefore, the legislative structure, and certainly the representative scheme of the EU fall more in the confederal than in the federate camp.

Of the sixteen modifications discussed, the EU therefore remains on the confederal side of the equation for eight. (No single people, no force, no direct taxation, no amendment by majority, secession, merged government, the executive and the representational scheme). Five scored as federate, or at least predominantly so (Supremacy, direct effect, broad attribution and implied powers, internal commerce competences, and a central judiciary. Three are here qualified as mixed (objectives, external powers, and the institutional setup of the legislature). These are either blended, the EU conforms to neither, or equally to both.

On the *truly foundational modifications* therefore, the EU remains overwhelmingly confederal. It equally remains firmly in the confederal camp for several other rather fundamental points such as the use of a merged government, and the lack of a strong and independent executive.

Most of the federate modifications that have been taken over, on the other hand, concern the *legal infrastructure and competences*. These include the – mutually reinforcing – federate modifications of supremacy, direct effect, attribution, and the internal market competences. Many of these modifications were made possible by the *institutional* modification of a central court with the competence to rule on the interpretation of the Treaty. These findings have been summarized in the table below:

Category		Modification	US CF	Blended	US Fed.
Institutional	16	Judiciary			
	15	Executive			
	14	Legislature			
	13	Representation			
Competences	12	Internal / commerce comps			
	11	War and external comps			
	10	Doctrine of attribution			
	9	Specific objectives			
Structural	8	Direct effect			
	7	Supremacy			
	6	Separate or merged gov			
Fundamentals	5	Enlargement / secession			
	4	Amendment by majority			
	3	Taxation			
	2	Use of force			
	1	Single people			
			8	3	5
			US CF	Blended	US Fed.

Of course these comparative points only form one selection and their binary qualification as either confederate or federate does not do justice to the complexities involved. Nevertheless it is suggested that the overall outcome does have some value for better understanding where and how the EU can be placed on the spectrum between the American confederate and federate systems. Again taking the limitations of these comparative conclusions into account, the next chapter uses these comparative outcomes to develop some more general conclusions on the nature and functioning of the EU constitutional order. Conclusions which aim to test the value of the comparison made, and at the same time explore what this comparison can provide us with in terms of understanding, inspiration and perhaps even solutions to some of the problems facing the interesting constitutional creature known as the EU.

3 The EU as an inverted confederation with a federate superstructure: The strengths of a modified confederal form

1 Introduction: Three general propositions on the nature of the EU

So where do these comparative findings leave us? Switching to a more analytical mode this chapter further refines the semi crude results of our comparison. The central aim is to better extract and test any explanatory power for the EU they might hold.

To that end this chapter brings together the different comparative insights into three more general *propositions*. First, how the EU may be understood as an *inverted* confederation, which has reversed the traditional confederal focus from the external to the internal. Second, how the EU has adapted the confederal form by *reinforcing and burdening its confederal basis with a partially federalized superstructure*. Third, how this inverted and adapted structure *heavily relies on a rule by law*, and therefore on the very stable legal and administrative systems of its Member States. The term 'modified confederation' will be used to refer to these three propositions and the modernized system they jointly create more generally.

To expound and test these propositions they will be applied to the EU. In line with the overall objectives of this thesis the question thereby is whether these confederal propositions help us to better understand the nature and functioning of the EU. More specifically it will be examined if these propositions help us to better comprehend some of the surprising strengths of the EU, as well as some of its weaknesses.

To this end this chapter first introduces each proposition, and discusses how they flow from the comparative findings in the previous chapter. For each proposition, and the modifications underlying it, it will then be explored if they help explain some of the remarkable *strengths* of the EU's constitutional set-up. After all, confederal systems are not exactly known for their robustness, so it must be wondered how the EU has managed to survive so far. Has it, for instance, managed to remove or compensate for some of the structural weaknesses traditionally associated with confederal systems? Approaching the EU through these confederal propositions may, therefore, help to expose some of the hidden pillars of EU stability. Pillars which could then be further developed, or at least guarded from accidental demolition.

Subsequently it must also be examined if the modified confederal system of the EU, as captured in these propositions, may help to better understand the obvious *weaknesses* of the EU's constitutional structure. For several well-known ailments of the EU may be partially understood as logical consequences of its modified (con)federal set-up. Ailments which either can be traced back to the traditional weak spots of the confederal form, or which may have been newly created by the EU modifications to the traditional confederal form.

It should be noted that the analysis in this chapter remains descriptive. Although no longer based on a structured comparison alone, the analysis aims to describe and understand the EU constitutional system as it is, including both its strengths and weaknesses. It does not yet concern the question whether a (modified) confederal system is also an option that should be normatively desired.

1.1 Structure

In light of these aims this chapter is structured as follows. Section 2 first introduces the first proposition on the inverted nature of the EU confederal form, and subsequently explores its potential contribution to strengthening the constitutional framework of the EU. Sections 3 and 4 then do the same for the other two propositions on the federate superstructure of the EU and its reliance on a rule by law. Combining these three propositions, sections 5 and 6 then return to the withering criticism levelled by Madison against confederal systems: Do the modifications described help to alleviate the confederal ailments he diagnosed?

1.2 Caveats and limits

Clearly the comments in this section are equally affected by all the limitations of the comparison it rests on. In light of the type of analysis, its restricted scope, and the vast, multifaceted problems under study the limitations of these conclusions must again be stressed. Different conclusions and propositions, furthermore, could be selected for discussion, and even within the confederal perspective suggested much more work is required than can be done here.

Based as they are on a limited comparison, furthermore, and on the relatively abstract discipline of constitutional theory, the conclusions developed here cannot proof direct, specific causality, if only because they lack the empirical foundation such claims would require. Nor can they claim to be sufficient explanations, as many other factors relevant for objects and processes under study cannot be taken into account here. Rather, any conclusions drawn suggest likely relations and consequences based on the analytical, comparative approach followed. By themselves these might form the

basis for more specific research in the future. At the same time it is nevertheless claimed that the proposed conclusions are sufficiently likely, and offer a constructive framework to approach and understand the EU constitutional order. A claim at least made likely by the fit between some of the generally acknowledged strengths and weaknesses of the EU, and those indeed predicted by the propositions developed here.

2 The inverted confederation: Europe as Impire

Traditionally confederations were primarily focussed externally. Their main objectives and competences lay in defence and foreign policy.[1] Internally, their role was limited, and the members' internal organization was left relatively intact.[2] The US Confederation followed this traditional pattern. It had exclusive war competences as well as general external competences. Legally it removed the states from the international plane, as under the Articles these were no longer allowed to conduct independent external relations.[3] Its internal competences, on the other hand, were limited. Most importantly it lacked the power to regulate trade internally, even though the Articles explicitly contained prohibitions we would now qualify as negative integration. A lack of internal competences that, as discussed above, contributed to its overall instability.[4]

The EU *inverted* this traditional confederal pattern. It lacks the external, and especially the military, focus and competences of the Confederation. Instead its primary focus is *internal and economic*.[5] With its mutually reinforcing

1 The United Provinces of the Netherlands, for instance, originated *de facto* in the wartime alliance that was the Union of Utrecht of 1579, and its main powers remained in external relations, defence and crucially the navy. The original Swiss confederation (1291(or 1315)-1798) also was defensive in origin. The restored Swiss confederation (1815-1848) was aimed at both 'economic and military affairs', though its main focus was defensive as well. The economic dimension largely related to the attempted unification during the Helvetic Republic, which could not be undone. Rather, it was only after the more federate constitution of 1848 that the central union really entered the field of welfare and economy. The German Bund of 1815 was also mainly focussed on security and defence, even if this security focus was also focussed internally. Hence the later separate development of the *Zollverein*. Carl Schmitt even defines a confederation as an '*alliance*', being a 'contractual relation that obligates a state to go to *war* in a particular instance.' Schmitt (2008), 383. See further Lenaerts (1990), 233. Forsyth (1981), 17, 27, 29, 48, and 160, 190, and Elazar (2006), 7.

2 Jensen (1970), 133.

3 The fact that in practice the states often blatantly violated this obligation does not detract from the legal or constitutional focus of the Articles.

4 See chapter 1, section 5. A pattern also born out by its institutional development. The departments that were relatively developed were war, foreign affairs, and finances.

5 See also Forsyth (1981), 5.

objectives of European peace and prosperity its centre of gravity lies with the internal organization of its Member States and its market.[6]

The primary *instrument* chosen to achieve the objectives of peace and prosperity reflects this internal focus: economic integration, which is not just an end in itself but also fosters interdependence via peace-dependent wealth.[7][8] Not incidentally this instrument involves the creation of one *internal* market.[9] Constructions which Elazar pertinently defines as 'forms of confederation emphasizing shared economic rather than political functions', and as such form a 'postmodern application of the federal principle.'[10] Logically, the specific competences of the EU match its internal focus. As discussed above its key competences concern the development of an internal market, and other related internal objectives.[11]

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6 Chalmers, Davies and Monti (2010), 12, 676, Van Middelaar (2009), 224-225. M.P. Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights' 4 *European Law Journal* (1997), 55 or Elazar (2006), 53: 'because the countries of Western Europe had mature economies, economic integration was the most logical way for them to proceed. In doing so, they invented a new way to confederate, through the Union of specific functions rather than through a general act of confederation.'

7 Cf already the Schuman declaration of 9 May 1950 and its openly federal vision: 'The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification.' See in this regard also the neo-functionalist hopes underlying integration, which were based on the functionalist theories as developed by *inter alia* Mitrany and Haas. See D. Mitrany. 'The Prospect of Integration: Federal or Functional', 4 *Journal of Common Market Studies* (1966), 119, E. Haas, *Beyond the Nation State: Functionalism and International Organization* (Stanford University Press 1964) and P. Schmitter, 'Three Neo-Functional Hypotheses about International Integration' 23 *International Organization* (1969), 562.

8 Cf Habermas (2001a), 5, 7 and 13: 'EU elites have replaced the original aims (of integration) with an ambitious economic agenda'. Of course, as he states, this focus also is a weak point for legitimacy: 'Economic expectations are not a strong enough motivation to induce the population to give their political support to the risk-filled project of the creation of a "Union" that would be deserving of the name. for that we need a common value orientation.' and the problem therefore lies in 'disparity between dense economic and weak political interpenetration.'

9 See for instance the language in the Treaty of Rome where the customs union, free movement, and transport are all grouped in title II, appropriately called: '*The Foundations of the Community*'. See also case 26/62 *Van Gend en Loos*, where the Court unequivocally states that: 'The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states.' Also see H. Lindahl, 'Sovereignty and Representation in the European Union', in: N. Walker (ed), *Sovereignty in transition* (Hart Publishing 2006), 104.

10 Elazar (2006), 7.

11 See especially art. 3-5 TFEU, yet also art. 21 TEU, and above chapter 2, section 4.3.3.

On the other hand the EU plays a far less prominent role in general external relations, especially of the 'high politics' kind.[12] Its role is even more limited in defence and national security, especially when compared with the Confederation. Not incidentally the EU was created after two devastating wars *between* European nations. Europe had to be protected against its own (once) powerful armies and the nationalist ambitions and emotions that had inspired their use.[13] The luxury of this internal focus was of course made possible only by American (nuclear) protection,[14] which sheltered the EU from a more Spartan upbringing it might not have survived.[15] The fact that even the Russian threat and the heated fears of the Cold War, realistic or not, did not lead to more far-reaching military cooperation underscores this internal focus of the European project, and its lack of a strong external, and certainly military, dimension.[16] The failure of the European Defence Community and the Political Union further completes this picture.[17]

12 Art. 24(1) TEU not incidentally maintains a separate status for this area. See also E. Cannizzaro, 'Unity and Pluralism in the EU's Foreign Relations Power', in: C. Barnard, *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (OUP 2007), 232.

13 This transformation of nationalism into an enemy by itself may also have assisted in the non-military focus of the EU. After all military might is of no use against such an ethereal enemy, but might only help to increase it.

14 Cf. S. Hoffmann, 'Obstinate or Obsolete? The fate of the Nation-State and the case of Western Europe' , 95 *Daedalus* (1966), 3. Of course the US also had their own aims and uses for European integration. These included, *inter alia*, a strong western European block against Russia. See on this point T. Schwartz, 'The Skeleton Key: American Foreign Policy, European Integration, and German Rearmament, 1949-54' 10 *Central European History* (1986), 369, as well as the express desire of the Americans, already in 1949, for the Europeans to establish some form of 'supranational institutions, operating on a less than unanimity basis for dealing with specific, economic, social and perhaps other problems' (Minister Acheson to his European ambassadors, letter of 19 October 1949, in A. Milward, *The Reconstruction of Western Europe, 1945-1951* (Methuen & Co 1984), 391.

15 The cold-war reality of course also meant that the nations of Europe could not even have conducted much of an independent foreign policy even if they had united for that purpose. Cf Habermas as cited in J. P. McCormick, *Weber, Habermas and Transformations of the European State* (CUP 2007), 198.

16 The fact that some of the most dominant Member States disagreed significantly in world views also prevented joint action externally of course. Furthermore this is not to deny the clear threat that the six perceived Russia to be. Adenauer, for instance, saw a German-French cooperation as a clear means to protect western Europe against Russia (Cf his statements in J. Koch, 'Konrad Adenauer und der Schuman-Plan. Ein Quellenzeugnis', in: K. Schwabe (ed), *Anfänge des Schuman-Plans 1950-1951* (Bruylant 1988), 131 et seq. The more limited point here is that they nevertheless did not feel a sufficient need to set up an external defense capacity, such as in the US Confederation, to counter this threat.

17 The European Defence Community was a clear failure, and the WEU has equally never really played any role of significance. See for instance Dwan (2001), 141.

2.1 *The relevance of the external for the EU…*

Clearly these findings do not deny the increasing, and increasingly important, external dimension of the EU, also in 'high' politics.[18] Since the Treaty of Rome the EU has seen an impressive increase in its external objectives and powers.[19] The fall of the Berlin wall also pushed the EU further onto the international stage: one could say that before 1989 the wall also kept part of the high politics *out* of European integration.[20]

Especially with Maastricht and Lisbon, therefore, the EU has become an increasingly important international actor.[21] The establishment of the European External Action Service,[22] and the creation of the High Representative,[23] together with the 'incorporation' of the former third pillar are only recent, though significant, developments in this ongoing process.

In addition to these explicit external competences, furthermore, the external has become increasingly enmeshed with the 'internal' and economic competences. To begin with, and largely due to the progressive case law of the Court of Justice, the EU is externally competent where this is necessary to effectively pursue an internal competence or objective,[24] wherever it is provided for in a legally binding Union act,[25] or where the external act is likely

18 Cf in this regard also the 'Declaration on The European Identity' published by the Nine Foreign Ministers on 14 December 1973 in Copenhagen, especially point 6: 'Although in the past the European countries were individually able to play a major rôle on the international scene, present international problems are difficult for any of the Nine to solve alone. International developments and the growing concentration of power and responsibility in the hands of a very small number of great powers mean that Europe must unite and speak increasingly with one voice if it wants to make itself heard and play its proper rôle in the world.'

19 Under the Treaty of Rome, for instance, there were 86 treaty articles dealing with specific competences and decision-making rules. Under Nice this had already grown to 254, and Lisbon has only increased this number. See A. Maurer *Committees in the EU system: A deliberative perspective*, 8. Available via: http://www.sv.uio.no/arena/english/research/projects/cidel/old/Workshop_Firenze/contMaurer.pdf.

20 Cf also Van Middelaar (2009), 186, 190, and 255 et seq.

21 Most certainly so in areas where it has exclusive competences, such as in the CCP. See art. 206-207 TFEU and already Opinion 1/75 [1975] ECR 1355. Here the EU forms a strong block.

22 Art. 27(3) TEU, Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU) *OJ* (2010) L 201/30. Blockmans and Hillion (2013).

23 Art. 18 TEU.

24 Now also see art. 216(1) TFEU. Case 22/70, *AETR*, and for recent application the open skies cases, including case C-467/98 *Commission v Denmark* ('Open Skies') [2002] ECR I-9519.Further for the elaborate development of this principle P. Eeckhout, *The External Relations of the European Union: legal and Constitutional Foundations* (OUP 2004), ch. 3.

25 Opinion 1/94 *World trade Organization Agreements* [1994] ECR I-5267, para. 95, Opinion 2/92 *Third Revised Decision of the OECD on National Treatment* [1995] ECR I-521 par. 33 and Case C-476/98 *Commission v. Germany* (Open Skies) [2002] ECR I-9855 par. 109.

to affect common rules or alter their scope.[26] The internal competence, so to say, begets the external competence as well. These internal-external competences are, furthermore, flanked by the doctrine of loyal cooperation.[27] Even where the Member States remain competent to act, and even where the area concerned does not fall within the competence of the EU at all, their actions may not interfere with any EU measures in place. In this way EU measures affect the external activity of Member States in areas where the EU has no competence at all.[28]

Lastly, and conversely, the external relevance of the internal achievements of the EU should not be underestimated. Precisely by forming one coordinated block internally the external relevance of the EU and its members is enhanced. Larger Member States, who can with some credibility claim to speak on behalf of 'Europe' externally, may in this way enhance their external relevance, or at least somewhat reduce the loss of external relevance *vis-à-vis* upcoming powers. In this sense the EU can be seen as a *replacement* for Empire instead as the creation of an impire.[29] Smaller Member States may (jointly) acquire some influence on the international plane, which would be wholly absent without the EU. Lastly, the presence of a strong Europe on the multi-polar chessboard might be welcomed by different external actors, albeit for different reasons.

2.2 …but the primacy of the internal and economic

The inverted focus of the EU, therefore, does not imply the absence of an external dimension. Just as the American Confederation did have an internal dimension, the EU does have an external dimension, and one that is becoming increasingly important. In fact, just as one major challenge for the Confederation became to establish an adequate internal policy, one mayor challenge of the EU is to *add* a sufficiently strong and coherent external policy to its internal powers without overstepping the limits inherent in its (confederal) form. Yet, as the US Confederation illustrates at the same time, a strong unified external representation is not impossible in a confederation at all. Quite the reverse, in fact, as historically confederations were aimed externally, not internally.

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26 See especially Opinion 1/03 *Lugano Convention* [2006] ECR I-1145.

27 Though of course based in the Treaties. Since Lisbon see art. 4(3) and 24(3) TEU.

28 Art. 4(3) TFEU. See further Opinion 1/03, par. 119, and case C-459/03 *Commission v Ireland* [2006] ECR I-4635, par. 174. Also see C. Hillion, 'Mixity and Coherence in EU External Relations', in: C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited* (Hart Publishing 2010), 91. For an especially broad application of this normally already immodest principle see the PFOS judgment, case C-246/07 *Commission / Sweden* (PFOS) [2010] ECR I-3317.

29 Although generally the non-core parts of an empire did not have voting rights or veto's.

Nevertheless, these important external dimensions of the EU do not alter the EU's *primary* internal focus, and certainly not its focus on market over military.[30] A quantitative overview of the *Acquis* provides a clear illustration. A 2009 study, for instance, found that of all EU legislation in force on 1 July 2008, 42.6% concerned agriculture, and another 20% the internal market, including legislation on free movement. External relations, on the other hand, accounted for approximately 10%.[31]

Even though such a quantitative overview may ignore the qualitative importance of specific pieces of legislation, as well as non-legislative activities, and even though the fields of agriculture and the internal market have external implications, the overall trend is clear. Conversely, furthermore, and partially due to the linkage of internal and external competences, even most EU external competence are aimed at trade and commerce, and not at defence or general external relations. A fact nicely born out by comparing the role of the EU in international organizations. In trade related international organisations such as the WTO, the EU plays a dominant role, whereas it remain the Member States that dominate in organizations such as the UN or NATO.[32]

Above all, even when the external powers of the EU are duly taken into account, they do not come close to the exclusive external, and especially military, competences of the Confederation.[33] The Articles completely removed its members from the international plane and gave Congress the power to declare and wage war by qualified majority. At least comparatively, therefore, the EU has an internal and economic focus.

30 E-U. Petersmann, 'From State Sovereignty to the 'Sovereignty of Citizens' in the International Relations of the EU?', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 152. Cf also the description by Joshka Fischer of the EU's foreign policy given to Van Middelaar: 'Vergeleken met vroeger is het heel wat. Vergeleken met wat nodig is, is het niets.' (compared to the early days it is quite something. Compared to what is needed, it is nothing.' Van Middelaar (2009), 292.

31 Y. Bertoncini, 'La législation nationale d'origine communautaire: briser le mythe des 80%', 'Notre Europe, Les Brefs No. 13 May 2009, available at http://www.notre-europe.eu/uploads/tx_publication/Bref13-YBertoncini_01.pdf. Also see for similar conclusions C. Grønnegaard, 'EU Legislation and National Regulation: Uncertain Steps Towards a European Public Policy', *Public administration* (2010), 3 et seq.

32 Also see below chapter 4, section 3.1. on the limited reach of confederations in general in areas where law and civil servants play a more limited role.

33 See in this regard also art. 42(2) TEU and the 2008 Declaration of the European Council: 'The Treaty of Lisbon does not prejudice the security and defence policy of Member States, including Ireland's traditional policy of neutrality, and the obligations of most other Member States. (Presidency Conclusions of 11 and 12 December 2008, EU Council 17271/08 REV 1. See also Rosas and Armati (2010), 7 and 198.

2.3 Inverting the confederal pattern

Where the main objectives and competences of the Confederation, therefore, lay in external relations and war but were lacking in trade, the EU has *reversed* this pattern. The centre has acquired near federate powers to regulate all kinds of subjects as long as a certain connection to the internal market is present.[34] Defence, on the other hand, remains firmly with the Member States. The EU can therefore be seen as a *mirror-image of the Confederation* in terms of focus, objectives and competences. To borrow a term from Ferguson, Europe has been constructed as an *Impire*, with an internal focus on peace and prosperity, not an Empire with external military fears or ambitions.[35]

As the EU forms one of the most powerful economic blocks in the world, and taking into account the paramount importance of economic performance today, this might not be a bad choice.[36] The only point made here, with all caveats that accompany such a generalization of complex entities, is the general picture of an EU grounded in exactly the opposite arena of governmental functions and objectives as the US Confederation.

2.4 The constitutional benefits of inverted confederalism

It is submitted that this shift in focus and foundation – infusing a confederal basis with internal market objectives – has been an important modification of the confederal model, and that this modification has strengthened the constitutional framework of the EU in several ways. The next sections will discuss four of these structural benefits of inversion, being the more constant impetus for cooperation it provides (2.4.1.), the structural-institutional benefits of inversion (2.4.2.), the self deepening effect of an inverted focus

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34 As long as this dimension is present, even areas in which the EU does not have legislative competence as such may be addressed, even where an explicit ban on harmonisation has been included in the Treaty. Case C-376/98 *Tobacco Advertising I*, case C-380/03 *Tobacco Advertising II*, and case C-210/03 *Swedish Match*. M. Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' 12 *European Law Journal* (2006), 503.

35 See N. Ferguson, *Empire* (Basic Books 2004).

36 See also J. Huysmans, 'Discussing Sovereignty and Transnational Politics', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 218. Currently, furthermore, it seems the stock market seems a far more efficient way to acquire another nation than military conquest, and of course endless money has always been the sinews, or veins, of war. At the same time the ascending military might of China, estimated to have a fully modernized army by 20202, including modern aircraft carriers, stealth airplanes, cyber warfare capabilities and anti-satellite missiles, combined with the declining military might of the United States might seem a worthy cause of concern. Cf. The perhaps not fully objective 2011 U.S. Defense Department's annual assessment to Congress on the Chinese military, available via: http://www.reuters.com/article/2011/08/25/us-usa-china-idUSTRE77N5TY20110825.

(2.4.3.), and the coalescence of this inverted focus with a shift from state to market more generally (2.4.4.).

2.4.1 A constant impetus for cooperation

Most centrally it is suggested that its internal and economic focus has provided the EU with a more *constant* impetus for continued loyal cooperation than a focus on external relations and defence could have. It provided a better engine, or fuel cell, to power the continuous cooperation that is required to keep a confederal system moving and to prevent it from stalling or even disintegrating.[37]

One of the major problems for confederations always lay in the lack of effectiveness and enforcement. As soon as the benefits of the confederation became more remote, the temptation to pursue individual state interests increased, even where this would be detrimental to the whole, or even statal self-interest on the longer run. With a focus on defence, for instance, this meant that in times of peace or less direct threats effectiveness suffered, often to the breaking point.[38] The US Confederation is a clear case in point, as was duly captured by Madison

> 'The close of the war however brought no cure for the public embarrassments. The States relieved from the pressure of foreign danger, and flushed with the enjoyment of independent and sovereign power (…) persevered in omissions and in measures incompatible with their relations to the Federal Gov't and with those among themselves.'[39]

The internal market, on the other hand, provides *constant benefits* and constant opportunities for more future benefits. It also creates a constant risk of economic damage if a state ever becomes excluded, especially once its economy has come to depend on the internal market. Exclusion not just limits its access to the internal market itself, but also means that a state will have to compete on its own in a world increasingly organized in large economic blocks.[40] The cost of collapse or exclusion, furthermore, increases with integration itself: the further integration has progressed, the higher will be

37 Cf also Van Middelaar (2009), 38 on the internal dynamic of the EU's internal sphere.

38 Wood (1969), 359 and 361.

39 Madison (Sketch), 8.

40 This need for a European Block to compete with other blocks already formed a driving force at the establishment of the EEC. The Spaak Report, for instance, began: 'Entre les Etats-Unis qui, presque dans chaque domaine, assurent a eux seuls la moitie de la production mondiale, et les pays qui sous un regime collectiviste s etendant au tiers de la population du globe, augmentent leur production au rythme de 10 ou de 15% par an, l'Europe, qui avait autrefois le monopole des industries de transformation et tirait d' importantes ressources de ses possessions d'outremer, voit aujourd' hui ses positions extérieures s affaiblir son influence decliner, sa capacité de progres se perdre dans ses divisions.'

the costs of collapse or exclusion.[41] Crucially, this means that *the incentive to continue cooperation keeps pace with the demands made by integration*. The EMU and the sovereign debt crisis, which will be used as a test case for the confederal prism more generally below, provide a clear, if not even unnerving, example of how strong this internal impetus to cooperate has by now become in the EU.[42]

For these reasons an internal market creates a more stable basis of mutual interest, and therefore a more stable basis for cooperation and compliance, self-interest always being a preferable basis for a polity over enforced compliance.[43]

2.4.2 Structural-institutional benefits

An internal focus also appears more geared towards creating stable institutions. Once created, these institutions assist in maintaining cooperation, and more generally reduce the overall institutional weakness traditionally associated with confederalism.

An internal market entails constant interaction between Member States, individuals and institutions. This requires no army or strong international footprint, but does require more internal competences, more detailed rules guiding these contacts, and more technical administration. Importantly, the existence of multiple detailed rules, the individual interests concerned in economic integration, and the sheer number of individual interactions taking place on the market also increase the need for adjudication and accepting individuals as objects and subjects. Different from military operations, furthermore, market behaviour does fall under the normal scope of law and courts. Consequently the regulation of trade also generates far more interactions between confederal law, national legal systems and individuals than, say, conducting a military operation. Consequently the confederal centre must develop some legal-administrative capacity to deal with these interactions, and cooperation between national administrations, national courts and the confederal centre becomes more logical. Equally, doctrines of supremacy and direct effect therefore seem *more likely to develop* in such an entity focussed on internal organization.

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41 Here the relative success of the German Zollverein between 1834 and 1867 forms an interesting comparison that could be developed further. Just as an example, however, the *Zollverein*, forming a type of customs union between German states, outlived the German Bund itself. It even survived and continued to operate during the Austro-Prussian war where its members fought on different sides. Apparently the benefits of belonging to this economic union were not easily given up.

42 The embrace of the Internal Market with the Single Market Program in 1985 was, of course, also partially aimed at resolving the crisis of stagnation at the time. See the White Paper from the Commission: Completing the Internal Market COM(85)110 final.

43 Cf in this regard also our third general proposition below on the rule by law. Self-interest and the rule of law make for an effective combination.

The reasoning of the ECJ in *Van Gend & Loos* is instructive in this regard, linked as it is with the internal market objectives and protection of market parties.[44] For how to create an internal market where the actual parties that form that market cannot rely on it? The point is further illustrated by the failure of the Articles in this regard. The inverted internal focus of the EU, therefore, not only was a modification in itself, it might also have been instrumental in developing and supporting some of the other crucial federate modifications discussed above.[45]

2.4.3 The self-deepening effect of the internal focus

The focus on market and economy also adds a *self-deepening mechanism*. Once the logic of a truly internal market is accepted, every step of integration deepens and strengthens interdependence. This subsequently suggests additional measures to further develop the internal market, and to safeguard the effectiveness of the existing level of integration.[46] Once workers are allowed to move freely, for instance, regulation of diplomas and training follows, as does regulation of their remuneration, social benefits, followed by the rights of their (same-sex) partners and children, and the question how workers should unionize themselves in an internal market, and….[47]

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44 Case 26/62 *Van Gend & Loos*.

45 It also puts the overall power of the EU in perspective: yes compared to most confederations the EU has very far-reaching internal powers, yet these are offset by a lack of external powers which the Member States would not even dream of surrendering. The overall question, which had more power overall, is therefore difficult to answer, since it depends on a qualitative assessment of internal over external powers.

46 This does not deny the necessity of political will in this progress. As the stagnation before the Delors Commission and the 90's internal market program show, integration certainly was not a given. The claim is only that the logic of an internal focus is more conducive to deepening integration than an external focus.

47 Art. 45 and 49 TFEU. See amongst many others case 2/74 *Reyners* [1974] ECR 631, case C-340/89 *Vlassopoulou* [1991] ECR I-2357, case C-55/94 *Gebhard* [1995] ECR I-4165, case C-85/96 *Martinez Sala* [1998] ECR I-2691, case C-238/98 *Hocsman* [2000] ECR I-6623 case C-281/98 *Angonese* [2000] ECR I-4139, case C-224/01 *Köbler* [2003] ECR I-10239, case C-456/01, *Trojani*, [2004] Jur I-7573, case C-200/02 *Baby Chen* [2004] ECR I-9925, case C-291/05 *Eind* [2004] ECR I-10791, case C-209/03 *Bidar* [2005] ECR I-2119, (yet also see case C-158/07 *Förster* [2008] ECR I-8507), case C-60/00, *Carpenter*, [2002] ECR I-6279, case C-73/08, *Bressol*, [2010] ECR I-2735, case C-438/05 *Viking* [2007] ECR I-10779, case C-341/05, *Laval* [2007] ECR I-11767. In terms of legislation see Directive 2005/36 on the recognition of professional qualifications, *OJ* (2005) L 255/22, Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *OJ* (1968) L/2, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ* (2004) L 158/77. On the sensitive issue of recognizing relationships see art. 3(2) of the Citizenship Directive, as well as M. Bell, 'Holding Back the Tide? Cross-border Recognition of Same Sex Partnerships within the European Union', 5 *European Review of Private Law* (2004), 613.

The examples in the EU are endless, ranging from EMU[48] to (transcription of) names,[49] and from healthcare[50] to criminal sanctions for ship source pollution.[51] A process that itself is, of course, well known, but becomes especially relevant from a confederal perspective.[52]

This self-deepening tendency of the internal focus was further stimulated by the globalization of markets and the predominance of markets and 'the economy' over government. Privatization and liberalization, for example, expanded the reach of the market.[53] Where the scope and importance of 'the market' increases, so does the power to speak and regulate on behalf of that market. Certainly where this market is increasingly falling outside the already limited control of individual states anyway. In this sense, the Union's focus on economy and market caught the more general trend in political organization and global realities from state to market, a fourth strengthening element connected to inversion.[54]

2.4.4 Riding the market wave

Lastly, and related to the growing importance of the market, the internal focus of the EU also allowed integration to dress itself in the *seemingly value-neutral garb of economics*. Questions could be approached from, or translated into, the 'objective' science of economics. As a result the EU could adopt the powerful language of a technocratic elite that could not be disputed, especially not from the subjective, unscientific and perhaps even 'perverse'

48 See for this dynamic for instance the 1989 Delors Report on economic and monetary union (Conclusions of the Madrid European Council of 1989, *EC Bulletin* 6-1989, 1.1.11.). See further chapter 13 below.

49 Case C-148/02 *Garcia Avello* [2003] ECR I-11613, as well as more recently case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, and very leniently C-391/09 *Runevič-Vardyn and Wardyn* [2011] nyr.

50 Case C-159/90 *Grogan* [1991] ECR I-4685.

51 Case C-176/03 *Ship Source Pollution I* and case C-440/05 *Ship Source Pollution II*.

52 A fact that the some US Supreme Court justices were worried about as well in the development of the Commerce clause. See for instance the dissent of McReynold, J, Van Devanter, Sutherland and Butler JJ in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 'Almost anything – marriage, birth, death, may in some fashion affect commerce.' Also see R. F. Nagel, 'The Future of Federalism', 46 *Case Western Reserve Law Review* (1996), 643, Merril (1998), 31, and McGimsey (2002), 1675.

53 Slot, Park and Cuyvers (2007).

54 See on this trend and its effect on the state J. Habermas, 'The European Nation State. Its Achievements and its Limitations. On the Past and future of Sovereignty and Citizenship' 9 *Ratio Juris* (1996), 128.

field of politics.[55] After all, who could be against efficiency and an increase in wealth?[56]

Thus clad in economics, and engaged with the technical and seemingly a-political rules that make a market, the growing impact of the EU was often not perceived as intrusive, or as affecting key political domains. As a result the internal market *Acquis*, including the inherently expansive rules and principles underlying it, could develop relatively unopposed.[57] A customs case on the smuggling of maize will not receive the same political attention as a military campaign, but may nevertheless establish a principle that eventually affects the criminal law of Member States.[58]

Were the banking and sovereign debt crises indeed to lead to a swing of the pendulum back in favour of government and politics over market and economics, which is one way of understanding the populist rise, this would affect this important mechanism.[59] Of course the opposite might also still happen, with the financial crisis illustrating the ultimate dominance of markets over government.[60] Whatever these future developments might bring,

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55 Interestingly the tactic of many politicians appears to have been to try and master the language of economics as well, indirectly contributing to the discrediting of 'politics' as such. Perhaps this has contributed to their loss of status, certainly now that economics has lost some of its magical appeal as well, and it is difficult to return to a more normative message. This has apparently laid open the field for more charismatic leadership and 'anti-establishment' movements. Cf also Van Middelaar (2009), 18 et seq. on this language and world view of functionalism, as well as his quote of Hallstein: 'the very nature of this world necessitates a redefinition of what we ordinarily mean by words like 'politics' and 'economics', and a redrawing, perhaps even elimination, of the semantic frontier between the two.' (W. Hallstein, *United Europe. Challenge and Opportunity* (Harvard University Press 1962), 58.

56 For the technocratic nature of, for instance, the Commission right from inception see K. Featherstone, 'Jean Monnet and the 'Democratic Deficit' in the European Union' 32 *Journal of Common Market Studies* (1994),149 or W. Wallace and J. Smith, 'Democracy or Technocracy? European Integration and the Problem of Popular Consent', in: J. Hayward (ed), *The Crisis of Representation in Europe* (Frank Cass & Co 1995), 140.

57 W. Sandholz and J. Zysman, '1992: Recasting the European Bargain' 42 *World Politics* (1989), 114-115.

58 See as an example the evolution from *Greek Ma*ize to *Spanish Strawberries* and *Ship Source Pollution I*, cases 68/88 *Commission / Greece (Greek Maize)* [1989] ECR 2965, C-265/95, *Commission / France (Spanish Strawberries)* [1997] ECR I-6959, and C-176/03 *Commission v Council*.

59 Alternatively one could say that economics itself is being politicized, or in a more neo-Marxist view, stripped from its supposed objectivity. As soon as 'economics' does not just steadily increases wealth for all, but also requires a redistribution of wealth, even to other Member States, it becomes political, and the political discourse takes over.

60 Two noted anecdotal but revealing examples may illustrate the point. Firstly the *daily* turnover of FOREX lies between the 4.5 and 5 *trillion* dollar. This is roughly five times the entire EU budget agreed in the multiannual financial framework for 2014-2020. The entire US debt of $16.5 trillion is matched easily every four days. Second, and perhaps more graphic and gripping, was the image of US President Obama directly and publicly responding in August 2011 to Standard and Poor's downgrading the triple A status of the US. Here the immense power of a small group of market actors over the state became extremely visible.

however, the alliance between inversion and economics has certainly contributed to the development of the EU, and has so far strengthened it.

2.5 The inverted confederation: Sub-conclusion

In these four ways the inverted focus of the EU has been an instrumental modification to the confederal model, stabilizing it, supporting its development, expanding its competences, and anchoring the EU in one of the most expanding and dominant fields of our time. The crucial importance of the 1985 internal market programme for the development of the EU provides a good illustration of this internal dynamic.

Now clearly no overly simplistic or single-variable explanations can be given for such a complex phenomenon as integration. Many other factors and events impacted and guided the development of the EU. Yet it does appear realistic to claim that the clear choice to (re-)engage the internal market as the spearhead of European integration played an essential role in the revival of the European project. Through the Single European Act, it provided both focus, incentive and means for EU action. It got the internal engine going again. Once going, furthermore, it seemed to provide sufficient impetus to keep on going, often even picking up more speed.[61] The success of the internal market initiative therefore helps to illustrate the structural benefits of inversion. Conversely, a confederal perspective might help in explaining why precisely the internal market turned out to be such a fortunate choice.

61 Where such an internal focus was lacking, furthermore, integration generally did not fare as well. Consider, for instance, such areas of 'high politics' as Kosovo and Libya.

As such an internal market focus may also counter another preconception against confederations: that Confederations can only endure where there is sufficient homogeneity between the members.[62] An assumption that that has certainly taken root in the debates on the EU and its long term viability.[63] Now the potential relevance of homogeneity does not have to be denied, and a lack of homogeneity can certainly form another hurdle. At the same time it could be wondered if the internal focus of the EU, and the self-interest it generates for continued cooperation, does not undermine this virtual dogma, and with it one of the major flaws associated with confederations.[64]

3 A confederal foundation with a federalized superstructure

Our second general proposition is based on two related trends borne out by our confederal comparison. Firstly, the EU has incorporated several of the key federate modifications in what will be labelled its constitutional superstructure. For example, the EU works directly on individuals. It claims, and generally enjoys, supremacy. The scope of EU competences is determined under a very 'federate' doctrine of attributed competences by the European Court of Justice; a powerful central court which has the final say on the interpretation and validity of EU law.[65] As will be further discussed below,

62 This thesis was for instance defended by De Tocqueville in his Democracy in the United States where he held that 'all peoples who have been seen to confederate had a certain number of common interests that formed the intellectual bonds of the association. But beyond material interests man also has ideas and sentiments. In order that a confederation subsist for a long time, it is no less necessary that there be homogeneity in he civilization than in the needs of the various people that compose it.' (De Tocqueville (2002), 158. A view that remained influential, amongst other places in Germany. Carl Schmitt, for instance, referring to De Tocqueville stated that '*Bunds*' can only exist where 'there is a substantial comparability, an existential relationship, as can be the case, for example, in states with a nationally comparable and similarly disposed population (…). However, where there is homogeneity, a federation is legally and politically possible,'. Schmitt (2008), 394-395. It is, however, suggested that this is a rather weak solution to his own federal antinomies and concept of the political. Such an assumption of homogeneity de facto removes the *political* use of a bund: either there is no conflict so no need for politics, or there is a conflict and the Bund cannot act. Either way it seems redundant, and Schmitt needs to sacrifice the essence of what he sees as the political to account for the reality of federations.

63 This issue will be discussed in more detail in part II but on the strong reliance on *demos* see Kirchof (1993) and P. Kirchof, 'The European Union of States', in: A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd edn. Hart Publishing 2010),739, 743 and the much debated *Maastricht Urteil* of 12 October 1993, BVerfGE 89, 155 largely inspired by the work of Kirchof.

64 Note also that for Schmitt the statal form and political principles of the different polities (for instance monarchy or republicanism) formed one key component of this homogeneity. Components on which the EU is not as diverse as when thicker notions of 'volk' are followed.

65 Börzel and Risse (2000), 9-10, 'even without the legitimate monopoly of coercive force, the European Union has acquired some fundamental federal qualities.'

these federate elements also evolved over time, gaining in strength, scope and relevance.

The second trend, however, is that the EU consistently incorporated these modifications *without matching the foundational modifications* that underlie them in the US. The EU cannot use force, cannot tax its citizens, cannot change the Treaty by majority or prevent secession. Most fundamentally the EU was not directly based on the body politic of a single sovereign people. On these fundamentals the EU remains much closer to the Confederation.

On several other important federate markers, moreover, the EU comes much closer to the confederal set-up as well. It is, for instance, fully merged with the governmental systems of the Member States , and especially lacks the strong and separate executive of the Federation. Instead of having 'internalized' the states' interest in an independent central institution, such as the Senate, this interest is represented by direct delegates of the states, as in the Confederation. These representatives, furthermore control two of the most powerful institutions, the Council of Ministers and the increasingly dominant European Council, and are even more closely tied to their home state than delegates in Congress were.

Putting the two trends together a distinctive constitutional structure emerges: a confederal undercarriage reinforced with, and burdened, by a partially federalized superstructure. In this sense the EU can indeed be seen as a hybrid: it contains elements of at least these two systems.[66]Yet crucially the different elements are *not co-equal*. Despite the importance and impact of the federate modifications the ultimate basis of the EU remains confederal.

It is proposed that precisely this unequal mix of confederal foundation and federate rebar may explain some of the distinctive features of the EU. A proposition that matches with the common intuition that the EU is federate in some ways, and yet in the end cannot be qualified as a 'real' federation.

If this proposition is correct, interesting questions arise as to what the effects are of adding federate elements to a confederal basis, and how much 'federate' weight such a basis can carry.[67] As will be further shown below, analysing the *relative* weight and position of these confederal and federate elements, as well as their interaction, can be helpful in advancing our grasp of the EU, the dynamic of its constitutional evolution, and some of the problems persistently troubling it.

66 See above chapter 1 section 2.

67 Obviously all constitutions are ultimately mixtures of multiple 'pure' models and conceptions, and in that sense constitutional chimera's. Constitutional theory is more often than not concerned with how these elements affect each other. What, for instance, happens when you add a presidential element to a parliamentary system, etc. In this sense the approach followed here follows standard constitutional theory. At the same time the specific mixture of confederal and federate elements in the EU is rather interesting, and also has the added element of occurring at supra-statal level.

For example, it becomes apparent that gap between the legitimacy capacity of a confederal basis and the legitimacy demands of a federate superstructure logically leads to legitimacy problems. In addition, these federate powers have been transplanted into a confederal context where they are freed from several federate counterweights. As a result their *relative power and influence* might be far greater than in a completely federate system, which only widens the schism between basis and superstructure. A side effect of federate transplants that might be seen as the constitutional equivalent of releasing a tiger on the Galapagos Islands.

Yet despite such side effects the federate superstructure does seem to have significantly strengthened the EU: some of the worst holes in the confederal design may have been federally plugged *without* having to fully federate. Examining these plugs may therefore help to further understand why the EU has not yet collapsed, as well-behaved confederations are supposed to do, and how a stable middle ground can be found between a classic confederal system and full federation. Three such plugs deserve specific attention here, being negative integration, which can provide a certain backbone to the confederal system (3.1), the federate competence system, which allows the EU to act (3.2), and pseudo-amendment, which further enables EU action and the process of self-deepening already described above.

3.1 Negative integration as a confederal backbone

As discussed, the free movement rights under the Articles of Confederation were strikingly similar to the prohibitions underlying negative integration in the EU. Rights, however, that remained parchment realities. They were not enforced or developed to the necessary detail required for economic actors to benefit from them.

In the EU, on the other hand, negative integration has played a vital role.[68] Now the story of negative integration, including its crucial role in judicially sustaining European Integration through its recurring crises, is well known.[69] It is a story, furthermore, which fully fits with the confederal perspective, as negative integration was largely based on the combined federate modifications of an authoritative central court, and the direct effect and supremacy of EU law developed by it.[70]

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68 See for the classic tale Weiler (1991) and J.H.H. Weiler, 'The Community System: The Dual Character of Supranationalism' 1 *YBEL* (1981), 267. The confederal prism fits fully with this history of the EU developing through law.

69 Already see on the important role of the Court for integration H. Schermers, 'The European Court of Justice: Promotor of European Integration', 22(3) *The American Journal of Comparative Law* (1974), 453.

70 Also see the third general proposition below on the importance of the rule of law more generally.

What the confederal perspective adds to this story, however, is how effective negative integration precisely reduces some of the traditional weaknesses of confederal organization. In other words, it helps to understand why negative integration was, and is, so important in sustaining a confederal basis, and how a confederal basis can be protected and reinforced by federate elements in the superstructure.

To begin with negative integration protects and promotes integration by providing a pro-integration fallback option for political inaction. The Courts famous judgments in *Dassonville*, *Cassis de Dijon* or *Defrenne* are cases in point, as is the Courts development of EU Citizenship.[71] Where the Member States took no, or only tepid, action, the Court defended and furthered what it considered the integration envisioned by the Treaties. Unlike under the Articles, therefore, political deadlock no longer equals a halt, or even a retreat, in integration. Instead political deadlock may lead to further integration, and may do so along lines of legal logic, which can deviate strongly from the political logic of compromise.

The crucial result is that inaction stops being a cost-free option for Member States. Rather, not acting may mean leaving the decision to the ECJ. A reality that can act as an effective pacemaker for stalling decision-making.

Second, and related to its pacemaker role, negative integration provides a base line for eventual action by the Member States. Legislation, after all, will not be allowed to violate primary law as interpreted by the Court. Additionally where no compromise can be reached between Member States it often makes sense to follow the line set out by the Court. Often, therefore, the case law of the Court is clearly visible in the contours of secondary legislation, which sometimes even amounts to a literal codification.[72] The extreme respect with which the four freedoms have been treated in the Lisbon Treaty provides a clear example of this mechanism even in primary law. This is not to say, of course, that the Court in its turn is not responsive to political signals.[73]

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71 See inter alia cases 8/74 *Dassonville* [1974] ECR 837, case 120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) [1979] ECR 649, Case 43/75 *Defrenne*, C-85/96, C-415/93 *Bosman* [1995] ECR I-4921, *Martinez Sala*, C-184/99 *Grzelczyk*, C-413/99 *Baumbast and R* [2002] ECR I-7091, or C-208/09 *Sayn-Wittgenstein*.

72 See for instance Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ* (2004) L 158/77. For an a-typical example see the services directive, which appears to have managed to do less than the case law: Directive 2006/123 on services in the internal market. On its rather stormy adoption and less than stormy content see C. Barnard, 'Unravelling the Services Directive' 41 *CMLRev* (1998), 323.

73 See for instance the development from C-209/03 *Bidar* to C-158/07 *Förster*, as well as the general recognition of subsidiarity and proportionality in the case law of the Court after Maastricht and Lisbon.

In these ways effective negative integration strengthens the overall confederal set-up. By providing a fallback option negative integration reduces the *need* for decision-making. By providing an incentive and a direction, it simultaneously increases the *capacity* to make decisions as well. Allowing enforcement through individuals, furthermore, also reduces pressure on the limited confederal capacity for *enforcement*. Overall, therefore, negative integration energizes and reduces the pressure on two of the Achilles heels of confederal systems: acting and enforcing.

3.2 Determining competences

One of the major problems of the US Confederation lay in its lack of competences. To a large extent this lack was due to the very restrictive interpretation of the competence-conferring clauses in the Articles of Confederation.

Again several federate modifications that have been incorporated in the superstructure of the EU have largely addressed this problem. These firstly include the attribution of specific market competences, which as discussed above are inherently expansive. Secondly, the broad, and relatively federate, doctrine of attribution developed by the ECJ, including its teleological linkage between objective and competence, has been especially important.[74] A modification which is itself based on the further federate modification of a central court with the competence to decide on the scope of EU competences. Such a central court provides a legal, generally pro-integration, mechanism to settle disputes on competence, reducing the possibility for state representatives to block decision-making by spurious competence challenges.

Legalizing the ultimate say on competences also has as expansive impact in itself. Once a competence has been accepted in a judgment it can normally not be rejected the next time: it is there to stay. Some consistency, furthermore, has to be introduced in legal decisions on competence. This leads to the development of some general principles such as effectiveness or coherence, which may expand competences more generally. If a certain threat to the free movement of ball bearings was sufficient to justify harmonization under art. 114 TFEU, for instance, a similar threat would also justify harmonization in the regulation of gambling or prostitution. Politically, however, there is quite some difference between these competences.[75] Similarly the principle of effectiveness may be rather uncontroversial in most areas.

74 See chapter 2, section 4.2.3. on this link between objectives and competence.

75 Obviously there still needs to be a political decision to adopt secondary legislation. See for an example where such political will is lacking the field of gambling, also for an interesting reaction by the Court of Justice. S.C.G. Van den Bogaert and A. Cuyvers 'Money For Nothing: The Case Law of the EU Court of Justice on the Regulation of Gambling' 48 *CMLRev* (2011), 1175.

Yet when the legal application of this same principle of effectiveness leads to a Union competence to demand criminal sanctions legal logic suddenly stands far removed from the political one.[76] Politically, after all, such criminal sanctions form a very different kettle of fish altogether.[77] The legal and judicial determination of competences, therefore, not only prevents back treading on competences that have already been accepted, it also tends to expand competences by applying legal logic and general principles to the question when a competences exists.

Together the federate modifications of a central court, a broader doctrine of attribution, a legal determination of competences and the inherently expansive nature of internal market powers addressed another one of the key weaknesses plaguing the US Confederation: the lack of competences generally, and the lack of internal competences specifically. For the EU competences rarely seem to be the limiting factor, especially not where there is a strong political will to act.[78] A strengthening factor that is closely related to the factor of the adaptability of the EU framework through pseudo-amendment.

3.3 Adaptability and pseudo-amendment

The Confederation was unable to flexibly interpret or to alter the Articles where they were ineffective. The resulting inability of the Confederation to *adapt* to proven weaknesses or new circumstances formed another of Madison's key complaints. The many failed attempts to secure a stable income for the Confederation strongly supported his charge. Even in times of crisis there would always be one state blocking the amendments required, paralyzing the entire system as a result. Partially with this weakness in mind, the federate constitution allowed for constitutional amendment by majority.

As noted above, the EU has not incorporated the federate modification of amendment by majority. Nevertheless, the broad and judicially determined doctrine of powers has also had a crucial secondary effect in this regard.

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76 Case C-176/03 *Ship Source Pollution I* and case C-440/05 *Ship Source Pollution II* .

77 Legally, after all, these cases contain a standard application of the 'effectiveness' case law of the Court of Justice. Also these cases provide a further example of how the case law of the ECJ may prepare the way for legislative action: Lisbon has to a large extent codified the case law of the Court, and even going one step further by even removing the limit introduced by the Court in *Ship Source Pollution II*. See art. 83(2) TFEU.

78 See above chapter 2, section 4.2 and 4.3, as well as the relation between C-376/98 *Tobacco Advertising I* and C-380/03 *Tobacco Advertising II*. This does also not change the fact that it might be hotly disputed who may act or how. A question which happens to depend on the specific legal basis and competence used as well. See in addition to the Ship Source Pollution cases for instance also C-91/05 *Commission v. Council (ECOWAS)* [2008] ECR I-3651.

In addition to providing the EU with a sufficiently filled toolkit to achieve its objectives, it allowed the EU to develop and adapt within its existing Treaty framework. An ability that limited the need for frequent Treaty amendments.[79] Living instruments do not need to be amended as often, thereby reducing the importance of amendment procedures.[80] Put differently, the federate modifications in the superstructure of the EU allowed for a form of (judicial) pseudo-amendment.[81]

The development of the US constitution underscores this finding. So far it has been amended twenty-seven times. Yet some of the most important changes did not happen through amendment at all. They were realized through constitutional interpretation or through changing practices. Constitutional review was established, abortion allowed and the rights of States determined without any amendment. Most interestingly for our comparative exercise the crucial and expansive interpretation of the Commerce clause did not require an amendment either, nor was it ever blocked by an amendment.

The possibility of amendment by majority, in other words, has not been as crucial as Madison might have expected. Its function has been partially pre-empted by other constitutional mechanisms. Having incorporated some of these same constitutional mechanisms, the EU framework has therefore proven to be far more flexible and adaptable than the Articles. Adaptation and flexibility that are always crucial for survival, and reduce the need for constitutional amendment by majority.[82]

At the same time, these alternative mechanisms can only offer a partial solution. They are not capable of those fundamental changes that truly require Treaty amendment and the political legitimacy it entails. As in the US one could think of amendments that alter the representational scheme, the set-up of the institutions, or even the switch from a confederal to a federate basis itself. Such fundamental changes, fortunately, still require a Treaty amendment, and, therefore, unanimity. As has become increasingly clear,

79 The Single European Act, with its introduction of then art. 100A, clearly also played an instrumental role. Yet even this flexibilization of the procedure for legislative action would have accomplished little if the competence to be applied by that action had not been as broad.

80 Whether the EU Treaties truly form a living instrument, or only a Frankenstein animated by the ECJ, is a question left up wholly to the views of the reader.

81 The Court of Justice has, of course, held that other mechanisms, such as art. 352 TFEU, may not be used to circumvent the rules on amendment, yet this only shifts the debate to the next question when something is considered as a circumvention. Hence the term pseudo-amendment. See Opinion 2/94.

82 See chapter 4, section 3.3. on the amendment trap, as well as Van Middelaar (2009), 65, and his discussion of Rousseau and the dangers of unanimity.

especially during the decennia-long spectacle leading to Lisbon, however, unanimous Treaty change is not an effective mechanism.[83]

On the one hand, therefore, the EU has a near federate capacity to adapt and develop within its existing constitutional framework. On the other hand, it faces confederal limitations in formally amending the Treaties. Most interesting from the confederal perspective, is the dynamic that results from *combining* both elements. The capacity to adapt *without* political process, combined with the inability to do so through a political process, or to compensate for non-political adoptions, might actually be one of the dangerous imbalances caused by the federate superstructure in the longer run, as will be discussed further below.

3.4 Enabling self-deepening

Lastly, the federate superstructure, and the flexibility it offered, dovetailed with the self-deepening of the internal focus. As discussed above the internal and economic focus of the EU has a self-deepening mechanism. Broad competences, and pseudo-amendment by interpretation, further enable this self-deepening mechanism to work. Without them, after all, the increasing demands of the internal market will simply hit a competence limit.

Additionally there also is the self-deepening effect that federate elements themselves acquire in a confederal context. As noted, a federate modification in a confederal context may well become a two-eyed man in the land of the blind. The confederal elements may often not be strong enough to contain or counterbalance the federate ones. As a result, the federate elements may over time expand their relative power and influence, overshadowing the confederal elements (and foundations) of the EU. A dynamic that either overburdens the confederal basis, or may lead to a confederal counter-coup that may weaken the federate superstructure, and the stability it brings, too much.[84]

The benefits and risks of such self-deepening have not gone unnoticed, for instance with regard to the Court of Justice. By some located within its very own fairy-Duchy, by others seen as leading a legal *coup d'état*, many have asked how to control this powerful institution. Of course even in fully federate systems as the US it has proven difficult to contain the judicial power whilst at the same time respecting its necessary independence and task to

83 Dougan (2008), 617. Also see for 'surgical' treaty changes and the use of intergovernmental treaties that nevertheless concern EU primary law the discussion on the EMU crisis below in chapter 13, section 3.2.

84 The rise of the European Council, or the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Brussels 2 March 2012) may perhaps both be understood as such counter-reactions. See further chapter 13, section 4.2.

control and limit the other powers. In the EU, however, the predominance of the Court of Justice is further reinforced, and explained, by its federate nature and its confederal context. As both the (constitutional) legislator and the executive are far more confederal in nature, the already powerful position of a court in a federal system is further increased.

This central role of the Court of Justice also leads us to our third general proposition on the rule by law and the importance of stable states for a confederation. In a sense taking a process initiated in Philadelphia to the next level, the EU seems to have taken 'laws empire' to unforeseen highs, and has done so in a way that reduces some of the executive weakness of a confederation.[85]

4 Rule by law, self-control, and the importance of stable Member States

As established in chapter three the EU constitutional framework incorporates five of the sixteen key federate modifications selected for comparison in this study. The starting point for our third general proposition lies in the fact that of these five no less than four are concerned with the status and role of law.[86] Supremacy, direct effect, the doctrine of attribution and the establishment of a central judiciary all concern the legal dimension of the constitutional framework, or in other words, the role and rule of law within that framework.[87] A finding that raises two further, related questions. First, how is it possible to solely incorporate these legal modifications without also incorporating related modifications in other areas? Second, what can

85 Also see G. Falkner and O. Treib, 'Three worlds of compliance or four' 46 *JCMS* (2008), 293 et seq., and Chalmers, Davies and Monti (2010), 323 – 325.

86 Already see, pointing to the federate nature of the legal system being developed, E. Stein, 'Lawyers, Judges and the making of a transnational constitution' 76 *American Journal of International Law* (1981), 1. 'Tucked away in the fairyland of Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal Europe.' More recently on the essential role of law, and the rule of law, for EU integration see A. von Bogdandy, 'Founding Principles' in: A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd edn. Hart Publishing 2010), 28-31 and 41.

87 Obviously the important role of law for EU integration has been broadly commented upon. Here the point is not the novelty of this importance but its fit with the confederal system. See for instance already, contrasting the political and the legal, J.H.H. Weiler (1981), 267, Weiler (1999), 83 and M. Shapiro, 'The European Court of Justice', in: P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (OUP 1999), 339. On the vital importance of direct effect, supremacy and the Supreme Court for the US federate system already see the analysis in 1888 by Bryce. He found that these 'mechanical contrivances' were vital for the functioning of the system, also by establishing 'a legal habit in the mind of the nation.' J. Bryce as cited in Burgess (2006), 17.

this predominance of legal modifications tell us about the role of law in a (modern) confederal system as the EU? Jointly, these questions lead us to the third proposition on *modern confederal rule by law over stable, self-limiting members*. A proposition that starts with the required context for a rule by law.

4.1 The importance of stable and well-constituted members for confederal rule

The American Confederation suffered from very weak compliance. Partially this was due to a lack of power in the centre and an inability to enforce. Another important reason for this failure, however, was the *overwhelming need to enforce*. States often and flagrantly ignored legally binding commands of Congress.[88] These violations, in turn, were largely due to the political and organizational weakness of the States themselves,[89] which made them rather unreliable partners.[90]

Revolutionary ideology was radical, distrusted central authority to the extreme, and believed in very direct democracy in small republics. The problem with this theory was that it was put to practice, and with a vengeance.[91] In varying degrees of radicalism the freshly sovereign republics embraced these revolutionary ideals in their new state constitutions. A fascinating flurry of constitution making resulted whereby innovative applications of English political theory, British constitutional law, and colonial charters were mixed together with revolutionary ideals. Although the result and practice differed per state,[92] most became far more democratic and radical,[93] especially taking the parameters of the time into account.[94]

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88 See above chapter 1 section 5.

89 Wood (1969), 467: It was 'the corruption and mutability of the Legislative Councils of the States', the 'evils operation in the States' that actually led to the overhauling of the federal government in 1787.

90 Cf Madison (Sketch), 3 and 7 where he described the states as 'feeble communities' and holds that: 'But the radical infirmity of the "Art8 of Confederation" was the dependence of Congress on the voluntary and simultaneous compliance with its Requisitions, by so many independent Communities, each consulting more or less its particular & convenience and distrusting the compliance of the others.'

91 Cf Wood (1969), 404.

92 Especially the Virginia constitution was very balanced, and played an important role in the convention. For although this period of experimentation led to some unstable states, it did provide important experiences for the Philadelphia convention. See further below, chapter 5 on the process of federation.

93 This even though almost all of the new state constitutions provided for a senate, explicitly in recognition of the need for an aristocratic element in Government so the 'contemplative and well informed' and the 'wise and learned' could check he people of which 'few [are] much read in the history, laws or politics'. An aristocratic desire already indicated by the choice for the term 'senate' itself. In most states, however, these upper houses were to weak to really balance the directly democratic lower houses. (Cf Jefferson in his "*Notes on Virginia*" in Peden (1955), 119-120. Also see Wood (1969), 209-216.

94 McDonald (1968), 101.

All states, except South Carolina,[95] for instance, held *yearly* elections for Parliament. These legislatures were often also endowed with judicial and executive powers.[96] Most radical was Pennsylvania.[97] There, for instance, all legislation had to be printed for the consideration of the people before it could become law, and the executive and judiciary were reduced to virtual non-existence.[98] All power, including that to adjudicate, rested with the legislature.

The decision making in these state parliaments, or the 'will' of the people in convention, could be swayed dramatically from one moment to the other by effective speakers.[99] 'Mob-democracy,' sometimes resulted, at least from the perspective of the propertied classes or others on the losing end of this system.[100]

These new state governments, furthermore, suddenly found themselves sovereign, and no longer bound by the framework of the Empire. The colonies had been used to significant degrees of self-rule, including democratic representation.[101] Nevertheless the step to full and unlimited sovereignty still was a significant one.[102]

This revolutionary ideology, coupled with the ballooned power of unhinged parliaments led to significant destabilization within the states.[103] One particularly important effect was the lack of protection for minorities against the unfettered will of the majority.[104]

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95 Here representatives were elected biannually, as under the current US Constitution.

96 Wood (1969), 166.

97 Wood (1969), 85-87. The radical constitution there explicitly aimed to prevent 'the danger of establishing an inconvenient aristocracy'. To put it bluntly, the aim of the second constitution could have been called 'to prevent the danger of an inconvenient democracy'! The disenchantment and disappointment with republicanism of some leading minds at Philadelphia added to this fear. Madison, for instance, had been an avid believer in abstract republicanism in 1776-77, prone as he was to theoretical purity.

98 Wood (1969), 232, 245.

99 The mutability of the laws was one of the major complaints. See for example the statement that the North Carolina laws of 1780 were 'the vilest collection of trash ever formed by a legislative body', which is especially remarkable since it came from the Attorney-General of North Carolina, James Iredell, himself charged with upholding these laws. (Wood (1969), 406).

100 Jensen (1970), 161.

101 The level depending per colonial charter and type of colony involved.

102 Many states also lacked a proper bureaucratic system. The federal bureaucracy in fact later acted as a model for several states in developing such a bureaucracy, filling the British void.

103 Wood (1969), 463.

104 McDonald (1968), 5. As Madison put his discovery of popular despotism 'It is much more to be dreaded that few will be unnecessarily sacrificed to the many.' (Madison to Jefferson, Oct. 17, 1788, Boyd (ed), *Jefferson Papers* XIV, 20.

This internal stability naturally led to problems in the functioning of the Confederation as well. Instead of being able to rely on the States, the Confederation was called upon to control them, and to become a counterforce which would confront the States.[105] This claim was especially strong amongst the 'losers' of the revolution and democratization. Predominantly these were British subjects and former colonial elites who had strong ties to the British, and who had generally controlled both politics and business before independence.

The Confederation could not provide this counterforce: it simply lacked the means and the legitimacy to do so. Its inability to provide protection further discredited it, especially in the eyes of those seeking to regain control over the states. Besides hindering the Confederation in achieving its own primary objectives, the inability to 'control excesses' in the states thereby became seen as an important 'failure' of the Articles in itself.[106]

4.2 The (more) stable basis of the EU and the capacity of self-control

Generally speaking, the EU does not have the same problem of unstable Member States. Quite the opposite: the relatively developed legal and administrative infrastructure of the Member States greatly supports it, and from the confederal analysis emerges as one of the key foundations for the relative success of the EU confederal experiment.[107] A conclusion that supports the criteria for accession as set in Copenhagen and Madrid, and even suggests that these should be further developed.[108]

Obviously not all states are equally well organized, and compliance remains an important problem within the EU. Significant improvements, furthermore, can still be made in terms of good governance and loyal application of EU law, especially when applying an ideal standard. Nevertheless the level of governmental organization, stability and compliance is incom-

105 Not coincidentally it was in South Carolina, a state where the conservatives retained most of their power, that the elites were initially less willing to support a more national government, seeing their local power was not threatened. Only when they started to loose power as well a national government suddenly became the logical solution. U.B. Phillips, 'The South Carolina Federalists I' 14 *American Historical Review* (1909), 541-542.

106 Jensen (1970), 19, Wood (1969), 463, 408.

107 Cf Habermas (1996), 128..

108 See the Presidency Conclusions, Copenhagen European Council, 21–22 June 1993, and the Presidency Conclusions, Madrid European Council, 15–16 December 1995. These conditions now include that 'the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (…). On the practical application see Kochenov (2008) and Smith (2003), 105 et seq. For a further discussion of these points see chapter 13, par. 5.2.

parably higher than that under the Articles.[109] As a consequence, the EU is generally not called upon to correct or restrain radical Member States, or to compensate for failing government and administration.[110]

The accession of weaker states, crises such as the Roma expulsion in France, the (mal)treatment of refugees in Greece, the strain on Schengen after Italian measures granting Schengen-visa to refugees, the problematic constitutional amendments in Hungary, openly Euro-aggressive populism, and the sovereign debt crisis are troubling developments in this regard, which will be further discussed below. In general, however, the EU is not pitted against its own Member States or asked to intervene in the same way as the US Confederation was.

Most important in this regard is that the developed legal and administrative systems of the Member States provide a level of *statal self-control*. Even where states are tempted to temporarily forget their obligations under EU law, or at least prefer a technically illegal but more favourable interpretation of those obligations,[111] their own bureaucracy and courts may restrain them from doing so.[112] Even if not fail-safe, this mechanism significantly reduces the *need* for the centre to enforce, and therefore reduces the stress on the inherently weak executive dimension of confederal organization. Instead of having to confront the Member States, the EU can rely on them, or at least their own governmental apparatus, to effectuate its commands.[113] For a confederation, this appears to be of existential importance, as it cannot substitute statal cooperation by force where necessary.

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109 See in this regard also the formal requirements for EU membership which art. 49 TEU links to art. 2 TEU. It hence postulates a minimum on important rule by law values as respect for human dignity, democracy, equality, the rule of law and respect for human rights,(…).

110 A constructive relationship seems the rule, rather than conflict. See D. Curtin and M. Egeberg, 'Tradition and Innovation: Europe's Accumulated Executive Order' 31 *West European Politics* (2008), 639, 649. Such conflict may occur in he future, in which case one of the weaknesses of the underlying confederal scheme may come to light.

111 See for a somewhat embarrassing example the string of cases against the Netherlands finding Dutch legislation to limit immigration in violation of EU law. Violations that were obvious in advance, yet where the Dutch government chose to stick to a untenable but politically more convenient interpretation of EU law. See C-155/11 PPU *Bibi Mohammad Imran* (nyr) an the related judgment by a Dutch Court of 23 November 2102 finding the Dutch rules in violation of EU law (Rechtbank Den Haag, LJN: BY4171, Awb 12 / 9408), or most recently C-508/10 *Commission v. Netherlands* [2012] nyr.

112 In fact the Hungarian amendments weakening the position of the judiciary, even if more understandable from their communist heritage, are especially threatening for the EU in this regard, as they undermine this capacity for self control.

113 Cf also Majone's notion of the EU as a regulatory state, G. Majone, 'The European Community as a Regulatory State', 5 *Collected Courses of the Academy of European Law* (1994), 321.

Our third proposition points to the fact that it is through the common language of law that the EU is able to directly relate, and even plug in to, these national apparatus. Hence the central importance of law, and an effective rule of law within the Member States, for the functioning of the EU. By incorporating many of the federate modifications concerning the rule of law, the EU equipped itself to govern in the only way a confederation really can: through a rule by law, and not by force.[114] It is suggested here that this choice plays a key role in stabilizing the modified confederal system of the EU.[115]

4.3 A rule by law: The USB of confederal organization

The EU does not have the physical means to enforce its commands, nor has it ever sought to accumulate them. Were it to compete with the Member States in the dimension of force or executive power, furthermore, it would surely loose.[116] Instead it formulates its commands in the form of law, and relies on the openness and responsiveness to law and legal commands of the Member States' legal systems for the effectiveness of these commands.[117] An almost institutionally-instinctive obedience to law that, as we saw above, has two elements. First, the Member States generally consider themselves bound to respect their legal obligations under the Treaties. Second, they by and large respect the decisions of the legal and administrative machinery, both at the national and EU level, on what these obligations entail.

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114 Cf also the conclusion by Hinsley (1986), 212-13 that only after states became 'constitutional' i.e. capable of responsible self-limitation such good governance was possible. The current crisis in Greece further seems to support this conclusion. Where does one start if there is no effective administration or rule of law?

115 The rule of law very thinly defined as the habit of systems to generally follow legal rules and the judgment of courts. The EU both depends on this system being available and entrenches the rule of law by empowering courts. Cf also Watts (1999), 14 on the import role of 'respect for constitutionalism' generally within federal systems.

116 Already by sheer force of numbers. Currently, for instance, the European Commission, the main administrative hub of the EU, employs around 35.000 civil servants, including interpreters. The Netherlands alone employs close to a million civil servants, or about 12% of all employed persons in the Netherlands, and the Netherlands has a relatively small public sector compared to other EU Member States.

117 Schütze (2012), 65. Of course there are many political pressures, including self-interests of the states, which promote compliance as well. But this does not alter the fact that the EU governs through law, only that Member States have self-serving reasons to follow the law as well.

Quite surprisingly this system has worked relatively well, as EU law seems to be generally effective.[118] A reality that should affect our understanding of the confederal model, as well as the related general debate in jurisprudence on the relation between law and power.[119] For it was the lack of enforcement capacity that was traditionally depicted as a core weakness of confederations. Madison's analysis of the weaknesses of the Articles provides a telling summary of this view:

> 'A sanction is essential to the idea of law, as coercion is to that of Government. The federal[120] system being destitute of both, wants the great vital principles of a Political Constitution. Under the form of such a Constitution, it is in fact nothing more than a treaty of amity, of commerce, and of alliance, between independent and Sovereign States.'

An analysis echoed by Washington. In hoping that the states would comply with their duties under the Articles without sanction, he stated: 'We have, probably, had too good an opinion of human nature in forming our Confederation.'[121] A view that formed part of the consensus at Philadelphia as well: law needed to be backed by force to be effective, or even to be proper law.[122]

The EU seems to have defied this classical rule of political and legal theory.[123] Building on the relatively effective legal systems in its Member States it has found a type of middle road: [124] a way of managing the non-compliance plaguing confederacies, *without* having to fully federate, for instance by creating a powerful central executive and granting it the right to use force.[125]

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118 See P. Craig and G. de Búrca, *EU Law* (OUP 2011), 476, note 95, who report a 96,3% implementation of ECJ rulings.

119 Cf Habermas (2001a), 17: '…the great achievement of the modern nation state, which with its status of citizenship first created a wholly new, namely abstract, solidarity transmitted by law.' Also see Habermas 2001), 113-14: 'the medium of state power is constituted in forms of law' (…) 'modern states are characterized by the fact that political power is constituted in the form of positive law.', or Stein (1981).

120 Here referring to the Articles, see above chapter 1, section 4.2. on terminology during the Confederation.

121 Wood (1969), 472.

122 See C. Schmitt, *Political Theology: Four chapters on the concept of sovereignty* (trans. G. Schwab, University of Chicago Press 2005), xix.

123 On this reliance on normative authority rather than enforcement capacity already see A.H. Robertson, 'Legal Problems of European Integration' 91 *Recueil des Cours de L'Académie de la Haye* (1957), 143 et seq. Also see B. van Roermund, 'Sovereignty: Unpopular and Popular', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 37, rightly pointing out the importance of other methods than force for the effective exercise of authority.

124 See Maduro (2006), 515-16 on the crucial role of national actors and the 'bottom-up' legitimacy and authority this provided EU law with.

125 CF also Börzel and Risse (2000), 6.

It did so, it is suggested, by partially separating law from power.[126] Something it was capable of doing by 'tapping into' the rule of law tradition of the Member States, including their well-oiled legal and bureaucratic machinery.[127] The judicial and administrative systems of the Member States are organized and programmed so well, with such strong professional training and levels of independence, that they respond to legal and administrative 'input' meeting a set of formal criteria. The remarkable acceptance of direct effect and supremacy are a clear example of Member State systems respecting and applying judicial decisions that have revolutionary effects for their own legal order, yet remain within the logic and language of law.[128] Once supremacy and direct effect had been accepted, at least in sub-constitutional matters, the EU had even more unlimited access to this pool of – often relatively autonomous – professionals.[129] With its 'output' formulated in the proper form of law, the EU could directly rely on this professional backbone of the Member States' bureaucratic and legal organization.

The rule of law, in other words, had created a sort of USB-standard the EU was able to plug into: it creates a common standard via which two different entities can connect, communicate, and control.[130] The EU did not need to be welded onto national systems, but like a mouse with a USB connector could be plugged in directly. Supremacy and direct effect thereby assist in the compatibility of the interacting legal orders. Yet the fundamental step, which even precedes and enables the use of *legal* doctrines as supremacy and direct effect, is a reliance on law and the rule of law itself. Without such a rule of law, after all, legal doctrines are useless.

Now it is not suggested here that all these developments resulted from a single grand design, or even that all actors involved were actually conscious of the overall system they were developing. Together, however, the developments within the EU, including the rise of the bureaucratic and legalized welfare state, did contribute to the circumstances in which such a confederal rule by law became feasible.

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126 Or at least allowing law and enforcement power to be placed further apart, being only indirectly linked via the sanctioning power of the Member State. A move that fits in a broader trend where even within Member States law increasingly seems to depend on convincing, rather than commanding or coercing subjects. Cf Habermas (2001a), 10.

127 Cf also the importance attached to administrative developments in this regard by P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010).

128 See further chapter 10, section 8 on the discussion on the supremacy of EU law.

129 Cf in this regard the failure of art. 23 of the Union of Utrecht to explicitly recognize the supremacy of confederal law and obligations. Supremacy was simply not accorded at the provincial level, and could not otherwise be enforced either, even though the legislation of the *Staten-Generaal*, the *Placaeten* or ordinances, were published and generally enforced in the provinces.

130 Obviously this USB is not globally compatible: were ASEAN to decide that henceforth its decisions would have supremacy in all EU Member States the national courts would obviously not follow suit. The fact that this USB requires certain preconditions to be met does not mean, however, that it does not exist.

The USB of the rule by law provided the EU with a sanction for non-compliance *without the EU needing to have the power to apply that sanction*.[131] Rather, the bureaucratic and legal systems of the Member States were so independent that they were capable of providing a mechanism of self-sanctioning that actually packed a punch.[132] In a sense one could see this as a form of cloud government: the EU does not need to incorporate the hardware of government, yet can access it via the rule by law network.[133] As a result, EU law is effective, or at least habitually followed, in a way that the American Confederation could not hope to achieve.[134]

The EU reliance on the rule by law, furthermore, is safeguarded to some extent by the equal dependence on law and bureaucracy of Member States governments. Government in modern welfare states is simply too vast and complex to tackle without them.[135] Consequently, national governments cannot attack the rule by law and their own bureaucracies too directly, as this would undermine their own capacity to govern as well.[136] In this regard one could say that, merged as they are, the national governments and the EU form a Siamese (non-identical) twin, joined at the administrative hip. One could also see this as a less glorious variation of Kant's vision on perpetual peace: a stable, cooperative republic of bureaucratic states, that are so dependent on their internal bureaucracy and rule of law that they are

131 See for a separation between law and the *power-in-fact* of politics in this regard the work of Neil MacCormick. He also indicates how law both depends and enables political rule, a view which also allows one to 'negate the existence of any analytically necessary nexus between law and state.' N. MacCormick, *Questioning Sovereignty* (OUP 1999), 15. Also see p. 21 on the importance of customary acceptance of law for governing and p. 105 for his discussion of plural law.

132 Also note in this regard the important work done by the Court of Justice in opening up the national system for enforcement through the notions of equivalence and effectiveness. Two notions that counteract the principle of state procedural autonomy that might otherwise have limited the effectiveness of EU law to a dangerous extent.

133 The limitations of the comparison are noted, including the fact that here the hardware is decentralized and the user centralized instead of the other way around.

134 The relative stability of the Swiss confederation might further support the proposition developed here. Based on the relatively more stable and established Cantons, the confederal system in Switzerland was put under far less stress than the US Confederation.

135 Interestingly, therefore, the very same instrument that supported the rise of 'sovereigns' nationally now also (and logically) helps in redefining that sovereignty. See part II of this thesis on sovereignty, and for the relation between law and sovereignty in the establishment of effective government in the middle ages already also M. Loughlin (2006), 58.

136 R. Bellamy, 'Sovereignty, Post-Sovereignty and Pre-Sovereignty', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 172.

forced to generally respect their obligations and are prevented from at least several excesses.[137]

Obviously governments can still attempt to reduce the influence of EU law over their courts and civil servants, and this thesis in no way claims that this will always be difficult to do. Nevertheless it is inherently problematic for the rule of law once individuals or institutions start deciding for themselves which laws to apply and which not; this interferes with its rule bound nature. At the same time such an overall rejection of law and legality could precisely be one of the dangers of the heavy reliance placed on it by the EU, at least as long as additional legitimacy for such use cannot be created.[138]

4.4 Laws impire and the plural nature of the EU order

Interestingly, such a true *rule by law*, a real laws impire, was exactly the goal the American founding fathers hoped to achieve. [139] The only way they saw to do so, however, was by granting the federate government a real and physical capacity to enforce.[140] For only full possession of that capacity, and the threat that came with it, could guarantee that the central government would be obeyed.

For these reasons they rejected proposals to improve the system under the Articles along the rule by law approach now adopted in the EU. It was proposed, for instance, to stabilize the confederal system via a central court, and by explicitly granting supremacy to confederal law.[141] A suggestion that was rejected by Madison based on the experiences of the German confederal system. The Diet of the Holy Roman Empire, he argued, had known no

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137 Clearly bureaucracies, courts and the rule of law are not fool-proof either, as Nazi Germany painfully illustrates. Radbruchs 'Fünf Minuten Rechtsfilosofie' should be a rude awakening to anyone placing too much faith in law alone. (G. Radbruch, *Rechtsphilosophie* (Müller Verlag 1999), 209). At the same time more often than not law has protected certain fundamental rights in the EU, and so far appears our best bet. Cf on the ideal of Kant also Lauterpacht (1977), 25: 'However, the federation of Kant was not a federal state; it was a confederation, presupposing the continued existence of sovereign states.'

138 See further part II and III and the potential of the confederal system to provide such a basis demonstrated in chapter 10, section 6, and chapter 12.

139 The founding fathers were very aware that they were trying to change the nature and operation of public authority, and the central place they were awarding to law to this end. Wood (1969), 66. Also see McLaughlin (1918), 231 describing the US system as a 'composite empire based on law'.

140 Hamilton for instance, foresaw the coercive effect law itself could have: 'Force, by which may be understood a coertion of laws of coertion of arms' Law itself, in other words, was already seen as a type of force. He could not, however, yet perceive of law without force, only as an intermediary between force: 'A certain portion of military force is absolutely necessary in large communities' See McDonald (1968).

141 See especially the original Dickinson draft of the Articles of Confederation and the Patterson plan introduced at Philadelphia.

less than three central supreme courts, each with direct effect and supremacy. Yet the system did not work because the system lacked the power to enforce their rulings:

> 'Altho' the establishmt. of Imperial Chambers &c give a more regular form to the police of the fiefs, it is not to be supposed they are capable of giving a certain force to the laws and maintaining the peace of the Empire if the House of Austria had not acquired power eno' to maintain itself on the imperial Throne, to make itself respected, to give orders which it might be imprudent to despise, as the laws were therefore despised.'

What, according to Madison, was missing in Germany, and in the Confederation, was an effective respect for law, necessary to empower a supranational court not backed by force. Yet the EU seems to have achieved exactly this: governing through law without itself having the physical powers to enforce.[142] As such it managed to reinforce the confederal set-up by latching onto the legal systems of its Member States. Thus it softened, though clearly not fully solving, one key dilemma for confederations: how to enforce your commands effectively without accumulating central powers that exceed the confederal nature of the union? Effective *self-control* of confederal obligations seems one way to solve this puzzle: it can ensure a relatively high level of compliance, without relocating the powers of enforcement to the centre.

Such effective self-control, furthermore, also fits with the '*pluralist' feeling* of the EU legal system.[143] It can help to explain why such a heterarchichal system can be relatively stable, or even be understood as a system. For even though the Member States retain ultimate authority, it is in fact *this same authority*, exercised through the medium of law, which is turned against them and used to uphold their obligations under EU law. In other words the supreme power and effectiveness of EU law does not derive from an ultimate normative superiority of the EU over the Member States.[144] It derives from the normative power awarded to EU law by the national rule of law, and therefore from the normative power Member States in turn award to this rule of law and the almost pre-legal norms as *pacta sunt servanda* that underlie it.

This view also matches the precarious nature of this order: after all the power that binds is equal to the power that is bound. No higher federate authority exists that truly trumps the statal level, which remains primary. In this way the EU could indeed be described as a gentleman's agreement or

142 The important role of law, and then especially supremacy and direct effect of EU law, has of course been often noted. The additional insight suggested here, however, is that these instruments must be seen against the larger confederal picture, and the role that law plays therein.

143 For an overview of pluralist logic see chapter 8, section 5.

144 See below chapter 8, section 5 on the notion of popular sovereignty and the ultimate authority of the individual Member Peoples as opposed to the secondary, *pacta sunt servanda* based, authority claim of the EU.

at least as an accord between morally adult legal systems: the effectiveness of the agreement derives from the inner constitutions of the parties. And where parties allow this to happen, they can violate their inner constitutions and breach the agreement.

In light of this rule by law, furthermore, the EU system could also be seen as a further evolution within the 'government by law' revolution initiated by the federate constitution itself: it constitutes a law's impire even beyond what the Founding Fathers thought possible. One that is made possible by the stability and level of development of its members.

Clearly the role of law should also not be overstated. It is certainly not suggested here that politics, or other non-legal factors, play no role in the EU constitutional system. They do, and they do so abundantly. In the end the ultimate authority and primary legitimacy of politics will trump law.[145] Compliance in the EU, to name but one example, is also improved by the political consequences of violating one's obligation, seeing how the Member States are repeat players at the game of cooperation. Many other reasons besides the rule by law, therefore, can rightly be linked to the better compliance within the EU as compared to the Articles. In addition the relevance of the rule by law is not unique for the EU, as other forms of cooperation such as the UN or the WTO also benefit from the rule of law traditions in (some of) their members.

Nevertheless it can be claimed that the rule by law has played a significant role in EU integration, not in the least by partially addressing one of the classic weaknesses of confederalism. A claim that is at least supported by the clear failures where political mechanisms instead of legal ones have been relied on to ensure compliance. The failure of the stability and growth pact provides is an example that speaks for itself.

The reliance on law and national legal and administrative systems of course also has several limitations and weaknesses. It does not provide the same level of security as a central executive power, for instance. It is also *limited to fields susceptible to legal or administrative control.* Yet these limitations and caveats, which will be further elaborated below, do not remove the significance or value of the above analysis on the rule by law and its central role in the EU system. A role that has of course been described before, but takes on a special importance and character from the confederal perspective.

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145 See also below chapter 13 on the EMU crisis where this is clearly illustrated, as well as already Hallstein (1962), 29: 'Just as language precedes grammar, so politics precedes political theory.' See further on the political space that has been developed in the EU, especially in the middle layer, Van Middelaar (2009), 105 et seq. and Walker (2006a), 20. Also see however above chapter 3 section 4: The fact that modern power needs a legal system to be effective may explain part of Foucault's paradox of sovereignty both being political power constituting the law, and law in turn restraining that same political power on which it is based.

Our third proposition therefore points to the central importance of law and the stable legal and administrative systems of the Member States for reinforcing the confederal rule by law in the EU. A conclusion that also explains just why law has been so central to the EU project. Seeing how the executive, and directly representational columns are reserved to the Member States, the EU has reinforced the judicial column with federate elements, and embraced the rule by law as a truly confederal approach to governing.[146]

5 Back to Madison's Score Card: Evaluating the modifications

Combining our three propositions, a picture emerges of the EU as an inverted confederation with a federate superstructure that allows it to largely govern by law alone. Compared to the US Confederation, the EU has, therefore, made significant modifications. Each of these has strengthened the confederal framework in some ways.[147]

To further assess the cumulative effect of the conclusions reached above, it is useful to briefly return to the original confederal score card devised by Madison for the US Confederation. Have the modifications discussed here helped in remedying the five key confederal weaknesses bemoaned therein? [148] The answer seems to be a clear yes.

5.1 General lack of power and energy in the centre and compliance in the states

The central confederal weakness Madison identified was the general lack of power and energy in the centre and the corresponding lack of compliance in the states. Concerning energy and effectiveness in the centre, clearly the EU still suffers from some of the traditional weaknesses of confederation. Taking decisions with so many Member States is a challenge at the best of times, even with QMV and 'pure' EU institutions as the European Parliament

146 See also Timmermans (2002), 3.

147 Cf Habermas (2001), 81, 84: The inverted confederation might be one model, one perspective, to assist in the challenge to 'bring global economic networks under political control' and to do so 'in institutional forms that do not regress below the legitimacy conditions for democratic self-determination.'

148 Madison named the following eleven vices: 1. Failure of the States to comply with the Constitutional requisitions; 2. Encroachments by the States on the federal authority; 3. Violations of the law of nations and of treaties; 4. Trespasses of the States on the rights of each other; 5. Want of concert in matters where common interest requires it; 6. Want of Guaranty to the States of their Constitutions and laws against internal violence; 7. Want of sanction to the laws, and of coercion in the Government of the Confederacy; 8. Want of ratification by the people of the articles of the Confederation; 9. Multiplicity of laws in the several States; 10. Mutability of the laws of the States; 11. Injustice of the laws of the States.

and the European Commission involved. The many different interest and perspectives that have to be taken into account mean decisions can take a long time, and may end up as awkward compromises. The saga surrounding the Services directive provides a telling example.[149] The EU, furthermore, has had its share of impasses, including a veritable dark age. Indeed the EU has been declared dead or dying on multiple occasions.[150]

Obviously, therefore, the EU decision-making machinery pays a price for respecting the autonomy of its Member States up to a confederal level. Nevertheless it is far more energetic and effective than the US Confederation, and seems to suffer much less from this confederal defect than one might expect.[151] Not only has the EU survived each crisis, it always seems to have emerged stronger. Since the Treaty of Rome integration has increased impressively both in scope, depth and intensity. In addition to specific feats such as a Common Currency, Schengen, European Citizenship, REACH or a Common External Action Service, the daunting size and breadth of the *Acquis* by itself forms clear proof, in any case of the capacity to legislate.[152] Some decisions, furthermore, can be taken relatively quickly, as demonstrated by the procedure for the new environmental package.[153] This can even reach scary speeds, as in the case of decision-making on the EMU crisis. The temporary stability fund, for instance, was conceived and established in less than 48 hours, even though the decisions involved will more likely than not have far-reaching effects on European integration and concerned significant sums of money.[154]

149 Barnard (1998). 323 et seq.

150 N. Ludlow, *The European Community and the Crisis of the 1960's: Negotiating the Gaullist Challenge* (Routledge 2006), N. Ludlow, 'Challenging French Leadership in Europe: Germany, Italy and the Netherlands and the Origins of the Empty Chair Crisis of 1965' 8 *Contemporary European History* (1999), 231.

151 Elazar (2006), 54: 'Thus the Construction of common institutions proceeded in such a way as to minimize the threat to the existing states which sought – and seek – to retain independence beyond that normally allotted to Federated states and at the same time enabled the establishment of a sufficiently energetic government in limited spheres with the means to attain the ends for which it was constituted.'

152 The implicit choice to circumvent some of the confederal obstacles (and the democratic ones) when creating normative acts via comitology also contributed to this effectiveness. See for instance F. Franchino, 'Delegating Powers in the European Community' 34 *BJPS* (2004), 269 or M. Pollack, *The Engines of European Integration: Delegation, Agency and Agenda-Setting in the EU* (OUP 2003).

153 See especially the adoption of Directive 2009/29/CE of the European Parliament and of the Council to improve and extend the greenhouse gas emission allowance trading scheme of the Community, *OJ* (2009) L 140/63. Of course this speed in itself may a be seen as a problem again, for instance where the influence of the European Parliament is reduced.

154 See chapter 13, section 2 below.

Similarly, as already indicated above, the compliance of the Member States is not perfect, but clearly is incomparably higher than in the Confederation, and probably far higher than anything Madison could ever have envisioned in a confederal system.

As outlined above, several of the federate modifications at least contribute to this increased energy and compliance, or help in better grasping its causes. Inversion created a more effective, constant and self-deepening impetus to cooperate. A broad array of teleologically interpreted competences allowed this energized centre to act. Effective negative integration manned the fort and shocked the system back into action where the centre was nevertheless immobile. Rule by law over stable states, furthermore, significantly increased compliance. Even if desiring to break their EU obligations, Member States face their own bureaucratic and judicial apparatus, as well as that of the EU, which can both be seized by interested individuals.

Although improvement is obviously possible, the modifications discussed here have at least reduced the weakness noted by Madison. The fact that the EU is still standing, as well as its impressive widening and deepening over the past decades, further suggests the effectiveness of these modifications in energizing confederal cooperation.

One should also apply a realistic standard. Even a fully-fledged federation, or a unitary state for that matter, would not have perfect 'energy' or compliance.[155] The federate constitution, for instance, did aim to make the centre more energetic, yet at the same time created numerous checks and balances to control that energy.[156] The debate on US healthcare reform, or the 2011 struggle over the debt ceiling and budget in the US, for instance, hardly bespeak of perfect energy.[157] In other words, *it is not a given that a fully federate EU system would make decisions much better or faster*. In any event its effectiveness would strongly depend on the checks, balances and other restrictions built into the federate framework. Seeing how creating any type of EU federation now would certainly entail many of such restrictions, overall effectiveness might not even be served that much by federating soon.

155 The concept of 'energy' is here used in the convenient and useful shorthand meaning of the term developed in the Federalist Papers and the debates on the American Constitution more generally, including in Madison's sketch on the failures of the Confederation. It denotes the will and the capacity of the (central) government to act effectively, and to thereby achieve its objectives. It should be contrasted with the situation under the Articles where the central government clearly lacked the will and the capacity to realize any will it might have.

156 The legislative process where both House and Senate produce a proposal (sometimes even multiple ones by different Committees) and then have to agree on a joint proposal is even very similar to the negotiation committee required under the ordinary legislative procedure, and is just as tedious.

157 As the saying goes: 'Laws are like sausages, you do not want to know how they are made.' (and in the US they usually contain pork).

5.2 Weak finances and unstable states

A second key weakness lay in *finances*. The US Confederation was crippled by its incapacity to generate a sufficient income. Here as well the EU is in much better shape, even though it was not granted the right to tax. Rather, due to better compliance, the Member States simply pay their share, even if the 'net payers' do so increasingly grudgingly.[158] In addition, the rule by law, and the regulatory focus of the EU also means that it does not need that big an income, at least in relative terms.[159] As a result the EU reduces the stress on its confederal system for collecting revenue. Stress that will increase, however, as EU financial demands increase, either in fact or in national perception. Here again the financial crisis provides increasingly clear confirmation, as the EU system struggles to deal with the increasing financial implications of safeguarding the Euro.

Madison's third woe, the *unstable states* that made up the Confederation, also troubles the EU, but to a lesser degree. More contextual providence than actual modification, the relative stability of the Member States has removed some of the stressors on the confederal basis of the EU. What is more, the stability of the states has become an enabling factor for the confederal rule by law.

Enlargement, financial woes and crises in national political legitimacy may undermine this stability of the Member States, and therefore negatively affect the EU as well. As we are currently seeing this in turn raises the question to what extent the EU should be allowed to influence or control such national preconditions for its effectiveness. Preconditions which often touch on key state powers as budgets or social policy: a problem which will be addressed in more detail below.[160]

158 Security of income may also have contributed to the relative stability of the Dutch Confederation. In the United Provinces of the Netherlands the confederal center, or generality, first of all had a more stable revenue of its own (See art. 6 and 7 of the Union of Utrecht). This revenue came from taxing the shared territories (*generality lands*), but mainly from license fees imposed on merchant ships. Second, the additional levies that were needed were paid more loyally by the different provinces. Here it may have helped significantly that Holland, by far the most powerful and wealthy province, on average picked up around 57% of the tab, but in return for its payments also had significant influence in the overall government of the Republic.

159 S. Korkman, *Economic Policy in the European Union* (Macmillan 2005), 59.

160 See chapter 13, sections 3 and 4.

5.3 *Lack of competences and the inability to (make) amend(s)*

The functioning of the Articles was seriously hampered by a *lack of (internal) competences*. Again this problem has to a large extent been addressed through several federate modifications. From the perspective of an ideal internal market gaps certainly exist in the competences of the EU, and important problems remain unresolved. Improvements could, for instance, be imagined concerning services of general economic interest, the relation between market and social objectives or the many indirect problems that simply remain between multiple different legal systems. Many of these problems, however, seem more due to the impressive scope of internal powers, than to their absence. With such significant market powers the problem rather becomes the absence of *non-market competences*, which become necessary to flank and counterbalance the market ones.[161]

In addition the EU, as an inverted confederation, is troubled by a lack of external competences. Just as the US confederation was hindered in its external activities by the lack of internal competences, the EU may require additional external powers to ensure effectiveness internally as well, let alone where it is asked to be an external actor in its own right. At the same time we should wonder if it is possible to extend the external powers further without also moving to a stronger (federate) foundation for the EU; can a confederal system dominate both the internal and the external sphere, or should it necessarily leave primary control of one of these halves to its members as part of a necessary confederal balance? Despite these problems, however, the EU clearly does not suffer from the lack of internal competences in the same way as the American Confederation.

The last major flaw Madison noted in the Confederation was the *inability to amend* its own shortcomings. Again, as we saw, the modified system of the EU at least reduces this weakness. Formal amendment, in line with its confederal basis, still requires unanimity. Yet the EU system has enough internal flexibility to adapt through interpretation and convention. In addition, the internal focus, negative integration as developed by the Court of Justice, and the relative stability of the Member States have helped in achieving several important formal amendments, such as the Single European Act. Compared to the US Confederation, therefore the EU system is far more flexible and adaptable, although future challenges await, especially with close to thirty Member States and an even heavier federate superstructure.

161 See for instance cases C-341/05 *Laval* and C-438/05 *Viking*. One could of course also then recast such non-economic competences as market competences by simply adopting a broader definition of market. At some point however, this seems to become disingenuous.

6 Madison's score card: A clear pass grade

Scoring the EU against the archetypal weaknesses of the American Confederation it becomes apparent that the EU has been able to contain, or at least soften, most of them. It did so by incorporating a mix of federate modifications and utilizing its very different context. The modifications to the EU's constitutional structure, therefore, seem to have been effective in stabilizing its constitutional framework to a certain degree, and have allowed it to survive several crises. Crises which could easily have been the downfall of a more conventional confederal system, but instead cause the EU to significantly deepen and broaden integration.[162]

Yet what are the *costs* of these modifications? Can one simply place a federate superstructure atop a confederal basis, or is this the constitutional equivalent of armouring a *deux chevaux* with six inch steel plates? Can such modifications, furthermore, deal with the more fundamental weakness underlying the confederal system, such as its limited and secondary authority and legitimacy, or the limited capacity to reign in the states when cooperation is close to the breaking point?

To address these questions, and to further complete our exploration of the strengths and weaknesses of a modern inverted confederal structure, the next chapter turns to the problems that might flow from these same federate modifications and the three propositions developed so far.

162 Cf also the intuition of Lauterpacht on the potential to strengthen the confederal form. Discussing some proposed changes to the League he concludes: 'such innovations would go a long way towards realizing most of the conditions of a progressive political integration of humanity. … if adopted they would go a very long way towards removing the shortcomings of a confederation while retaining its necessary form.' Lauterpacht (1977), 16.

4 The costs of modification and the limits of the confederal form: Of new and exacerbated problems

1 Introduction

A free lunch is rare, even in constitutional theory. Besides their strengths, modified confederal systems obviously retain many flaws and inherent weaknesses. What is more, the same modifications that strengthen the constitutional framework of the EU may also bring new weaknesses and risks, or exacerbate existing ones. Some of these weaknesses and risks may be well known, but have perhaps not yet been traced back to their confederal root causes. Others are perhaps less visible or have not yet materialized, but logically flow from the nature and dynamic of a modified confederal scheme. All of these weaknesses and risks deserve to be explored as they may assist in better understanding the problems facing the EU and the limits that remain inherent in modified confederal forms. Limits that should ideally be understood and respected before they are overstepped and lead to a full crisis

Again it is necessary to limit our discussion to some of the most central problems, for which end we return to our three central propositions: what are the risks and downsides of the inverted market focus of the EU (section 2), its reliance on the rule by law (section 3) and the combination of a confederal basis and a federate superstructure (section 4)?

2 A market without borders or an EU without limits?

The inverted and economic focus of the EU energized integration. It partially did so by basing integration on a self-deepening conception of an internal market. As it turns out, however, this market focus might be too energetic, or at least too one-directional. Almost anything can be related to the market in some way, and therefore to an EU competence. As such this modification may help to better understand the increasing concern that the EU is usurping too much power, and is leaving too little space for national politics.[1]

1 A concern that amongst other things can be seen in the criticism of the Court of Justice, impossible but persistent calls for limitative lists of EU competences to be drawn up, or the virtual obsession with subsidiarity tangible in the Lisbon Treaty. Especially see the German *Lissabon Urteil*, BVerfGE, 2 BvE 2/08, and its attempt to establish some limits based on the German Constitution, see further chapter 8, section 4.4.

A market without borders might be desirable, an EU without limits is not.[2]

Several factors, related to the internal focus of the EU, contribute to this dynamic. To start with the self-deepening of the market brings ever more areas within the ambit of EU law. Once embarked on the project to create a genuine internal market, it turns out there are few areas that cannot at least in some way endanger this aim.[3] At least no logical or inherent limit in the concept of a market itself seems to exist. At the same time non-market aims have not been elevated to the same federate level as the market, and therefore struggle to provide such limits.

The increasingly distant link with the market required to establish an EU competence or trigger free movement prohibitions is the legal reflection of this dynamic. Under the almost federate doctrine of competences developed by the Court, for instance, only a relatively limited link with the internal market is required for the competence of art. 114 or 115 TFEU to become available.[4] One could, for instance, wonder what the real market risk is of not regulating the importation of thumbscrews (both serrated and regular) or electric chairs.[5] Similarly, the very broad definition of a restriction in the context of free movement law means even a rather remote connection with the market may bring into play the full arsenal of negative integration: any national measure, 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' forms a restriction which and in principle prohibited. [6] Staying below this threshold has almost become a challenge in itself. Examples of restrictions that stretch the imagination of at least those not-initiated in common market logic are not hard to find. In *AGM-COS.MET*, for instance, a televised interview given by one civil servant was enough to form a restriction, and could even lead to state

2 See in this regard the notorious claim by Lenaerts that in the EU there simply no longer is any: 'nucleus of protected state powers'. Lenaerts (1990), 222. Not surprisingly here the EU therefore shares in the same problems that many federations face: preserving any area of true state autonomy. As will be further discussed in the next parts the EU will also require more political solutions to counter this danger. Federal law, with its inherent central bias, cannot fulfil this role on its own.

3 On this point see already the analysis by Hamilton, who supported his proposal to abolish the states altogether with the argument that 'they are not necessary for the great purposes of commerce, revenue or agriculture.' McDonald (1968), 141.

4 Case C-376/98 *Tobacco Advertising I* [2000] ECR I-8419, case C-380/03 *Tobacco Advertising II* [2006] ECR I-11573, and case C-210/03 *Swedish Match* [2004] ECR I-11893.

5 See the truly fascinating Council Regulation 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment *OJ* (2005) L 200/1, annex III point 1.3, as well as the equally intriguing territorial *exceptions* to this prohibition.

6 Case 8/74 *Dassonville*. See for far-reaching applications of this test amongst many others case C-434/04 *Ahokkainen* [2006] ECR I-9171, case C-170/04 *Rosengren* [2007] ECR I-4071, case C-73/08 *Bressol*, [or case C-188/04 *Alfa Vita* [2006] ECR I-8135. Although of course all within the logic of the internal market, these cases do betray a certain measure of radicalism as well.

liability.[7] In Carpenter, though not the strongest of precedents one assumes, a spouse turned out to be necessary for interstate commercial activities,[8] as was a reduced rate on vignettes for disabled drivers.[9] The depillarization of EU law may further contribute to the further evolution and broadening of the internal market.

Naturally under the legal logic of the internal market a restriction does exist in these cases, and of course even minor restrictions can have a large effect or create loopholes for Member States to abuse. Equally the Court can, and has, compensated for this broad definition of a restriction through its case law on justification or by excluding certain domains from the internal market altogether.[10] Nevertheless these examples do illustrate the almost unlimited scope of the market, especially where there is a will to find a an actual or potential threat to its functioning.

Second, and in addition to this (legal) self-deepening, the *market itself* has expanded, and with it the competences and reach of the EU. With liberalization and privatization on the rise more and more formally public domains have been subsumed in the market place. These domains often concern important and sensitive goods and services such as healthcare, public transportation or energy. [11] As even the introduction of a small market component in an otherwise fully public service can trigger the full rigour of the internal market, furthermore, the transition from public to private, and therefore controlled by internal market law, can be a rapid process.[12]

As a result of these developments the EU has entered an increasing number of socially sensitive areas where it has limited competences for actual harmonisation.[13] This discrepancy between positive competences and negative reach is becoming increasingly contentious, and progressively taxes the

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7 Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749.

8 Case C-60/00 *Carpenter*.

9 See case C-103/08 *Gottwald* [2009] ECR I-9117 Although here the restriction was found justified.

10 See recently case C-137/09 *Josemans* [2010] ECR I-13019.

11 See for instance case C-158/96 *Kohll* [1998] ECR I-1931, case C-157/99 *Peerbooms* [2001] ECR I-5473, case C-385/99 *Müller-Fauré* [2003] ECR I-4509, case C-372/04 *Watts v. Bedford Primary Care Trust* [2006] ECR I-4325, case C-381/05 *Commission v. Germany* [2007] ECR I-6957, case C-73/08 *Bressol*. Further see C. Newdick, 'Citizenship, Free Movement and Healthcare: Cementing Individual Rights by Corroding Social Solidarity' 43 *CMLRev* (2006), 1645 or E. Spaventa, 'Public Services and European Law: Looking for Boundaries' *Cambridge Yearbook of European Legal Studies* (2002), 271.

12 Slot, Park and Cuyvers (2007), 101 et seq. Of course art. 106 TFEU creates a balancing mechanism here, but it only does so within the scope of the internal market law, and under the strict criterion that the desired level of the public service cannot be guaranteed within the rules established for economic activities.

13 Already see Weiler (1991), 2477 and R. Dehousse, 'Integration v. Regulation? On the Dynamics of Regulation in the Community' 30 *Journal of Common Market Studies* (1992), 383.

legitimacy of the EU. In addition it may restrict political action: where the EU cannot legislate because it has no competences, and where the Member States can only legislate within the limits of the Treaty exceptions and the Rule of Reason, the space for political action becomes rather limited, and negative integration is all that remains.[14]

Third, once within its scope, the EU approaches these sectors with a market perspective backed up by near federate powers. As discussed above, after all, other public objectives did not receive the same federate competences, and are not enforced by federate means. Consequently, even though the centrality of fundamental rights is continuing to grow with the Charter, the market perspective remains the constitutional *primus inter pares*, which dominates non-market objectives. This carries the danger of elevating the market over other non-market interests. A risk even (or especially) where the EU does not have competences to legislate on a specific non-market value, yet where Member State competences are still subject to higher rules of EU internal market law.[15]

2.1 The challenge of an unlimited market: Collective action

The example of collective action provides an interesting example of this elevation of the internal market, and the risk for imbalance that accompanies it.[16] The tension between collective action and free movement came to a head in the *Viking* and *Laval* cases.[17] In *Laval* the Swedish unions took collective action against the refusal of certain foreign companies to sign on to Swedish collective agreements, especially for posted workers. The companies targeted argued these actions violated their free movement rights. In *Viking* Finnish trade unions undertook collective actions, together with the powerful International Transport Workers' Federation, against a Finnish company wanting to reflag a ship to a Latvian flag.

In both cases the Court of Justice held that the actions fell under the scope of respectively the freedom to provide services and the freedom of establishment.[18] Especially in *Viking* this in itself already formed an important extension of the horizontal direct effect of the market freedoms, and with that of the internal market itself. Instead of demanding some form of (semi-)public

14 See on this dynamic F. Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States', in: G. Marks et. al. *Governance in the European Union* (Sage 1996), 15 et seq.

15 Also see more fundamentally: K. Polyani, *The Great Transformation* (2nd edn, Beacon 2001) on the inversion between market and society that the EU might entail or stimulate.

16 N. Reich, 'Free Movement v. Social Rights in a Enlarged Union: The *Laval* and *Viking* Cases before the ECJ' 9 *German Law Journal* (2008), 125et seq.

17 Cases C-431/05 *Laval* and C-438/05 *Viking*.

18 Art. 49 and 56 TFEU, *Laval* par. 98, *Viking* par. 64-65.

authority for the freedoms to apply, the mere capacity to obstruct free movement was enough to trigger horizontal application.[19] This is a logical step where the aim is to protect the ultimate effectiveness of the market; why would powerful private entities be allowed to do what the state is not? Yet, already on the level of scope, this decision also illustrates the expansive logic of the internal market, and the tension this creates with other objectives.

Weighing the rights involved, furthermore, free movement won out in both cases. The claim here is agnostic as to whether the specific outcome in these cases was right or wrong.[20] Rather the point is that these judgments illustrate how the internal market logic elevates the right to establishment to the same level as an important social right as collective action, and in a specific case subsequently prioritizes free movement. Although the internal market rules are set at the EU level, furthermore, these social rights cannot be fully established at the EU level.[21] As a result, these rights are largely defined and protected at the national level, which then has to take into account the supranational rules on the internal market. Again the point here is not that social rights should not be weighed against other interest, as they also are at the national level, but the *prima facie* imbalance between the two rights created by the central and federate position of the internal market.

2.2 Fundamental rights

In this regard the explicit weighing that takes place between market freedoms and more classic fundamental rights is interesting in itself as well. In *Schmidberger*, for instance free movement of goods is weighed against the freedom of assembly.[22] In this case, as in *Viking* and *Laval*, both are placed at the same level and then weighed.[23] Now in *Schmidberger*, as in *Omega Spielhallen*, the fundamental right at stake is found to outweigh the restrictions on free movement. An outcome that illustrates how serious the ECJ takes these fundamental rights, and also how it manages to provide a certain counterbalance to the market within EU law itself.

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19 Also see A. Dashwood, '*Viking* and *Laval*: Issues of Horizontal Direct effect', 10 *Cambridge Yearbook of European Law Studies* (2008), 525.

20 For discussion see amongst many others: J. Malmberg and T. Sigeman, 'Industrial Actors and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' 43 *CMLRev* (2008), 1115, and S. Sciarra, '*Viking* and *Laval*: Collective Labour Rights and Market Freedoms in the Enlarged EU' 10 *Cambridge Yearbook of European Law Studies* (2008), 563.

21 See also the weaker formulation of such social rights in the Charter, as well as the various opt-outs to even these weaker formulations.

22 Case C-112/00 *Schmidberger* [2003] ECR I-5659. Note how, for instance in par. 51, free movement of goods is explicitly transformed into a principle, instead of a rule, to allow this balancing.

23 For similar exercises balancing free movement and fundamental rights also see case C-275/92 *Schindler* [1994] ECR I-1039, case C-36/02 *Omega Spielhallen* [2004] ECR I-9609 and case C-71/02 *Karner v. Troostwijk* [2004] ECR I-3025.

Again, therefore, the claim here is not that the Court, or EU law more generally, is deaf to all but internal market interests. Only two more limited claims are made. First, as with collective action, the elevation of the internal market as a near federate element within the EU leads to a confrontation between market interests and other interests that have not been elevated in the same manner. The fact that free movement rules are actually balances against fundamental rights only illustrates this elevation of the market. Second, without automatically overruling other social or public aims, this federate elevation of the internal market does give an advantage to the market within confrontation, seeing how the internal market has the structural benefit of its federate position and authority.

A central focus on market and economy becomes particularly problematic where one ascribes to thick or existential notions of the political. For either the EU then threatens this political core, wrongly replacing politics with economics. Or alternatively the internal and economic focus of the EU can never be strong enough to support a real polity, and must therefore lead to the downfall of the EU. This because a polity can only be based on more political notions than economic interest. See in this regard, for as thick a notion of the political as one can get, the discussion of a customs union by Carl Schmitt:

> (…) unions such as postal association contracts, customs and trade unions, etc. This type of contractual relation or connection is characterized by the fact that it establishes obligatory commitments with a definable content, which are often very important, but it does not entail the political existence of the state as such in its totality. It is never a connection that is a matter of life and death.
> It can be that economic or other connections become significant, but they are first decisive when they involve the political existence of the state. (…) If an economic connection like that of a customs union would result in a political community, the political element would simply become decisive and an additional connection involving the existence of the state would occur in lieu of the contractually regulated individual relations.'[24]

Obviously the claim in this thesis, as will be further developed in part II, is that the confederal form does form such a stronger political bond that can be partially driven by economics but should indeed be based on more. Nevertheless the risk of too one-sided a market approach should be recognized.

2.3 In search of confederal limits?

Somewhat surprisingly for a confederation, therefore, the question arises how to curb the authority, actions and impact of the confederal centre and the rules it enacts. How to delimit the market in a way that does not undermine the project altogether? Recent case law of the Court of Justice can be

24 Schmitt (2008), 382-383.

seen as an attempt in this direction. In some sensitive and contested areas, such as gambling, soft-drugs, or particularly sensitive rules on transcription of names, for instance, it seems the Court works hard to create more space for national decision making. It even seems to be setting some moral limits to the market.[25] As the struggles of the Court show, however, this is not an easy task, especially not within the legal framework currently in place.

The objective here is only to flag up this danger, and to show how it fits with the confederal prism proposed. From that prism, however, one could envision different means of addressing this imbalance. For instance some other EU objectives could be upgraded to a more federate level as well.[26] Conversely, the market objective itself, or parts of it, could be toned down. Taking a leaf from competition law, to give but one idea, one could strive for a *workable market* only, and not for a perfect one. In addition one could imagine that a more established, 'adult' internal market could be less puritanical and more pragmatic in choosing its battles. All such actions, however, do run the risk of undermining precisely the legal focus and mechanisms supporting integration. At the same time it is important that the internal market does not start writing cheques the rest of the constitutional structure cannot cash.[27] Although this problem cannot be solved here, part II of this thesis will return to it, further building on the insights developed there regarding sovereignty.

3 Limits and risks of the rule by law

The second and third proposition pointed out how the EU relies on the rule by law. An approach that allowed it to reduce the confederal weaknesses concerning inaction and compliance. Several other weaknesses, however, remain, have been exacerbated, or have even been newly created by this reliance on a rule by law. Five of these, which are especially relevant to a theory of the EU as a modified confederal system, will be focused on here. First, how the range of a rule by law is limited to areas amenable to legal control. Second, its tendency to unbalance the relation within the *trias*, and between law and politics more generally. A problem which feeds into the

25 See especially case C-387/96 *Sjöberg* [1998] ECR I-1225, and case C-137/09 *Josemans*. For a further analysis also see Van den Bogaert and Cuyvers (2011), 1175.

26 See in this regard the attempt made with the protocol on services of general economic interest.

27 The current situation hereby leaves Member States in a difficult catch 22. They can counter the market focus by elevating some other, more social objectives to an equally federal level within the EU. Yet this would further strengthen the EU and reduce their national say in these per definition sensitive fields. If they choose not to do so, however, these non-market objectives continue to be subjugated to the internal market focus. Either way control is lost, and it should be decided in each case which is the lesser evil.

further issues concerning the amendment trap created and the inherent but vulnerable reliance on the stability of Member States and their legal infrastructure. Lastly, the risk of political free riding on the rule by law must be acknowledged.

3.1 Areas not amenable to legal control

First, relying on law restricts EU control to *those areas covered by law*. Areas where law holds no sway, for instance because they do not fall under the jurisdiction of courts or administrations, or because they are inherently not rule bound, escape effective control by the EU. Vice versa, the problem exists that the EU needs to 'juridify' an issue to exercise control. Luckily for EU effectiveness few areas seem to escape juridification these days, yet this limitation does help to explain why the EU is having such difficulties in more purely political areas. Foreign affairs, defence, or the budget, for instance, are generally left to the discretion of democratically elected politicians.[28] Not only do they generally fall outside the competence of courts and bureaucrats, these areas often involve truly political decisions that are difficult to capture legally. As a consequence they fall within only the most marginal of legal limits, even where judicial review is provided for at all.

As a result, the EU cannot effectively control such non-legal fields via national courts or bureaucracies. An analysis that also explains why it is not so much the political 'sensitivity' of a field that limits EU involvement, but the level of national legal control over this field . The internal market inroads into criminal law, social law and immigration have shown as much. Rather than political or social sensitivity, it is the level of juridification and of rule based control in a certain area that determines the potential for EU involvement.

If correct, this conclusion points to two potential problems or limits for integration. First, it limits EU control in 'high politics' dimensions such as foreign affairs or military cooperation. Conversely, however, it points to another risk for the long-term legitimacy of the EU. There might be a temptation to increasingly juridify core political domains so as to increase the capacity for EU control and prevent national political actions from undermining EU effectiveness. Juridifaction of these domains, however, would further empower courts and bureaucracies over politics, and could undermine both EU and national legitimacy in the longer run. A political system cannot live by law alone.

These risks of juridification thereby also point to another risk in the rule by law, and one that is already occurring: a relative empowerment of law over politics.

28 On budget and EMU see further below chapter 13.

3.2 Unbalancing the Trias

Even in areas amenable to legal control, law may at points have become too dominant. Here we see the same challenge as with the internal market: where only one element in a confederal system receives near federate backing, be it the market or the national judiciary, its relative power is dramatically increased over elements that do not. In the end this alters the overall balance in ways that might not be desirable.

By introducing federate legal and judicial elements such as supremacy and direct effect, the EU has empowered national bureaucracies, but especially national courts *vis-à-vis* their executives and legislators.[29] They now speak, if they choose to do so, with the supremacy of EU law. As is well known these federate modifications enabled even the lowest national court to review all national norms, up to constitutional norms, against any norm of EU law.[30] A body of law that that contains an expansive set of rules, principles and interpretative tools that further empower a national court where it wishes to be so empowered.

In this way the EU has reversed the relation between politics and law, or has at least affected the balance between the two in the benefit of law and courts. As a result the relation between the courts and the other branches of government has changed, as has the relation between law and political decision-making itself. This especially because at the same time the national executives have been empowered *vis-à-vis* their own legislatures as well, further affecting the *Trias* and the balance of power within the national systems.

At the EU level a similar empowerment of law over politics took place. A federate style court was placed amongst confederal political institutions. This court now has the authority to interpret a corpus of supreme primary law, with which all secondary law must comply.[31] In fact the first *Kadi* judgment of the Court of Justice seems to suggest that even primary law might not be exempt from review against the principles that – according to the Court – form the very foundations of the EU legal order.[32]

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29 At the same time the national executives have also been empowered *vis-à-vis* their own legislatures, further affecting the Trias. This shift in power between the executives and legislatures will be further discussed in chapter 10 section 6.2 and chapter 12 section 3.

30 Cases 106/77 *Simmenthal* [1978] ECR 629 and C-213/89 *Factortame* [1990] ECR I-2433.

31 See recently Opinion 1/09 on the potential establishment of a Patent Court.

32 Joined cases C-402/05 P & C-415/05 P *Kadi I*. For discussion see Cuyvers (2009) and A. Cuyvers, 'The Kadi II judgment of the General Court: the ECJ's predicament and the consequences for Member States' 7 *European Constitutional Law Review* (2011), 481.

Now it is normal for modern government to be controlled by the courts, and the general difficulties this creates are well known. Yet these difficulties become especially acute for the EU where the political counterparts are based on a far more confederal footing than the ECJ. An imbalance which further enhances the relative power of the Court, even beyond the high level of judicial authority normally found in a federal system.

The relatively limited power of the political institutions also forms a further risk of the rule by law in itself. One that provides an interesting example of the unintended consequences of mixing a confederal basis with a federate superstructure, and might be labelled as the amendment trap.

3.3 Setting an amendment trap

Considering the complexities of EU legislation it is already difficult to respond politically to the European courts via secondary law.[33] On the level of Treaty change, the only way to formally counteract an interpretation of primary law by the Court, the difficulties are even more daunting. Only where Member States unanimously agree on an alternative to the interpretation of the Court of Justice can they use the instrument of Treaty change to overrule the Court.[34]

Clearly the Court does take into account the views and sensitivities of the Member States.[35] Views which the Member States may express as intervening parties or via other routes with different degrees of formality. Furthermore, the Court has often proven sensitive to changes in tone reflected by Treaty amendments. After Maastricht, for instance, a certain restraint was generally perceived in the Court's case law. Similarly the clear emphasis on subsidiarity and the limits of EU competences in Lisbon, including the repeated warnings that the Charter is not intended to extend the scope of EU law nor EU competences, [36] gave give a clear signal to the Court which

33 For one example see the development from *Bidar*, via Directive 2004/38 to *Förster* concerning the maximum residence period that Member States may require to become eligible for study grants.

34 Also see on the limiting effect of the stringent requirements for amendment A. von Bogdandy and J. Bast, 'The European Union's vertical order of competences: The current law and proposals for its reform', 39 *CMLRev* (2002), 237.

35 See for instance case 72/83 *Campus Oil* [1984] ECR 2727, joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, C-36/02 *Omega Spielhallen*, C-440/05 *Ship Source Pollution II*, C-203/08 *Sporting Exchange* [2010] ECR I-4695, C-137/09 *Josemans*, C-434/09 *McCarthy* [2011] nyr., C-256/11 *Dereci and others* [2012] nyr., or C-370/12 *Pringle* [2012] nyr.

36 See for example art. 4, 5, 6, 12(b), and 48(2) TEU, art. 69 and 352(2) TFEU, Protocol 1 on the role of national parliaments in the European union, art. 3, and Protocol 2 on the application of the principles of subsidiarity and proportionality or art. 51 of the Charter.

it appears to take into account.[37] These alternative means of communicating with the Court, however, do not alter the fundamental fact that actual amendment, and therefore directly correcting an interpretation of primary law by the Court, requires unanimity.[38]

By establishing a federate court, yet maintaining a requirement of unanimity for Treaty change, the Member States have in fact created a confederal amendment trap. Since each Member State can veto a Treaty change, amendment will only succeed when the proposed change is better than the status-quo for all parties.[39] Clearly this will not readily be the case.[40] As a result the status quo, being the current Treaties as interpreted by the Court of Justice, is deeply entrenched.

Instead of protecting members from radical change, as the unanimity requirement does in a standard confederation, their own veto's trap the Member States into the autonomous development of the Treaty.[41] In a sense they have locked themselves up with a (robed) tiger and thrown away the key. The fact that none of the *Acquis* on the internal market was really touched in Lisbon, despite its many contested elements, illustrates the strength of this mechanism.

One often ignored consequence of this trap is that it becomes more difficult to claim that the current interpretations of the Court, including those on supremacy, rest on tacit agreement of the Member States. A claim often made based on the reasoning that Member States have repeatedly chosen not to challenge those interpretations in later Treaty amendments.[42] That fact alone, however, only proves their inability to unanimously agree on an alternative. It cannot prove their consent, not even tacitly.

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37 Dougan (2008), 617. Also see, for instance, the careful way in which the ECJ acts in *Dereci*, not expanding the scope of the charter itself, though giving a nudge to national courts in the direction of fundamental rights and the ECHR.

38 Compare the very different reality in the now re-emerging East African Union. There, after the first case in which the East African Court of Justice ruled on its own competence, the Treaty was immediately amended by the Member States. See EACJ [2007] *Prof. Peter Anyang' Nyong'o & 10 others v. The Attorney General of Kenya & 5 others*, Reference No. 1 of 2006 and H. Onoria, 'Botched-Up Elections, Treaty Amendments and Judicial Independence in the East African Community, Journal of African Law (2010), 78.

39 Trade offs between the Member States are of course possible, but complex with close to thirty parties.

40 Two examples may suffice to illustrate the point. First, the inability to really reform the agricultural policy. Second, the ongoing traveling circus between Brussels and Strasbourg. A practice that cannot be defended, but only explained by the requirement of unanimous Treaty change, and has become an increasingly damaging symbol for EU wastefulness. On the 'sticking power' of agriculture at the EU level see A. Milward, *The European Rescue of the Nation State* (Routledge 1992), 317.

41 Cf also Tushnet (2006), 1240 on this general dynamic between the ease of amendment and the need for constitutional adjudication.

42 See for an example De Búrca (2006), 450.

So far this confederal lock-in has certainly helped to protect and promote integration: The crucial backbone provided by entrenched negative integration, for instance, has already been discussed.[43] Unfortunately, it also means that their might be a (widening) gap between the content of EU law as interpreted by the Court of Justice, and the political will supposedly underlying it. A fact that would provide an additional explanation for the extreme difficulties that recent attempts to substantial Treaty amendment unavoidably seem to run in to.[44] A gap also, that might create a search for more radical solutions by threatened, or opportunistic, Member States in the future.[45]

3.4 Reliance on stable Member States and member courts

The rule by law depends on stable states and effective legal systems. Anything that reduces these preconditions threatens this type of confederal rule. The accession of less well-developed Member States forms one such potential threat. Another threat, which bears an interesting resemblance with our US comparator, is the apparent rise of populist, anti-establishment parties. When such parties come to power, they may introduce a less stable form of politics, and one less concerned with loyal external cooperation, especially in light of the nationalist streak that often energizes them. Even when such parties do not participate in government, they may destabilize national politics, either because their support is required to govern, or because they scare more centrist parties into a nationalistic mode as well. The Dutch PVV provides a clear example of both, but examples are not hard to find within the EU as a whole.[46]

Equally the rule by law would run into difficulties where national courts were to cease their cooperation. Of course a certain level of resistance already exists, and has existed from the beginning.[47] Not asking preliminary questions is one common form.[48] Equally, most supreme courts openly challenge the basis of supremacy in EU law itself, and with that its absoluteness. It is suggested here, and developed in detail in the next part of this thesis, that a confederal system cannot but accept these claims of national

43 See chapter 3, section 3.1.

44 Cf also the tangible fear and reluctance of the Member States when Treaty amendment proved necessary in the EMU crisis.

45 When this gap gets to big, Member States might start agreeing on radical amendments to reduce EU influence. The significant strengthening of the European Council perhaps shows one example of this process already.

46 The Greek 'Golden Dawn' party forming a particularly worrying example.

47 See for an overview of the early case law the more detailed discussion of supremacy below in chapter 2, section 3.1.3.

48 It is furthermore very difficult to find out how well EU law is applied in the day-to-day reality of lower courts, already as many judgments are not even published. A significant blind spot in our understanding of the EU system, and of course a limitation that limits the certainty of the rule of law claim made here.

supreme courts. Such heterarchy, at least between the EU and the Member States, is inherent in a confederate basis, and should be accommodated and managed as well as possible. What is essential, however, is that in 'ordinary' cases, supremacy of EU law seems by and large respected, again as it also should be in a confederal system. As long as supremacy is granted where the core of national constitutions is not threatened or national supreme courts are not forced to prove their own supreme status, the rule by law is not undermined too much. Only where rejecting supremacy would become the default position of national courts would the rule by law, on which a confederal system must partially rely, be made impossible.

Even where national courts do generally respect EU law, however, another opposite risk attaches to a rule by law: it places significant stress on the legitimacy of law and national courts, the primary instruments of a rule by law. Yet not just a national revolt *by* the courts would undermine the EU system, so would revolts *against* the national judiciary, or law in general. Courts enjoy a certain level of legitimacy as independent, professional institutions that apply 'the law'. Institutionally they derive legitimacy from their specific task, and from their position in the national constitutional framework. This national framework, however, was not developed with their EU role in mind. Instead, to put it boldly, the EU has 'commandeered' these institutions through the medium of law, upsetting the national balance in the process.

As discussed above, this focus on law and the judiciary has so far proven a very effective one for the confederal rule of the EU. Not only did it prevent the need for more federate intrusion into the executive or the legislature, it also allowed the EU to tap into the legitimacy that courts enjoyed in their national systems. In the longer run, however, this EU role of courts might diminish their legitimacy, certainly where no national rebalancing takes place. Yet where the authority and legitimacy of national courts is threatened, so is the very rule of law on which the EU depends. For that reason any future conception of the EU constitutional system must also consider just how to fortify and legitimate these national foundations of the EU system.[49]

3.5 Absolving political responsibility

Where too large a burden may be placed on the courts, a rule by law may require to little from national political actors. For a last risk of too one-sided a reliance on the rule by law is that it reduces the need for political actors to explain, justify and improve the process of integration. Instead, they can

49 Further see chapter 10 section 6 and chapter 12 on the need for national constitutional systems to be better adjusted to their participation in a confederal constitutional system.

score political points by criticizing courts and Brussels: the legal machinery will take care of itself and 'force' them to cooperate whilst they defend the nation.

One of the long term risks of this dynamic is that no *positive political discourse* is developed to explain, positively conceptualize, or sell the EU. The often clumsy campaigns and lack of a convincing message in 'yes' campaigns for referenda provide painful examples. Where there is no shortage of punchy one-liners on the 'no' side – factual correctness aside –, a positive message on the EU has not yet evolved through practise and repetition.

Consequently, instead of having the support of politics, courts are increasingly forced to go against it. And that in a time where their legitimacy is already under pressure in some Member States where courts, as other public institutions, are increasingly stripped from the almost automatic authority they used to enjoy. Considering the importance of national courts for the modified confederal system of the EU it will be a crucial challenge to find ways to ensure their legitimacy. Equally national politics must be enlisted, and political free riding on the rule by law must be prevented. This will require, it is suggested, creating constitutional incentives that align political interest with that of EU integration. A challenge that will be further addressed in part II and III of this thesis.[50]

As will be clear from the overview so far the inversion of the EU's focus, and its reliance on a rule by law not just strengthened the constitutional system. They also introduced certain weaknesses of their own, or amplified existing ones. It is suggested, however, that the most central problem of the modified confederal system of the EU lies in the *growing imbalance between its confederal basis and its federate superstructure*. A schism that directly relates to the legitimacy challenge the EU is facing, and points to some of the real limits that a confederal basis imposes.

4 The increasing schism between foundation and superstructure

As shown the EU has incorporated several federate modifications yet has consistently not incorporated the foundational modifications that underpin them in the US. Most crucially, the EU is not based on one sovereign people, but on a mixture of states and the sovereign peoples these represent. As a result, there is a gap between the federate superstructure of the EU and the

50 See especially chapter 12 on the ways in which the EU could assist in restructuring, and enriching, the national democratic process itself.

confederal legitimacy structure it rests on.[51] The supremacy of EU law, for instance, is not supported by the normative superiority of a single people, as it is in the US.[52] Similarly primary citizenship allegiance, in law and in social fact, generally lies with the Member State or sub-national units.[53] The national courts derive their institutional power from the Member State constitutions, not the Treaties, yet are asked to overrule those very same constitutions.

It is this gap between superstructure and foundation, it is suggested, that forms one of the root causes of the infamous legitimacy problems of the EU, as well as its perceived democratic deficit.[54] In this regard the confederal perspective fits with, and may contribute to, the impressive amount of work already done on the legitimacy of transnational governance.[55] This growing schism also points to another inherent weakness in confederal systems: their limited capacity for direct conflict.

4.1 An increasing schism: A problem of normative capacity

From the confederal perspective the key problem underlying the democratic deficit is that the EU has federate powers but no federate authority to base them on. Consequently its problems go deeper than just the institutional set-up or the system of representation. They are directly related to limits inherent in the confederal basis of the EU. As long as the centre does not have the normative capacity to legitimize centralized federate powers, after all, no solutions *at the EU* level exist to bridge the gap between basis and superstructure; the problem is one of normative authority, not representation.

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51 The entire human rights turn in EU law can be understood as one attempt to fill this gap with another form of, substantive normative authority. Yet from a constitutional point human rights are not suitable as a basis for such normative hierarchy: they are heterarchichal in nature, as is natural law itself. The normative superiority of fundamental rights can be claimed by all, including by Member States or national courts *against* the EU. See for a further discussion of this dynamic Cuyvers (2011), 481.

52 See chapter 2, section 3.1.3.above and chapter 10, section 8 below on the effects this has on the nature of supremacy in the EU legal order.

53 For example the Language Communities in Belgium, the regions in Spain or the polities with devolved authority in the UK.

54 Clearly this analysis, as the entire democratic problem itself, dissipates where the EU is deemed already sufficiently legitimated by its 'output' or other technocratic standards. Even the Commission, perhaps out of desperation or resignation concerning deeper and stronger sources of legitimacy, seems to have embraced this language of results. Cf the 2006 Commission paper 'A Citizens' agenda: delivering results for Europe'. (COM/2006/0211) final. Without being too cynical, however, it should at least be wondered if you are taking the European citizens seriously if the fundamental transformation in public authority that the EU entails is to be justified by lowered cell-phone costs.

55 J.H.H. Weiler, U.R. Haltern and F.C. Mayer, 'European Democracy and its Critique', in: J. Hayward (ed), *The Crisis of Representation in Europe* (Frank Cass & Co 1995), 24.

The development of the European Parliament illustrates the point. The powers of the Parliament have steadily increased since its inception as an Assembly with supervisory powers in 1951.[56] After Lisbon it can truly claim to have become a serious co-legislator, also in comparison to many national parliaments. In many ways this has been a welcome development. Yet it has to be acknowledged that the consecutive upgrades of the European Parliament have not closed 'the gap'.[57] A thought experiment might drive the point home: would the legitimacy problem of the EU, and the perception of a democratic deficit, really go away if we made the European Parliament sole legislator tomorrow? Quite to the contrary. It seems more likely that most citizens would strongly object to such a move. Most likely they would see it as a decrease in legitimacy, as they feel more represented by their government than by 'their' MEP's.[58]

The underlying issue, after all, is not so much that the Member States, or their citizens, are not represented democratically enough. Both the members of the European Parliament and the members of government that act in Brussels have clear democratic mandates. It is useful in this regard to keep in mind the example of the German *Bundesrat*. Just as the Council of Ministers, the *Bundesrat* consists of members of the state governments, yet no one challenges its democratic credentials as such.

The real issue, therefore, is not the system of EU representation. It is that there is no central normative authority to represent, be it democratically or not. For unlike the *Bundesrat*, the Council does not act on behalf of a larger and normatively primary central entity. It is for the same reason that it would be highly problematic to grant the EU the power to tax directly, let alone to allow it to use force against Member States, or to allow the institutions to amend the Treaties without Member State consent. Even if all of the above would be done perfectly democratically the EU would still lack the normative authority to wield these powers.

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56 See art. 20-25 of the ECSC Treaty of 1951.

57 Cf also Van Middelaar (2009), 378-379, 389, and especially 391: Het [Europese Parlement] is geen volkstribuun die met de steun van de straat de machthebbers uitdaagt. Het lijkt eerder een hofmusicus, op zoek naar de aandacht van de prins – omdat achter de prins het publiek zit.' ([The European Parliament] is not a tribune of the people who, with the support of the street challenges those in power. It rather comes across as a court musician, seeking the attention of the Prince – because it is behind the Prince where the audience sits. My translation).

58 Cf Dann (2010), 271: 'Institutionally the EP has to be regarded as a strong parliament. Sociologically, however, it barely exists in the European Political mindset.' For an even starker analysis of the legitimizing power of the European Parliament, even under the – now – ordinary legislative procedure, see D. Grimm, 'Does Europe Need a Constitution?' 1 *European Law Journal* (1995), 283-4 and 296.

4.2 The no-demos challenge...or not

Because the confederal basis of the EU does not represent a single highest authority, the normative authority of each member remains primary and more intense.[59] As a result the EU cannot rely on the same normative superiority that the US federate government has. Instead, it has to recognize the primary normative superiority of its many masters.[60] Changing how each of these masters is represented at the EU level, therefore, does not alter the fact that there is no joint European body politic that normatively trumps, or equals, the individual Member Peoples.[61]

On the one hand this conclusion fits with the well-known 'no-demos' position. This holds that there can be no real democracy, and therefore no real legitimacy, at the EU level because there is no EU people.[62] Indeed the current analysis also points to the fact that there is no such central and superior entity to ground EU authority in. Of course this point would be solved if the EU manages to fully federate. Something that might be a possible outcome in the (much) longer run, but does not form a realistic shorter term solution to this schism between foundation and superstructure. [63] In any event it is also not the solution explored here, given our exploration of the confederal form and its potential.

Different from the 'no-demos' position, however, the confederal analysis does not reduce the legitimacy issues of the EU to an insurmountable *demos*-based limit inherent in democracy. Instead, it points to a mismatch between a confederal basis and a federate superstructure. A mismatch that would indeed have been solved if the EU had one '*demos*'. Yet a single *demos* only

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59 See for a further analysis on this point chapter 9 sections 5 and 7.

60 A fact which does not undermine the unique claim of the EU that it alone holds the *combined* delegated authority from all members. A claim that will be explored in chapter 10, section 8.

61 From that perspective the European Parliament only provides a *different mode* of national representation. Why this representation is any more 'direct' than the representation by governments, as is implied by art. 10(2) TFEU, is not exactly clear. This especially for states where the governments are directly elected, or consist of MP's. As the division of EMP's per Member State shows the EP does directly represent the citizens, but only the citizens in their own Member State. In that sense the language in art. 189 EC that proclaimed that the EP consisted of 'representatives of the peoples of the States brought together in the Community' was more accurate than the current art. 14(2) TEU. Note in this regard especially he second sentence of art 14(2) TEU, which states that: 'Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State.' Not only is the predicate 'European' left out, representation clearly takes place per Member State.

62 See for a discussion of the key tenets of statism chapter 8, section 4.3. below.

63 Von Bogdandy (2000), 51. See also the political judgment in the Intergovernmental Conference of 1996: Report of the Reflection Group, Brussels (1996) p. 21 et seq. Also see below chapter 5 on the process of American federation.

forms one of the potential solutions. Focussing on the lack of a *demos* alone, therefore, mistakes one potential solution for the problem itself.

The absence of a European demos does, therefore, *not* automatically mean that there are no alternatives to democratically organize the EU in a way that legitimizes its federate superstructure. What needs to be explored is if, and to what extent, a stronger yet still confederal basis for the EU can be conceived. A confederal basis that provides an *alternative* to creating one European people, but that is nevertheless robust enough to carry a number of federate elements.

Logically such a confederal solution should not start at the central level. It must start from the primary building blocks of a confederal system: the members.[64] For only once a sufficient confederal normative authority has been established at the national level can one consider how to democratically represent it at the confederal level.

To this end Part II will investigate a *confederal notion of sovereignty*. It will be examined if such a conception, which incorporates the EU into the constitutional power conferring arrangements of its different Member Peoples, can assist in establishing a sufficiently stable but still confederal basis. A confederal approach, which, if possible, might also allow us to recast the EU from a threat to democracy to an opportunity to protect democratic government. For a properly constituted confederation could take the Member peoples seriously, both nationally and supranationally, and allow them to escape the confines of the state. A solution, furthermore, that is necessary where one wants to truly and lastingly combine three crucial elements: democracy, the reality of increasing integration, and the enduring role of the state. A combination for which the – modified – confederal form might provide a suitable model if it can be properly grounded. For at the moment such a confederal conception and foundation for the EU's superstructure is missing, even though integration is progressing. The consequence is an increasingly hefty toll on democratic legitimacy.

Even if such confederal solutions can be found, however, its confederal foundation, and the gap between foundation and superstructure will continue to impose limitations on the EU. Limitations that must therefore be taken into account in the future development of the EU. One such inherent limitation must be discussed here in more detail before we engage the quest

64 In that sense the increased focus on the national parliaments under Lisbon, which hopes to draft them into the constitutional framework of the EU goes in the right direction. Mistakenly, however, the measures focus on the EU level once more, and not enough on the national process. See art. 12 TEU, and Lisbon Protocol no. 9 on the role of national parliament in the European Union. Also see on the tendency to include national organs already Rosas (2003), 7 et seq. and further O. Tans et. al (eds), *National Parliaments and European Democracy: A Bottom-Up Approach to European Constitutionalism* (Europa Law Publishing 2007).

for a stronger confederal foundation. A limitation that appears to become increasingly relevant and also should be taken into account when exploring a more stable confederal basis: the limited capacity of the confederal centre to actively and for a continued period of time pit itself against one or more Member States who willingly violate their obligations or in some other way obstruct cooperation.

4.3 The limited capacity of a confederal system for direct conflict

The fact that under a confederal system the members retain their ultimate and primary normative power also means that it is difficult for the confederal centre to directly confront a member. Certainly where this member directly relies on its normative primacy and is willing to violate binding legal obligations. Who, after all, is the EU to tell the French, the Greek, the British, the Danish or the Italian people what to do on their own territory? The EU also lacks the *means* to win such a direct conflict. It does not have an army or a police. More importantly, the EU also does not have the ear or the heart of the citizens to appeal to.[65] Not incidentally, all these instruments of power remain with the Member States.

Again the fate of the US Confederation provides a useful example. The unstable American states often did not have the capacity to self-police their obligations under the Articles. Consequently the Confederation was required to enforce these obligations. In addition, Congress was asked to intervene directly in several states where the rights of certain groups and individuals were increasingly being violated. Where such violations concerned (former) British individuals, furthermore, they also entailed breaches of the peace treaty that had been concluded with Great Britain. The Confederation, however, failed to reign in delinquent states, and could not put a halt to persistent and blatant violations.[66] It simply lacked the means and the authority to do so.

Such requests to become a counter-force to its members, therefore, forces a confederate system exactly into the role for which it is most ill suited: enforcement and conflict. A lose-lose situation occurs: either the confederal centre does not confront the delinquent state, and loses face. Alternatively it may choose confrontation, but suffer even greater loss of face where it loses this confrontation. In the case of the US Confederation, the consequence of its repeated failure to intervene or protect significantly harmed its legitimacy and credibility.

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65 Arguably where Member State governments are failing, trust in the EU may on the other hand exceed that in the national institutions. Italy and Greece illustrate this, up to a certain point.

66 See chapter 1, section 5.

Clearly this limited capacity for direct conflict forms a serious limit on confederal systems. One could even wonder what use a constitutional system is that only works where it pleases the members, yet cannot enforce even the fundamental rules of its own system where challenged. One can, after all, not base a serious constitution on the hope that no crisis will occur, or that the self-interests of the members will never come into conflict with the rules of the confederation. An argument that is often used to disqualify confederal rule as transitional arrangement at most.[67] Once the constitutional dating period is over one either moves to a stable federate marriage or separates, at most remaining friends with institutional benefits such as a free trade zone.

Obviously this limit to confederal systems is a serious one. It forms a major challenge to their usability and viability. It certainly means that great care must be taken not to bring a confederation in a position of prolonged confrontation, and to relieve it as much as possible from the need to pit itself against Member States directly.

As we saw above the modifications in the EU already go quite some way in this regard. The internal market provides increasing incentives to continue loyal cooperation even where other national interests might point in the other direction. The rule by law and the capacity for self-control have helped by entrenching confederal obligations *within* the national systems themselves, relieving pressure on the EU. Similarly states are already restrained by their own constitutions and by other international obligations from violating individual rights, although recent events such as the deportation of Roma, the treatment of asylum seekers in Greece, and the constitutional amendments in Hungary give cause for concern, and potential conflicts.[68]

So far these mechanisms have at least helped the EU survive several crises. The EU has generally even managed to strengthen and deepen integration via such crises. At the same time this track record does not guarantee this will always be the case. Further strengthening the system of the EU, especially by reducing or managing the schism between superstructure and foundation, therefore, remains of crucial importance.

67 See Kinneging (2007), or Watts (1998), 126.

68 Indeed one also sees that the Greek situation immediately put pressure on the Dublin system, built as it is around a typically confederal notion of mutual recognition. It therefore depends on proper minimum standards being observed in each Member State. See the ECJ judgment in C-411/10 *N. S. and others* [2011] nyr., as preceded by its ECtHR counterpart in *M.S.S. v Belgium and Greece*, [2011] Application no. 30696/09. On Hungary now see case C-286/12 *Commission v. Hungary* [2012] nyr.

As indicated, furthermore, part III of this thesis will analyse exactly one such crisis: the EMU crisis, which has shaken the EU to its core, and is interestingly heralded both as the end of the EU and the harbinger of even more far-reaching integration. As such it is an ideal, if daunting, candidate to help us test and develop the confederal insights developed above, as well as the further suggestions on strengthening the confederal basis that will be developed in part II.

5 Conclusion: The weaknesses of a modified confederation

The previous two chapters refined the semi-crudes of our sixteen-point confederal comparison into three more general propositions on the modified confederal nature of the EU. It was illustrated how these propositions, and the more general confederal approach they represent, can assist in better determining and understanding the specific strengths and weaknesses of the EU constitutional system.

The overarching image that arises from this exercise is a significantly strengthened system that nevertheless contains some serious risks and weaknesses. For the different modifications to the classic confederal model have indeed managed to reduce several of the most classic and existential flaws of the confederal form. An inverted focus, for instance, provided more 'energy' to the centre and ensured that the self-interest of Member States in cooperating kept pace with the demands of deepening integration. This increased will to act could be more effectively channelled and translated into action through the federate elements in the superstructure of the EU, which also guard against inaction. These federate elements, together with the stable and developed legal systems of the Member States, further enabled an EU rule by law, which reduced pressure on the confederal Achilles heals of executive capacity and compliance. The cumulative increases in effectiveness and stability these modifications have brought may well have impressed a Madison, and perhaps even surpass the expectations that some founding fathers had of the federate system at Philadelphia.

At the same time each proposition also pinpoints several serious flaws. The self-deepening of the inverted focus, for example, might lead the EU to unsustainable levels, just as the tendency of the federate elements in the EU system to increase in relative weight and importance vis-à-vis their confederal counterparts. Two elements that also help to better understand the evolution of the EU constitutional system more generally. A rule by law may be no match for direct political challenges, may actually undermine the political dimension needed to sustain EU integration, and in any event depends on several preconditions that may not hold. Most fundamentally, however, the growing schism between the federate superstructure and the confederal foundation of the EU puts an increasing strain on the overall constitutional structure and its legitimacy.

All in all these are serious challenges that need to be addressed or at least taken into account. Before further drawing these findings together in a general conclusion, and exploring some potential suggestions and solutions in part II and III, it is, however, useful to first turn to a second and so far unexplored dimension of our confederal comparison: the process of American federation.

As will be seen, several of the key procedural elements driving and enabling the federal transition in the US seem to be lacking in the EU. Even if the economic crisis provides a certain push factor towards federation, therefore, this is not supported, or even counteracted, by some other relevant procedural factors brought to the fore by the process of federation in the US. If correct this is directly relevant to our further research, as it increases the stakes of finding a confederal solution, simply because it becomes more unlikely that a federate one will be available any time soon. Equally, some of the procedural findings are directly relevant for the solutions explored in part II and III. For this purpose the next chapter will first address the fascinating process underlying the US transition into a federation, before chapter 7 provides a general conclusion to part I.

5 Of elite structures and anti-democratic revolutions: The process of federation

1 From Confederation to federation: The process

Having analyzed the substantive position of the EU between our confederal and federate waypoints this chapter looks at *process*. What factors drove the constitutional change in the US, who were involved, and how was such a dramatic shift realized?

A better grasp of this process not only sheds light on the nature of (con) federal systems and the European modifications. It also provides some concrete foundation for debates over whether Europe could or should 'federate', and if so how. No claim whatsoever is made, however, to completeness when it comes to explaining the origins of the American constitution.[1] Equally, considering the high context-dependence of political processes, all earlier caveats on the risks and limits of comparative research must again be stressed.[2] Fundamental shifts of this magnitude, however, are very rare. Carefully designed and well documented shifts are rarer still.[3] Consequently we cannot be too picky in our choice of comparators.

Acknowledging these limitations, our focus is intentionally restricted to several elements that, even considered in relative isolation, provide relevant comparative insights for the EU. In addition it must be emphasized that on some points the reality in the US was not that far removed from the one in the EU. Most importantly the move to a federate system in the US was far from automatic. There was very strong opposition to such centralization, and this opposition was lead by many prominent figures. Moreover, the major consequences of federation were known. The new constitution was openly described as nationalist, and there could be no doubt that the states and the peoples would be giving up their independent sovereign status. In other words, the stakes were clear and both sides were well represented. Any claim that the move to a more centralized system in the US was not contentious, and thus not comparable to the EU, is therefore simply incorrect.

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1 Beard (1986), Beeman, Botein and Carter (1987), McDonald (1985), Rakove (1996) or Wood (2003).

2 See especially Introduction, section 4.2. and chapter 1, section 3.

3 Elazar (2006), 33.

Four process elements that are of particular relevance for the EU be discussed here. First, and most centrally, the *elite structure* in the US which, unlike in the EU, was geared towards federation. (section 2). Second, the anti-democratic nature of the US transition (section 3). Regarding the more practical aspects of constitutional change the confidentiality of the US drafting process and the use of attached amendments (sections 4 and 5) and the importance of *aemulatio* rather than *innovatio* will be discussed (section 6), before we end with a sub-conclusion on process in section 7 and continue to the overall conclusion of part I.

2 Elites and elite structure: If you cant beat them make them join you

One of the most interesting comparative process points concerns the make-up and incentive structure of the relevant political elites. The relevance of this structure can be summarized by one question: who will lead further European integration? The term 'elite' is intended here as a descriptive and value neutral term, to the extent possible, and only as a shorthand to indicate those in relevant positions of (political) power.

2.1 The federate path to power in the US

The US experience is of great interest on this point. The new constitution was conceived, formulated, and intensely promoted by powerful elites. These groups, as usual, were motivated by a variety of interests, ranging from the idealistic to the downright selfish.[4] One especially relevant incentive, however, united them: many of these elites had lost their hold on the state legislatures.[5] They were threatened by the radical democratization of politics in their states.[6]

4 See for an account that very much stresses the personal interests of the Founding Fathers (yet has now been largely discredited), for instance Beard (1986).

5 See for instance the resolution that Sam Adams, one of the radical leaders, offered to Congress on 10 May 1776: those colonies which had not yet adopted governments 'sufficient to the exigencies of their affairs' should be encouraged to adopt such governments 'as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in General'. *De facto* this amounted to a general coup against conservatives who controlled the 'old' governments. (Jensen (1970), 98).

6 Jensen, (1970) intro p. xxiii. En p. 9 *et seq.* Jensen even describes these elites as the 'ruling aristocracy' and the 'political oligarchy.' In fact, the revolution was: 'as much a war against the colonial aristocracy as a war for independence' (p. 11). In which the aristocracy was in a tight spot: Once (grudgingly) in rebellion, it needed the ore radical and democratic party to succeed, but thereby empowered their own natural opponent. Where these elites had retained control of the executive, they also strongly supported federation. Jensen (1965), 336.

The issue of paper money provides an illustrative example. Most of the elites, including the founding fathers, were large creditors and traders. In those capacities they were alarmed by the introduction of paper money. Paper currency was printed in large quantities, yet did not have sufficient backing. As a result it soon lost any value. At the same time, however, state legislatures controlled by more radical factions decreed that paper money should continue to be accepted as valid payment of debts. Obviously these measures were highly popular with the increasing number of people in serious debt. For the creditors, however, paper money equalled writing off all outstanding loans. Multiple other comparable measures were taken, especially harming the interests of those with strong ties to the old tyrant.

Questions of social justice aside, these elites felt wronged and threatened. Yet they had lost their hold over the public bodies in the states, and hence were unable to protect their interests and their views on the proper social order of things at the statal level. These elites, therefore, repeatedly turned to Congress to protect their interests. As described above, they were consistently disappointed. Congress lacked the energy and authority to assist, and often also the will.

With no more hold over their states, and no help coming from the weak centre, further centralization, and ensuring control of the new central government to be created, was seen by a cross-state elite as the only way to regain political power.[7] Centralization thus received the strong support of different elites, who jointly still controlled important political, economic and intellectual resources. A group, furthermore, that included individuals with enormous personal authority such as George Washington and Benjamin Franklin. It is safe to say that without these elites – who played a vital part in the entire process from getting Congress to appoint a Committee charged with amending the Articles, convincing this Committee to violate its orders and to draft a new federate constitution instead, ensuring the adoption of this Constitution by popular conventions and delivering the first presidents – federation would likely not have occurred.[8]

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7 Although compared to current standards the respect and acceptance of 'ones betters' was still quite high. The story of one anti-federalist is almost endearing, 'he did not seek re-election because he had been too keenly made aware of 'the want of a proper Education I feel my Self So Small on many occasions that I all most Scrink into Nothing Besides I am often obliged to Borrow from Gentlemen had advantages which I have not.' Wood (1969), 487.

8 McDonald (1968), 11 et seq., Wood (1969), 485. Because, as Lee pointed out, 'we must recollect how disproportionately the democratic and aristocratic parts of the community were represented' not only in the Philadelphia Convention but also in the ratifying conventions, many of the real anti-federalists, those intimately involved in the democratic politics of the 1780's and consequently with an emotional as well as an intellectual commitment to Anti federalism, were never clearly heard in the formal debates of 1787-88.'

This important pro-federation role of ousted elites in the US points to an important difference with the EU. One that certainly applies to the Netherlands, but also seems to holds true for other Member States: there is no strong elite, and certainly no pan-European one, that requires federation to secure or increase its influence. Nor is there a central EU-elite with sufficient political power in the Member States to lead a federate charge. There is, in short, no critical mass of unified elites that stand to benefit from federation.

Obviously there are political parties that support further integration, even if they generally do so with an impressive lack of energy, and only as long as they are in government. Strongly championing Europe, or at least placing Europe centre stage, however, is not even an option. Hamilton captured this logical tendency in a confederation, and the converse importance of channelling ambitions via the central government:

> 'He did not mean corruption, but a dispensation of those regular honors & emoluments which produce an attachment the Government. Almost all the weight of these is on the side of the States; and must continue so as long as the States continue to exist. All the passions then we see, of avarice, ambition, interest, which govern most individuals, and all public bodies, fall into the current of the States, and do not flow in the stream of the General Government. The former therefore will generally be an overmatch for the General Government and render any confederacy, in its very nature precarious.'[9]

Going through the Dutch election manifesto's and party programs on the EU, for instance, this is immediately obvious: these are usually short, generally opportunistic and mostly lack vision and real European ambition. The 'new elite' furthermore, if we could label the new populist leaders as such for now, is strongly opposed to further integration: their power lies nationally. Equally there are of course many other elites, such as business leaders, that do support European integration. Yet these lack the political power that the US elites could mobilize, and may also not desire to surrender the influence they have established at the national levels. Equally the different circles of elites that might have a pro-European interest are not as aligned and unified by a common enemy as they were in the US.

Based on the parallel with the US it is suggested this relative lack of a strong pro-integration elite, let alone a pro-federation elite, is partially due to the fact that *there is no critical mass of (political) elites that derive their power from Europe, or ultimately aim to derive such power from Europe within the time span of their (political) future*.[10] What is more, this elite structure is consolidated

9 The only option Hamilton saw was to put 'complete sovereignty' in the centre, so that all these powers start to work for the central government. Gouverneur Morris supports this sentiment: 'loaves & fishes must bribe the demagogues. They must be made to expect higher offices under the general than the State governments.' (July 2nd 1787, McDonald (1968), 140, 158).

10 Cf Wood (1969), 361 and F. McDonald, *E Pluribus Unum* (Houghton Mifflin 1965), 30 and 56.

rather than challenged by the confederal organization of political power in the EU.[11] Two conclusions that need some unpacking.

2.2 The national path to (EU) power

Even though Europe clearly enhances the power of some elites, especially those in government, the road to European political power runs through national political power. Nor can Europe assist much in getting to power in a Member State.[12] Consequently the EU is predominantly controlled by individuals whose primary authority, and therefore political interest, lies at the national level.

One consequence of this national basis of political power is that the current confederal structure of the EU *maintains* an elite structure that actually opposes more far-reaching political integration, at least along federate lines.[13] One can simply not hold it against politicians that they listen to, and prioratise, the demands of their national power base. Nor can they be expected to dismantle that power base in favour of a stronger centre where they will not hold equal power or status. At the same time, the EU itself does not have sufficient venues, means or legitimacy to bypass these statal or infra-statal elites and influence the people directly.

As long as principal political power lies nationally, therefore, it is contended that politicians will use Europe to get national power, and not the other way around.[14] Although anecdotal the many examples of politicians preferring (a shot at) national power over high EU office are significant in this

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11 In the terms of neo-functionalism one might say that the predicted 'political spill over', has not occurred, or at least not to the critical level required to actually create spill over effects. See for instance S. George, *Politics and Policy in the European Union* (3rd edition, OUP 1996) p. 38-43.

12 Even though limited to its circumstances, the 2012 loss of former French President Sarkozy, despite open support from German Chancellor Merkel and a leading role in the EU, provides one illustration, as do the repeated electoral bills footed by German Chancellor Merkel herself.

13 This not to deny that other elites, especially business and financial elites, have (at times) strongly promoted European integration, for instance being directly involved in the Single Market Program though organs such as the European Round Table. See N. Fligstein and P. Brantley, 'The Single Market Program and the Interests of Business' in: B. Eichengreen and J. Frieden (eds), *Politics and Institutions in an Integrated Europe* (Springer 1995) or Sandholz and Zysman (1989), 95.

14 Compare in this regard the interesting parallel with the US confederation where it was also complained, including by George Washington, that 'the strong men preferred to serve in state governments rather than to serve in Congress.' And Hamilton stated: 'Each State in order to promote its own internal government and prosperity, has selected its best members to fill the offices within itself, and conduct its own affairs.' Van Tyne (1907), 543.

regard.[15] As they are the professionals in the arena of political power, we would be wise to follow their instinct as to where ultimate power still lies: in the Member States. Almost none of them think they are capable of achieving more political power by leading the charge for European federation, be it by merely proclaiming that cause nationally or actually achieving it.[16]

The resilience and self-maintaining effect of this elite structure also helps to explain the mistake in one of the assumptions of Neo-functionalism: the expectation that elites, including national political elites, would shift their loyalties to the European centre, and would from there promote further integration.[17] Although repeated contact and prolonged activity on the European level does have an effect, this effect is not as significant or fundamental as seems to have been expected. Considering the implicit anti-democratic streak in such functional transfers of authority and loyalty this might also not be a bad thing.[18] In any event such functional accounts did not take into account, or at least underestimated, the pull of democratic and party systems in the Member States through which national elites gain power. A reality which forces them to cater primarily to their national audience,[19] including to their sentiments of nationalism and identity that only seem to increase where integration deepens.[20] A mechanism, however, that does not deny the real authority and influence wielded in Brussels, or the many actors that compete for this authority and influence, but only emphasizes the relative primacy of the national process.

Federate ideals for the EU, therefore, have to deal with two related challenges. Firstly the lack of *national elite push factors*; there are no national elites that are either threatened or systematically out of power and that seek their

15 See for example David Milliband preferring a shot at UK political power over becoming the first High Representative or Franco Frattini who had little doubt in giving up his seat in the Commission to joint the Government of Berlusconi as foreign minister.

16 For a further discussion on the related question how to better integrate and relate the national democratic legitimacy and power base with the EU obligations that come with it see chapter 10 section 6 and chapter 12.

17 Cf Haas (1958), 312-13 or Wiener and Diez (2009), 49. Cf also the notion of political spill over which suffers from the same problem: J. Transholm-Mikkelsen, 'Neofunctionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the European Community', 20(1) *Millennium: Journal of International Studies* (1991), 5.

18 Craig (1999), 7: 'Democracy was, by way of contrast, a secondary consideration in a double sense. This was in part because it was felt that the best, or perhaps only, way of securing the desired peace and prosperity was by technocratic, elite-led guidance.'

19 Moravcsik (1993), 473.

20 A. Niemann and P.C. Schmitter 'Neofunctionalism', in: A. Wiener and T. Diez (eds), *European Integration Theory* (2nd edition, OUP 2009), 52 'More orthodox theorists of international relations have long protested that neo-functionalist systematically (and naively) underestimated the continued impact of sovereignty consciousness and nationalism as barriers to the integration process.'

salvation in empowering the Union.[21] Why, after all, create a political rival, where now one can have the best of both worlds: representing the ultimate national legitimacy at the EU level, and representing or blaming the EU where it helps to increase power nationally.[22] The US situation was also rather unique in this regard, linked as it was to its colonial past and recent independence from Great Britain.

Second, the EU not only lacks this specific push factor, but would even need to *overcome* the existing confederal elite structure, and the elites that depend on it, in order to achieve a federate level of integration. Where elites were a push factor for federation in the US they form a hurdle to federation in the EU.

National democratic mechanisms themselves, therefore, seem to restrict federate integration, which creates an interesting tension between further integration and democracy. A tension that can also be seen at work in our second process element. One that is not often emphasized in American discussions of the Constitution, as it does not fully fit with the mythical image of the founding fathers as the white knights of pure democracy.

3 The anti-democratic revolution[23]

Many proposals for a federate Europe rely on the necessity of federating to 'increase democracy'.[24] Often the US Constitution thereby acts as a shining example: was Philadelphia not one of the birthplaces of modern democracy, of a government by the People and for the People? Yet here actual history and mythology must be separated, for the reality behind the process of American federation was not as simple.

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21 A situation that forms a problem for effectiveness and EU legitimacy more generally because such push factors are equally lacking to inspire national political elites to enhance, or even defend, the authority and legitimacy of the confederal system already in place. See, reinforcing this tendency, also the comments above on the dependence of the rule by law, and the way this takes some of the responsibility of the shoulders of the political actors.

22 Moravcsik (1993), 514-17.

23 Wood (1969), 485 'Both the proponents and opponents of the Constitution focused throughout the debates on an essential point of political sociology that ultimately must be used to distinguish a Federalist from an Antifederalist. The quarrel was fundamentally one between aristocracy and democracy' and p. 493: 'those beliefs in elitism that lay at the heart of their conception of politics and of their constitutional program.', and p. 496 'That the people were represented better by one of the natural aristocracy (…) was the defining element of the Federalist philosophy.'

24 See especially the discussion of statism, including federate aspirations for the EU in chapter 8, section 4.

In fact one could describe American federation as an *anti-democratic revolution*.[25] Jensen even goes as far as to call it an 'anti-democratic crusade'.[26] The opponents of the federate constitution also attacked it as such. In the words of Richard Henry Lee, one of the anti-federalists' most impressive champions: 'every man of reflection must see that the change now proposed is a transfer of power from the many to the few.'[27]

Many drafters and supporters of the new constitution were openly opposed to the 'radical' democracy of the revolution.[28] As discussed the shift towards direct democracy had cost most of them their political power. But it also conflicted with their deeper beliefs on social justice and the proper organisation of a polity. Finding ways to control the will of the people became crucially important, so as to ensure that this will could be rationalized and checked by 'the purest and noblest characters'[29] the nation could offer. As Edmund Randolph put it at the beginning of the Philadelphia convention,

> 'our chief dangers arise from the democratic parts of our constitutions. (…) None of the constitutions have provided sufficient checks against the democracy'.[30]

25 Wood (1969), 562 even states that there is 'something disingenuous' about the emphasis on democracy in the federal defence of the constitution: 'They appropriated and exploited the language that more rightfully belonged to their opponents.' To illustrate, John Adams, for example, literally quoted Aristotle on aristocracy in defending the Constitution (John Adams, Notes for an Oration at Braintree, 1772, in: L.H. Butterfield, L.C. Faber and W. D. Garrett, *Diary and autobiography of John Adams vol. 2* (Belknap Press 1962), 57-60. Many federalist leaders saw aristocracy as a necessary element of government (Wood (1969), 200 et seq.): 'The Americans were thoroughly familiar with the theory [of mixed constitutions-AC] and this knowledge was even 'Axiomatic'. 'The republicanism of the Revolution was not for most Americans directed at aristocracy per se, but only at an artificial Crown-created aristocracy which owed its position not to merit but to connections and influence. That some sort of aristocracy 'consisting of a small number of the ablest men in the nation', was necessary for the stability of their mixed republics few Whigs denied.'

26 Jensen (1970), XV: 'therefore they are unwilling to accept the idea that the articles of Confederation were an expression of the democratic philosophy of the eighteenth century and that the Constitution of 1787 was the culmination of an anti-democratic crusade'

27 See '*Letters from the Federal Farmer*', no. 4 of 12 October 1787, from either Richard Henry Lee or Melancton Smith. Available online via: http://www.constitution.org/afp/fedfar00.htm.

28 The failures and dangers of democracy were a commonplace in the Philadelphia convention. As Madison notes (July 2) 'Every man of observation had seen in the democratic branches of the State Legislatures, precipitation-in Congress changeableness, in every department excesses agst. personal liberty private property & personal safety. What qualities are necessary to constitute a check in this case? Abilities and virtue, are equally necessary in both branches. Something more then is now wanted.' This second branch (the Senate) must therefore have the 'aristocratic spirit'.

29 Federalist Paper no. 10.

30 Cf Jensen (1970), XX.

If possible Gouverneur Morris, another leading figure, was even more explicit:

> 'the mob begins to think and reason. Poor reptiles! It is with hem a vernal morning; they are struggling to cast of their winter's slough, they bask in the sunshine, and ere noon they will bite!'[31]

And that same Morris on if this would come to pass:

> 'farewell aristocracy. I see, and I see with fear and trembling that if the disputes with *Great Britain* continue, we shall be under the worst of all possible dominions; we shall be under the domination of a riotous mob. It is to the interest of all men, therefore, to seek for reunion with the parent state.'[32]

It is true that, despite this sentiment, the Constitution eventually adopted still left the US as one of the most democratic nations of the time. So much so that ironically the mixed system created has almost come to define democracy. The shift to a federation was, however, emphatically not intended to increase democracy, but to decrease it.

The fundamental shift towards a single American people also dovetailed with this aristocratic goal of checking the democratic element: it pacified radical factions that might hold a majority in one state by merging them into a more amorphous whole.[33] Put more bluntly, besides an honest reliance on popular sovereignty the famous 'We the People' also had as its aim to pacify the actual citizens by locking them into a semi-abstract notion that empowered the central government yet was too vast for any faction to animate directly.[34] A move anti-federalists aptly perceived as one *radically reducing democracy*.[35]

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31 Gouverneur Morris to mr. Penn, New York, May 30, 1774, in Force, American Archives, 4th series, 1: 342.

32 Idem, p. 342-343. For the aristocratic elements already present in radical republicanism itself via the notion of virtue, see Wood, (1969), 71 et seq. This existing thread of republicanism provided an important basis for the convention. Also see Madison declaring that government had fallen 'into the Hands of those whose ability or situation in Life does not entitle them to it', that is 'men without reading, experience or principle' (Federalist Paper no. 62, notably a public defence of the Constitution). Wood ((1969), 503) even states that 'by the 1780's the most common conception used to describe the society was the dichotomy between aristocracy and democracy, the few and the many.' On this dichotomy see further Cuyvers (2007).

33 Jensen (1970), 28, 91, 95, Wood (1969), 411.

34 Of course this was before the arrival of mass media. In any event the opponents of the constitution did heatedly point out its aristocratic nature as well: See for instance Lee: 'the government, in which the great body of the people, in the nature of things, will be only nominally represented.' (McDonald (1968), 201 et. seq.)

35 Jensen (1970), 117.

Now obviously these aristocratic objectives only form one of the many elements that were driving American federation. Equally the federate constitution that resulted can still be seen as democratic, depending on the yardstick used. Nevertheless the anti-democratic objectives behind the American process should be taken into account when contemplating a federate Europe, especially when the objective is to democratize the EU. For *federation is not the same as democratization*. Just as confederalism does not equate with intergovernmental or undemocratic, federation cannot be equated with democratic. Although the founding fathers have done a truly impressive PR-job in linking the federation and democracy, there simply is no necessary or automatic link. Federation can equally be used, as in the US, to reduce democracy, or at least to dampen the direct democratic influence of member peoples or factions.

The democratic level of any federate polity will, therefore, depend on *how* the federate system is developed, as well as on the prior issue of how one includes the scale, level and directness of representation in one's definition of democracy. In one imaginary configuration, for instance, it could be imagined that after an explosive rise of populist parties we would indeed have a similar situation of ousted former elites in the EU who would turn to the EU to regain control. Here suggestions of federation would again aim to restrain the more direct strands of democracy rather than trying to increase them. Even leaving fictitious scenarios aside, however, it in any event becomes harder to push federation as the solution for democracy where it has to be honestly acknowledged that such federation carries an inherent aristocratic tendency.

It should be stressed, therefore, that the federate move in the US was not intended to increase democracy but to check it. Nor should federation simplistically be equated with democratization. A point that will be further developed in part II of this thesis where, based on a confederal notion of sovereignty, it will be explored to what extent the confederal form, instead of the federate form, might hold part of the key to realign the democratic process with the reality of far-reaching integration and the multiple centres of public authority it creates. A confederal solution that, unlike federation, would not require disassembling the Member States, and with them the entire foundation for the current organization of public authority in Europe.

4 The benefits of secrecy: Inverting the convention scheme and attached amendments

A more limited, practical element of process concerns the complete secrecy during the drafting of the Constitution in Philadelphia. Obviously, there was no twitter to violate such secrecy, but it was still an achievement that all delegates respected the agreement not to divulge anything about their deliberations until work had been completed. This had one marvellous ben-

efit, as is evident from the notes published later: open debate and compromise seeking were possible, and no loss of face occurred when a point had to be 'surrendered'.[36] In fact, it is highly doubtful if agreement could have been reached otherwise. After an agreement had been reached during the Convention, however, a full public debate was initiated to discuss the resulting proposal. A debate that was not concerned with what should ideally be included in a draft constitution, but on whether the proposed system, inevitably a compromise but still defended as a consistent whole, was desirable.

The EU, and especially the new 'convention system' now enshrined in the Treaties despite the failure of the Constitutional treaty, follows a reversed procedure.[37] Transparency and open debated are primarily sought during the drafting, infusing any and all political rivalries directly into the debates. The subsequent ratification in the Member States, however, was less rigorous, although large differences exist in the rigour of the public debate in different Member States. Even more sadly, where direct public support was asked via a referendum it was far too often refused. Without implying that there were many realistic alternatives, it only needs to be remarked here that this reverse order of events, at least as compared to the US, has so far only seems to have increased distrust and resentment in many Member States.

It should be asked, therefore, if the reverse US order does not make better sense:[38] to first, in relative seclusion, draft a proposal, which after real debate can then receive a proper democratic seal of approval.[39] Such a process, which comes closer to the Treaty amendments of old, safe the thorough and open debate afterwards, would seem superior in general, but is especially crucial if the step towards full federation is seriously contemplated. Such a fundamental shift, after all, requires higher political support than parliamentary ratification, and better drafting than public conventions seem capable of. Such a reverse process could perhaps also benefit from one other mechanism without which ratification of the US constitution would have failed: *attached amendments*.

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36 Cf more generally on this point Tushnet (2006), 1236.

37 Art. 48 TFEU. This EU system in fact has very little to do with the reality of the US conventions after which it is named. As discussed above, furthermore, political leaders tried hard to avoid a convention in the amendment of art. 136 TFEU.

38 Somewhat cynically, when it was time to stop reflecting and adopt Lisbon, the very same Treaty that prescribes the conventions, a very closed approach was taken. First, political agreement was reached in closed discussions between ministries (Sherpa's). Only then was a point 'opened' for an IGC. See Chalmers, Davies and Monti (2010), 39.

39 Watts (1998), 128: ' an important aspect of the establishment of federal systems is the degree of elite accommodation and public involvement in the process. In the contemporary era, when the importance of democratic processes is increasingly emphasized, elite accommodation by itself may no longer be sufficient for legitimizing new political systems; this has complicated the patterns of negotiation for the establishment of federal systems, as the development of the European Union has demonstrated.'

5 Attached amendments

Many states were facing majority opposition to the Constitution. Several state conventions were even debating a second national Convention in which states could propose amendments. Something which, if allowed, would have enormously delayed, and probably sunk the entire Constitution. It would certainly have undermined its coherence. Starting on a proposal from Madison in New York, it was then suggested to allow ratification to be accompanied by a set of proposed amendments to the constitution. Instead of demanding amendments or attaching reservations up front, all of these proposed amendments would then be dealt with *under the mechanism of the new Constitution*. This method was adopted by most states, who did indeed add proposed amendments to their act of ratification. Without this outlet, if simply forced to say yes or no, the nine state majority required would not have been achieved. Also, most of the commonly proposed amendments were indeed adopted afterwards: the first ten amendments, including the bill of rights, closely follow the attached state amendments, especially the Pennsylvania one.[40]

The flexibility that this mechanism allowed was vital, but even more important was what it indicated: the states accepted, and had faith in, the *political process* that was to develop under the new constitution. They did not need to legally determine everything up front, but trusted that their proposals would be properly dealt with under that new system.

A similar process could be envisioned for the EU, also at the level of secondary law: ratification could be accompanied by further amendments or proposed secondary legislation. Suggestions which should then receive careful attention at the EU level, and perhaps could even be the subject of a special amendment procedure.

6 Aemulatio, not innovatio

The popular myth has it that a group of demi-gods, in an historically unrivalled concentration of intellect and virtue, gathered at Philadelphia. Managing to capture truth and democracy itself on Parchment, they brought forth the completely unique federate constitution of the US. As a myth, this story has been quite helpful in generating support for the constitution, and building an American nation. It certainly has been more effective than the EU attempt at symbolism in the Constitutional Treaty, which backfired with impressive and almost comical force. It is also just that: a myth.[41]

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40 Beeman (2010), 386 et seq.

41 'When a great question is first started, there are very few, even of the greatest minds, which suddenly and intuitively comprehend it, in all its consequences' (Wood (1969), 44.

To a very large extent, the new American constitution built on, and even copy pasted, existing materials.[42] First, many of the innovations were direct responses to the failures of the Confederation.[43] Second, a wealth of recent constitutional experiments in the states was at hand: many of the delegates at Philadelphia had the benefit of first hand experience in drafting these state constitutions.[44] Of these recent examples especially the Virginia constitution served as an important model.[45] Third, many elements of the Constitution were based on traditional British constitutional theory, and on the colonial bond that the US had enjoyed with Great Britain.[46]

Naturally, important innovations were made as well, for instance in the way that such existing elements were combined. In addition, some of the enlightenment political theory relied on was put into practice for the first time.[47] Yet understanding the US constitution as complete innovation, instead of impressive *aemulatio* may lead to the dangerous conclusion that new constitutions can be devised in abstraction and completely anew, if only one just has enough smart people.[48] What the US process learns, in fact, is that the best change lies in practical yet well thought through and informed, emulation.[49]

7 Process conclusions

The process elements outlined above provide some specific insights for the future process of developing the EU constitutional order. Their overarching trend, though based on a selective sample, points to several key process elements underlying US federation that are lacking in the EU. Most importantly the national democratic and elite structure prevents rather than propels a

42 Cf. Wood (Creation), 564.

43 McLaughlin (1918), 239.

44 This experience had brought both practical constitutional ideas and a deeper change in the understanding of, and approach to, politics. Wood, (1969), xvii, 127.

45 In addition the New York constitution of 1777 and the Massachusetts one of 1780 also paved the way for some of the 'innovations'. New York, for instance, had a very strong senate and a more powerful executive in the governor. Massachusetts had the strongest governor of them all, whose authority included the power to veto all legislation, unless the house repassed it by a 2/3 majority.

46 See in this regard also the earlier plan by Benjamin Franklin that had proposed a further American Union but still under the aegis of the Empire.

47 For a similar argument about how most of the 'remarkable institutional features' of the EU 'came out of the existing toolbox of international law' but were combined in a 'unprecedented' manner see: De Witte (2012), 19 et seq.

48 For a thorough overview of the underlying experiences and theories see McDonald (1985) as well as Beeman (2006).

49 Jensen (1970), 162 notes on the location of sovereignty in the Articles: 'it was a matter of practical politics, arrived at by the political manoeuvring of two opposing parties having quite different political aims and ideals.'. On the EU also see Habermas (2001a), 4.

fundamental shift in political authority. In addition, one of the key normative argument that seems to support European federation – making the EU more democratic – is largely based on a confusion between having a central normative authority and how this authority is represented, or between federation and democracy. Even aside from any desire to federate, furthermore, the process via which the EU establishes its own basic rules might benefit from the US experience in the Philadelphia Convention.

Consequently these process elements only confirm the necessity of finding confederal solutions to the woes and weaknesses of the EU, at least for the foreseeable future. In addition, as will be developed further in the part II, they may point the way to some methods of actually strengthening the confederal basis of the EU, without having to fully federate.

6 Conclusions part I: The Modified Confederal Model of the EU

1 The modified confederation as a model?

Part I of this thesis has illustrated the value of a confederal understanding of the EU. The EU can be usefully understood as a further evolution of the unfashionable but rich confederal form. Approaching the EU as a modified confederal form provides us with an instructive prism to better understand its nature, functioning and evolution of the EU. It helps to explain, for instance, the relative success and deepening of European integration, the plural nature of the EU legal order, or the increasing gap between the growing federate authority of the EU and its static confederal legitimacy. The modified confederal approach equally fits with the general intuition that the EU is federate in some sense, but not 'really' so, just as a moped with a bigger engine is not really a racing bike. Several more specific findings underlie these general conclusions on the relevance and potential of reconnecting the EU with confederalism.

To begin with the confederal perspective has proven instructive in delineating where the EU does follow the classic confederal model and where it does not. To operationalize the confederal model for this purpose the EU was compared against two concrete examples: the often ignored American Confederation and its evolution into a federal state. A comparison that was structured around sixteen key federate modifications that shaped this evolution. Jointly these modifications created a comparative grid on which the EU could be positioned between the confederal and the federal poles.

A systematic comparison subsequently showed that the EU remains confederal on eight of these federate markers. Crucially, however, these eight include all *foundational modifications* that together provided the constitutional basis for American federation: The EU is not based on a single people, may not use force against its members or impose direct taxes. Equally no amendment by majority is possible, but secession is. Lastly the government of the EU is fully merged and not separate as in the US, has a weak executive and relies on a primarily confederal representational scheme. On all these foundational points the EU remains confederal. These findings, therefore, support the initial intuition that the EU sufficiently shares in the core characteristics of the confederal form to be usefully approached as such. Especially relevant for our comparative purpose, furthermore, is that EU is not based on a single European people, whereas the assumption of one sovereign American people constituted the very core of the federate shift in the US.

At the same time the constitutional system of the EU has incorporated five important federate modifications. To begin with EU law claims, and generally receives, supremacy and direct effect. The EU can also rely on a broad doctrine of competences, as well as on specific competences to regulate commerce internally. The US Confederation sorely lacked these instruments. Lastly, and vitally, a central court was established and given the final say on the interpretation of EU law. Not incidentally these federate elements coincide with several hallmarks of the EU constitutional order: they are the federate all-stars that stand out in the otherwise confederal team. They have proven to be of vital importance for the nature and functioning of the EU, and should be considered crucial modifications to the standard confederal model.

The remaining three federate modifications compared presented a more mixed result. As far as objectives, external powers and the institutional set-up of the legislature were concerned the EU system was either blended, conformed to neither, or equally to both the systems under the American Confederation and the US Federation.

2 An inverted confederation with a federate superstructure relying on a rule by law

These comparative findings, and the interesting blend of confederal and federate elements they reveal, help us to better understand the functioning and evolutionary dynamic of the EU. To better serve this purpose these individual comparative findings were aggregated and analytically refined into three more general propositions on the modified confederal system that has evolved in the EU, and that has managed to address several of the existential weaknesses of confederalism.

To begin with, these modifications show how the EU can be understood as an *inverted confederation*. As an 'impire' the EU inverted the traditional external and military focus of confederations to an internal and economic focus. A modification that has had a significant impact on the overall functioning and stability of the EU. Most importantly this internal focus provided a more secure incentive for confederal cooperation. For where traditional confederations often broke down after the external threat disappeared, an internal market provides a more constant spur for cooperation: there are no times of peace in the marketplace. Consequently Member States have a continuous interest in economic cooperation, and face immediate and serious harm if they are excluded. What is more, this incentive to cooperate and overcome other self-interests keeps pace with the level of integration: the more developed the market, the bigger the benefits and the higher the costs of exclusion. This federate modification, therefore, helps to explain the relative stability of the EU, as well as its capacity to spread to ever more sensi-

tive areas and overcome deep crises. The level to which the Member States have so far been willing to go during the EMU crisis is a case in point.

The inverted focus on an internal market also provided an inherent incentive to deepen integration: the market has virtually no limits in itself, and can always be improved. An internal market is also far more likely to spawn a more developed institutional and legal framework. In contrast to external relations a market concerns innumerable interactions between individuals and public authorities in areas covered by national law. As such famous EU doctrines as supremacy and direct effect were also far more likely to develop within an internal market concerned with the proper tariff for urea formaldehyde than in a defensive confederation.

By stimulating such institutional and legal developments the inverted focus of the EU also links to the second proposition developed in part I: how the EU combines a confederal foundation with a federalized superstructure. An image that clearly materializes where one zooms out and combines the results on the sixteen points compared: on all foundational modifications the EU remains confederal, whereas it has incorporated five federate modifications at the structural and institutional level.

These different federate elements in the superstructure of the EU, including supremacy, direct effect and the ECJ, help to explain the remarkable effectiveness and stability the EU has achieved, certainly for a confederal system. Negative integration as developed by the Court of Justice, for instance, provided an essential legal backbone. It limited the effects of political inaction and acted as pacemaker where the political process stalled. Broader competences allowed the EU to act where there was political will. The broad and judicially developed system of EU competences even compensated for the confederal rigidity of the amendment process through what may be termed pseudo-amendment. Together these federate modifications reduced several of the existential weaknesses in the classic confederal model: the superstructure reinforced the basis.

The federalized superstructure these modifications created also enabled the EU to develop a genuinely confederal rule by law, the third general proposition developed in part I. No less then four of the five federate modifications incorporated in the superstructure of the EU concern law and the legal system. Where the legislative and the executive remained largely or wholly confederal, the legal column was federalized to a significant extent. Through these federate legal modifications as supremacy, direct effect and other legal principles developed by the Court of Justice the EU could plug in to the well-developed legal and bureaucratic systems of its Member States. It could subsequently rely on these systems, and the capacity for statal self-control they contain. A mode of governing wholly unavailable to the American Confederation because its members were far to unstable and undeveloped. A mode of governing that also explains the importance of law in the EU as well as the plural nature of its legal order: it allows the EU to

govern relatively effectively without itself acquiring the institutional capacity or normative authority normally deemed necessary to ensure compliance. As such this rule by law partially challenges the conventional linking of law and power and law and state. It thereby forms a further evolution of the federal idea developed in Philadelphia itself, creating an impire of law beyond what even the founding fathers deemed possible.

Though clearly not fail-safe, the rule by law is secured by the fact that Member States have become dependent on their own legal systems as well: they cannot do without courts or bureaucrats. And it is difficult to reduce the rule of law reflexes in these systems, which like a USB standard allow the EU to plug in through the format of law, without undermining their effectiveness altogether.

Jointly these modifications have significantly strengthened the constitutional system of the EU. They have created a modified confederal model which at least softens the most existential weaknesses in the system of the American Confederation. Weaknesses so aptly analyzed by Madison, and which largely inspired the federate Constitution.

The inverted focus and the legal backbone of negative integration, for instance, improve the 'energy' in the centre, spurring it to act. Broadly defined powers allow it to act. An effective rule by law ensures compliance of acts once the centre has acted, without the centre needing to develop the capacity to enforce. Several of the confederal Achilles heels mentioned by Madison are therefore covered, including the lack of authority and capacity to act in the centre, the inability to amend and a lack of compliance due to limited enforcement capacity. All in all not a bad score for the modified confederal model. Certainly not as it belongs to a constitutional sub-species that normally rivals the Panda bear in its seeming desire for extinction.

3 Weaknesses and risks of a modified confederal system: A widening gap…

At the same time many challenges remain, and some serious new ones have been created by these modifications as well. A further use of the confederal perspective is therefore to assist in better identifying and understanding these weak spots in the modified confederal system of the EU.

The self-deepening tendencies of the internal market, for instance, raises the problem of delimitation: are there any boundaries to the internal market? And how to balance a federate and legalized market against other objectives that are organized at a confederal and political level?

The rule by law approach of the EU, furthermore, has several inherent weaknesses as well. It is logically limited to areas governed by law, excluding several important areas of public authority not reducible to legal control. Where an area is nevertheless legalized to allow for EU control the

relation between the members of the *Trias*, and between law and politics more generally, may be unbalanced. Conversely a reliance on law may also reduce the politicization of EU topics; integration is seemingly imposed by courts and bureaucrats and becomes the opposite of politics. This allows national politicians to refrain from taking responsibility for European integration, let alone for developing a political narrative capable of explaining or supporting it.

Most problematic, however, a rule by law seems to depend on several preconditions which might not endure. These include the stability of the Member States and the openness and receptiveness of their legal and bureaucratic systems to an EU rule by law. Where these preconditions are threatened, as they increasingly seem to be, a rule by law may loose its effectiveness, and classic confederal compliance problems resurface.

The most fundamental risk in the modified confederal model, however, stems from the increasing gap between the confederal basis and the federate superstructure of the EU. As was shown the federate elements in the EU system have gradually expanded and deepened over time. The EU, for instance, claims increasing authority on ever more sensitive areas, which strongly increases its legitimacy demands.

On the other hand the confederal basis of the EU cannot match this federate deepening, and is left struggling to meet these increasing legitimacy needs of the federate superstructure. The confederal elements in the EU system are also incapable of stopping their federate counterparts from expanding further, nor can these federate modifications be removed altogether as this would undermine overall stability.

The inevitable clash between these trends is clear, and is exemplified rather dramatically by the EMU crisis. Yet importantly the confederal perspective demonstrates that this legitimacy gap should not be misdiagnosed as a problem of democratic representation. Nor can it be reduced to a 'no-*demos*' argument. It is true that the creation of a single European people would establish a federate basis, and therefore close the gap between basis and superstructure. However, such a European *demos* only forms *one* of the possible solutions. It should not be mistaken for the problem itself, which originates in the increasing gap between a confederal basis and an expanding federate superstructure.

This distinction between the legitimacy gap itself and the potential solution of a European *demos* is particularly important, furthermore, because the creation of a European people seems unlikely, at least for quite some time to come. As chapter 6 showed, several of the key factors that drove the process of US federation are absent in the EU. Some factors are even reversed, and work against federation. One of the most vital differences in this regard concerns the difference in elite structures. The typical post-colonial elite structure of the US promoted federation: several groups of ousted pre-colonial elites hoped to regain political power and influence through federation.

In the EU no such group exists, or in any event does not form a sufficiently critical mass. Both national and European political power derives primarily from the national level. Rather than aiming to empower the European centre, this reality incentivizes current elites to protect their national authority and strongholds from further centralization. Contrary to the US, therefore, the current elite structure in the EU resists rather than supports a federate shift of ultimate authority to the EU. In addition it was shown that the process of US federation should, for an important part, be understood as an attempt to *limit democracy*, and to ensure that democracy was sufficiently tempered by aristocratic elements. Federation as such should, consequently, not be confused with democratization. Federation is neither necessary nor sufficient for democracy: in fact the situation under the American Confederation could be described as more democratic than the system envisioned by the founders at Philadelphia, as they themselves openly acknowledged.

4 Closing the gap?

Obviously this leaves the question how to strengthen the confederal foundation of the EU. How to do so before it crumbles under the weight of its own federate superstructure, and without leaving the confederal confines imposed by the lack of a European people? A foundation that will have to build on the specific strengths of the confederal model, yet must avoid its many inherent weaknesses.

Although clearly not coming close to a final solution to this fundamental challenge, the next part of this thesis engages precisely this challenge of modifying and strengthening the EU confederal basis.

It does so by exploring another classic concept of constitutional theory, and one which also played a key role in the US: sovereignty. Can a confederal conception of sovereignty be envisioned which can help to construe a foundation strong enough to support the federate superstructure of the EU? For if such a stronger confederal foundation can be established it would allow the EU to retain and develop its modified confederal system. An outcome that is considered normatively desirable because of its ability to actually combine unity and diversity in a reasonable effective manner, and to do so in a way that realigns government and national democratic systems with the global reality that requires governing. As such a reinforced confederal system could even open up an interesting model for international organization more generally.[1]

1 Cf. Elazar (2006), 51: 'There are many indications that the European Community with its functional arrangements presages a revival of confederal government in other parts of the world as well.'

Part II

A confederal conception of sovereignty

7 Towards a confederal conception of sovereignty

1 Introduction: 'We the peoples'?

Part I identified an increasing gap between the authority *capacity* of the EU's confederal foundation and the authority *demands* of its expanding federate superstructure. This gap, it was suggested, forms one of the root causes of the EU's legitimacy problems.

How to deal with this gap? A question that feeds into the more general challenge of grounding and democratically legitimizing an entity like the EU. A question also that brings to mind Rousseau's comment on the confederal dream of the Abbé de Saint-Pierre: 'He has designed so to speak the roof of a building of which it was necessary to show the foundations.'[1]

A first obvious solution would be to downsize the federate superstructure. The problem is that the EU relies on its federate superstructure for stability. Downsizing it to a sufficiently confederal level would, consequently, revive the classic weaknesses of confederation and undermine the stability of the entire EU.[2] In the case of the EU the federate roof not just seeks a foundation, it also keeps the building together.

Upgrading the EU's foundation to a federate level is not a realistic solution either. At least not in the foreseeable future.[3] Nor is it necessarily desirable.[4] It would mean relinquishing the potential the confederal form holds for a more flexible and extra-statal design of government. One that is based on improved methods of democratically legitimizing public authority on several distinct levels, rather than just subsuming its members into a larger state.[5]

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1 Rousseau, *Oeuvres*, III p. 658. Also see for the ideas of Rousseau on the 'good Abbé' Rosas (2003).

2 Although more work could be done to see if some federate modifications could be safely reduced, better contained or at least counterbalanced this path will not be further explored here.

3 Von Bogdandy (2000), 43-44, Rosas (2003), 2, Van Middelaar (2009).

4 Cf already Max Kohnstamm in his diary on October 19th 1956: 'We moeten niet natie Europa in plaats van natie Frankrijk plaatsen. Dit zou kleine zaak zijn die catastrofe ten slotte toch niet zou vermijden.' (We must not replace the French nation with a European nation. This would be a small-minded affair that would not avoid catastrophe in the end.' (my translation) in, M. Segers and M. Kohnstamm, *De Europese dagboeken van Max Kohnstamm. Augustus 1953 – September 1957* (Boom 2008), 187. Pleading for federation see – rather famously – F. Mancini, 'Europe, The Case for Statehood' 4 *European Law Journal* (1998), 43. Also see G. Morgan, *The Idea of European Superstate* (Princeton University Press, 2005).

5 Cf also the argument in Habermas (2001).

Consequently neither dismantling the federate superstructure, nor creating a US-style federate basis are feasible ways forward. A conclusion that seemingly leaves the EU, and us, in a bind. The EU seems to have both gone too far, and not far enough. It is either a failed orange, or a tangerine with dangerous delusions of grandeur.

Building on the confederal approach, part II of this thesis suggests that a confederal conception of popular sovereignty may offer one way out of this dilemma. It may provide a sufficiently stable, legitimate, and flexible basis for EU authority without undermining the Member States as primary centres of public authority or the member peoples as separate, independent and sovereign entities.

The starting point for this suggestion again lies in the US. More specifically it lies in the *federal evolution of the concept of popular sovereignty* that enabled the US to federate. As will be suggested the EU could emulate this federate application of sovereignty by taking it one confederal step further. A step that fits with the evolution and logic of sovereignty, and one that would enable the EU to reinforce its constitutional foundation without leaving the confederal confines.

2 Aims and advantages of a confederal conception of sovereignty

Part II therefore explores a possible evolution towards a *confederal* conception of sovereignty for the EU. If feasible, such a conception would serve several more specific aims and offer several advantages that are useful to set out first.

2.1 Removing sovereignty as an obstacle to constructive theory

To begin with a confederal conception may reduce the false juxtaposition between sovereignty and integration, and the unfortunate effects this juxtaposition has on a constructive constitutional theory of the EU.

Currently sovereignty is generally seen as an obstacle to integration.[6] As a result those defending national sovereignty often see themselves forced to limit integration to a low level that does not undermine the sovereign state. Those supporting further integration generally feel compelled to reject sovereignty altogether precisely because it obstructs any meaningful level of integration.[7] The resulting conflict leaves sovereignty a divisive concept.

6 See amongst many others Schütze (2012), 48: 'From the very beginning, the idea of state sovereignty hindered an understanding of the nature of the European Union.' See for a detailed discussion ch. 9 below.

7 Bellamy (2006), 168.

One that is either strongly attacked or absolutized as the last line of defence against a European super state.[8]

Since both camps field convincing arguments, this juxtaposition tends to force one into some undesirable and often untenable positions. The result generally is an unhelpful deadlock in the debate on European integration. Like the German Constitutional Court, for instance, one may end up defining the minimum 'substance' of national democracy, or devising all kinds of other unworkable or opportunistic limitations on integration.[9] The alternative strategy of ostracizing sovereignty altogether generally leaves one with a daunting hole in the organization and legitimization of authority.[10] What tends to remain are several free-floating authorities that are hopefully restrained, but scarcely legitimated, by a dialogue between them on some values they are presumed to share.

An evolved notion of confederal sovereignty may be able to soften this juxtaposition between integration and sovereignty. In doing so it may also bring sovereignty back in play as part of the solution. Instead of having to overcome sovereignty, and all the normative authority and national history that comes with it, the EU could start to rely on it. An outcome that also leads to the second, and even more fundamental, advantage of confederal sovereignty for the EU: the prospect of a sufficiently stable and legitimate foundation.

2.2 Grounding the EU in its sovereign member peoples

A confederal conception of sovereignty could enable the EU to ground its authority, including its federate superstructure, in the one foundation strong enough to support it: the *sovereign member peoples* as embodied, organized and represented by their states.[11] This would allow a solid confederal foun-

8 Cf Lindahl (2006), 87.

9 See for a detailed discussion of the case law of the German *Bundesverfassungsgericht* chapter 8 section 4.4.

10 This also *within* the Member States, where national authority may be linked to the discourse of sovereignty as well, or in the words of Walker, where 'notions of sovereignty' are necessary 'within the meta-language of explanation.' (Walker (2006b), 25). This is especially the case in the Central and Eastern European Member States, where, largely due to their Soviet history, sovereignty plays a far more central role, and 'relinquishing' it is both far more sensitive and generally constitutionally restricted. See A. Albi, 'Postmodern Versus Retrospective Sovereignty: Two Different Discourses in the EU and the Candidate Countries', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 402.

11 See on this position of the citizens also Pernice (2002), 511 et seq. as well as De Witte (1995), who contemplates placing sovereignty in the peoples of the EU taken together. As such this position does not believe that 'cosmopolitan' or 'universal' shared principles can be enough to carry the full weight of public authority, even though they can play an important supportive role. Different see, for instance,: M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in: J.L. Dunoff and J.P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) p. 258.

dation without requiring the abolition of the Member States or the separate member peoples. Rather than competing with these entities for authority and legitimacy, or even threatening to replace them altogether, the EU could build on them in a more symbiotic, and confederal, fashion.

If such a confederal foundation could be conceptualized, sovereignty could indeed be turned from an obstacle to theory and integration into a constructive tool for both. A reapplication that would allow the EU to harness the legitimizing and organizing potential of sovereignty, instead of resisting it. Several further advantages would also flow from these two primary ones.

2.3 The fit of confederal sovereignty with EU Treaties and case law

A first additional advantage of confederal sovereignty is its fit with the consecutive EU Treaties and their progressive interpretation in the case law of the European Court of Justice. It particularly fits with, justifies, and delimits one of the fundamental trends in both: the progressive inclusion of the individual.[12] From direct effect to direct representation, expanding EU citizenship, or the inclusion of national parliaments into the EU institutional structure, all of these developments can be placed in the gradual relation building between the EU and its popular sovereigns, and the 'ever-closer union among the *peoples of Europe*' already envisioned in the preamble of the Treaty of Rome.[13] A relation, however, that is still in need of the conceptual and constitutional foundation that confederal sovereignty may help to construe.

2.4 Confederal constitutionalism and confederal supremacy

Two further advantages concern the fit between confederal sovereignty and EU constitutionalism, and the different perspective it allows on the supremacy conundrum.

To begin with a confederal approach fits with the increasing popularity of approaching the EU through a constitutional lens. A confederation, after all, creates a constitutional bond between the different members, certainly where this bond is based on the sovereign peoples directly. At the same time a confederal approach also captures the ambivalence of a purely constitutional understanding of the EU.[14] An ambivalence perhaps best captured by

12 Cf Rosas (2003), 3.

13 To the extent that political authority is relational in nature, the EU can also only become political, and be *politically* legitimized, by establishing a relation with the citizens. (Cf H. Arendt, 'What is Authority?' in: H. Arendt, *On Revolution* (Penguin 1973), 175). Part of the exercise here is to show how such a relation with the sovereign people directly does not require federation or the removal of the states.

14 Cf on this point also Schmitt (2008), 385 and his term of a 'constitutional contract'.

the term constitutional treaty, which retains the link with both the international and the constitutional dimension.[15]

Second, and closely related, a confederal conception of sovereignty also allows a more logical understanding of the seemingly incompatible claims to primacy at the national and the EU level. Claims which from a confederal perspective are simply based on different and largely compatible grounds. Consequently the clash between national and European claims to supremacy may be partially neutralized once they are related to the overarching claim of the sovereign member peoples.

2.5 *An attractive narrative: A confederal evolution of democracy*

Lastly, and most tentatively, confederal sovereignty may assist in construing a more positive and normatively attractive narrative of the EU. In the US, after all, federalism became part of the powerful narrative of popular government: the sovereign people were given two governments who would both strive and compete to serve the citizen.[16] Confederal sovereignty might allow a similar narrative by recasting the EU as a creature of the member peoples. Instead of a threat to democracy and national identity the EU could also be seen as a second layer of government that liberates the people from their entrapment in the state, and allows them to exist and act on the increasingly vital global plane. From this perspective the EU may transform from a threat to national democracy to a tool to restructure and update the national democratic process, and save it from irrelevance. To explore the potential for such a narrative this particular value of confederal sovereignty will also be introduced in part II, before it is further tested and developed in part III of this thesis.

3 Approach and method: Limiting scope and ambitions

Now it appears customary to start any expedition into the realm of sovereignty by proclaiming one's utter despair. [17] The concept is so old and con-

15 See for a discussion of this question chapter 10 section 7.

16 See for the anti-democratic intentions behind this narrative, however, above chapter 5, section 2 and 3.

17 See for instance: M. Akehurst, *A Modern Introduction to International Law* (4th ed., Allen and Unwin 1982), 15 or R. Barents, *De Communautaire Rechtsorde* (Kluwer 2000), 69. Although more optimistic views can be found as well, as in: J.D.B. Miller, *The World of States: Connected Essays* (St. Martin's Press 1981), 16: 'Just as we know a camel or a chair when we see one, so we know a sovereign state. It is a political entity which is treated as a sovereign state by other sovereign states', Of course the rather circular nature of this approach might in turn only serve to increase desperation again. Defying the mysticism a 'working definition' is also provided by Walker (2006b), 6.

tested[18] that compared to analyzing it, even the Danaids had an easy job.[19] More hole than barrel, any attempt to fill in even the basics dissipates ingloriously.[20] One popular solution, therefore, is to simply discard the entire concept: Even if practical in the past, surely this archaic notion no longer forms a useful paradigm in this post-modern age of globalization.[21]

Clearly this author does not share the rejection of sovereignty as a useless relic.[22] Quite the opposite: the controversial role of sovereignty only

18 H. Jahrreis, 'Die Souveränität der Staaten. Ein Wort – mehrere Begriffe – viele Misverständnisse', in: R. Hofmann (ed), *Die Entstehung der modernen souveränen Staates* (Kiepenheuer & Witsch 1967), 35 et seq., Loughlin (2006), 56, A disagreement that is already quite clear from the wide array of conflicting adjectives used such as domestic sovereignty, monetary sovereignty, new sovereignty, pooled sovereignty, popular sovereignty legal sovereignty, political sovereignty etc.

19 Just epistemologically the terrain is already a minefield. See for instance J. Bartelson, *A Genealogy of Sovereignty* (CUP 1995), especially ch. 2. An impressive overview is, however, given by Hinsley (1986).

20 H. Kelsen, *Allgemeine Staatslehre* (J. Springer 1925), 102 et seq. already gives eight different meanings and applications. S.D. Krasner, *Sovereignty, Organized Hypocrisy* (Princeton University Press 1999), 3 gives four. G. Schwarzenberger, 'The Forms of Sovereignty', 10 *CLP* (1957), 264, compares discussing sovereignty to 'shadowfighting' whilst according to Koskenniemi every attempt to define it per definition oscillates between two necessary yet irreconcilable poles: M. Koskenniemi, *From Apology to Utopia: The structure of International Legal Argument* (CUP 2005). Also see: N.G. Onuf, 'Sovereignty: Outline of a Conceptual History', 16 *Alternatives* (1991), 425 et seq.

21 This is not an exclusively modern phenomenon, by the way. Kelsen already supported abolishing it for example (H. Kelsen, *Das Problem der Souveränität und die Theorie des Volkerrechts* (Tübingen 1920), 321 et seq., in the 1950's sovereignty was also on its way out (W.J. Rees, 'The Theory of Sovereignty Restated' 59 *Mind* (1950), 495, and Foucault equally rejected it forcefully (M. Foucault, *Power/Knowledge* (Harvester 1980), 121. Nevertheless such rejections of the concept do seem to have become more popular with the current globalization and European integration. See, amongst many others, K. Schiemann, 'Europe and the loss of sovereignty', 56 *International Comparative Law Quarterly* (2007), 475; D. Held, *A Globalizing World?* (Routledge 2004); Krasner (1999); W. Wallace, 'The Sharing of Sovereignty: the European Paradox' 47 *Political Studies* 1999, 503; D. Philpott, 'Westphalia, Authority, and International Society', 47 *Political Studies* (1999), 566; MacCormick (1999); W. Pogge, 'Cosmopolitanism and Sovereignty', 103 *Ethics* (1992), 48 or already T. Koopmans, 'De Europese Gemeenschappen en het Nederlandse staatsbestel' *RM Themis* (1980), 276, 287. For a very clear overview see Van Roermund (2006), 33 discussing the 'Argument from Redundancy' and the 'Argument from Incoherence'. An alternative is to accept the concept, yet to deny it has a fixed extension, such as Koskenniemi (2005), 242: 'There simply is no fixed meaning, no natural extent to sovereignty at all'.

22 Perhaps one could even reverse matters: sovereignty is so fundamental and dominant a paradigm, that every (seeming) diversion from it draws enormous attention. Also see R. Jackson, *Sovereignty: The Evolution of an Idea* (Polity Press 2007), 110: 'We are living at a time when existing territorial jurisdictions are vested with exceptional international validity'. Equally see Koskenniemi (2005), 237, Lindahl (2006), 87, Walker (2006), 301-31 and Walker (2006a), vi: 'Yet the idea of sovereignty cannot just be whished away. Neither is it obvious that it will simply wither away, nor that its secular decline should be approved or encouraged.'

seems to reaffirm its continued relevance.[23] Nevertheless its multi-dimensionality, rich history, and the numerous learned – and conflicting – comments devoted to it do mean that any attempt to permanently pin down sovereignty inevitably runs into its diverse meanings and uses. Sovereignty arrangements differ per polity, and may even be contested within a polity. Agreeing on the Belgian, Spanish, British or Dutch sovereign, for instance, is already difficult in itself.[24] Sovereignty, and the vocabulary on sovereignty, furthermore, are intimately linked to the state and carry strong normative connotations. Any application outside the state must, therefore, be sensitive to the statal context and normative assumptions imbedded in sovereignty discourse.[25]

These risks and limits, together with the modesty they necessarily inspire, must be respected when engaging with sovereignty.[26] All previous caveats about comparative and conceptual analysis in general, furthermore, have to remain in full force as well. By engaging sovereignty, furthermore, we also enter a more normative dimension, certainly where particular notions as popular sovereignty are not just described or analyzed, but suggested as the 'best' option for the EU. In addition even a descriptive analysis of sovereignty cannot avoid highly contested and normative terrain. This normative dimension also forms an important limitation, as any disagreement on normative assumptions may not be settled objectively. To a certain extent the analysis in part II minimizes this risk by relying on normative conceptions that are as thin as possible, and are hence generally shared. These primarily include a thin notion of democracy and the claim that within a democratic system authority should ultimately derive from, or be linked to, the people. Where thicker notions are relied upon, furthermore, these will be defended.

At the same time the limited aim of this chapter does not require us to provide the exclusive or 'true' definition of sovereignty, if that is even possible for social facts. The far more limited aim is to put forward, and make an initial contribution to, a specifically confederal conception of popular sovereignty suited for the EU. Rather than demanding its expulsion from civilized EU discourse, in other words, it explores whether European integration should not embrace sovereignty, albeit by spearheading a gentle

23 Cf. De Witte (1995), 170: 'the debate on the Treaty on European Union has started a new phase of turmoil in the legal analysis of European Integration, and the concept of sovereignty is playing a key role in this debate which should be acknowledged by both its defenders and its opponents.'

24 See for instance the contributions by J. Ziller, M. Aziz, M. Cartabia, K. Armstrong, B. de Witte and C. Mik in: N. Walker (ed), *Sovereignty in Transition*,(Hart Publishing 2006).

25 J. Shaw and A. Wiener, 'The Paradox of the European Polity', in: M. Green Cowles and M. Smith (eds), *State of the European Union vol. 5: Risks, Resistance and Revival* (OUP 2000), 64, Loughlin (2006), 57.

26 Cf Carl Schmitt (2005), 16-17.

reapplication of its essential core to new circumstances.[27] To this end, and actually building on the richness and variety within the idea of sovereignty, two definitional elements of confederal sovereignty will be proposed.

First and foremost it will be suggested that a confederal conception of sovereignty should be based on an internal, and not an external concept of sovereignty. Much of the current confusion surrounding sovereignty and the EU derives from – often implicit – reliance on simplified and external conceptions of sovereignty. [28] Second, and flowing from this internal focus, sovereignty should rest with the different semi-abstract member peoples as constituted within their states.[29] Though these two elements clearly fall short of a sufficient definition, it is suggested that they form necessary elements, and already give some shape to a confederal conception of sovereignty. In any event they assist in demonstrating the *prima facie* attractiveness of such a conception.

These two elements will be developed and tested through two complementary methods. On the one hand part II will demonstrate the fit of confederal sovereignty with the logic and conceptual evolution of sovereignty. It does so via a succinct conceptual analysis which first untangles the internal and external strands of sovereignty, and subsequently shows how confederal sovereignty forms a logical next step in the evolution of internal sovereignty.

On the other hand confederal sovereignty will be tested against the opposing camps of statism and pluralism. Two influential schools that lie at the opposite ends of the 'sovereignty' debate: the 'statist' defenders of sovereignty, with the *Bundesverfassungsgericht* as its main champion, and the

27 Walker (2006), 28: '(…) the dynamic of transformation within late sovereignty will involve the continuous evolution, rather than the demise of sovereignty.'

28 See for instance Maduro (2006), 504-5. For, right after the ritual despair and the exoneration that sovereignty is a contested concept, as described above, it usually turns out that happily there does exist an acceptable working definition of sovereignty. This definition may respectably be used, especially where sovereignty is not the main focus. It generally is a variation of 'internal supremacy over all other authorities within a given territory, and external independence of outside authority.' Cf. R.O. Keohane, 'Ironies of Sovereignty: the European Union and the United States' 40 *JCMS* (2002), 746 (Citing Bull) or comparable Jackson (2007), 6. For a similar conclusion already drawn in 1922 see Carl Schmitt (2005), 17: 'Nevertheless the old definition, in phraseological variations, is always repeated: Sovereignty is the highest, legally independent, underived power.' The general acceptance of this definition unfortunately, seems to be directly proportional with its meaninglessness. Essential questions such as the meaning of supremacy or authority are not answered, but simply made part of the definition.

29 This does not necessarily entail the claim that within each Member State the people are or should be the formal sovereign as well, even though almost all national constitutions of EU Member States do acknowledge the sovereignty and ultimate authority of the people. See for an overview chapter 10, section 3.2. and chapter 12.

'pluralist' challengers, rejecting sovereignty as a thing of the past.[30] This confrontation with statism and pluralism also connects our confederal approach to the existing theories on the EU and to the challenges these theories engage with. In addition to testing the feasibility of confederal sovereignty in itself, this application of a confederal approach also explores a potential synthesis: to what extent may the key truths and objectives of statism and pluralism be far more compatible with each other than they seem, at least once both are considered from an evolved understanding of confederalism and sovereignty.[31] If correct, a confederal application of sovereignty may allow us, at least in part, to combine the respective strong points of statism and pluralism.

4 Structure

To achieve the aims set out above section II is structured as follows. First we need to set out the perceived problems concerning sovereignty and the EU: why do sovereignty and integration seem to deadlock? To do so we turn to the statist and pluralist schools, and their opposing views on sovereignty (chapter 8). Once we have established an understanding of the problem we turn to the conceptual development of sovereignty itself. It will be demonstrated that, different from what is often assumed, internal and external sovereignty are two distinct, albeit related, concepts. To this end the development of the internal and external strands of sovereignty will be traced through five different stages of their development and conceptual entanglement, including the accommodation of federal government and sovereignty in the US. These stages lead up to the current point where the EU again collides internal and external sovereignty, acting as a sort of Hadron collider for constitutional theory and the concept of sovereignty. Just as the Hadron collider breaks up atomic particles by colliding them, the presumed elementary particle of sovereignty is collided with the EU, and subsequently breaks up into the more elementary particles of internal and external sovereignty, the characteristics of which we can then study separately (chapter 9).

30 On the (academic) prominence of (constitutional) pluralism see, somewhat hyperbolic, Weiler (2012), 1 who calls it a 'academic Pandemic'. A pretty exclusionary virus at that since 'Constitutional Pluralism is today the only Party Membership Card which will guarantee a seat at the High Tables of the public law Professoriate.'

31 In this regard this thesis aims to contribute to the aim already formulated by Walker: 'The task, therefore, of political and constitutional theory in conditions of late sovereignty is not to imagine, or to anticipate, a world in which new political values and virtues flourish in the absence of sovereignty, but to imagine and anticipate ways in which such values and virtues may flourish *through* the operation of sovereignty (emphasis in original). Walker (2006), 31.

Once the internal and the external concepts of sovereignty have been separated in this way, the idea of a confederal conception of sovereignty will be further introduced. Subsequently the different advantages set out above will be tested and explored (chapter 10), and some general conclusions will be drawn (chapter 11), before we continue with part III, which proffers some, highly tentative, suggestions to apply the conclusions reached in part I and II to the challenges of institutionalizing a confederal evolution of the national democratic process and the EMU crisis.

8 The statist and pluralist challenge

1 Sovereignty as an obstacle: The statist and the pluralist challenges

Sovereignty and integration do not seem natural allies. The absoluteness and centralism associated with sovereignty appear to block supranational cooperation, or forces it to the extreme of forming a new sovereign state.[1] Conversely it seems integration must overcome sovereignty to be successful. Not surprisingly, therefore, sovereignty has been a problematic and divisive concept for EU integration.[2]Yet, if sovereignty and integration are indeed fundamentally incompatible, any confederal attempt to reconcile the two would be inherently futile. Before exploring the potential of a confederal conception of sovereignty for the EU it is, therefore, necessary to first examine this apparent clash between sovereignty and integration, and the theoretical deadlocks that result from it.

To that end this chapter turns to statism and pluralism: Two of the currently most dominant schools on EU integration that together perfectly represent the common assumption that integration and sovereignty conflict, and that substantiate this position with a range of arguments. Both schools hold powerful, yet strongly opposed, views on integration. Sovereignty figures prominently in both, albeit as Saint George in the one and the dragon in the other. Contrasting statism and pluralism therefore provides a useful starting point for the analysis of confederal sovereignty and its potential for the EU. It forces any conception of confederal sovereignty to engage with the strongest and most fully developed arguments against combining sovereignty and integration that currently exist. It also connects the analy-

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1 Cf for instance BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil*, par. 228 or Schütze (2009), 1090 and 1095, including his translation of Jellineks classic position on federalism, illustrating how even in a federal state undivided sovereignty remained with the federate center: 'Whatever the actual distribution of competences, the Federal State retains its character as a sovereign State: and, as such, it potentially contains within itself all sovereign powers, even those whose autonomous exercise has been delegated to the Member States.' Alternatively see D. Wyatt, 'New Legal Order, or Old?' 7 *European Law Review* (1982), 147, who on the basis of this dichotomy forces the EU into the corner of an international organization.

2 See in this regard already the clear language by Monnet, which he had drafted for an earlier version of the Schuman declaration: 'This proposal has an essential political objective: to make a breach in the ramparts of national sovereignty which will be narrow enough to secure consent, but deep enough to open the way towards the unity that is essential to peace.' (Monnet (1978), 296)

sis in this thesis to some of the leading views in the current debate on the nature of the EU, instead of developing it in splendid but sterile isolation. The overview below, therefore, will also form the basis for a more critical appraisal of both schools later in part II, as well as for the attempt to establish a (partial) confederal synthesis between them. For as will be seen both statism and pluralism lead to certain deadlocks in our thinking on European integration. Several of these deadlocks derive from incorrect or unsuitable conceptions of sovereignty, and it is here that a confederal approach can make one of its contributions, as it precisely reduces or circumvents these deadlocks. At the same time the overview also serves to test the confederal approach itself, as it should also be able to incorporate and build on the important insights provided by both schools.

The following sections will first introduce the dichotomy between statism and pluralism (section 2). Subsequently statism will be set out (section 3) beginning with an overview of its academic defence. Based on this overview the key tenets of statism will be briefly outlined, after which we turn to the forceful judicial application of these tenets by the German *Bundesverfassungsgericht* and the vital role played by sovereignty in this application. Section 4 then sets out the academic defence of pluralism, including its use of the EU as a crown witness against sovereignty. Considering that there is no explicit judicial defence of pluralism available, this section then provides several conclusions on the strengths and weaknesses of pluralism, including its powerful attack on statism. After statism has been allowed a rejoinder, two attempts to bridge the dichotomy between statism and pluralism will be briefly discussed (section 5), before some general conclusions on the dichotomy between statism and pluralism, and between sovereignty and integration, are drawn in section 6.

The overview provided will be based on the work of several leading figures from the respective schools. It must be stressed, however, that the aim in this chapter is not to make specific contributions to either statism or pluralism, or to set out in detail the existing – and important– differences within each camp. Rather the aim is to sketch the larger picture, and, abstracting from these internal conflicts, set out the core characteristics of both approaches and their relation to sovereignty.

2 Central dichotomies: National v. international or statism v. pluralism

The EU is commonly placed in the spectrum between the national and the international.[3] Is it a state like entity best approached as a national system,

3 De Witte (2012), 49, 53. For an early example see C. Sasse, 'The Common Market: Between International and Municipal Law', 75 *Yale Law Journal* (1965-6), 659.

or is it an international organisation, a 'creature of international law'?[4] National conceptions tend to suggest further federation as the best way forward for the EU to achieve sufficient stability and to match the Member States in effectiveness and legitimacy.[5] Alternatively they lead to a *sui generis* conception where the EU cannot be made to fit the national framework.[6] Conversely the international view maintains that the EU, as a far-reaching form of voluntary association between states, does not exceed the outer limits of an international organization. [7] For example it derives its powers from the Member States and does not posses any original or ultimate authority of its own accord.[8]

Within this national – international dichotomy a confederal approach can already be of use as a conceptual halfway house. A more fundamental dichotomy, however, should be distinguished, already because it underlies and incorporates the national – international one. This is the dichotomy between *statist* approaches on the one hand, and *non-statist*, or *plural* approaches on the other.[9]

3 The statist – pluralist dichotomy

Statist approaches start from the existing statal framework. The concepts and normative ideals surrounding the nation-state, and the encompassing system for public authority they create, are applied to the EU. The question becomes where the EU fits within this statal framework. It must be stressed that this statal framework *includes* the national – international dichotomy. The inter-national, after all, derives from the statal order.[10] The question whether the EU is national or international, therefore, remains within the statist paradigm.

4 De Witte (2012), 19.
5 See Kinneging (2007), 40 or Mancini (1998).
6 See supra Introduction, section 4.1. on the *sui generis* character of the EU as well as Baquero Cruz (2008), 389.
7 See also the work of Hoffman, especially Hofmann (1966), 862 and 'Reflections on the Nation-State in Europe Today' 21 *Journal of Common Market Studies* (1982), 719.
8 T.C. Hartley, 'The Constitutional foundations of the European Union' 117 *Law Quarterly Review* (2001), 225, 228, 243, also see Milward (1992).
9 Also see in this regard N. Walker, 'European Constitutionalism in the State Constitutional Tradition' 59 *Current Legal Problems* (2006), 51.
10 See for a detailed discussion of this point chapter 9, sections 2 and 4.

Pluralist approaches reject the statal framework itself, which they see as monist and rigid.[11] They strive to develop a post-statal framework, which shows how the EU falls completely outside, and not just in-between, the national and the international.[12] Instead of a statal world with clear centers of ultimate authority, we live in a plural reality where multiple overlapping centers and orders must interact with each other.

Both approaches also flow from two opposing yet necessary logics or methods. On the one hand one can approach the EU from the existing statal theory and see how the EU fits, or should be made to fit. On the other hand one can start from the apparent innovations in the EU that appear to defy the statist framework, and then see how existing theory must be changed or discarded to allow for these innovations and the plural reality they seem to create.[13] Both approaches, however, seem to lead to conflicting outcomes, and hence a dichotomy in the theory of the EU.[14] Neil Walker nicely expresses the logical tension between both approaches where he juxtaposes pluralism with constitutional monism, which is one form of statism:

> 'Constitutional monism merely grants a label to the defining assumption of constitutionalism in the Westphalian age which we discussed earlier, namely the idea that the sole centres or units of constitutional authorities are states. Constitutional pluralism, by contrast, recognises that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of inter-national law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states. The relationship between the orders, that is to say, is now horizontal rather than vertical – heterarchichal rather than hierarchical.[15]

The fundamental dichotomy, therefore, does no lie between the state and the international, as the international is a function of the state.[16] Nor does it lie between statism and federation, as a federation is only another variant of the state. The real dichotomy lies between the *statal* and *non-statal* conceptions of public authority, of which pluralism forms one of the most prominent schools. So let us take a closer look at these two schools and this dichotomy between statal and pluralist conceptions.

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11 N. MacCormick, 'The Maastricht Urteil: Sovereignty Now' 1 *European Law Journal* (1995), 264: '(…) the most appropriate analysis of the relations of legal systems is pluralistic rather than monistic, and interactive rather than hierarchical.'

12 J.H.H. Weiler and U.R. Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in: A-M Slaughter, A. Stone Sweet and J.H.H. Weiler (eds), *The European Courts and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998), 331.

13 See in this regard also the comments on normalism v. exceptionalism in Introduction, section 4.1.

14 See discussing this tension, and in a sense its emergence into general awareness at the Maastricht judgment, Baquero Cruz (2008), for instance at 405.

15 Walker (2002), 337.

16 See also N. Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay', 25 *Oxford Journal of Legal Studies* (2005), 587.

4 Statism: The sovereign state as bulwark and safe haven

Statist accounts emphasize the essential position of the state. Be it because democracy is only possible within the sovereign state, because the state embodies and protects a pre-political '*Volk*', because the nation-state is the optimum or only viable form of political organization, or for other reasons, the central postulate is that the sovereign state must not be 'dissolved' in the process of European integration.[17] Because of this vital role of the state it also becomes logically necessary to contain the EU within the realm of international cooperation.[18]

Based on the work of some leading statist scholars, the next sections first introduce statism as developed academically and provide an overview of the key tenets of statism. Subsequently, the analysis focuses on one of the most influential and developed judicial defences of statism and sovereignty: the *Lissabon Urteil* of the German *Bundesverfassungsgericht*.

4.1 Academic statism

The work of Paul Kirchhof epitomizes statism, partially because of its rather pure and undiluted form.[19] He strongly emphasizes the essential role of the state, which must remain the primary and ultimate entity in the organization of public authority. He especially stresses the unique capacity of the state to provide democratic legitimacy.[20] As the EU is not a state, and is not based on a single European people, the EU can never provide an equal – or sufficient – level of democracy.[21] Protecting the state against integra-

17 The danger of 'dissolving' is taken from P. Kirchhof, 'Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland' in: J. Isensee (ed), *Europa als politische Idee und als rechtliche Form* (Duncker & Humblot 1993), 64.

18 See in this regard the qualification of 'supranational organizations' as a species of international organizations in handbooks on the law of international organizations, such as in H. Schermers and N. Blokker, *International Institutional Law: Unity within Diversity* (4th edn, Martinus Nijhoff Publishers 2003), 46. Also see Forsyth (1981), x: 'However, classical theory does not positively indicate why or how states join together voluntarily to create a body capable of legislating for their own citizens – indeed, precisely because of its emphasis on state sovereignty, it tends to make one deeply sceptical of the possibility of such a development, and to deny in the name of theory the reality that exists before one's eyes.'

19 So explicitly so in his academic work that one may safely assume the same for his previous position within the Bundesverfassungsgericht, not least as Judge Rapporteur of the *Maastricht Urteil* (BVErfGE 89, 189 (1993).

20 Kirchhof (2010), 737.

21 'Due to its indirect legitimation through the peoples of its members (*Staatsvölker*) and not through a European people (*Staatsvolk*), the European Union cannot lay claim to the legitimation, the universal nature and the power of re-innovation of a constitutional state.' Kirchhof (2010), 739 and 743.

tion, therefore, is necessary to protect democracy itself. But the state is of even more fundamental importance for human life than democracy alone:

> '(…) without the safety of a state, the human being remains without peace, reliable liberty under the rule of law, the secure frame of professional and personal development, future provisions and existential safety.(…) The end of history was proclaimed, but that, finally, led to the insight of founding states so that the preconditions of a free development of the people would be established.'[22]

The sovereign state must, therefore, remain the foundation of all political organization. A position which necessarily entails that 'European public authority is ancillary to state authority, which grows out of and rests upon the state foundation.'[23]

As a non-statal entity the EU can also not have a 'real' constitution. The: 'term 'constitution' suggests the emergence of statehood – the ultimate source of a legal order, *absolute* primacy, the authority of constitution making of the *people* (*pouvoir constituant*), and the presence of an *exclusive* and basic political structure.'[24] This fundamental and exclusive nature of a constitution means that two real constitutions cannot coexist in the same territory. As a consequence, any claim that the EU *does or should* have a real constitution attacks the constitutions and independent existence of the Member States. Talk of EU constitutionalism, therefore, is not a harmless borrowing of terms. It threatens the very basis of political and legal organization: the state.[25]

Under this statist approach the concepts of state, people, democracy, and constitution are bound together.[26] The notion of *state sovereignty* captures this unity. It safeguards all that is fundamental and necessary for a well ordered public authority. As a result 'Every state demands sovereignty, the ultimate and final power to ensure domestic law and peace, in order to preserve independence from other states and to represent community in relationships with third parties. *Sovereignty protects the state's cohesion* (…)' Kirchhof is obviously well aware of the high level of integration already

22 Idem, 755.
23 Cf also Hartley (2001), 235.
24 Idem. Similarly see Boom (1995), 209.
25 Kirchof (2010), 740. Also see p. 744: 'Hence, the constitutional states' independence, the characteristics of their constitutions and the achievements of their constitutional history would get pulled into vortex of a European constitution and would eventually become lost within it.' Note that logically within the statist framework the granting of constitutional status to one entity means removing that status from the other. Statism cannot, therefore, be simplistically be seen as one side of a pluralist account without completely denaturizing it.
26 For the extremely thick normative and historical conception of 'people' relied on by Kirchhof as an additional objection to European constitutionalism and democracy see Kirchof (2010), 747-748. Equally linking these concepts Grimm (1995), for instance at 291.

established, and does try to accommodate far-reaching integration. He acknowledges that 'membership of a state in the European Union's union of states *affects* its sovereignty.'[27] Yet this effect does not exceed the standard practice of sovereigns to cooperate and enter into mutual, binding legal relations.[28] Therefore:

> 'Membership in the European Union leaves the Member States' sovereignty with them, in the sense of final responsibility for the public authority exercised by the European Community and its present responsibility vis-à-vis its people. The question regarding sovereignty does not remain open: (…). The democratic state keeps the internal and external sovereignty together and accounts for its recognition within the European Union vis-à-vis the people.'[29]

The EU, therefore, derives its authority from the Member States alone, and not from the people directly.[30] A hierarchical reality that also means that EU law can only take effect within the limits set by the respective national constitutions.[31] This assessment does not deny the high level of integration within the EU, nor the need for that integration. The EU 'calls for the reconsideration of statehood open to the world'.[32] Kirchhof even accepts that 'The treaties constitute the basic order of the Community, which (…) is *partially superior* to the Member States' constitutions.'[33] Within this frame-

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27 Kirchof (2010), 741, 747-748. The EU also 'calls for the reconsideration of statehood open to the world and a sovereignty open to Europe.'

28 In the words of De Witte: Member States act '(…) as the *Herren der Verträge*, bound by nothing else than their respective national constitutional rules and by the rules of international treaty law; they act as 'independent and sovereign states have freely decided [..] to exercise in common some of their competences.' De Witte (2012), 36. He rightly adds that 'the fact that the Member State governments act as 'Masters of the Treaty text' does not mean that they also control what happens with the Treaties once they enter into force.' Which is of course another point. See on his qualification of the EU as an international organization also De Witte (2010), 324.

29 Cf Grimm (1995), 285: 'That was the birth of the modern State, which raised itself above society, now conceived of as privatised, and saw its attribute in sovereignty, understood as supreme irresistible power over society.'

30 Kirchof (2010), 744. See similarly Grimm (1995), 290 and T. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' 17 *Harvard International Law Journal* (1996), 394.

31 Kirchof (2010), 743, 746. At the same time, however, Kirchhof urges judicial cooperation, and efforts by all parties to prevent the primacy question from even being posed, 'The judiciary fosters the culture of standards, equalisation and co-operation, not of predominance, submission and rejection. To this extent, Europe offers the chance to discover anew the classic legal ideal of balance of powers. (p. 759) .

32 Kirchhof (2010), 741, and 747: 'These states' functions have always exceeded the individual state's capacity (…) Hence, states depend on co-operation in overarching organisations.'

33 Idem, also: 'On the other hand, the ECJ is the ultimate interpreter of European law, and as a result interprets Union institutions' competences and powers at the expense of the domestic constitutional institutions.(…) Furthermore, the development of substantive constitutional law is strongly influenced by European law.'(p. 745). Also see Grimm (1995), 297.

work of cooperation, however, the states remain '(…) independent – and in this regard non-connected (…) because unlike the EU they have been truly 'constituted.'[34]

Fundamentally, therefore, the EU can be no more than a side-wheel.[35] The *sovereign state* remains the basis for political organization. The EU is not capable of taking over from the state, and must, in the interest of all, also not aspire to do so.[36]

Dieter Grimm, also a former judge in the *Bundesverfassungsgericht*, has developed a milder version of statism.[37] He also sees the statal context as the only one able to provide the conditions necessary for a true democratic process.[38] At the EU level, on the other hand, 'even the prerequisites' for democracy 'are largely lacking', let alone actual democracy itself.[39] These prerequisites, furthermore, such as a European party system, citizens' movements, European media or a common language 'cannot simply be created.' Retaining the state, and upholding its primacy and ultimate hierarchy, therefore, is again a demand of democracy itself: 'The achievement of the democratic constitutional state can for the time being be adequately realised only in the national framework.'[40] This does not mean that 'the political form of the nation-State ought to be preserved for its own sake'. Grimm even admits that 'the nation-State, understood as a political unit that regulates its internal affairs autonomously, is something whose time is past.'[41] Supranational cooperation is required to address this challenge, but must necessarily stay within the limits imposed by democracy, and therefore by the statal system.[42]

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34 Kirchof (2010), 741, my emphases. Note the use of 'partial' and of the term 'superior' instead of supremacy or primacy. On p. 746 it is phrased even more restrictive as 'European law has limited primacy over the Member States' constitutional law *according to the Member States' order of application*'.

35 P. Kirchhof, 'The Balance of Powers Between National and European Institutions', 5 *European Law Journal* (1999), 225.

36 Kirchof (2010), 757.

37 For instance he rejects the notion of a 'Volksgemeinschaf [ethnic community ILF]' as the only basis for true democracy. Kirchof (2010), 297.

38 Cf Grimm (1995), 293. 'The democratic nature of a political system is attested not so much by the existence of elected parliaments, (…) as by the pluralism, internal representativity, freedom and capacity for compromise of the *intermediate area of parties, associations, citizens' movements and communication*. Where a parliament does not rest on such a structure, which guarantees constant interaction between people and State, democratic substance is lacking even if democratic forms are present.'

39 Grimm (1995), 294.

40 Grimm (1995), 297.

41 Grimm (1995), 297.

42 See also D. Grimm, 'The Constitution in the Process of Denationalization' 12 *Constellations* (2005), 460 and D. Grimm, 'Comments on the German Constitutional Court's Decision on the Lisbon Treaty. Defending Sovereign Statehood against Transforming the European Union into a State', 5 *European Constitutional Law Review* (2009), 353.

The statist perspective is obviously not just academically defended by former judges of the *Bundesverfassungsgericht*. Hartley, for instance, also strongly defends a statist approach, including the claim that the Member States remain the sovereign and ultimate authorities.[43] His rather Kelsinian approach starts from the qualification of the EU as a creature of *law*. As such it cannot but depend on its own legal foundation, being the legal systems of the states that created it.[44] Any other claim would require a radical change of the current '*Grundnorm*'. In turn this would entail that 'sovereignty had been transferred to the Union.'[45] Such a radical change is legally not possible, already because the national constitutional courts, gatekeepers of the authority the EU now relies on, would not allow it.[46] As a result: 'The Member States remain sovereign.'[47] Any claim that denies this basic fact, and proclaims the EU to have an independent or supreme authority, can only do so by denying reality, and thus by 'a wave of the jurist's magic wand.' Such grand, constitutional ambitions for the EU, therefore, suffer 'from a reality deficit'.[48]

4.2 Empirical statism

In addition to these predominantly theoretical claims, based on the nature of *inter alia* democracy and a legal system, statism can also draw on more empirical research in the field of international organization.[49] Especially so on Liberal Intergovernmentalism, which emphasizes the continued centrality of the state. The forceful work of Moravcsik plays a leading role in this field.[50] Leaving formal legal and theoretical arguments to one side, he points to the continued predominance of actual power that remains with

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43 For another passionate British statist perspective see the work of H.W.R. Wade, especially: 'The Legal Basis of Sovereignty' *Cambridge Law Journal* (1955), 172, 'Sovereignty and the European Communities' 88 *Law Quarterly Review* (1972), 1, 'What has Happened to the Sovereignty of Parliament?' 107 *Law Quarterly Review* (1991), 1, and 'Sovereignty – Revolution or Evolution?' 112 *Law Quarterly Review* (1996), 568.

44 Hartley (2001), 225, 228, 243, Hartley (1999), 148, 179.

45 Hartley (2001), 232. A claim that would be 'overwhelmingly *rejected*' and therefore means that 'The theory of constitutionalisation (…) is wrong.'

46 Hartley (1999), 160-61, similarly Schilling (1996), 397.

47 Hartley (1999), 179. For a French variant of statism, further linking sovereignty and the state by postulating a necessary and exclusive relation, see A. Pellet, 'Les Fondements Juridiques Internationaux du Droit Communautaire', in: *Academy of European law: Collected Courses of the Academy of European law* (vol. V Book 2, Kluwer Law International 1997), 229: 'L'identité entre souveraineté et forme étatique est totale: toute entité souveraine est nécessairement un Etat et tout Etat est nécessairement souverain.'

48 Hartley (1999), 181.

49 Also see Hoffman (1966) and Hoffman (1982).

50 Moravcsik (1993), 473, A. Moravcsik, *The Choice for Europe. Social Purpose and State Power From Messina to Maastricht* (Cornell University Press 1998) and A. Moravcsik 'The European Constitutional Settlement', in: K. McNamara and S. Meunier (eds) *Making History: European Integration and Institutional Change* (OUP 2007), 50.

the states. In terms of key resources as money, enforcement power or legitimacy the EU does not even come close to its Member States. It are the preferences and actions of these 'critical actors', that determine EU action, and ultimately the process of integration itself. Far from eclipsing the states, the EU should be perceived within the existing statist framework as 'an international regime for policy co-ordination.'[51] From that perspective the EU rather strengthens,[52] or even rescues, the state.[53]

4.3 The key tenets of statism

Based on the overview given above, and for the purposes of this thesis, the key tenets of statism can be outlined as follows.

First and foremost statism starts from the ultimate authority of the state (1). It is the state that remains the foundation and apex of public authority.[54] Usually this claim is also linked to democracy: (2) the state is the essential habitat of democracy, whereas the EU does not offer the same democratic safeguards or even lacks the capacity for true democracy altogether.[55] A claim which is often supported (3) by the lack of a European people or *demos*,[56] and (4) with empirical claims on the remaining centrality and unique resources of the state, for instance in terms of legitimacy, democratic process, money or administrative capacity.[57]

Several further elements then flow from this central position of the state. To begin with (5) the authority of the EU can only be derived from the ultimate authority of the state,[58] and (6) therefore is inherently subject to, and circumscribed by, this higher authority.[59] Any act which violates these limits is *ultra vires* and therefore does not bind the national legal orders.[60]

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51 A. Moravcsik and F. Schimmelfennig, 'Liberal Intergovernmentalism', in: A. Wiener and T. Diez (eds), *European Integration Theory* (2nd edition, OUP 2009), 68. This does not mean, however, that institutions, or the EU as a whole, does not matter, just that they are not in the drives seat.

52 A. Moravcsik, 'Why the European Community Strengthens the State' Centre for European Studies, *Working paper series No. 52* (Harvard University 1999).

53 Milward (1992).

54 Kirchof (2010), Grimm (2005), Hartley (2001).

55 Grimm (1995), 293-4, 297.

56 See on this point also L. Siedentop, *Democracy in Europe* (Columbia University Press 2001).

57 'The EU, like other international institutions, can be profitably studied by treating states as the critical actors in a context of anarchy.' Moravcsik and Schimmelfennig (2009), 68. This does not mean, however, that institutions, or the EU as a whole, do not matter, just that they are not in the drivers seat. Also see Moravcsik (1993), 473, or Moravcsik (2007), 50.

58 Hartley (2001), 228, 243, Hartley (1999), 148.

59 Maduro (2006), 507-8, including footnotes 12 and 13. Decision 170, *Granital* of 8 June 1984 by the Italian Constitutional Court and by the Belgian *Cour d'arbitrage* judgment no. 12/94, *Ecoles Europeenes*, of 3 February 1994 (Moniteur Belge 1994).

60 See paradigmatically BVerfGE 89, 155 (1993) *Maastricht Urteil* par. 88-89.

(7) Ultimate supremacy can, already for these reason, only lie at the national (constitutional) level,[61] and, therefore, be wielded by national constitutional courts alone.[62] Equally the EU (8) cannot have a real constitution, at least not in a meaningful sense of the term.[63] Consequently, and as recognized by the Treaty, (9) the Member States remain the Masters of the Treaties. They retain the full power to amend the Treaties, withdraw or even abolish the EU altogether.[64]

Lastly, and as a further result of all former tenets, (10) the EU must remain within the conceptual space left by the state:[65] As long as it does not become a state it must be limited in authority and status to a level which does not undermine the minimum authority and the ultimate hierarchy that necessarily accrue to states.[66] The residual conceptual space this leaves to the EU is then often, though not necessarily, linked to the construct of an international organization, which may or may not be *sui generis*.[67]

All in all, therefore, statism requires that integration take place within the boundaries of the sovereign state alone. Having established these theoretical tenets of statism, we now turn to their judicial application in practice. This judicial application has been particularly relevant for the development and impact of statism, and forms one of the key legal realities that any viable theory on the constitutional structure of the EU should take into account.

4.4 Application: Judicial statism

Probably the most impressive support for statism comes from the many national constitutional and highest courts that have adopted statist approaches.[68] Perhaps not surprising, – they have been established to

61 Schilling (1996), 399.

62 As phrased by Chalmers, '(…) all the highest national courts enjoy a de facto veto over the development of the Community legal order.' D. Chalmers, 'Judicial Preferences and the Community Legal Order' *Modern Law Review* (1997), 180. Also see Hartley (1999), 160-61, or Schilling (1996), 397.

63 Kirchhof (2010), 755, or Boom (1995), 209.

64 Art. 48 and 50 TEU, also see on these points chapter 2, section 2.4.3. and 2.5.3. on amendment and secession in the EU.

65 Cf Pellet (1997), 229.

66 Grimm (2005), 460.

67 For a strong defense of why the EU should still be seen as an international organization, though not necessarily linked to other statist tenets set out above, see De Witte (2012).

68 This statist approach by national courts is often creatively posited by pluralist as proof of their theory. In all seriousness, however, it cannot be claimed that from their *internal* legal perspective these courts accept true pluralism in the sense of waving the ultimate hierarchy of their own constitutions and accepting a fundamental heterarchy. Nevertheless qualifying these courts as true pluralists would then make it impossible not to be a pluralist except by surrendering to a higher authority, making the label trite.

uphold their national constitutions – almost all of these courts have defended the ultimate supremacy of their national constitutions.[69] Sovereignty generally features prominently in these judgments. Central and Eastern European constitutional courts have been particularly outspoken in defending the sovereignty and independence that was so recently regained.[70] To complete our overview of the statist approach to sovereignty we now turn to one particularly well developed and influential sample of judicial statism: the *Lissabon Urteil* of the German Bundesverfassungsgericht. A judgment by one of the most influential constitutional courts in the EU in which sovereignty plays a vital role, and which forms a key point of reference for any discussion on statism, sovereignty and European integration.

4.4.1 The Lissabon Urteil: The statist challenge of the Bundesverfassungsgericht

For decades, the *Bundesverfassungsgericht* (BVG) has played both a leading and a controversial role in the debate on European integration.[71] The *Lissabon Urteil* forms one of its central contributions to this debate.[72] To date it is the Court's most developed attempt to conceptualize the EU as a union of sovereign states (*Staatenverbund*), and thereby to provide a convincing statist paradigm for European integration.[73] Even though it has been developed

69 See for the history of this development generally Oppenheimer (1994) and (2003). For further examples see for instance Mik (2006), 390-91, the Czech Constitutional Court judgment in Landtova Pl. ÚS 5/12, or the Polish Constitutional Court in its judgment of 11 May 2005, K18/04. Even the Spanish Constitutional Court, although most politely, eventually retains ultimate primacy for the national constitution. (See its Declaration 1/2004 of December 13 2004 on the Constitutional Treaty, (BOE number 3 of 4 January 2005) par. 35, 55 et seq.). Further see Besselink (2007), 9 or Baquero Cruz (2008), 397.

70 See generally A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (CUP 2005), or Mik (2006), 390-91.

71 See already BVerfGE 31, 145 (1971), but the saga traditionally starts from BVerfGE 37, 271 (1974) *Solange I* and and BVerfGE 73, 339 (1986) *Solange II*, to continue with BVerfGE 89, 155 (1993) *Maastricht Urteil*, BVerfGE 102, 147 (2000) *Banana Market*, BVerfGE 113, 273 (2005) *European Arrest Warrant*, and BVerfGE 118,79 (2007) *European Emission Certificates* and post Lisbon BVerfGE 1 BvR 256/08, 1 BvR 263/09, 1 BvR 568/08 (2010) *Data Retention*, BVerfGE 2 BvR 2661/06 (2010) *Honeywell*, BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*, BVerfGE 2 BvE 8/11 (2012) *Sondergremium*, and BverGE 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 be 6/12 (2012) *ESM Treaty*. See in general, amongst the vast literature inspired by this earlier case law, M. Herdegen, 'Maastricht and the German Constitutional Court: Constitutional restraints for an Ever Closer Union' 31 *CMLRev* (1994), 235 or M. Payandeh, 'Constitutional Review of EU Law after *Honeywell*: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice' 48 *CMLRev* (2011), 9, as well as the references below.

72 2 BvE 2/08 (2009) *Lissabon Urteil*. For citation this chapter will use the English official translation available on the website of the Court at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html. References to the case will, for reasons of brevity, only mention 'Lissabon' with a paragraph number.

73 For earlier attempts see in its case law also see Aziz (2006), 293.

by important case law since,[74] the *Lissabon Urteil*, therefore, remains the central case for our discussion of statism and sovereignty. This especially as in its core the *Lissabon Urteil* is a fundamental defence of sovereignty and the state.[75] A defence of sovereignty as a central concept for the organization of political authority, but foremost a defence of *German* sovereignty. A defence for which sovereignty is normatively armoured with the notion of 'democracy', welded onto the concept of 'state', and developed into an ultimate barrier against too far-reaching integration.

For reasons of efficiency no general summary of the judgments will be given.[76] This chapter will therefore only give a very brief overview of the case, before engaging those parts of the judgment relevant for our purposes: the statist use of sovereignty by the BVG, and the resulting limits on European integration. A forceful defence of sovereignty that any viable notion of confederal sovereignty must be able to counter or incorporate.

4.4.2 Background and brief overview of the Lissabon Urteil

In the *Lissabon Urteil* the BVG checked if the Lisbon Treaty went beyond the level of integration allowed by the German constitution. In its earlier case law the BVG had already established two boundaries in this regard: human rights[77] and *ultra vires*.[78] It now added a third: identity review:[79] 'the Court reviews whether the *inviolable core content of the constitutional identity of the Basic Law* pursuant to Article 23(1)(3) in conjunction with Article 79(3) of the Basic Law is respected.'[80] The German Constitution does not allow integration that would violate this core. If such integration is nevertheless

74 See especially BVerfGE 2 BvR 2661/06 (2010) *Honeywell* and BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*.

75 Thym (2009), 1796, T. Lock, 'Why the European Union is Not a State. Some Critical Remarks', 5 *European Constitutional Law Review* (2009), 407. See also the dissenting opinion from Justice Landau to BVerfGE 2 BvR 2661/06 (2010) *Honeywell*, par. 97 and 102.

76 Many excellent general discussions are already available. See for instance Thym (2009), Schönberger (2009), F. Schorkopf, 'The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon; 10 *German Law Journal* (2009), 1220, C. Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon', 10 *German Law Journal* (2009), 1259, R. Bieber, 'Comments on the German Constitutional Court's Decision. 'An Association of Sovereign States'', 5 *European Constitutional Law Review* (2009), 39, Grimm (2009), 353.

77 BVerfGE 37, 271 (1974) *Solange I*, and BVerfGE 73, 339 (1986) *Solange II*.

78 *Maastricht Urteil*, par. 49. Also confirmed in the *Lissabon Urteil*, for instance par. 240.

79 This can be usefully applied as a separate test, but conceptually comes closer to a further development of the ultra vires logic itself, only now applied to the German Constitution and its wide but limited authority to support European integration. See further A. Cuyvers, 'Een soeverein hof bewaakt de soevereine staat om het soevereine volk te behoeden voor een soeverein Europa: Het Lisbon Urteil als these en antithese voor de verhouding van Nederland tot de EU' in: J.M.J. Rijn van Alkemade and J. Uzman (eds) *Soevereiniteit of pluralisme? Nederland en Europa na het Lissabon-Urteil* (Wolf Legal Publishers 2011), 49 et seq. See also *Lissabon* par. 218 or 226.

80 Lissabon par. 340.

desired, the only way to do so is for the constituent power of the people to adopt a new constitution which subsumes Germany into a European federate state.[81]

The nature and content of this new identity test, including its relation to democracy, will be discussed in more detail below. Here it suffices to say that the BVG ultimately held that the Lisbon Treaty did not violate the German Constitution. Before reaching that conclusion, however, the BVG first denied even the *capacity* of the EU to ever develop into a true democratic polity. This because the EU can never equal the democratic legitimacy produced within a state, at least not without transforming into a state itself.[82] Nevertheless the EU does posses certain democratic elements.[83] At the moment the nature and level of these democratic elements suffices for the competences that have been transferred so far.[84] Further transfers of sovereign powers may alter this balance, and require further democratic checks at the European or the national level.[85] As the capacity for democracy on the EU level is limited, however, so must the maximum level of powers that may be delegated to the EU be limited as well.

The Lisbon Treaty, therefore, survived review. Yet it did so with multiple alarms ringing, and with future trap wires being set, at least in theory. It is against this general background that the specific treatment of sovereignty in the *Lisbon Urteil* must be seen.

4.4.3 A sovereign people under a sovereign constitution in a sovereign state

The *Bundesverfassungsgericht* takes protecting sovereignty seriously. The term sovereignty occurs 73 times in the reasoning of the judgment. Even more impressive is that both the state, the people, and the constitution turn out to be sovereign, with the BVG as the (sovereign?) watchdog for all these sovereigns. Paragraph 216, for instance, holds that 'the basic law not only assumes sovereign statehood, but guarantees it', and paragraph 298 'Even after the entry into force of the Treaty of Lisbon the Federal Republic of Germany will remain a sovereign state.' Notwithstanding this sovereign state paragraph 334 declares the 'the continuing sovereignty of the people', whereas paragraph 340 talks about '(…) the sovereignty contained in the last instance in the German constitution.'

81 Lissabon par. 228.
82 See amongst others Lissabon paras. 272, 280, 286
83 For instance Lissabon paras. 271 et seq.
84 Lissabon paras. 272, 278, 280, 286.
85 In a measured warning shot that did not endanger the Treaty of Lisbon itself the BVG did, in this line, demand amendments to the national legislation accompanying the Treaty which would better secure the role of the German Parliament in the use of art. 252 TFEU and other flexibility clauses. See Lissabon paras.406 et seq, and for the German repair legislation the Federal Law Gazette No. 60 of 24 September 2009.

Comparing the different uses, a sovereign *state* is explicitly assumed in paragraphs 216, 224, 226 229, 235, 240, 247, 249, 275, 278, 287, 298, 299, 329, 339, 343 and 351. The sovereign people make an appearance in paragraphs 208, 209, 218, 334, 179 and 347.[86] Paragraphs 179, 216 340, en 339 nominate the constitution as the sovereign. Interestingly, a combination of the three appears possible as well, as in paragraph 231:

> 'In a functional sense, the source of Community authority, and of the European constitution that constitutes it, are the *peoples* of Europe with their democratic *constitutions* in their *states*.'[87]

Here ultimate authority lies with the state, the people and the constitution together, creating a kind of sovereign trinity.[88] Everyone is allowed to be sovereign, it appears, except the EU.

Considering the central position of sovereignty in the argumentation of the BVG this lack of clarity, intentional or not, is not very helpful. This miraculous multiplication of sovereigns within one legal order also seems hard to square with the concept of sovereignty itself, certainly in the way the BVG apparently understands it. Most often, however, it is the *state* that is declared the sovereign. More importantly, even where other entities as the people or the constitution are referred to as 'sovereign', this sovereignty is ultimately redirected to the state through the notion of democracy, effectively endowing the state with sovereignty again. This linkage between state, sovereignty and democracy greatly increases the centrality of the state in the reasoning of the Court, and deserves closer attention.

4.4.4 Democracy as the normative armour of the sovereign state

Just as the academic supporters of statism, the BVG merges democracy, sovereignty and the state together. Democracy forms the normative core and power source of this construction.

The BVG starts with art. 38(1) GC, that guarantees the right to vote. Via the argument that an *effective* right to vote[89] also requires a well functioning democratic system, this right to vote, together with art. 20(1) and 20(2) GC, becomes a fundamental right to a democratic polity.[90] As art. 20 GC falls under the 'eternity clause' of art. 79(3) GC, this right belongs to the invio-

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86 Lissabon 280 en 281 further indicate, however, that there can be no sovereign European people.

87 As will be discussed in chapter 8 this holy trinity might, from a different perspective, offer a useful starting point to link the case law of the Bundesverfassungsgericht to the notion of confederal sovereignty. Also note that, against the views of Kirchof, the Treaties are here referred to as a 'European Constitution.'

88 See, for instance, also Lissabon paras. 347 and 350.

89 Lissabon 167.

90 See for instance Lissabon 208-210. A right that even goes back to the even more fundamental value of human dignity enshrined in art. 1 GC.

lable core of the constitution.[91] And it is this inviolable core of democracy on which the ultimate primacy of the German constitution is founded. Consequently, each argument against the ultimate primacy of German law is automatically transformed into an argument against democracy.

The BVG subsequently postulates a sovereign state as the *conditio sine qua non* for this democratic core.[92] The Court supports this linkage with the claim that a true democratic process requires a certain critical mass of content and influence.[93] To exaggerate the point, where the competences of the German federal government are reduced to the management of parks and other public greenery, the right to vote for this government looses its value. As a result, there could be no more real democratic process in Germany anymore, simply because there would be no power to control democratically. Certain key areas of public authority, therefore, need to remain under the control of German politics:

> 'European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain *sufficient space for the political formation of the economic, cultural and social circumstances of life*. (…) Essential areas of democratic formative action comprise, inter alia, *citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights*, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of *language*, the shaping of circumstances concerning the *family and education*, the ordering of the freedom of opinion, of the press and of association and the dealing with the *profession of faith or ideology*.[94]

Democracy requires that all these areas remain under the control of one single political system. They may not be divided over separate centres of authority. For this single political control the BVG only sees one candidate: the sovereign state, that 'globally recognized form of organization of a *viable* political community.'[95]

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91 Art. 79 (3) GC reads: '(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.'

92 Lissabon 224, also see 226.

93 Lissabon 218, 226, 244 and 246. See also BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*, par. 98: 'The right to vote also comprises the fundamental democratic content of the right to vote, that is, the guarantee of effective popular government.', as well as par. 101.

94 Lissabon 248 (my italics). Also see 252 et seq. for a further determination of this critical democratic mass. The Court does nuance this enumeration, for instance by not excluding all EU influence in these fields but only requiring that sufficient control is maintained. For a confirmation of this line, and its application to the issue of revenue and expenditure see BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*.

95 Lissabon 224.

Only a sovereign state, therefore, is capable of bringing all these fields under democratic government. As a consequence, any attack on the sovereign state entails an attack on democracy as well. As paragraph 248 puts it: 'the safeguarding of sovereignty demanded by the principle of democracy.'

In this way the sovereign state has been normatively armoured with nothing less than democracy itself, a powerful shield against integration. Proponents of further integration in these key areas become opponents of democracy. The EU itself, furthermore, is certainly obligated to respect these national core competences, seeing how it is founded on the value of democracy.[96]

4.4.5 The case of sovereignty and democracy v. integration

The *Lissabon Urteil* develops a fundamental defence of the sovereign state as the heart-lung machine of a people under democratic self-rule.[97] For that reason, it sets some limits to the maximum level and form of integration under the current German constitution,[98] and denies the ultimate primacy of European law.[99] Within these limits, however, the German constitution, and the BVG, is '*Europarechtfreundlich*'.[100]

The judgment provides an important contribution to the discussion on sovereignty and the EU. It therefore must be addressed by any confederal approach to the EU, certainly one which relies on sovereignty as a foundation rather than a nemesis of integration. The judgment also exposes several weak spots in competing plural conceptions of European integration, and therefore is an essential part of the theoretical background developed here. The position of the Court, for instance, seems to conform better to the current political reality, which hardly qualifies as cosmopolitan, than pluralism does.

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96 Art. 2 and 6 TEU.

97 See, for instance, Lissabon 224 and 226. Also Thym (2009), 1796.

98 Lissabon 228, 263-4, 252 et seq. 'What has always been deemed especially sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior (2), the fundamental fiscal decisions on public revenue and public expenditure, with the latter being particularly motivated, inter alia, by social-policy considerations (3), decisions on the shaping of circumstances of life in a social state (4) and decisions which are of particular importance culturally, for instance as regards family law, the school and education system and dealing with religious communities (5).'

99 For instance Lissabon 330.

100 The judgment certainly contains many positive and constructive elements, not the least of which is its outcome. For early constructive judgments, furthermore, see already the acceptance by the BVG in 1967 that EU law trumps *ordinary* statutes, even if adopted at a later time, BVerfGE 22, 293 (1967) and BVerfGE 31, 145 (1971). The theoretical core of the Lisbon judgment nevertheless lies in setting limits. Under due recognition, and appreciation, of its constructive elements, and the obvious overall constructive attempt to prevent an open conflict, this chapter focuses on these limits.

Similarly it seems to better capture the factual balance of power between the Member States and the EU.[101]

Fully in line with the tradition of the BVG, however, the judgment is also highly contested, and appears to be based on several theoretical black holes.[102] Even though the often decried reference to a pre-political '*Volk*' has disappeared,[103] in its stead new far-reaching positions have been adopted on issues as democracy, sovereignty, and the relation between both. Positions that partially rest on unsupported generalizations, or rather unconvincing assumptions, such as the claim that only 'one man one vote' systems can be truly democratic.[104]

These positions also lead to equally problematic challenges, such as defining the substance of democracy and hence the limits of integration. The opportunistic and somewhat unconvincing selection of limits provided by the BVG in the Lisbon judgment testifies to the difficulties this raises.[105] The further nuancing concerning the actual *policing* of these borders in the *Honeywell* judgment suggests the BVG itself is very aware of this difficulty as well: The indication that it will only act in exceptional cases after the ECJ has been consulted, and even then granting the ECJ a 'Fehlertoleranz', can hardly be seen otherwise.[106] The EMU cases highlight similar weaknesses within the specific area of revenue and expenditure, where for instance

101 Concerning the political climate see the rise of populist an often anti-EU parties across Europe. As to the political power of the Member States the recent sovereign debt crisis provides an illuminating example, where the Member States, and with them the European Council, took control. See the discussion on the EMU crisis from the confederal perspective in part III. Further see Editorial Comments 'An ever Mighty European Council' 46 *CMLRev* (2009), 1383, and for a sober and factual analysis of the still immense and dominant power of the Member States, A. Moravscik, 'The European Constitutional Compromise and the Neofunctionalist Legacy, 12 *Journal of European Public Policy* (2005), 349, and Moravscik (2001). Based on this analysis one could even wonder if the *Bundesverfassungsgericht* does not feel itself *to* threatened by the EU.

102 C. Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigone at Sea', 10 *German Law Journal* (2009), 1209, Thym (2009), 1795.

103 See the far thinner conception of the people, for example, in Lissabon par. 251. Further see Thym (2009), 1816, as well as the difference between the approaches of Kirchhoff and Grimm set out above.

104 Editorial, 5 *European Constitutional Law Review* (2009).

105 See also D. Halberstam and C. Möllers, 'The German Constitutional Court says 'Ja zu Deutschland', 10 *German Law Journal* (2009), 1241, 1249-1251.

106 BVerfGE 2 BvR 2661/06 (2010) *Honeywell*, par. 60, 61 and 66. Similarly see the deferential application of Lisbon BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*. Note also that the BVG is exclusively competent to declare an EU act *ultra vires*, which at one level sits uneasily with the logic of being *ultra vires* itself but does reduce the danger of judicial 'accidents'. Further see the critical dissent by Justice Landau on what he sees as 'excessive requirements', 'shying away' from enforcing limits, and a deviation from the limits established by the *Lissabon Urteil*, and Payandeh (2011), 9.

'only a manifest overstepping of extreme limits is relevant.'[107] Several other unconvincing assumptions and consequences mar the approach of the BVG as well. Foremost amongst these is the fact that it blocks a necessary evolution in democracy by locking the people in the state instead of empowering them externally.

These problematic weaknesses will be further discussed below, where it will be seen to what extent a confederal notion of sovereignty may provide a more constructive and viable alternative to the reasoning of the BVG, or may alternatively help to strengthen the approach of the BVG by providing a more suitable notion of sovereignty.[108] For example confederal sovereignty may allow the BVG to protect sovereignty in a way that does not obstruct democracy from adapting to interdependence.

Be of these objections what they may, however, they do not detract from the fact that the BVG has chosen to defend the sovereign state. Its view, furthermore, is not just one of the many opinions (this one included) on the relation between the EU and the Member States. It is the judicial *qualification* of that relation by the highest court of a not unimportant Member State. As a result it is a determining factor in the same phenomenon of integration it aims to describe, a legal observer-effect so to speak.[109] Even if one disagrees with the BVG, therefore, any alternative vision will have to incorporate the fact that a key player like the BVG continues to approach the EU as a union of sovereign states. An approach in which it is followed by many other constitutional and supreme courts.

The challenge from statism, therefore, is clear: integration within the boundaries of the sovereign state alone. Sovereignty is embraced as a core value, linked to several other vital values as democracy, state, nation and constitution, and subsequently developed as the ultimate bulwark against advancing integration.

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107 In BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*, par. 131. More generally see par, 124 et seq, where the BVG retreats to the procedural safeguard of *Bundestag* 'control' of 'fundamental budgetary decisions.' See on this procedural safeguard also BVerfGE 2 BvE 8/11 (2012) (*Sondergremium*) and BverGE 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 be 6/12 (2012) *ESM Treaty*, for instance par. 198 et seq. For discussion see A. von Ungern-Sternberg 'Parliaments – Fig Leaf or Heartbeat of Democracy? Case note to German Constitutional Court Judgment of 7 September on the *Euro Rescue Package*' 8 *European Constitutional Law Review* (2012), 304.

108 See below chapter 10 section 4.

109 The observer effect in physics ponts to the fact that the act of observation may actually affect the object being observed. Similarly the BVG cannot rule on the process of European integration without affecting it.

5 Pluralism: Overcoming sovereignty and our darker selves

Pluralism challenges the statist approach at its root: [110] it rejects hierarchy itself, and with it the central and ultimate position of the sovereign state.[111] Between the legal systems in the EU there is no ultimate hierarchy, but only a heterarchichal reality wherein multiple independent centres of authority co-exist.[112] And as there is no apex, the state cannot claim to be it. In the words of Neil MacCormick, one of the founding fathers of EU pluralism:

> 'So relations between states *inter se* and between states and Community are interactive rather than hierarchical. The legal systems of member-states and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another. It follows also that the interpretative power of the highest decision-making authorities of the different systems must be, as to each system, ultimate.'[113]

Or as formulated by the equally leading mind of Neil Walker:

> 'Constitutional pluralism recognizes that in the post-Westphalian world there exists a range of different constitutional sites and processes configured in a heterarchichal rather than a hierarchical pattern, (…).'[114]

In reaching this conclusion pluralists generally start from precisely those EU novelties that seemingly defy hierarchy and the statal framework. Novelties that require novel thinking: 'We must try to take seriously the unique and novel character of this 'mixed commonwealth' [EU], and aim for theoretical perspectives that respect its uniqueness and novelty rather than wedging it into old stereotypes.'[115] Walker even points to an epistemological necessity for a pluralist approach: truly *knowing* either the EU or the national systems and their respective claim to authority, and representing them as independent constitutional centers, requires a 'different way of knowing and ordering, a different epistemic starting point and perspective with regard to each

110 This section discusses pluralism in its relation to the EU, and not the more general theory of (legal) pluralism that underlies it. See for this theory more generally G. Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' 13 *Cardozo Law Review* (1992), 1443, or J. Griffiths, 'What is Legal Pluralism?' 24 *Journal of Legal Pluralism* (1986), 1.

111 Cf also M. Avbelj and J. Komarek, 'Four Visions of Constitutional Pluralism' *EUI Working Papers* 2008/21, 2, also introducing pluralism as a reaction to 'the statist origins of classical constitutionalism'.

112 K-H. Ladeur, 'Towards a Legal Theory of Supranationality – The Viability of the Network Concept', 3 *European Law Journal* (1997), 331.

113 MacCormick (1999), 118.

114 Walker (2002), 317. Note though that Walker does try to combine, or at least connect, his pluralism within an overall and continuing development in political organization, an does not see it as a radical break from modernity, which significantly adds to the attractiveness of his views. See also Walker (2012), 57.

115 MacCormick (1999), 156.

unit(y);'[116] As a result there simply is no meta-position, or an 'Archimedean point', from which we can simultaneously know both units, let alone connect them or subject one to the other. As a result even knowing the EU is impossible without adopting a pluralist framework.

By clinging to a statist perspective, or even by searching for a form of non-statal hierarchy, we therefore miss the essence of the EU, and with it its great potential. It is like approaching a cubist Picasso as a Rubik's cube that needs ordering. Instead of welcoming the liberation and possibilities it entails, one tries to destroy it by reducing it to that which it has transcended.

Challenging the existence, and necessity, of one ultimate rule, – be it a Kelsinian *Grundnorm*, a Hartian rule of recognition, or a natural law truth – lawyers should therefore stop trying to understand the European legal order as an either/or between the Member States and the EU.[117] They should accept the fact that each distinct legal order follows a different hierarchy if pushed to the extreme. Continuing to search for the primary egg or supreme chicken will not provide a (conceptual) answer for the EU authority conundrum.[118]

Once heterarchy is embraced concepts like a sovereign state no longer seem tenable. Trying to comprehend a plural reality from an intrinsically hierarchical concept as sovereignty is impossible. As Kumm states: 'Constitutional pluralism (…) allows us to reconceive legitimate authority and institutional practices in a way that makes do without the ideas of the state, of sovereignty, of ultimate authority, and of 'We the People' as basic foundations of law and the reconstruction of legal practice.'[119] From the elementary particles of public authority states and sovereignty become 'passing phenomena of a few centuries.'[120] An overcoming of hierarchy that also conforms with several more post-modern assumptions that often inform pluralism, such as the impossibility of objective or absolute foundations, knowledge, objectivity or truth.[121] Clearly such ontological or epistemological assumptions sit uneasily with the idea of hierarchy as such, let alone with sovereignty.

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116 N Walker (2002), 337.

117 See for one of the founding fathers: N. MacCormick, 'Beyond the Sovereign State', 56 *Modern Law Review* (1993), 1, MacCormick (1995), 259, or MacCormick (1999).

118 Although sometimes, when push comes to shove, an eventual hierarchy is accepted. See for an example Kumm (1999) or Maduro (2006).

119 M. Kumm as quoted in Avbelj and Komarek (2008), 34. The EU is 'post-statist, post-nationalist and post-positivist' (p. 27).

120 MacCormick (1993), 1. Also see D.M. Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy* (Kluwer 1997), 50-51.

121 See for a challenge to knowledge that would (almost) make one quit academia and spend life on matters that one can talk about, the work of Ludwig Wittgenstein, for instance in *Über Gewissheit* (edited by G.E.M. Anscombe and G.H. von Wright, Harper 1972).

5.1 The EU as crown witness against sovereignty

For theories claiming, or prophesising, the demise of sovereignty as a useful construct the EU understandably forms a crown witness.[122] The argument generally goes as follows.[123]

First, it is illustrated how within the EU the once mighty sovereign state has lost its position at the apex of political organization, and can no longer be considered sovereign. And indeed, even though states have bound themselves by treaties for centuries,[124] including via a range of international organizations, no other organization of states has had such a significant impact on the functioning of its members as the EU.[125] One only has to enumerate some of the key developments to drive the point home. Member States, for instance, no longer hold the exclusive supreme legislative or judicial power, traditionally considered key marks of sovereignty.[126] Some have even surrendered their entire monetary policy, another key mark.[127] EU law claims to trump all national law, including constitutional law.[128] Even in fields where the EU has no competences Member States are still bound to respect the negative limits imposed by EU law. Directly or indirectly, therefore, EU law affects even the most sensitive areas such as healthcare, education, collective bargaining, social housing, immigration, benefits, criminal law, and taxes. [129]

The rapidly developing notion of citizenship, furthermore, increasingly prevents Member States from giving preferential treatment to their own citizens.[130] Further limitations flow from the different layers of fundamental

122 See N. MacCormick, 'Liberalism, Nationalism and the Post-Sovereign State' 44 *Political Studies* (1996), 555 or Walker (2006), 3. See for a clear example MacCormick (1993), 1, who calls the sovereign state a 'passing phenomena of a few centuries'.

123 Also see Bellamy (2006), 168, 175. Hinsley (1986), 121.

124 In 2100 BC already a treaty was concluded between the rulers of Lagash and Umma concerning their boundary. (A. Nussbaum, *A Concise History of the Law of Nations* (MacMillian 1954), 1-2), whereas the Greek City-States had a system of treaties as well as an 'external policy', such as for example the Delic Union. Also see: J. Shaw, *International Law* (5th edn. CUP 2003), 16. In line with the points described above, the hypothesis of this chapter is that the EU is exactly so threatening because it for the first time confronts internal and external sovereignty on a large scale by applying the (constitutional) logic of internal sovereignty on the external relation between states. Of course it is already quite curious that the *beginning* of the modern system of nation-states is placed in the *treaties* underlying the peace of Westphalia.

125 See for example the famous analysis of Lenaerts: 'There simply is no nucleus of sovereign power that the Member States can invoke, as such, against the Community.' (Lenaerts (1990), 220).

126 At least under the perspective of EU law. Even statists as Kirchhof and Grimm, furthermore, accept this impact of the EU as a fact. See chapter 8, section 4.1.

127 See chapter 9, section 3.1.

128 Case 6/64 *Costa v E.N.E.L.*, Case 11/70 *Internationale Handelsgesellschaft*, Case 106/77 *Simmenthal*.

129 See for a more detailed discussion and references above chapter 3, section 2.4.

130 See for example C-73/08, *Bressol*.

rights that are supranationally defined and enforced.[131] The new developments regarding economic policy and budgetary control only confirm this trend: they affect money and fiscal policy, the heart and soul of politics.[132] All these qualitative changes in the role and power of the state, furthermore, cannot be masked by a formalistic focus on the (theoretical) power of the Member States as 'Masters of the Treaties'.

Once it has thus been established that the Member States can no longer be considered sovereign, the second step in the argument points out that the EU has not assumed sovereign statehood either.[133] Although the EU has an impressive array of powers and claims supremacy over Member State laws, it lacks too many vital elements, such as executive capacity, an army or a people of its own, to be considered sovereign.[134] As neither the EU nor the Member States are sovereign, the necessary conclusion seems to be that somewhere in creating the '*sui generis*' structure of the Union, sovereignty has left the building.[135]

The conclusion that the EU has rid us and itself of sovereignty is then often further supported with one or more of these additional arguments.

To start with one can point to the reality, and impressive potential, of authority-conflicts within the EU that simply have no (legal) solution.[136] The most famous of these is the simmering conflict between the Court of Justice and the different constitutional and supreme courts set out above. Such conflicts illustrate that there is no clear and linear hierarchy, no ultimate or sovereign authority which can settle these questions. Instead, multiple 'highest' points exist, neither of which can command or overrule the other.

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131 These now include *inter alia* the strongly overlapping EU Charter, the European Convention on Human Rights and the General Principles of EU law. See exploring the limits of these regimes Von Bogdandy *et al* (2012a).

132 See for a discussion of the EMU crisis and the responses so far below chapter 13, section 2.

133 See MacCormicks famous comparison with virginity on this point: Sovereignty can be lost without another gaining it. (MacCormick (1999), 126.

134 Here pluralists and statist agree. See however the opinion of advocate general La Pergola in *NIFPO and NIFF*, case C-4/96 [1996] ECR I-681, footnote 7, holding that the Community had concluded a treaty 'acting as a single sovereign entity.'

135 As Europa carried off by Zeus. Also see the qualification of the EU as a 'non-sovereign commonwealth of post-sovereign states', by N. MacCormick, 'Democracy, Subsidiarity and Citizenship in the "European Commonwealth', in: N. MacCormick (ed), *Constructing Legal Systems. 'European Union' in Legal Theory* (Kluwer 1997), 338-39.

136 For a recent example see the Czech Constitutional Court judgment of 31 January 2012, *Landtova* Pl. ÚS 5/12, rejecting a preliminary ruling of the ECJ as fundamentally mistaken and creating an open conflict for which no further legal solution exists, at least not between the legal orders involved.

Secondly, there is the normative argument against sovereignty. Sovereignty is rejected as morally problematic in itself. The sad track record of devastation by sovereign states, both within heir borders and outside, is used to show how sovereignty has contributed to some of the worst abuses in history. In addition, reliance on sovereignty stands in the way of new and morally superior ways of organizing the world. Ways which emphasize cooperation and individual rights rather than power and the right to be left alone. [137] The dialogue made necessary by the lack of a single highest authority is hence turned into a normatively superior form of political organization with a vital civilizing effect

Lastly, just as statism, these theoretical arguments are often supported further by a more empirical analysis: in the interdependent world of today any notion of sovereignty is outdated anyway. Vital areas such as the economy, basic resources, the environment, migration, or security have outgrown the state, and can only be tackled through cooperation. Interdependency has thereby reached such a high level that talk of an absolute and unlimited sovereign state is outdated at best. More likely, however, it should be qualified as a dangerously foolish state of denial for those not capable of grasping today's complex reality, and are desperately clinging to the security of a less dynamic past.[138]

5.2 The key tenets of pluralism

Obviously many relevant differences exist within the plural universe of pluralism. At the same time, taking together the observations above, it is possible to identify several key elements underlying and uniting pluralist approaches, also in their shared resistance to statism.

First and foremost, (1) pluralism denies and rejects hierarchy. Instead a fundamental heterarchy between different legal orders or centers of authority is posited.[139] (2) The state is one (important) of these authority centers, also because it houses the national legal system. Yet it no longer is the sole or

137 See for example, MacCormick (1999), 117, N.W. Barber, 'Legal Pluralism and the European Union', 12 *European Law Journal* (2006), 328, or Walker (2006b), 11 et seq.

138 See amongst many others J. Camilleri and J. Falk, *The End of Sovereignty? The politics of a Shrinking and Fragmenting World* (Edward Elgar Publishers 1992), or K. Ohmae, *The End of the Nation State. The Rise of Regional Economics* (Free Press 1995).

139 Cf Baquero Cruz (2008), for instance 412, 414-415, describing pluralisms 'rejection of any sort of hierarchy'. Further see A. von Bogdandy, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' 48 *CMLRev* (2011), 1417, Ladeur (2007), 331, M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* (2005), 262, M. La Torre, 'Legal Pluralism as an Evolutionary Achievement of Community Law' 12 *Ratio Juris* (1999), 182, or MacCormick (1993), 1.

ultimate one.[140] Instead (3) public authority is dispersed over multiple and pluriform centres of governance,[141] including international organizations, committees, networks, and even companies.[142] The far-reaching and intrusive characteristics of the EU (4) far exceed the boundaries of a mere international organization, and form clear proof of this statal decline.[143] Such a plural organization of government is also (5) the only possible one for a globalizing and plural reality.[144]

The lack of a (statal) hierarchy also means that (6) no single centre can claim ultimate supremacy: a plural reality entails the existence of multiple conflicting claims to supremacy which are all valid from the internal perspective of their own legal orders.[145] Both the national constitutional courts and the ECJ are, therefore, right, albeit within their own legal orders.[146] As 'no legal solution'[147] exists to authority conflicts between them, therefore, the different centres of authority (7) need to rely on cooperation and dialogue to prevent and solve such conflicts.[148] Generally this need is then (8) embraced as a normative victory as well.[149] Cooperation based on dialogue (or even 'multilogue') [150] transcends the less civilised, and in a sense less liberal, reliance on formal authority. It requires discussion,[151] and thereby, one

140 'Whenever we should date the emergence of the sovereign state, and wherever we may locate its first emergence, it seems we may at last be witnessing its demise in Europe, through the development of a new and not-yet-well-theorized legal and political order in the form of the European Union.' MacCormick (1999), 125.

141 Pernice (2002), 511.

142 Chalmers, Davies and Monti (2010), 199, P.L. Lindseth, ''Weak' Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union.', 21 *Oxford Journal of Legal Studies* (2001), 145, and Lindseth (2010), for instance p. 21 et seq.

143 The EU goes 'well beyond' the 'status of international organization' (Douglas-Scott (2002), 260). See De Witte, (2012), 50 for a clear enumeration, and rejection, of the general arguments against qualifying the EU as an international organization, and therefore as inside the normal statist-IO framework. For a similar overview of facts with the opposite qualification see Schütze (2012), 60-61.

144 MacCormick (1999).

145 At least once the 'internal' perspective of these different legal systems is adopted and respected. MacCormick (1995), 259.

146 MacCormick (1999), 141.

147 'Acceptance of a radically pluralist conception of legal systems entails acknowledging that not every legal problem can be solved legally. (…) The problem is not logically embarrassing, because strictly speaking the he answers are from the point of view of different systems. But it is practically embarrassing to the extent that the same human beings or corporations are said to have and not to have a certain right. (…). MacCormick (1999), 119.

148 F. Mayer, 'The European Constitution and the Courts', in: A. von Bogdandy and J. Bas (eds), *Principles of European Constitutional Law* (1st edn. Oxford, Hart, 2006), 323. I. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', 15 *Columbia Journal of European Law* (2009), 349, A. von Bogdandy, 'Founding Principles of EU law: A Theoretical and Doctrinal Sketch' 16 *European Law Journal* (2010), 95.

149 See for instance Mayer (2006), 323.

150 Maduro (2006), 513.

151 Avbelj and Komarek (2008), 20.

hopes, communication, (rational) argumentation and taking the perspective of 'the other'.[152] Requirements that may transcend the (severe) downsides of the absolute and authoritarian state, as well as its simplistic world view.[153]

5.3 The fit and failure of pluralism

Considering its tendency to take meta-positions, or at least external positions, it is hardly surprising that constitutional pluralism is especially popular, or even dominant, in academia.[154] Its intellectual and post-modern flair appeals to key values in academia, where it is also not burdened with the responsibility of taking individual decisions but with grasping overall reality. As a result, however, we cannot, nor do we need to, go into a judicial application of pluralism. Rather, as mentioned, pluralism tries to claim the statist point of view retained by national constitutional courts as proof of its own position. Consequently we can proceed with some concluding remarks on pluralism and its rejection of statism and sovereignty, before we move on to that statist rejoinder, and some bridging attempts.

For based on the tenets set out above, pluralism attacks statism as thoroughly outdated. It is an ostrich-like reaction to a brave new world. A reaction which equals clinging to the abacus in an age of quantum computing. Consequently it cannot begin to grasp the reality of the EU. A fact also illustrated by the statist reliance on some highly formal arguments, like the right to secession or the requirement of unanimous Treaty amendment, which purportedly preserve the ultimate authority of the state. Important facts, which, however, do not capture the substantive reality in the EU, just as the formal legal fact that in theory all land belongs to the British crown does not portray a realistic image of the real estate market in the UK. Statism should, therefore, be abandoned for a pluralist understanding that can think beyond the binary divide in states and international organizations:

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152 See classically the work of Weiler, for instance, J.H.H. Weiler, 'Why Should Europe Be a Democracy? The Corruption of Political Culture and the Principle of Toleration', in: F. Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart Publishing 2000), Weiler (2000) or Weiler (1999) especially chapter X: 'To be a European Citizen: Eros and Civilization'.

153 Von Bogdandy (2010), 95, Pernice (2009), 349, Walker, (2006b), 11 et seq., Maduro (2006), 501, Kumm (2005), 262, J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Polity Press 1999), 118 et seq., MacCormick (1999), 117 or D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press 1998), for instance 135.

154 Also J.H.H. Weiler, 'Introduction' in J.H.H. Weiler and G de Búrca (eds.), *The Worlds of Constitutionalism* (CUP: Cambridge, 2011) p. 1.See for some academic views closely related to the bench, however, A.W.H. Meij, 'Circles of Coherence: On Unity of Case law in the Context of Globalisation', 6 *European Constitutional Law Review* (2010), 84, and A. Voßkuhle, 'Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' 6 *European Constitutional Law Review* (2010), 175.

> 'As noted earlier in our critique of state-centredness, to try to explain the new emerging post-Westphalian order in one-dimensional terms, by reference to national delegation, Intergovernmentalism and the traditional law of international organisations, is to try to force square pegs into round holes, and to understate the extent and distort the character of the transformation which is underway.'[155]

Jointly these arguments lead to the conclusion that we are in need of another, post-sovereign, paradigm to structure and understand the EU, and with that the future of public authority.[156] Pluralism consequently fits with the experiences of globalisation and the apparent loss of control that accompanies it. As such it contains a great deal of valuable insights, and rightly forces attention to the complexity of reality and the multiplicity of interconnected public and private processes taking place simultaneously.

At the same time pluralism has the tendency to be destructive in the sense of removing too much of the foundation that, for instance, statism is working so hard to retain. Little is given in return, furthermore, especially if one does not dare to put too much stock in the inherent value of pluralism or voluntary cooperation. In addition pluralism might have the tendency to underestimate the power retained by the states, and may focus too exclusively on a few plural phenomena. These potential weaknesses in pluralism will be further discussed below, after we have been able to explore the conceptual development of sovereignty, and can relate those findings to the concept of sovereignty implicitly assumed by pluralism. At this point, however, it suffices to conclude that pluralism forms a direct challenge to sovereignty as it is commonly understood, and in certain ways even appears to be its complete opposite or negation. Consequently the pluralist conception of integration challenges any confederal conception of sovereignty as just another doomed attempt to re-establish some hierarchy in a fundamentally plural reality.

5.4 The statist rejoinder

In their turn statist generally reject pluralism as a special branch of wishful thinking.[157] Pointing to the remaining centrality of the state they claim the high ground of realism, and continue to pour some cold water on what they see as overheated theoretical enthusiasm. For instance, pluralism would not provide enough stability, but instead replaces 'established institutions, approved values and reliable political experiences' with hopes of cooperation and self-restraint.[158] It also fails as a concept of law, as it cannot solve

155 Walker (2002), 337.
156 MacCormick (1999), Walker, (2006b), or Schiemann (2007), 475.
157 Hartley (1999) and Hartley (2001). For a further discussion see also chapter10 sections 4 and 5, containing a confederal criticism on both schools.
158 Kirchhof (2010), 736.

conflicts.[159] Instead pluralism leads back to precisely the sort of politics and power struggle the EU was intended to prevent.[160] Also, it is argued that pluralists tend to rely on a highly restrictive understanding of international organization. One that does not give enough credit to the flexibility and potential of international law, and falsely increases the paradigm shattering 'uniqueness' of the EU.[161]

Overall, from the statist perspective, the pluralists seem to loose themselves in some important but less than revolutionary innovations in the EU. Swept off their feet by these innovations, and guided more by their hopes than a sober appraisal of actual political power and legitimacy in the EU, these exceptions are declared the rule.

6 The statist – pluralist divide: Bridging attempts

As the overview above confirms, a divide exists between statist and pluralist accounts, their views on sovereignty, and the two basic approaches to the EU they represent. A divide that is especially problematic as both views contain much of value, but at the same time contain dangerous weaknesses as well, as they so effectively point out in each other.

Now of course a wealth of possibilities lies between the strong statism of Kirchof and the 'radical' pluralism of MacCormick.[162] Some of these possibilities developed do also reduce the gap between the two approaches in their purest forms. At the same time these generally seem unable to escape the gravitational pull of either one basic approach in the end; ultimately some hierarchy is accepted with all the risks of monism, or it is rejected, with all the risks and instability of pluralism.

Nevertheless these attempts to bridge the divide again contain much of value, certainly for a confederal approach that seeks to establish a viable confederal middle ground for the EU. Before we continue to the confederal approach suggested in this thesis, therefore, it is useful to briefly discuss some of these bridging attempts. Especially interesting in this regard is the sub-category of 'constitutional pluralism'. A sophisticated branch of pluralism that attempts to establish some structure in plurality whilst steering clear of ultimate and formal hierarchy.

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159 Of course this reduction in the 'utility of law as a determinate guide to conduct at least in the area of conflict' is recognized by several well developed conceptions of pluralism, but even these may skip too easily over the fact that precisely in these cases of conflict guidance is necessary, and appeals to pluralist perceptions may become attractive, also as an abuse. The quote is from MacCormick (1999), 102.

160 See for instance, also for a further and forceful critique on pluralism, Baquero Cruz (2008), 389.

161 De Witte (2012), 21. Similarly Hartley (2001), 225 et seq.

162 Such as his own later version of pluralism under international law: MacCormick (1999), 121.

Constitutional pluralism illustrates the difficulty of bridging the statist – pluralist divide, and hence the potential contribution of a confederal middle ground. But it equally shares the 'constitutional intuition' of confederalism in its quest to combine statism with pluralism, or a certain foundation with far-reaching heterarchy. As will be seen below, therefore, a confederal approach may particularly contribute to further develop constitutional pluralism.

6.1 Constitutional pluralism: Constitutionalizing plurality without hierarchy

Constitutional pluralism tries to regain some coherence and system within the limits of plurality through the use of constitutionalism. In a sense it thereby takes the notion of a constitution from the statist camp and attempts to make it switch sides.[163] Within this extra-statal notion of constitutionalism coherence can then be pursued in various ways.

Kumm, for example, postulates several overarching values in a Dworkinian attempt to create a *substantive* superstructure without establishing a *formal* hierarchy.[164] All EU legal orders share 'the basic constitutional principles of political liberalism: the rule of law, democracy, human rights, complemented by subsidiarity (..).'[165] Coordination of these legal orders should be based on these shared substantive values. Decisions should not depend on a formal and preordained primacy of either the national or the EU legal order, but on the best fit with these values.

Kumm's approach does create some structure and coherence without (formal) hierarchy. It equally stimulates debate and dialogue on the content of these values. Yet though the values he enumerates are broadly shared, his approach does not break free from more radical pluralism in the end. For only where agreement already exists on these values and their specific application is no authority structure (or EU) needed. Where agreement remains absent, however, no specific interpretation can be imposed.[166] That is, unless one accepts some formal hierarchy to apply these values, this approach relies on a enlightened, liberal revival of natural law theory where all authority derives from substantive correctness and conformity with supreme values. By replacing a formal hierarchy by a substantive hierarchy,

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163 Cf Kumms notion of 'Constitutionalism Beyond the State' in Kumm (2005), 262. See for the vehement rejection of any such attempts at recruitment Kirchof (2010) strongly denying the viability of constitutional language outside the state. In any event this feat does require softening constitutionalism, and hence freeing it from some of the thicker normative layers surrounding it, which also reduces the very normative force required by pluralism. Also see Schilling (1996), 389 and Schütze (2012), 67.

164 Kumm (2005), 262.

165 M. Kumm as quoted in Avbelj and Komarek (2008), 26.

166 Cf in this regard the challenge to any form of authority by R.P. Wolff, *In Defense of Anarchism* (University of California Press 1998).

therefore, we revive the classical natural law problem: who may authoritatively formulate and apply these values? Unless we assume agreement, and hence assume away the problem we want to solve, we return to a radical heterarchy, even within national legal systems.[167] A heterarchy which threatens even the thin concept of law as defined by Fuller.[168] What is more, the far from hypothetical risk arises that both the ECJ and the state courts will simply rely on such substantive arguments and values to establish an ultimately procedural and hierarchical claim to supremacy.[169] In addition the combination of a post-modern logic of pluralism with the existence of some form of substantive, knowable and intersubjectively valid, values, even if based on discourse, seems problematic. In a sense the attempt to avoid formal hierarchy thereby leads to the assumption of a substantive hierarchy even more inimical to the roots of pluralism itself.[170]

6.2 Heterarchy under Contrapunctual principles

Instead of creating order through substantive principles one can also attempt to take the sharper edges of pluralism by relying on overarching *procedural* principles.[171] Participants in the different legal orders within the EU should follow certain procedural axioms that would prevent conflict and ensure a harmonious functioning of the EU legal order. Maduro's 'Contrapunctual' principles provide a clear example of the strengths, and weaknesses, of such an approach.[172] What is needed to 'manage the non-hierarchical relationship between the different legal orders and institutions' is a set of 'Contrapunctual principles:[173]

> 'In a sense, for pluralism to be viable in a context of a coherent legal order there must be a common basis for discourse. Such a basis is a set of principles shared by all the participants that, while respecting their competing claims of authority , guarantees the coherence and integrity of the European legal order. These are understood as framework principles that characterise the form of European legal pluralism and regulate the relation among the different national legal orders and between these and the EU legal order.'[174]

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167 See on this risk Cuyvers (2011), 49 et seq.

168 L. Fuller, *The Morality of Law*, (2nd ed, Yale University Press 1969), especially chapter 2.

169 Cf in this regard the reasoning of the ECJ in *Kadi I*, finding that it alone is able to define and protect the substantive values in play. Joined cases C-402/05 P and C-415/05 P *Kadi I*.

170 See in this regard also the epistemological defense of pluralism by Walker discussed above.

171 As an intermediate option, and with a strong Kelsinian streak, one could also opt for a pluralism between the EU legal orders, yet under the overarching system of international law. See, for instance, MacCormick (1999), 119-121 or N. MacCormick, 'Risking Constitutional Collision in Europe?' 18 *Oxford Journal of Legal Studies* (1998), 517. Here as well, however, the actual controlling force of international law remains vague, as it must remain if it is not to undermine pluralism as such.

172 Maduro (2006), 520.

173 Idem, p. 523.

174 Idem, p. 524.

Such a procedural framework can indeed reduce conflict, and may accurately describe the efforts by different actors in the EU to prevent conflict. Yet these procedural principles ultimately run into the same barriers as the substantive values relied on by Kumm. They even do so more spectacularly due to their formal nature. A clear risk exists of postulating a superior overarching system that ultimately undermines real pluralism,[175] which means that the escape in proceduralism cannot dissolve the tension between the (legal) need for some (limited) form of hierarchy and pluralism.[176]

This tension is already visible at the level of language. Maduro states, for example, that: 'these are the principles to which all actors of the European legal community *must* commit themselves (…). This commitment is *voluntary* but it may still be *presented* as a limit to pluralism'[177] Undoubtedly due to a lack of imagination, this does beg the question: if the commitment is not voluntary (must) how does this fit with pluralism? Yet if it is voluntary, how does it provide a limit? Equally the more free and friendly use of 'principles' is sometimes replaced by the less plural sounding contrapunctual 'rules'.[178]

The implied hierarchy in contrapunctual law becomes even more obvious once one takes into account the three actual rules or principles it entails. For instance 'each theory must be constructed so as to adjust and adapt to the competing theories'.[179] Simply translated this means that the different legal systems may not seek, or at least not maintain, conflict. Yet this makes the logic, or envisioned 'solution' circular: One prevents conflict by imposing a rule that each system should prevent conflict. The same goes for the principle whereby each system is prohibited to affirm its identity in 'a manner that either challenges the identity of the other legal orders or the pluralist conception of the European legal order itself.'[180] Again conflict is conceptually removed by prohibiting it (without claiming hierarchy). A requirement, furthermore that does not seem to fit with the current case law of most national constitutional courts or the primacy claim of the ECJ.[181]

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175 Notice in this regard the assumption of something like an overarching EU *legal* order: 'The European legal order should be conceived as *integrating* the claims of validity of both national and EU constitutional law' Idem, p. 524.

176 For an *institutional* alternative, aimed at resolving potential conflicts not by posing substantive or procedural values but by creating an institution to resolve them (based on the principles it sees fit) see the proposal by Weiler for a Constitutional Council comprised of national and EU judges: J.H.H. Weiler, 'The European Union Belongs to its Citizens: Three Immodest Proposals', 22 *European Law Review* (1997), 150.

177 Maduro (2006), 524.

178 Idem, p. 525.

179 Idem.

180 Idem, p. 526.

181 For a recent example see the decision of the Czech constitutional Court of 31 January 2012, *Landtova* Pl. ÚS 5/12, or the different national judgments regarding the European Arrest Warrant. See J. Komarek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles", 44 *CMLRev* (2007), 9.

Thirdly it is suggested by Maduro that 'When national courts apply EU law they *must* do so in such a manner as to make these decisions fit the decisions taken by the European Court of Justice but also by other national courts.'[182] Not only does this rather delimit freedom under pluralism, it also imposes a truly herculean task on judges: even Dworkin only required a fit within one legal order.[183] Perhaps the best illustration of this implicit hierarchy, however, is that Maduro himself finds it necessary to put the word independent between quotation marks where he eventually states that: 'The integrity and coherence of the pluralist legal order will stem from the *obligation* of any national legal order to construct their *'independent'* conception of EU law in a manner that is compatible with the other conceptions and with a coherent European legal order.' Direct hierarchy between the ECJ and the national courts is replaced by a perhaps even more stringent obligation towards higher principles of contrapunctual law.[184] As a result, when one takes these principles seriously they seem hard to square with true pluralism and its rejection of hierarchy. When one does not, they do not solve the problem of plural chaos implicitly accepted by Maduro.[185]

Perhaps this problem could already have been expected, seeing how the comparison Maduro makes with music ignores that the harmonious balance in a piece of music has been predetermined by an omnipotent composer, and is safeguarded by a conductor. Rarely does one put 28 musicians with highly different instruments and musical training in a room without sheet music and says: play! Especially not where one wrong note may have the weight and effect that supreme court rulings have. For changing the political rule of a continent is not the same as musicians jamming or improvising, and as the previous 'concert of Europe' has shown, false notes may carry grave consequences. For most fundamentally supreme courts are not musicians, and the legal rule of a continent is not a piece of music.

182 Maduro (2006), 528.

183 A problem equally applying to the substantive values of Kumm.

184 Maduro (2006), 538.

185 Would one leave adherence to these principles fully voluntary, one would, it seems, simply return to Weilers genuinely plural, and self-declared 'noble', notion of 'constitutional tolerance'. Constitutional tolerance 'is premised on the need of the legal orders of the Member States *voluntarily* to accept the constitutional discipline demanded by the European legal order, even absent a constitutional demos.' Under this approach, for instance, the 'French and the Italians' are 'invited to obey'. Weiler (2012), 12-13 (italics in original) and Weiler (2000), for the original concept. Clearly such hopes of nobility and voluntary compliance question not just the nature of law, but even the need for law. Conceptual issues aside, statist, or cynical commentators may point to the fate of the Stability and Growth Pact, or the suspension of Schengen obligations by France and Italy, for some serious doubts as to the survival chances of nobility when faced with strong national self interest or identity.

7 Conclusion: A sovereign either/ or?

A fundamental dichotomy seems to lie between sovereignty and integration, and hence between statism and pluralism. For the moment one supports a meaningful notion of sovereignty, as the statists do, one is seemingly forced to establish and defend all kinds of sovereignty-based limits to integration. A task that not just appears herculean, but also far too static. Rejecting sovereignty altogether in a plural embrace of integration, however, also leaves one with some rather fundamental gaps and problems. How, for instance, to ground public authority without sovereignty? Or why would one accept any form of authority at all, not just within the overarching international legal order, but even within national legal systems?[186] For once the anti-hierarchical genie is out of the lamp, it is hard to prevent it from spiriting away all formal hierarchy.

To complicate matters, both approaches convince on some points whilst falling short on others. Statism increasingly struggles to accommodate the current realities of integration within a statal framework. Vice versa pluralism struggles to relate its claims to the existing, and still vital, statal structures or any other form of foundation for that matter. As a result it remains rather ethereal and academic, lacking the capacity to solve conflicts or carry much weight.[187] Certainly not the amount of weight it offloads unto itself from the shoulders of the state.

Several insightful and constructive attempts have been made to reduce the divide between both approaches. Yet these also seem unable to really emancipate themselves from either linear hierarchy or radical pluralism.[188] Consequently we seem trapped in an unattractive dichotomy: statism or pluralism, established theory or *tabula rasa*, foundation or flexibility, sovereignty or the EU.

As indicated this thesis explores the potential of a confederal conception of sovereignty. A conception which could soften the juxtaposition between the views described above, and between sovereignty and integration more generally. For example it could allow a high level of operational heterarchy *within* a more exceptional but clear confederal hierarchy. A goal worth striving for as it would allow us to take the best of both camps, whilst helping to strengthen the constitutional foundation of the EU. In this quest for such a confederal conception of sovereignty the following chapter turns to the conceptual development of sovereignty itself: Is the concept of sovereignty really as absolute and as anathema to integration as it seems?

186 See Cuyvers, (2011), 481.
187 Chalmers, Davies and Monti (2010), 199.
188 Cf the conclusion of Baquero Cruz (2008), 414: '*tertium non datur*'.

9 A tale of entanglement: The evolution and confusion of internal and external sovereignty

1 Introduction-A tale of entanglement

Having set out two prominent and opposing views on the EU and sovereignty, and the conflict between sovereignty and integration that seems to result, we now turn to sovereignty itself. The following chapter takes a closer look at the original concept of sovereignty behind the absolutist myth that now surrounds it, and obfuscates debates on sovereignty and integration. In doing so it demonstrates the conceptual fit and coherence of a confederal conception of sovereignty, and how such a confederal conception even forms a logical further step in the federal application of sovereignty.

To substantiate these claims this chapter traces two developments in the conceptual evolution of sovereignty.[1] First, it will be shown how internal and external sovereignty are at their root two separate concepts, which over time have become increasingly entangled and confused. [2] It will be argued that it is precisely this confusion between internal and external sovereignty, and the resulting tendency to approach the EU from ill-suited and absolutist

1 Cf on the importance of the historical development for an understanding of sovereignty also Laski: 'Nothing today is more greatly needed than clarity upon ancient notions. Sovereignty, liberty, authority, personality – these are the words of which we want alike the history and definition; or rather, we want the history because its substance is in fact the definition.' H.J. Laski, *The Foundations of Sovereignty and Other Essays* (Harcourt, Brace and Company 1921), 314.

2 See for a powerful formulation of this distinction already Lauterpacht: '(…) it is only by dint of a gross inaccuracy of language that we give the same designation of sovereignty to the supreme authority of the State as determined by its constitutional law and to its legal position in international law.' Lauterpacht (1977), 9. A statement which could also form the motto of part II. For the customary blending of the two see for instance B. Fassbender, 'Sovereignty and Constitutionalism in International Law', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 116: 'According to a widely shared view, sovereignty has two complementary and mutually dependent dimensions: Within a state, a sovereign power makes law with the assertion that this law is supreme and ultimate, *i.e.* that its validity does not depend on the will of any other, or 'higher', authority. Externally, a sovereign power observes no other authority.' For another recent example see Thym (2009), 1796.

external conceptions of sovereignty, which underlies much of the presumed conflict between sovereignty and integration.[3]

Second, within the concept of internal sovereignty we will focus on the development of popular sovereignty, and specifically on its federal application in the US. Not incidentally these two developments coincide with the two definitional elements of internal and popular sovereignty part II aims to develop.

The outcome of this analysis will serve as a further basis for our discussion on a confederal conception of sovereignty and its potential to guide and support European integration. It will provide the conceptual tools required to further outline such a confederal conception, and to overcome the counterproductive and ultimately false juxtaposition between sovereignty and integration.

2 Five phases of historical development

To properly disentangle internal and external sovereignty, five different steps in the historical development of these concepts are suggested and analyzed. First, internal sovereignty is developed by Bodin as a solution for the internal organization of the polity (section 3). Second, the concept of sovereignty, as developed for internal purposes, is applied to create and structure an *external* order. Sovereign, territorial units become the building blocks of the now 'international' order (section 4). Third, modern constitutional theory increasingly introduces 'abstract' internal sovereigns. These abstractions require constitutional delegation of sovereign authority and therefore allow 'sovereignty' to be freely divided and shared within the state. Popular sovereignty forms one application of this development, and is combined with federalism in the US (section 5). Fourth, external sovereignty retains, and strengthens, the fiction of one absolute sovereign per territory. As long as all sovereign powers remain delegated *within* one state this remains a usable fiction (section 6). Fifth, and last, powers traditionally delegated within the state are delegated 'externally', that is outside the state. As a result, the logic of internal sovereignty enters the domain of external sovereignty. The result is a clash between two logics. Where internal and external sovereignty are not distinguished, or where an external conception of sovereignty is exclusively relied on, this clash cannot be explained, and sovereignty as such seems to loose its relevance (section 7).

3 In this sense the aim of this chapter could also be described as a vindication of Althusius. An aim that is logically connected to an application of federalism, which has firm roots in the more contractual approach of Althusius. See J. Althusius, *Politica* (translated by F.S. Carney, Liberty Fund 1995).

It is this last development, and the resulting clash between internal and external sovereignty, which both requires and suggests a confederal evolution of sovereignty.

Obviously the proposed analysis triple jumps through vast, complex, and contested terrain. It does not intend to give a complete or final conceptual history of sovereignty. The five steps described above have also been chosen pragmatically and make no claim to exclusivity or historical necessity. [4] In addition the overview below provides a synopsis of a more elaborate conceptual analysis of sovereignty carried out elsewhere.[5] Here only those conclusions are presented which are necessary for the specific argument developed here.

3 Bodin and the origin of the absolute myth

The starting point of our second trip down historical memory lane lies with Bodin.[6] Firstly so because Bodin did lay the theoretical foundation of sovereignty as a distinct concept.[7] He has had a lasting influence on not just the content, but also the *structure* of the discourse on sovereignty.[8] A genuine understanding of his project, therefore, is a necessary condition for any real understanding of the nature and historical development of this concept. Second, the confusion of internal and external sovereignty partially stems from mistaken interpretations of Bodin. Especially to blame are too rigid and simplistic interpretations of his notions of 'absoluteness' and 'indivisibility'.

Appreciating Bodin's real views, therefore, helps to untangle internal and external sovereignty at their root. Four elements in Bodin's conception are especially relevant for this purpose: its complete *internal focus*, its *relative absolutism*, its exclusive use of a *personal sovereign*, and the *prescriptive nature* his sovereignty.

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4 This is not to say that the development of sovereignty forms one straight or necessary development since Bodin. Cf on this point also Schmitt (2005), 16-17.

5 Cuyvers (2011a), 49 et seq.

6 Clearly recognizing that the questions underlying sovereignty are as old as human society itself. See also Hinsley (1986), 27 and the overview by G. Buijs, '*Que les Latins appellent maiestatem*': An Exploration into the Theological Background of the Concept of Sovereignty', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 229 et seq.

7 Hinsley (1986), 121, J.H. Franklin, *Jean Bodin and the Rise of Absolutist Theory* (CUP 1973), 1 et seq.

8 Franklin (1973), P. King, *The Ideology of Order* (George Allen & Unwin 1974). Which is not the same as saying that Bodin is the Alpha en Omega of sovereignty (Onuf (1991), 427)

3.1 *The internal focus and relative absolutism of Bodin's sovereign*

Any appreciation of Bodin must start with the internal focus of his project: how to organize political authority *within* a polity. [9] This internal focus was not very surprising if one considers his primary concerns: enormous religious tensions,[10] civil wars,[11] renegade nobles, and the development of ever more sophisticated theories supporting a right to resist the monarch.[12] Bulwarking internal order and the authority of the monarch therefore formed the core objectives of the *Six Livres*. [13]

Bodin's famous definition of sovereignty as '*la puissance perpétuelle et absolue d'une république*'[14] formed a direct answer to this threat to internal order and security. It exclusively concerned the relation sovereign-subject *within* the polity.[15] The relation *between* sovereigns did not form part of Bodin's notion of sovereignty, and was not regulated by the concept.[16]

9 A. Jakab, 'Neutralizing the Sovereignty Question: Compromise Strategies in Constitutional Argumentations before European Integration and since' 2 *European Constitutional Law Review* (2006), 375, and H. Lindahl, 'Sovereignty and Symbolization' 28 *Rechtstheorie* (1997), 353. Franklin (1973), 41.

10 Cf Hinsley (1986), 119-120.

11 Although ones count may differ, between 1562 and 1598 there were eight religious wars in France. The first version of the *Six Livres* was not accidentally published four years after the St. Bartholomew's Day massacre.

12 Two important examples: Brutus, *Vindiciae, Contra Tyrannos* (1570-1579, translated by G. Garnett, CUP 2003), and J. Boucher, *De Justa Henrici tertii Abdicatione* (Paris, around 1589).

13 Jean Bodin, *Les Six Livres de la République* (Paris 1583). Unless indicated otherwise, this chapter refers to the English translation of J.H. Franklin, *Bodin: On Sovereignty* (CUP 2007), with book and chapter number, in addition to the page number. On these objectives see, for instance, Book I, chapter 8, 19, as well as Franklin (1973), xiv et seq. Further see Lindahl (2006), 88.

14 Bodin, Book I, chapter. 8.

15 A fact already borne out by his method of finding 'those properties not shared by subjects', but only possessed by the sovereign. Bodin, Book 1, chapter 10, 46.

16 Quite the opposite in fact: Sovereigns had the right, and in some situations perhaps even the duty, to intervene in another sovereigns territory, with force if need be. Bodin, Book II, chapter 5, 113-14, or Book II, chapter 5, 120. Note that this is equally true for Hobbes, a fellow founder of sovereignty, who 'made no attempt to extend the notion of sovereignty beyond state borders.' Carl Schmitt, *The Concept of the Political* (Translated by G. Schwab, University of Chicago Press 2007), xxiii.

In addition Bodin's sovereign was *not* as absolute as is customarily assumed.[17] Ironically, 'Bodin', 'absolute' and 'sovereign' have by now become almost synonymous.[18] Yet in reality absolutistic notions of sovereignty represent a caricature of his theory.[19] Obviously the *Six Livres* did aim to strengthen the position of the monarch, and contains no shortage of absolutist one-liners.[20] Yet in fact Bodin went to great lengths to *retain*[21] the many limitations on the powers of the monarch that existed in French legal practice.[22] On several points he stretched his conceptual framework to the extreme, and perhaps even beyond, to accommodate such limitations on power.

The first and most important of these limits lay in the subordination of the sovereign to the laws of God *and* nature.[23] Although only God was allowed to *enforce* these laws, this qualification was a very real one for Bodin.[24] On a careful reading of his work, furthermore, additional limits on the sovereign abound. The sovereign, for instance, was not *capable* of changing the basis, content, or scope of his own sovereignty,[25] nor was he allowed to levy taxes at his pleasure or confiscate private property.[26] In addition the sovereign was under an obligation to honour contracts with his subjects,[27] even though this obligation is interspersed with complex exceptions.[28]

17 Franklin (1973), 102 et seq. Bodin himself, by the way, discusses several authors before him that, in his opinion, already wrote about the absolute power of the monarch. See, for instance, Book I, chapter. 8, 10.

18 See, amongst others, Schmitt (2005), 5, Walker (2002), 345, B. Yack, 'Popular Sovereignty and Nationalism', 29 *Political Theory* (2001), 527, R.O. Keohane, 'Ironies of Sovereignty: the European Union and the United States' 40 *JCMS* (2002), 746, A. James, 'The Practice of Sovereign Statehood in Contemporary International Society', (47) *Political Studies* (1999), 462, E. Barker, *Principles of Social and Political Theory* (OUP 1956), 60. Or see judicially: J. Holmes: 'The very meaning of sovereignty is that the decree of the sovereign makes law', *American Banana Co. v. United Fruit Co* (1909) 213 U.S., 347, 356, 358, 29 Sup. Ct. 511, 512, 513.

19 Cf. also Hinsley (1986), 122.

20 See already Book I, chapter 8, 3, and Book I, chapter 10, 50, 87.

21 Franklin (1973), 79 et seq. and Franklin (2007), xxv.

22 Hinsley (1986), 91, 105-7.

23 His own works on religion lead one to suspect that Bodin himself would value the *Ratio*, and the laws of nature derived by it, over any Divine law. See his interesting *Colloquium Heptaplomeres de Rerum Sublimium Arcanis Abditis* in: M. Leathers en D. Kuntz (trans); *Colloquium of the Seven about Secrets of the Sublime* (Hildesheim 1970), in which he constructs a dialogue between the different faiths.

24 'For if we say that to have absolute power is to not to be subject to any law at all, no prince of this world will be sovereign, since every earthy prince is subject to the laws of God and nature and to various human laws that are common to all peoples.' (Bodin Book I, chapter. 8,10) See for further examples also: Book I, chapter. 8, 8, 13, 32 or 34.

25 Bodin, Book I, chapter. 8, 18 and Book I, chapter. 10, 49.

26 For the discussion of confiscation and taxes see Bodin Book I, chapter 8, 21, 39-40.

27 See amongst others Book I chapter 8, 14, 35-36

28 Bodin, Book I, chapter 8, 42-45.

This obligation includes the duty of a sovereign to follow judicial rulings in a contractual dispute.[29] In combination with the prohibition on expropriation Bodin, therefore, *de facto* outlined a fundamental right to property which the sovereign needed to respect.

Of course these restrictions could not be enforced against the crown by force.[30] Yet it can only be concluded that the sovereign Bodin envisioned was not as absolute as an isolated reading of some of his statements might indicate.

3.2 The personal sovereign and the impossibility of a constitution

For Bodin sovereignty always rested with real individuals, be it with a single monarch or a group.[31] Two consequences of this personal conception of sovereignty are especially relevant here.

First, a personal sovereign makes delegation unavoidable because no single individual is capable of exercising all sovereign attributes without help. Bodin, therefore, accepts that the sovereign will delegate the daily exercise of his sovereign authority to others, as long as such attribution does not amount to a *de facto* relinquishing of his sovereign attributes.[32]

The second important consequence of a personal sovereign is that it does not allow for an *abstract* sovereign such as 'the state'.[33] The impossibility of abstract sovereigns in turn made it impossible for Bodin to subsume his sovereign under a supreme constitution, or even to differentiate between 'ordinary' legislation and a constitution. The sovereign had to be the highest legislator. He was also, therefore, the unrestricted constitutional legislator, meaning that his own powers could not be circumscribed by a constitution.

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29 Bodin, Book I, chapter 8, 42. On the other hand, the sovereign should also have the power to judge in final instance, although Bodin does imply that he should not do so in civil cases to which he is a party.

30 Bodin, Book II, chapter 5, 115.

31 For this reason perpetual sovereignty also simply meant 'for life' (Book I, chapter 8, 6). See for an example his discussion of the Venetian system in Book II, chapter 1, 98-99.

32 Bodin, Book I, chapter 10, 58.

33 Even though Bodin could have developed such a conception in multiple places in his work. His discussion of democracy and aristocracy, after all, lead him to situations in which a large group is jointly sovereign. Especially in a democracy where the population constantly changes and is amorphous the step to an abstraction as 'the people' or the nation' is nearby. Also, Bodin uses the maxim 'the king never dies' (Book 1, chapter. 8, 44), which implies some abstraction in the crown. On this old and established rule even in his own time see, E. Kantorowicz, *The Kings Two Bodies: A Study in Political Medieval Theology* (Princeton University Press 1957). Nevertheless Bodin does not follow these leads to a more refined, abstract conception of the sovereign. His notions of indivisibility and the focus on a personal sovereign apparently blocked such a step.

Combined with the fact that the sovereign could not bind his own future self, a proper constitution became impossible, both conceptually and pragmatically.[34] As will be seen below, such abstract sovereigns and constitutional layers were two of the major modifications introduced during the subsequent development of internal sovereignty.

3.3 The prescriptive nature of sovereignty

A fourth and last element that requires discussion here concerns the distinction between prescriptive and descriptive conceptions of sovereignty. This distinction traces the difference between (legal) *authority* and (factual) *power*: Is sovereignty concerned with or determined by 'absolute' factual power, or by supreme legal authority?

Bodin clearly recognizes the importance of actual power, including the capacity of the sovereign to use force.[35] Yet fundamentally his conception concerns legal authority, not actual power.[36] His primary attribute of sovereignty, for instance, is the capacity to legislate, and not some factual power or force.[37] Equally Bodin rejects the possibility of usurping sovereignty by force, even where a subject might have accumulated far more actual power than the sovereign. Considering the entire purpose of sovereignty for Bodin – ensuring order through well constituted authority – distinguishing sovereignty from actual power is also the only logical possibility. Were sovereignty to depend on the actual distribution of power it would, for instance, fluctuate and lead to factual power *contests*. The net result would be struggle and chaos, and an open invitation to usurpers.[38]

With his conception of sovereignty the jurist Bodin was, therefore, not describing actual power. Quite the opposite: it was the threatened power of the monarchy that led him to his conception of sovereignty in the first place. In that regard his concept aimed to *change* reality, or at least counter some developments in the balance of power. Describing the reality on the ground would, therefore, not have brought Bodin closer to this objective. Instead he

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34 See on this point also Grimm (1995), 286.

35 See, for instance, Bodin, Book II, chapter 1, 108: '(…) and in matters of state, the master of brute force is the master of men, of the laws, and of the entire commonwealth.' This doses of *Realpolitik*, however, is also immediately relativized: 'from a *legal standpoint*, says Papinian, we must look not to what they do at Rome, but what they ought to do.' Whereby Bodin eventually chooses for legal authority over power again.

36 See also Fassbender (2006), 116.

37 Bodin, Book I, chapter 8, 23. Bodin's analysis of different historical examples is also revealing on this point, always declaring the legal authority to be sovereign instead of usurpers holding *de facto* power (Book II, chapter 5, 114-115, 117, Book II, chapter 5, 110).

38 The importance Bodin attaches to respecting the sovereign also shows in the period of a *hundred years* it takes for an usurper to become the legitimate sovereign: No usurper, in other words, will ever live to see that day. Book II, chapter 5, 112.

was searching for a *normative* concept to structure and guide the reality of actual power in a suitable manner. Consequently, his conception contained a large prescriptive element. It described how authority *should* be organized, hoping the reality of power would then follow suit.[39]

3.4 The descriptive fallacy

The distinction between prescriptive and descriptive conceptions of sovereignty is an important one, especially when assessing the potential of a constructive conception of sovereignty for the EU. Many of the arguments claiming that the growing interdependence in the world undermines sovereignty implicitly confuse the descriptive with the prescriptive,[40] and fail for that reason.[41] Typically such approaches are linked to rather radical conceptions of sovereignty as an absolute, undivided and unlimited power. After checking such absolutist conceptions against the confused reality of political power, sovereignty is then usually declared officially deceased, as to our surprise no such supreme centre of power is found.[42]

With Werner and De Wilde I will term this approach the *descriptive fallacy*.[43] For of course actual power is not organized and exercised in a neat hierarchical and linear process. In any real decision, be it judicial, bureaucratic or political, a multitude of actors may exert influence. And these actors do not stand in a one-dimensional, fixed hierarchical relation to one another.[44] Understanding and describing this actual power reality is highly important, yet falls squarely within the realm of the empirical sciences. Prescriptive

39 J.H. Franklin, 'Sovereignty and the Mixed Constitution: Bodin and his Critics', in: J.H. Burns and M. Goldie (eds), *The Cambridge History of Political Thought 1450-1700* (CUP, 1991), 298.

40 Cf also M. Kumm, 'The Moral Point of Constitutional Pluralism. Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection' In: J. Dickson and P. Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (OUP 2012), 216.

41 A nice example is K. Jayasuriya, 'Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism', 8 *Constellations* (2001), 442.

42 Cf G. Marks, L. Hooghe, and K. Blank, 'European Integration from the 1980s: State-Centric v. Multiple-Level Governance' 34 *JCMS* (1996), 346-7, describing how (the presumed sovereign state) does not have ultimate control.

43 W.G. Werner and J.H. De Wilde, 'The Endurance of Sovereignty' 7 *European Journal of International Relations* (2001), 283, 285. Also see the four misunderstandings identified by Van Roermund (2006), 35 et seq.

44 Something already clearly described by precisely a descriptive approach as neo-functionalism. See for instance George (1996), 36. Additionally, if a descriptive conception of sovereignty is applied it is not the complexity of today's world that would undermine it. Even in Bodin's time his concept made no descriptive sense: There never has been a real leviathan.

concepts such as sovereignty, however, should not be denaturized into such a descriptive exercise.[45]

Sovereignty, it is suggested, should therefore be understood as a *prescriptive* concept, and not as a descriptive one.[46] It was also developed as such by Bodin. It is a theoretical concept that abstracts from reality, aiming to create order and hierarchy in a complex reality which obeys no single or stable hierarchy.[47] As the historical and conceptual analysis below will show, sovereignty has been developed and used to *mould* reality and *justify* certain power set-ups, not to describe it.[48] A role it may again be able to perform for the EU, and other forms of regional integration.

This does not make sovereignty an excuse to ignore reality. To be able to exert any normative influence any conception of sovereignty must stay sufficiently close to the reality it aims to guide.[49] It is therefore suggested sovereignty should be understood as sharing in that same double relationship that law has with reality (and therefore politics). On the one hand it is there to guide and shape reality, which means it cannot be simply falsified by finding a single example where reality does not conform to the sovereign ideal.[50] On the other hand it cannot deviate too far from reality, as this simply means it has lost its normative status and influence.[51]

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45 Law, as an inherently normative system, stands in a special relation to such factual description. Law, after all, contains norms as how things should be, instead of just describing how they are. In addition law has institutions who get to decide on what the social reality will be, as society is in need of ending conflicts. Sovereignty to an extent is the self-reflexive exercise of this task. For it is exactly the aim of sovereignty to structure and normatively order this power reality, girding it with legitimacy where it sufficiently approaches the ideal-type.

46 Cf Walker (2006b), 31-2 and 6: '(…) sovereignty involves a 'speech act' – a *claim* to ordering power.'

47 R. Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape' 67 *Political Studies* (1999), 439. At the same time, of course, legal authority can then be used as a platform to acquire the necessary factual power, that is, the normative system becomes part of the dynamics of actual power.

48 Hinsley (1986), 68: 'it is in the realm of theory that the concept of sovereignty must be sought'. See also Burgess (2009), 227. This also fits with the position of sovereignty 'at the boundary between politics and law.' (Walker (2006b), 20).

49 Forcefully Schmitt (2005), 17-18: (…) it utilizes the superlative "the highest power" to characterize a true quantity, even though from the standpoint of reality, which is governed by the law of causality, no single factor can be picked out and accorded such a superlative. In political reality, there is no irresistible highest or greatest power that operates according to the certainty of natural law.' And; 'the connection of actual power with the legally highest power is the fundamental problem of sovereignty'.

50 Cf also for a very sharp analysis of this, admittedly faith, of lawyers in 'the creative force of the rule' Van Middelaar (2009), 22: 'only the legal rule can transform a conceptual castle in the air into an institutional fact.' (my translation).

51 See especially how even Kelsen (1925), who goes to extreme lengths to keep his theory of law 'pure', has to introduce some notion of effectiveness in his definition of law, again binding the definition and status of law to reality, and not just a legal norm

In line with this prescriptive nature of sovereignty, some of the potential of a confederal conception of sovereignty precisely lies in envisioning a more convincing and legitimate understanding of EU authority.[52] In doing so, the suggested definitional elements proposed must of course stay within the relevant conceptual and factual limits,. But in line with the historical role of sovereignty, they intentionally contain an element of idealism as well: an image of what the EU can and should become.[53] A potential that requires action, and not just passive discovery.[54]

3.5 Sub-conclusion: Dismantling the absolutist myth of Bodin

Instead of an absolute monarch with unlimited worldly power, Bodin's sovereign was an internally focused and prescriptive ideal with impressive but far from absolute legal authority. The crude notion of an absolute, omnipotent Leviathan as the only possible sovereign simply cannot be ascribed to Bodin. In fact Bodin himself was 'amazed' by the criticism of a contemporary that he was *de facto* propagating tyranny.[55]

In any event Bodin's prescriptive idea proved to be a phenomenally powerful, and flexible, conceptual tool for the future organization of political authority.[56] It was so useful that it inspired the development of both our modern concepts of internal *and* external sovereignty, although internal sovereignty developed further Bodin's actual concept within the state, whereas external sovereignty only used a simplified version as a starting assumption.[57]

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52 In that manner it also hopes to address the normative weakness underlying (constitutional) pluralist accounts, contributing to the challenge set by Kumm: 'In other words, what is the constitutional theory that can provide an account of the normative point, structure and limits of constitutional pluralism?' Kumm (2012).

53 Cf in this regard also Walker (2006b), 3, on the need to define the explanatory and normative purpose of an assessment of sovereignty: 'This is not to say that sovereignty can mean whatever we want it to mean (…). it is also crucial that the knowledge claims that emerge from that scheme are more generally persuasive.' Part of the persuasiveness of the proposed conception of sovereignty here precisely derives from such a normative attraction, and aims to enhance 'the explanatory and/or normative value of that overall scheme.' In this sense it forms a return to the more 'confident' use of sovereignty in the 'Westphalian phase' (p. 10). On the need / capacity of ideas to make alternative realities 'conceivable' also see Lindseth (2001), 145, 163. Further see the interesting argument on sovereignty as a 'social psychology' that Schütze (2012), 57 draws from Kelsen.

54 See further below chapter 12 on the national adaptations required. Also see Lindahl (2006), 111.

55 Jean Bodin, *République* 1961, Epistola in its introduction, cited in Franklin (2007), xxvi.

56 Loughlin (2006), 61, S. Lee, 'A Puzzle of Sovereignty', 27 *California Western International Law Journal* (1997), 244, Bartelson (1995), 83 and 98.

57 Cf Hinsley (1986), 125: 'But it was not for nothing that subsequent theorists would be unable to ignore the notion of sovereignty or to alter Bodin's statement of it to any significant extent – that the further history of the concept will be a history of its use and misuse in varying political conditions and not of restatements of it in different or in novel terms.'

4 The Primitives and the creation of the external

The second step in our conceptual detective on the development and confusion on internal and external sovereignty concerns the externalization of sovereignty. The assumption of one exclusive, highest authority per delineated territory, after all, has tremendous organizing potential. Suddenly the world can be divided into territorial units with one representative each. A stark contrast with the complex and pluriform organization of authority in Medieval Europe, where authority was divided along overlapping functional, territorial, personal and sectoral lines, including the conflicting authority claims of the church and even more worldly rulers.[58]

4.1 Discovering the external via the internal

In this second step early internationalists[59] such as Vitoria,[60] Suárez,[61] Gentili,[62] and Grotius[63] seize this potential to *create* the external itself.[64] For only after the creation of the 'internal' by Bodin could an 'external' space be conceived as well.[65] In this 'external' space territorial sovereigns could

58 Franklin (1973), 4 et seq. Koskenniemi (2005), 116, and Jackson (2007), 25, 'They conceived of themselves as belonging to one, unified Christian World – Christendom – however loose and wobbly its unity might be in practice.' Other actors could only become external after their was a realization of the internal. Also see G. Mattingly, *Renaissance Diplomacy* (Dover Publications 1988), 16.

59 A group also known as 'primitive scholarship', D. Kennedy, 'Primitive Legal Scholarship', 27 *Harvard. International Law Journal* (1986), 1 et seq.

60 F. de Vittoria (1480-1546), central work *Reflectiones Theologicae,* of which especially *De Indis Noviter Inventis* (on the recently discovered Indians) and *De Iure Belli Hispanorum in Barbaros* (On the right of war waged by Spain against the Barbarians) would now be considered 'international'. See: E. Nys (ed), J. Pawley Bate (trans), *Classics of International Law No. 7* (Carnegie Foundation 1917).

61 F. Suarez (1584-1617), of which the most relevant 'international' work is *De Legibus, ac Deo Legislatore* (On the Law, and God the legislator). See: J.B. Scott (ed), G. Williams, A Brown & J. Waldron (trans), *Selections from Three Works of Francisco Suárez*, *Classics of International Law No. 20* (Clarendon Press 1944).

62 A. Gentili (1552-1608), See especially his *De Iure Belli Libri Tres* (Three book on the right to war), in: J.B. Scott ed., J. Rolfe (trans), *Classics of International law No. 16* (Clarendon Press 1933) and *De Legationibus Libri tres* (On Envoys), in: J.B. Scott (ed), G. Laing (trans), *Classics of International Law No. 12* (OUP 1924).

63 H. Grotius (1583-1645), with of course as the central work for this chapter *De Iure Belli ac Pacis Libris Tres* (On the right of war and peace), in: J.B Scott (ed), F. Kelsey (trans), *Classics of International Law No. 3* (Clarendon Press 1925).

64 Shaw (2003), 20; Jackson (1999), 432, Hinsley (1986), 185, who talks about a 'refashioning' of internal sovereignty that is required.

65 Hinsley (1987), 159.

in turn become the exclusive actors.[66] Instead of the linchpin in the internal organization of a polity, sovereigns become the building blocks of what we by now have learned to see as the *international legal order*.[67] The major consequence of this conceptual innovation was revealed and illustrated by Westphalia:[68] Sectoral, functional and overlapping authority was to be replaced by a system of territorial, sovereign units, with one supreme authority each.[69]

4.2 A new concept is born: External sovereignty

In this way external sovereignty transplanted Bodin's concept of internal sovereignty into the external arena.[70] As a result, external sovereignty has many similarities with internal sovereignty. It naturally shares some structural elements and underlying logic with its conceptual parent.[71] The early internationalists also remained *in sync* with Bodin on several other important points. For instance, they generally retained personal sovereigns.[72] Equally their external sovereigns were not absolute but remained bound by the rules of God and nature.[73]

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66 Obviously historical and gradual developments are concerned here, and territory has always played an important ordering role. This role, however, was not yet as conceptually fundamental or developed as it became. No concept or understanding of an international system, existing of specific territorially organized external actors, yet existed (Shaw (2003), 15). In addition, this was a first, conceptual step. It would take a long time before the world indeed consisted, or was generally perceived to consist, exclusively of territorial sovereigns. Important here is especially that such a world became *imaginable*. See also Bartelson (1995).

67 Grotius, for instance, held that the law between nations derived its binding force of from the will of all or many nations. See also L. Strauss and J. Cropsey (eds), *History of Political Philosophy* (3d edn, University of Chicago Press 1987), 390 and Hinsley (1986), 90 as well as his differentiation between internal and external sovereignty in chapters IV and V.

68 Of course the conceptual development was, in its turn, influenced by the already changing political reality in the period before Westphalia.

69 At a time where many of these 'sovereigns' had long lost true internal sovereignty as understood by Bodin, a fact that further underscores the complete abstraction from the real internal sovereign in the external discourse.

70 Also see Shaw (2003), 21: 'the idea of the sovereign as supreme legislator was in the course of time *transmuted* into the principle which gave the state supreme power vis-à-vis other states.'

71 The argument by Van Roermund that both internal and external sovereignty 'flow from an idea of sovereignty being 'supreme power'.' Is recognized. A relation between the two concepts is also not denied, nor is it claimed that this distinction is a sufficient answer in itself to the 'Argument from Incoherence'. Merely that it provides a better sovereignty narrative for the EU. Van Roermund (2006), 40-41.

72 Koskenniemi (2005), 98-99, Bartelson (1995), 98.

73 See for example Vittoria, *De Indis* sect. I, 120-122 or Vitoria (Quoting the Bible, Romans 13) in '*De Potestate Civili*' lxx., Suárez, *De Legibus*, Book I, Chapter I, sect. 6, or *De Legibus*, Book II, Chapter 19, sect. 9, 348-349, Gentili, *De Iure*, p. 10, and Grotius *De Iure Belli*, Prolegomena par. 16. Further see Kennedy (1986), 4 et seq., Koskenniemi (2005), 95 et seq., and H. Bull, *The Anarchical Society* (3rd ed. Palgrave 2002), 29. Hinsley (1986), 181.

Despite these similarities, however, external sovereignty formed a separate and distinct concept from internal sovereignty, already at its inception. External sovereignty completely abstracts from Bodin's core question, namely the internal position of a sovereign in his own polity. This core question is turned into the *assumption*: an absolute sovereign exists in each territory, and represents this territory externally.[74] All the complexities with which Bodin was concerned, therefore, become irrelevant. Instead they are simplified into a simple assumption and applied to the relation between sovereigns that did not concern Bodin. As internal and external sovereignty still attached to the same entity (the monarch), this fundamental difference between internal and external sovereignty, however, was not yet very conspicuous, although it would lead both concepts to develop very differently.

5 The constitutionalization of the internal sovereign

The third step in our analysis describes the taming of the internal sovereign. For where sovereigns increasingly became a reality instead of an ideal, the need quickly arose to effectively control their authority. A desire, however, that proved a challenge, both practically and conceptually.

The modern history of taming sovereign and governmental power is so well known that one could almost suffice with naming a series of icons: Locke, Montesquieu, Hume, Rousseau, Hamilton, Madison, Mill, Tocqueville, and so on.[75]

Within this history our analysis focuses on three developments that are of special interest to a confederal conception: the shift from personal to abstract sovereigns, the creation of a constitutional layer between the sovereign and the exercise of sovereign prerogatives, and the invention of the people as the semi-abstract sovereign underlying that constitution. Developments that lead us to the second definitional element of confederal sovereignty explored in this thesis, that of popular sovereignty and its potential appeal for EU integration.

74 As shown below, within the concept of external sovereignty this internal question will increasingly be abstracted from. See also Hinsley (1986), 225.

75 More recent additions to this canon of course exist.

5.1 *The abstract sovereign: Abstractions don't shoot*

Although abstraction often form an escape where true understanding is lacking,[76] for sovereignty abstraction proved part of the solution.[77] One of the central strategies to reconcile 'absolute and effective power' with 'limited and controlled power'[78] turned out to be the use of abstract sovereigns. [79] Abstractions as 'the state' or 'the nation' made it possible to make the internal sovereign more absolute, and less threatening for liberty at the same time.

To begin with an abstract sovereign avoids many of the problems of a human sovereign.[80] An abstraction will never have delusions of grandeur or put his individual interest over the common good. Even more fundamentally, an abstraction cannot decide, act, or exercise power itself. In this sense an abstraction resembles the Eunuch in a Harem, the classical solutions to the *quis custodiet*.

The impotence of an abstraction to act necessitates an elaborate system of delegation, as eventually a competence will have to be applied by a person.[81] It is this need to delegate *all* public power from the abstraction to institutions and individuals that creates the crucial room required to accommodate a separation of powers and checks and balances, without removing the sovereign as the theoretical and conceptual basis under the legal order.[82] Under an abstract sovereign, therefore, conceptual space becomes available to freely cut, separate, limit and divide public authority.[83] Although Bodin accepted the possibility of delegation, such pervasive and all-encompassing delegation is an important modification to his conception, and enables

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76 Cf the discussion of rationality and knowledge by Hayek (1960), ch. 2 and 3.

77 As it did already in the early Thomist attempt to reconcile absolute multiple claims to power (Community, Church, Empire) which could only be accommodated by assuming a higher yet more abstract notion of divine sovereignty. Also see Hinsley (1986), 99. Alternatively, abstraction could be seen as a logical recognition of the fact that the unity presupposed by sovereignty is only the (fictive) agent to whom the joint (or popular) intention is ascribed; there need not be a physical, concrete 'we' for individual agents to ascribe an action to it. Cf. Van Roermund (2006), 47.

78 Also see *Federalist Paper* No. 37.

79 Jakab (2006), 375 et seq. On this point I therefore disagree with Hinsley: only after Bodin was a more coherent way found to create both an unrestricted power yet escape simple absolutism. (Hinsley 1986), 125).

80 Cf Hinsley (1986), 221.

81 Hinsley (1986), 146.

82 Cf in this regard also Dworkins comments on the notion of discretion. R.M. Dworkin, *Taking Rights Seriously* (Duckworth 1978), 31.

83 Here any Critical Legal Studies approach would of course point out that in reality a fiction is deployed to mask the real holders of power, and this power needs to be traced back to the actual people behind such fictions to find out what they had for breakfasts. Compare also Schmitt's *auctoritatis interposito* (Schmitt (2005), 31). Acknowledging this risk, see nevertheless the discussion above on the fact that abstract sovereigns, as a legal fiction, are exactly used not to force a regression into actual power analysis.

the use of a modern constitution to structure and control internal sovereign authority.

5.2 The constitutional layer

With an abstract sovereign a constitution becomes a logical, and even necessary step, even from the perspective of the sovereign. After all the constitution is not a way in which the sovereign restricts himself, but a way in which the sovereign restricts his servants, thereby safeguarding his own sovereignty.[84]

The constitution, or any layer of rules between the actual wielders of public authority and the sovereign, thereby offers a practical means to reduce the classical tension between the 'absoluteness' of sovereignty and the obvious desire to safeguard some 'higher norms' such as the right to life or property. For within a constitutional layer these higher norms can be positivized, which makes them clear, cognizable and legally enforceable. Formally, furthermore, such constitutional rights do not form a restriction of the sovereign, yet a restriction the sovereign has placed on his own servants. Factually however, as the sovereign power can only be wielded via intermediaries who are bound by the constitution, such constitutional safeguards tend to cover all exercise of public authority. The constitutional order in this way *absorbs* the higher norm, and internalizes it.[85]

The shift to abstract sovereigns and constitutions also enabled a further development within internal sovereignty: the discovery of the people as a semi-abstract sovereign. Here we are of course especially interested in the evolution of internal and popular sovereignty that supported American federation, and lead to the famous 'We, the people'.

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84 Although the problem remains to what degree the constitution can limit the sovereign in the future, for instance by entrenching clauses. On the other hand, no legal contraption is truly capable of blocking the will of an activated people, or other energy peaks in reality, if these truly want to alter the constitution.

85 See especially variants of 'Soft Positivism' such as that of H.L.A. Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994), in which the Rule of Recognition may also *refer* to 'soft' sources of law such as morality. Obviously this strategy does not solve the fundamental theoretical problem what to do when the constitution itself conflicts with a higher norm. The practical significance of this question, however, is greatly reduced where the constitution usually matches the 'higher' norm. It is no coincidence that most 'universal, 'higher' norms are nowhere protected more effectively than as part of a constitutional framework, latched directly to public power itself. As long as we do not agree on the content and status of fundamental norms, especially not once we leave the safety of abstraction, the best option might indeed be to prevent the need for asking these questions by positivizing them in constitutions or treaties in a form of pre-emptive practicality.

5.3 *The Federalists and the sovereign 'We'*

As discussed in part I the American Constitution leaves little doubt as to where sovereignty lies: the people. The people are the 'fountain of authority' for all public power.[86] This 'people' however, form an abstract, almost mythical figure. One that disappeared into the background, certainly after the Constitution had been ratified.[87]

Obviously the US has an actual population, consisting of very real people. These people are, however, not constantly present as the sovereign. Normally these citizens form one part of the democratic system of governance as established by the sovereign 'People'[88]

This separation between the 'People' as sovereign and the people as the normal electorate also becomes apparent after one realizes that the 'sovereign' was deliberately left without any means to act once it had enacted the Constitution.[89] Outside the Constitution and the system of government it creates 'the People' have no more means to execute their wishes. Even amending the Constitution has to take place within the framework of the Constitution itself.[90]

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86 *Federalist Paper* No. 51.

87 See chapter 2, section 2.1.2. One could, furthermore, go one step further and state that even during the 'founding' moment 'the people' were a purely symbolic construct allowing the presupposition of unity. Cf Lindahl (2006), 98: 'The sovereign people is not a real entity but a symbolic pole lying 'outside' the community of individuals , and by reference to which these individuals can recognize themselves as the members of a polity.' Such a fully abstract understanding of the people fully fits with the (normative) aims of this thesis, and does not prevent relating the EU to these different abstractions.

88 On the act whereby the people as the *pouvoir constituent* create the constitution and attribute political power to themselves and public institutions also see Grimm (1995), 290.

89 Compare in the framework of a Schmittian analysis the people with the 'unmoved mover', the watchmaker that after activating the mechanism withdraws. The people here are both *Pouvoir Constituant*, and *Pouvoir Constitueé*. See, also pointing out this incapacity of the people, H.P. Monaghan, 'We the People[s], 'Original Understanding, and Constitutional Amendment', 96 *Columbia Law Review* (1996), 121-122, 168. Monaghan, however, ignores the normative claim and prescriptive nature of sovereignty, and the capacity of the people to become a reality. On the other extreme, reminding us of the risk (or benefits) of direct action by the sovereign people see the work of Amar, for instance A.R. Amar, 'The Consent of the Governed: Constitutional Amendment Outside Art. V', 94 *Columbia Law Review* (1994), 457.

90 See article V of the US Constitution. Clearly the option of revolution remains, but this would bring us back to an analysis of real power, and not legal authority. Also see *Federalist Papers* No. 51.

Exorcising the direct use, and abuse, of the people's sovereign power actually formed one of the explicit aims of the Federalists.[91] For the biggest danger in 'popular government' was tyrannical rule by a faction.[92] Publius is painfully clear:

'whilst all authority will be derived from and dependant on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority will be in little danger from interested combinations of the majority.'[93]

Put more plainly, although the people as a whole are the sole legitimate source of power, we would rather not see them wield that power directly.[94] The original and ultimate sovereign authority is therefore placed in a (semi-) abstraction, the People.[95] This abstraction can then be used as a legitimate source and tool to delegate parts of this public authority over the different parts of government. At the same time, however, this approach creates a strong, and important, normative link between the people and the different levels of government. The people, furthermore, may be an abstraction in daily practice, yet certainly have the *potential* to become far less abstract in times of crisis or fundamental conflict. Especially so when the constitutional layer does not provide a substantive or procedural solution and one or more factions are able to appeal directly to the authority of the people.[96]

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91 See also chapter 5, section 2 and 3 on the abuse and excesses of democracy after the revolution.

92 See especially *Federalist Papers* No. 10 for the classic formulation of this point.

93 *Federalist Papers* No. 51.

94 Cf in this regard also the, somewhat contradictory, limited grant of sovereignty to the people in art. 1 of the Italian constitution: 'Sovereignty belongs to the people, who exercise it in the manner, and within the limits, laid down by the Constitution.' A limit that also fits with the remaining position of the state and the inviolable core of some constitutional values (not provisions), such as embodied in art. 139, which cannot be amended. Here one could say that ultimate sovereignty even lies in these values. Cf Cartabia (2006), 317. Art. 33 of the Belgian constitution equally limits the sovereign powers of the nation.

95 As an abstraction, one can also disagree on when this pre-political people was established. It can for instance be asked if the American people were created by, or with, the federate Constitution, or whether they predated it. Clearly this question is also one of self-creation and therefore politics. Lincoln, for instance, and other anti-secessionists during the Civil War, would hold that the American People had even predated the Confederation and had created the states. In the words of Lincoln: 'The Union is older than any of the States; and in fact created them as States.' The only thing relevant here is *that* the US Constitution presupposes the existence of a sovereign American people. Whether created before, during, or after the ratification of the Constitution is not even that relevant. The quote is from M.E. Brandon, *Free in the World, American Slavery and Constitutional Failure* (Princeton University Press 1998), 174.

96 A referendum may be an (intermediate) solution allowing a controlled appeal to the people (if not quite the pre-political *constituant*). Cf in this regard the qualification of a constitutional referendum by the French *Conseil constitutionnel* in *Maastricht II* as 'adoptées par le Peuple français'(…) 'constituent l'expression directe de la souveraineté nationale.'

As will be discussed further below, this might be the situation in the EU at the moment where increasing appeals to the authority of the people in the form of referenda are felt to be necessary.

5.4 Combining federalism, sovereignty, and democracy

The American use of popular sovereignty already formed an interesting development in internal sovereignty in itself.[97] So interesting that the concept of popular sovereignty could of course easily fill several volumes by itself. Here we can only make two limited and selective points regarding the potential of popular sovereignty for a confederal notion of sovereignty.

Firstly, the use of a semi-abstract people as the sovereign allowed a reconciliation between sovereignty and federation.[98] Ultimate authority was located in the non-statal and largely abstract entity of 'the People'. Through the constitution, the People then delegated sovereign prerogatives directly to both governments. As a result, both government hold original power, independent from one another.[99] By creating a semi-abstract sovereign over and above the multiple governments the federalists transformed sovereignty into a foundation for the federate structure that it appeared to resist. [100]

To grasp the importance of this reconciliation it is important to realize that, as in the EU today, sovereignty was initially used as a key argument *against* the proposed federate system.[101] The federalists countered this argument precisely by basing these multiple and separate governments on a single sovereign people.[102] Instead of anathema, the plurality of governments reflected and safeguarded the sovereignty of the people.[103]

Second, and of special interest to the EU, popular sovereignty dovetailed with democratic theory. By choosing the people as the ultimate locus of sovereignty, the American system linked sovereignty and federation to democracy, greatly contributing to the normative appeal of both. Though, as we saw, the constitution did also aim to reduce what were seen as the excesses of direct popular government, it at the same time provided a powerful

97 Elazar (1976), 9 et seq., Elazar (2006), 41.

98 See below chapter 2, section 2.1.2.

99 See also Grimm (1995), 287: 'The splitting of the legal order is thus preceded by a splitting of the public power into a *pouvoir constituant*, formed by the people as sovereign, and various *pouvoirs constitutes* deriving their power from it.'

100 In this regard I disagree with Schütze (2009), 1077, that the US did not focus on sovereignty. Sovereignty was very much considered, and then a pragmatic and novel approach was taken. Also see Elazar (2006), 41: 'Rather than accepting the sixteenth-century European view of the sovereign state, Americans understood sovereignty to be vested in the People'.

101 Wood, (1969), 527-529, and Bailyn (1993).

102 This line of argument even became 'the basis of all Federalist thinking' (Wood, (1969), 530), not accidentally merging sovereignty with democratic theory at the same time.

103 Cf also Elazar (2006), 39 and 41.

foundation for democratization in the long run. For in addition to the democratic mechanisms within the Constitution, the people were postulated as the ultimate source of authority and legitimacy. Even though one can, and probably should, question the extent to which this assumption reflects reality, this is an important normative statement. It expresses a key constitutional value, which has surely impacted on the development of actual politics in the US. In any event it forms an important source of legitimacy for the American government in general, as its authority can be founded on the People directly. The lasting appeal and power of the 'We the People' is a testimony to the potency of this linkage.[104]

As will be discussed further below, both the capacity of popular sovereignty to ground multiple governments, as well as its normative linkage with democracy may be of use to an EU needing to bridge a gap between its confederal foundation and a necessary but weighty federate superstructure.[105] First however, we return to the development of external sovereignty. The fourth and penultimate step in our analysis will show how external sovereignty became increasingly absolute, and further removed from its historical roots in internal sovereignty.

6 Fulfilling the myth: External sovereignty and the creation of the absolute

In step two of our analysis we saw how the concept of internal sovereignty was used as a basic assumption to create, found and structure an external order.

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104 Clearly this linkage also comes at the price of some conceptual confusion, including the charge of incoherency, generally based on Foucault, that sovereignty aims to 'express both the (political) power that enacts law and the law that restrains (political) power.' Equally it injects some clearly whish full thinking or 'In one fell swoop it turns both rule of law and democracy into a romantic dream of universal participation.' (Van Roermund (2006), 34, 40). At the same time this transition, which precisely allows the move from pre-legal to a legal, constitutionalized, and self-restraining order, also forms the power of sovereignty. See also for a positive evaluation of this sovereign 'paradox' Walker (2006b). Equally the proposals in this thesis would also fit with a 'reflexive' understanding of popular sovereignty, which leaves the self-definition of their unity to the different member peoples.

105 At the same time the conceptual problems inherent in popular sovereignty must be recognized as well, especially its (unfounded) presumption of a unity at the moment of constitution, and the related danger of according 'primacy of presence over representation.' (Cf Lindahl (2006), 95-97, and 111). Besides pragmatically pointing to the *de facto* usefulness of popular sovereignty, one could also point to the role of *time* here, seeing how the claim of unity has to be sustained and approved in the future. To the theoretical objection that 'unity cannot be generated from plurality' the perhaps low brow but effective answer of, for instance, the federalists would be that they have managed to do precisely that. Lindahl also accepts this where he speaks of 'the core of irreducible groundlessness at the heart of every political community (…).' (p. 113).

This fourth step looks at two subsequent developments in external sovereignty. First, how externally the 'state' became the exclusive carrier of sovereignty. Second, how this external sovereignty became increasingly absolute and dominant.[106]

6.1 From Monarch to State: Disconnecting the external from the internal

Gradually, the state has become the model-T of external sovereignty: external sovereigns may come in all forms and shapes, as long as they are states.[107] In this way territorial sovereigns became the exclusive, and conceptually standardized, building blocks of the 'external'.[108] An approach that has been of great practical value in conceptualizing the international legal order, providing it with subject, object and foundation at the same time.[109] Such an exclusive role for the state, however, also had significant consequences

for external sovereignty, and its relation to internal sovereignty.

To begin with this development required the definition of a state to become so general that it could encompass all possible types of internal organization. From people's-republic to democracy and theocracy, all can be a state as long as they have effective control over people and territory.[110] In turn, however, this meant that the external sovereign had to be fully detached from the reality and complexities of the internal sovereign. No longer united in the person of the monarch, the internal and the external sovereign become two different entities.[111]

A second consequence of the state becoming the sole possible external sovereign was that – by necessity – the state also became the *exclusive* external representative of the *whole* internal sovereignty. The internal sov-

106 See also Fassbender (2006), 118 et seq.

107 When Henry Ford was asked in what colours his famous Model-T could be ordered he famously answered (so goes at least the story) 'People can get the Model-T in any colour they want, as long as it is black'. He had discovered that black paint dried the fastest, and therefore sped up the production process.

108 In the words of Lauterpacht: 'The orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law.' E. Lauterpacht (ed), *International Law: Collected Papers, Being the Collected Papers of Hersch Lauterpacht, vol. II* (CUP 1975), 489, Shaw (2003), 177.

109 Shaw (2003), 189 et seq. Of course this foundation still contains many a problem as well. See Koskenniemi (2005), 246 et seq.

110 Or where other, powerful, sovereigns decide they are, or should be, sovereign. See Krasner (1999).

111 Kennedy (1986), 8. One result of the recent weakening of absolute external sovereignty, therefore, also might be that doubt arises as to the right of external representation where another, normatively more authoritative, internal sovereign claims sovereign rights, such as a popular resistant movement or a suppressed people claiming the right of self-determination. Here the internal sovereign also shimmers through, upsetting the external system.

ereign simply did not have another route to manifest itself externally. As a result internal sovereigns were, in a sense, *locked in to their external shells*. Where internally the state is (formally) subordinate to the sovereign People, externally this subordination is reversed, as it is assumed that the state has full internal control and say over its 'population'. The only remaining link between internal and external sovereignty here is the *assumption* underlying external sovereignty that somewhere within the national order a supreme authority exists, and that this sovereignty is represented by the state.

6.2 The absolute external sovereign

In addition to this divergence between the identity of the internal and the external sovereign, the external sovereign also became increasingly absolute. To start with, the exclusive position of the state logically makes it a far more absolute and powerful actor than the divided, checked, and circumscribed internal recipients of delegated sovereign prerogatives. The absolute nature of the externally sovereign state was further reinforced by the theoretical victory of positivism in international law.[112] Positivism freed the external sovereigns from the normative limits that the early internationalists had still firmly believed in. Unlike the internal sovereign, however, they were not, or at least not to the same level, encapsulated under a constitutional structure.

The modern external sovereign, therefore, emerged as an absolute and unlimited state, exclusively representing the national sovereignty on the international plane. The state had turned into the absolute and mythical entity the internal sovereign never was.

6.3 The conceptual dominance of external sovereignty

The external statal sovereign did not just eclipse the internal sovereign in absoluteness. External sovereignty also eclipsed internal sovereignty in visibility and conceptual dominance. The archetypical example of a sovereign changed from the sovereign monarch to the sovereign state. The rise of the *nation*-state only supported this image.

The conceptual dominance of the external sovereign was further enhanced by the fact that all the bearers of delegated internal sovereignty formed part of the state. Though divided functionally and geographically, all public authority was in the hands of different emanations of the state. Consequently, the state became the exclusive nexus between internal and external sovereignty; it *exercised* all internal public authority and *was* the exclusive, absolute external sovereign. Even though internal and external sovereignty were no longer united in the crown, the difference between the internal and the external sovereign was still masked by the state.

112 Koskenniemi (2005), 226 et seq., Shaw (2003), 25.

At the same time the internal sovereign became less visible. It was increasingly embedded in, and hidden behind, the ever more developed legal and constitutional system.[113] The more seamless these systems became, and the more the exercise of public authority was guided by detailed rules, established conventions and effective procedural mechanisms to prevent or solve conflicts, the more the sovereign People could fade into the background. The very success of the constitutionalist project to encapsulate the sovereign within a constitutional framework, therefore, decreased the visibility and daily relevance of the sovereign. Sovereignty became more of a postulate for the state, and became less and less relevant in daily practice.

Combining these developments, it is not surprising that the state was increasingly seen as *the* sovereign, overshadowing more fundamental, and ultimately more authoritative, internal conceptions of sovereignty. Completing the eclipse of internal sovereignty it even became common to assume that internal and external sovereignty are two elements of the same concept.[114] In a form of conceptual patricide, external sovereignty thereby swallowed the notion of internal sovereignty, out of which it had itself developed.

6.4 Sub-conclusion: Towards a fifth step in sovereignty?

The previous sections outlined how internal and external sovereignty form two distinct concepts, both of which developed along completely opposing lines. Internal sovereignty became characterized by increasing delegation and diffusion of public authority. Using abstract sovereigns, and through increasingly complex systems for constitutional delegation, the exercise of sovereign authority was increasingly divided. Popular sovereignty linked internal sovereignty with democratic theory, and allowed a 'federal twist', further dividing power over multiple separate governments.

External sovereignty, in contrast, became increasingly typified by concentration and absoluteness. States became the sole and absolute sovereigns in the 'external' order. To enable this development external sovereignty was decoupled from internal sovereignty. The internal locus of sovereignty became irrelevant, and was replaced by the assumption of effective control over population and territory.

113 Cf the conception of sovereignty as a borderline construct developed by Carl Schmitt (Schmitt (2005), 1 et seq.)

114 Cf Thym (2009), 1795, 1798, as well as A. Bleckmann and B. Fassbender, in: B. Simma (ed), *The Charter of the United Nations, vol I* (2nd edn. OUP 2002), Art. 2(1) paras. 3 et seq.

With the internal sovereign benignly receding behind the national constitutional order, the absolute and highly visible external sovereign, furthermore, became the dominant image of the sovereign. Due to the states' monopoly over delegated internal sovereign prerogatives, internal sovereignty increasingly became seen as one side of (the states) overall sovereignty.

More recently, however, the exclusive, and absolute, position of the state has come under pressure.[115] Both internally and externally the state appears to have lost its place at the pinnacle of public authority. Multiple related factors contribute to this development, amongst which 'globalization', increased interdependence, advancements in technology, and the decline of strict legal positivism.[116] We are, of course, especially, interested in one specific phenomenon in this regard: regional integration, of which the EU is the most prominent example.

These developments propel us from the relative safe haven of the past to the still unfolding present in the EU. They bring us to what, in the categorization developed in this thesis, would be a fifth phase in the conceptual development of sovereignty. As will be shown below, grasping this phase requires a sharp distinction between internal and external conceptions of sovereignty. For the developments spearheaded by the EU can best be understood as a further development of internal sovereignty at the expense of external sovereignty, and therefore as a clash between these two conceptions.

7 The EU: Where internal and external sovereignty meet?

Considering the confusion of internal and external sovereignty, and the relative dominance of external sovereignty, it can come as no surprise that the EU is generally approached from external conceptions of sovereignty, and that this is often unwittingly so. Moreover external conceptions of sovereignty might also be consciously considered the most appropriate. After all the EU is based on an international treaty signed by states. The domain of external sovereignty *par excellence* one would say.[117]

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115 See also Fassbender (2006), 124 et seq.

116 C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Courts* (1999), for instance p. 63 et seq., or P-M Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', 1 *Max Planck Yearbook on United Nations Law* (1997), 1.

117 For a good example of this statist assumption, as well as its dogmatic strength, see also the contribution by former British foreign secretary Jack Straw, 'A constitution for Europe' in the *Economist*, 12 October 2002. He states, without any hesitation, that: 'The constitution should start with just a few lines, setting out what the EU is—a union of sovereign states who have decided to pool some of that sovereignty, better to secure peace and prosperity in Europe and the wider world.'

Yet from the absolutist perspective of external sovereignty the EU offers a rather spectacular and confusing sight indeed. Significant competences, clearly linked to the exercise of sovereign authority, are taken from the state and delegated to an external and non-statal entity. Sovereignty, once absolute and indivisible, becomes a flexible substance. It appears capable of amazing feats such as being pooled, shared, cut up, temporarily given away, or simple being left in the middle.[118] Feats that are fully at odds with the absolute conceptions of external sovereignty that were outlined above. As a result we indeed appear forced to choose between sovereignty or the desire for integration.[119]

Once the EU is approached from the perspective of internal sovereignty a more logical and appealing, if far from perfect, picture emerges. EU characteristics that appear so baffling from the external perspective, such as far-reaching delegation and division of sovereign authority, become far less revolutionary. Internal sovereignty, after all, has already evolved to embrace total delegation and division of sovereign prerogatives over multiple actors. The federate twist even allowed the internal delegation of sovereign authority over multiple separate governments.

The perspective from internal sovereignty will be further developed in the following chapters. Three main conclusions, however, can already be drawn here based on the conceptual analysis carried out above, and the resulting distinction between internal and external sovereignty.

7.1 The conceptual fit of integration and confederal sovereignty

The first main conclusion is that European integration does not conflict with sovereignty as such, but only with external concepts of sovereignty. The EU does fit with the concept of internal sovereignty and its tradition of constitutionally dividing powers. Internal sovereignty, furthermore, forms the more fundamental concept of sovereignty, as it is both conceptually and normatively trumps external sovereignty. The assumption of internal sovereignty, for instance, underlies external sovereignty. And where external sovereignty abstracts from democratic theory, internal sovereignty has managed to dovetail with it through the notion of popular sovereignty. The EU,

118 A development primarily initiated judicially. See, famously, E Case 26/62 *Van Gend en Loos*, Case 6/64 *Costa v E.N.E.L.*, and for the next steps case 294/83 *Les Verts* [1986] ECR 1339 and Joined cases C-402/05 P & C-415/05 P *Kadi I*, but is now also making theoretical furore. See amongst many others: L.J. Brinkhorst, *Europese Unie en Nationale Soevereiniteit* (Oratie Leiden 2008), Jackson (2007), Walker, (2006b), 5 especially note 7, J. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept', 97 *American Journal of International Law* (2003), 782, 801, 145 et seq., Habermas (1996), 125 et seq., MacCormick (2003), 1 et seq., De Witte (1995).

119 See the juxtaposition set out in chapter 9 above. Also see M. Keating, 'Sovereignty and Plurinational Democracy: Problems in Political Science', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 192, 198.

therefore, fits with what is ultimately the most important concept of sovereignty, even if it is not the most conspicuous one.

The second conclusion is that a confederal notion of sovereignty forms a logical next step in the evolution of internal sovereignty. As illustrated the evolution of internal sovereignty is one of increasing abstraction and delegation, with the federate twist even allowing the division of sovereign powers over multiple governments. Confederal sovereignty takes this evolution one step further. It incorporates extra-statal, and even non-statal, entities into the framework for the delegation of sovereign powers. Instead of delegating the exercise of sovereign powers to the state alone, the sovereign delegates some of his power outside the state, and thereby partially emancipates itself from the state.[120] The conceptual evolution of internal sovereignty, including its federate twist, here provides us with a wealth of conceptual substance and space to support this further evolution along confederal lines.

Furthermore, a confederal evolution also fits with the prescriptive nature of internal sovereignty. Just as under Bodin or in the US, it can be used to indicate how public authority *should* be organized and legitimated, and to subsequently help create that desired reality. An admittedly normative use of sovereignty that will be further explored and defended below. It nevertheless deserves to be stressed here already, as it explains why a conception of sovereignty for the EU is not directly falsified by any descriptive inaccuracy.

Jointly these two conclusions also lead to a third general conclusion: We are not so much witnessing a clash between integration and sovereignty, but one between internal and external sovereignty.

7.2 The clash between internal and external sovereignty

If regional integration can indeed be seen as a logical confederal development within internal sovereignty, where does the tension between sovereignty and integration come from? Why is the EU not simply embraced as an application of internal sovereignty?

The analysis above suggests that this is because, instead of a clash between sovereignty and integration as such, we are witnessing a clash between internal and external sovereignty. In the confederal system of European integration the organizing principles of internal sovereignty are being

120 In this sense the confederal form fulfills exactly the need identified by Fisher in his famous 2000 speech: 'The completion of European Integration can only be successfully conceived if it is done on the basis of a division of sovereignty between Europe and the nation-state.' Fisher (2000).

applied in the 'external' domain: substantial sovereign powers are constitutionally delegated to entities outside the state.[121] Internal sovereignty, therefore, is conquering ground previously held by external sovereignty.

As a result, the long separate domains of internal and external sovereignty are increasingly colliding. The state no longer forms a complete barrier and controlling nexus between the two. Where internal and external sovereignty were first united in the crown, and where the difference between both was later masked by the state, the internal sovereign is now openly challenging the external sovereign. The existing conceptual framework, which sees both as part of the same concept, cannot explain this collision. Instead it remains committed to the dominant but unsuitable notion of external sovereignty. As a result this standard framework leads one to either reject integration or the concept of sovereignty as a whole. An outcome that fully follows the juxtaposition between statist defenders of sovereignty and pluralist defenders of integration outlined earlier. Not incidentally, as will be further shown below, both schools rely on unsuited external notions of sovereignty. Both can, therefore, be strengthened and even partially reconciled when infused with a confederal notion of sovereignty.

The tension between sovereignty and integration, therefore, should be exposed as a clash between internal and external sovereignty. Consequently we are also not witnessing the decline of sovereignty. Rather we are witnessing a relative decline of external sovereignty, and a relative ascendance of internal sovereignty. A development which cannot be comprehended as long as internal and external sovereignty are not separated, and the conceptual and normative primacy of internal sovereignty is not recognized.

This renewed ascent of internal sovereignty, in a confederal form, holds great opportunity for supporting and organizing far-reaching cooperation and integration between states. At the same time it also creates many challenges as it upsets part of the established and deeply rooted system for the exercise of public authority in place. Advantages and challenges that will be set out in more detail in the next chapter, now that the fit and coherence of a confederal conception of sovereignty has been established.

121 Cf in this regard the intuition of W. Friedmann in 1964, referring to the Community: 'If mankind is to achieve a more effective international organization (…) the development must be from international towards constitutional law.' Note also the reliance on 'effectiveness', a key principle for the EU Court of Justice in justifying EU authority. W. Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964), 113.

10 The Confederal Potential of 'We the peoples'

1 Introduction: The uses of confederal sovereignty

Having set out the commonly assumed conflict between sovereignty and integration in chapter 8, and the conceptual feasibility of confederal sovereignty in chapter 9, this chapter further unpacks confederal sovereignty, and explores its explanatory and normative potential for the EU.[1] It first provides an introductory overview of confederal sovereignty (section 2), and establishes its fit with the EU Treaties and the case law of the European Court of Justice (section 3). Subsequently the idea of confederal sovereignty is further developed and tested by examining the potential advantages indicated in chapter 7. First to be discussed is the potential of confederal sovereignty to reduce some of the theoretical deadlocks that flow from the misconceived contradiction between sovereignty and integration, including some of the disagreement between statism and pluralism (sections 4 and 5). Second, and even more fundamentally, the capacity of confederal sovereignty to provide a more stable and potent confederal foundation for the EU will be explored. A vital task as this foundation must be able to support the increasing federate superstructure of the EU outlined in part I (section 6).

In addition to these two primary objectives, three further and mutually related benefits of confederal sovereignty will then be examined as well. To begin with it will be seen if confederal supremacy can help to explain why, and to what extent, constitutionalism seems to fit the EU (section 7). Subsequently we look at its potential to conceptualize a distinctly confederal form of supremacy for EU law. This would be a conception of supremacy that grants a certain type of broad operational primacy to EU law, without undermining a narrow but ultimate supremacy of national constitutions (section 8). Last, but certainly not least, we test the capacity of confederal sovereignty to create a normatively attractive narrative of and for the EU.

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1 See Walker (2006b), 3. The proposed analysis thereby also hopes to meet Walkers criticism that 'abstract debate' on sovereignty remains 'sterile and meaningless'. The conception developed in this chapter actually aims to connect a notion of sovereignty to the specific context of the EU, so that 'the particular conception of sovereignty within the particular intellectual scheme in question helps to produce significant knowledge claims on behalf of the scheme as a whole.'

One that builds on the potential of the EU to modify and improve the democratic process, rather than casting it as a necessary democratic evil (section 9).

2 Outlining a confederal conception of sovereignty

So what would confederal sovereignty look like? What conceptual outlines can be established based on the two definitional elements of internal and popular sovereignty suggested here as necessary elements of such a confederal conception?

The most basic shift concerns the identity of the sovereign. From the internal perspective it is no longer the state that forms the sovereign starting point.[2] Instead it is the sovereign entity that underlies public authority *within* the state. Under a popular conception of internal sovereignty this would be 'the people'. Already due to this basic fact all challenges lamenting that the Member States are loosing their sovereignty due to integration loose their comprehensibility. These challenges simply target the wrong sovereign.[3] Instead the question should be if the people, or any other internal sovereign, have lost their sovereignty due to European integration.[4] A question that must be approached from the internal perspective, including its extensive practice of delegation.[5]

For as we saw above, the development of (semi-)abstract sovereigns, such as 'the people', necessitated extensive delegation.[6] In turn, such delegation enabled the development of a *constitutional layer*, which structured the delegation and laid down some general rules and outer limits for the use of delegated powers. Within that constitutional layer authority could subsequently be divided without dividing the underlying sovereignty. The federate twist even allowed a division of authority over multiple distinct governments, though still only within one state.

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2 On the way in which the concept of sovereignty used tends to lead to an unhelpful statist focus also see Schütze (2009), 1095.

3 Cf. also Börzel and Risse (2000), 7.

4 From here on the discussion will assume the people as the internal sovereign. Most arguments made here, however, will also fit wit other internal and abstract sovereigns. Yet, as will be further discussed below, it is believed that a popular conception of internal sovereignty might of special interest to the EU.

5 For a possible counterargument, focusing on the continued necessity of the state to represent the people, see Walker (2006b), 14, note 31. As clarified further below, however, this argument looses its force against a confederal conception, which has no qualms in acknowledging the relative normative primacy of the statal sub-units.

6 Cf Hinsley (1986), 222, 'the only remaining recourse was to locate sovereignty in the body-politic which the community and the state together composed, the community being regarded as wholly or partly the source of sovereignty and the state as the sole instrument which exercised it.'

From the confederal perspective the EU largely follows this system of constitutional delegation of sovereign powers, albeit with three major modifications. First, the internal sovereigns have now delegated part of their authority *outside* their own statal framework. Second, the recipient of the delegated power is a non-statal actor. Third, multiple internal sovereigns have *reciprocally* delegated sovereign prerogatives to one and the same external entity, the EU. What has changed, therefore, is the practice of solely delegating sovereign powers of this scope and nature *within* the own state, not the practice of splitting up and parcelling out sovereign powers itself.[7]

Clearly these are important modifications in the organization of public authority, whose effects will be further analysed below. They do not, however, alter the fundamental structure of internal and popular sovereignty. For neither of these require the sovereign to delegate solely to one recipient.[8] A fact already born out by the US federate system, as well as by the federate systems within the EU for that matter. All of these have multiple recipients of delegated authority.

Equally there is nothing in the concepts of internal and popular sovereignty that requires a sovereign to delegate powers within a *single* state only, or that the recipients of sovereign prerogatives could only be *statal* actors.[9] As shown in chapter 9, nothing in the concept of internal sovereignty prevents such extra-statal delegation, certainly not as it is the internal sovereign that underlies the state, and not the other way around.

Confederal sovereignty, therefore, does not start from federate sovereignty, but from the more basic assumption underlying the feder*al* use of sovereignty: The basic capacity of a sovereign people to delegate part of its sovereign powers to alternative centres of government. Different from the federate use of sovereignty, however, sovereign authority is directly delegated to an extra-statal actor.[10] This confederal application of sovereignty unravels the traditional understanding of sovereignty where the 'external' is the exclusive domain of sovereign states. Nonetheless it forms a perfectly

7 This, furthermore, is also an adaption of the federal model, which first creates different actors within a single state, to which one people then delegates powers.

8 See also chapter 10, section 4 on the case law of the German *Bundesverfassungsgericht*, which mistakenly relies on this implicit assumption.

9 The American States or German *Länder*, after all, are not sovereign states either. Cf also O. Beaud, 'Europa als Föderation? Relevanz und Bedeuting einer Bundeslehre für due Europäische Union', 5 *Forum Constitutiones Europea* (2008), 18 or Lindahl (2006), 89. Equally this approach also fits with Loughlins understanding of sovereignty as a tool to 'give expression to the distinctively political bond between a group of people and its mode of governance.' It is only that the group now includes multiple peoples, and that the mode of governance is confederal. Loughlin (2006), 56.

10 Note that the defining difference between federate and confederal use of sovereignty here list in the extra-statal delegation, and not in the fact that the EU is also a non-statal actor. The non-statal nature of the EU does, however, form an interesting further modification on its own, and equally fits fully with the confederal approach developed here.

logical application of federal popular sovereignty, only now in a confederal modus outside of statal boundaries.

Once this capacity for the external delegation of sovereignty authority is acknowledged, the EU can be understood as a logical application of this capacity. An application which forms an evolution of the federate system analysed in part I: instead of creating one state to encapsulate the delegation of sovereignty, the EU includes the 'external' in the 'internal' constitutional systems of its members.[11] The EU is grounded in each national constitutional system separately: it does not receive its power in one chunk from an overarching supreme entity, but in multiple parcels from the different member peoples. Vice versa the EU included in all national constitutional schemes for the delegation of sovereign authority.[12] Relying on the rule by law, the establishment of an overarching state is not deemed necessary, as the whole is held together by a confederal and not a federate bond.

Though not creating a European state, this evolution does end the virtual monopoly of the state in executing sovereign authority and representing the internal sovereign. An arrangement that carried several benefits, for instance in terms of coherence and legitimacy. The loss of these benefits must now be compensated for, as will be further discussed below and in part III.

The more fundamental point here, however, is that the new confederal arrangement in the EU fully fits with internal and popular sovereignty. The EU can be logically understood as a simultaneous delegation of sovereign authority by multiple sovereign member peoples to one and the same centre of government.[13] This delegation, furthermore, is reciprocal between the

11 See already on how the confederal constitution should be considered as part of the constitution of the individual Member States, Schmitt (2008), part IV. See also the French *Conseil constitutionnel*, Décision No. 2004-505 DC of 19 November 2004, on the Constitutional Treaty, par 11: the French constitution recognizes 'l'existence d'un ordre juridique communautaire *integrer à l'ordre juridique interne* et distinct de l'ordre juridique international.'

12 Cf. here the notion of a 'composite constitution', as suggested by Besselink (2007), inter alia on p 6, and 15. The confederal perspctive fits with such composite approach, although more than the concept of Besselink a confederal perspective stresses the primacy of the national, and hopes to explain and support the necessary hierarchy to deal with conflicts between the different components. As such it may provide part of the limits of the composite constitution Besselink himself predicts. See chapter 10 sections 6,7 and 8 for further discussion of thse points.

13 Cf in this regard also the views of Calhoun on how popular sovereignty may resolve the tension between the indivisibility of sovereignty itself, and the federal co-existence of multiple governments wielding sovereign powers. Views which can easily be transposed to a confederal system, or rather were developed to support the confederal reading of the US Constitution that Calhoun favoured: 'There is no difficulty in understanding how powers, appertaining to sovereignty, may be divided; and the exercise of one portion delegated to one set of agents, and another portion to another: or how sovereignty may be vested in one man, or in a few, or in many.' This insight into the potential of sovereignty may be supported and developed, however, without ascribing to Calhoun's confederal reading of the American Constitution. As cited in Forsyth (1981), 125.

member peoples. Each people delegates authority in return for EU influence, but also for the delegation of sovereign authority to the EU by the other member peoples.[14] Not incidentally this leads to the confederal mirror image of the sovereignty structure in a federate system. Instead of one people delegating authority to two levels of government, in the EU multiple sovereign peoples reciprocally delegate part of their sovereign prerogatives to one and the same extra-statal government.

In true confederal style the definition of a member people is thereby left to the national level.[15] Who belongs to the French or Estonian people, and how these express their will, is determined within the national legal orders. Equally, and as will be further shown below, confederal sovereignty leaves a certain primary, or existential, authority and legitimacy with the different Member States. Nonetheless confederal sovereignty can at the same time create a sufficiently strong link between the member peoples and the EU to support a federate superstructure, and to keep the Member States on their toes – an important objective of federalism more generally. For unlike under federate popular sovereignty the centre does not receive the normative authority of the whole people, whilst the Member States remain the principal bodies through which the member peoples have organized themselves.[16]

Obviously confederal sovereignty and its application to the EU face multiple challenges. In addition, the conception explored here wilfully contains an element of idealism, as it also aims to provide a guide for the future development of the EU. Nevertheless confederal sovereignty can already claim a strong fit with the EU and with EU law today. Before we explore the advantages of confederal sovereignty further, it is first useful to establish this fit in more detail.

3 The fit between confederal sovereignty and the legal and normative basis of the EU

Legally and normatively confederal sovereignty fits with the Treaties as interpreted by the Court of Justice, their normative foundations, and some key trends in their evolution. A fit which obviously relates to the confederal foundation of the EU established in part I, and which can be demonstrated

14 Excepting exceptional arrangements such as opt-outs, rebates or exemptions for specific members, furthermore, these reciprocal delegations are, in principle, also of equal size. In the case of enhanced cooperation this reciprocity is also visible in the limited rights of those members not participating.

15 Art. 9 TEU, art. 18-21 TFEU.

16 On the strong but 'secondary' claim to primacy this creates to the EU see chapter 10 section 8.

through three key elements: the basis of the EU in delegation, the values of democracy and popular government, and the increasing relation between the EU and the individual.

3.1 The legal fit: Delegation of sovereign powers

Article 4 and 5 TEU explicitly base the EU on the principle of conferral. The EU only has those powers that have been delegated to it. All powers that have not been delegated to the EU 'remain' with the state, unless delegated to another entity.

The EU, therefore, has been incorporated into in the national constitutional scheme whereby the sovereign member peoples delegate sovereign prerogatives between different centres of government. As such art. 4 and 5 TEU do not transfer any sort of original competence or sovereignty onto the EU. They only delegate the exercise of some sovereign *powers*. The case law of the Court of Justice on the principle of conferral, and its meaning for the status of the EU, confirms this confederal approach.

To begin with the Court has never claimed actual sovereignty for the EU. It only holds that EU institutions have been 'endowed with sovereign rights'. Similarly the Member States have not lost internal sovereignty either, which they never had. They only 'limited their sovereign rights',[17] or as it was phrased in *Costa v. E.N.E.L.*: 'the EU, having real powers stemming from a limitation of sovereignty *or a transfer of powers* from the states to the Community, the Member States have limited *their sovereign rights*.'[18]

The Member States, therefore, have *not* limited their *sovereignty*. Some of the sovereign rights previously delegated to the Member States are now delegated to the EU, and therefore outside the statal framework altogether.[19] This reasoning has been consistently followed by the Court.[20] Recently it

17 Case 26/62 *Van Gend en Loos*.

18 Notice how the limitation of sovereignty is equated to a transfer of powers, and how only the Member States have limited their sovereign powers, not the member people. In this regard the Court also find that: 'The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of *their* sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail'.

19 Equally see Ruling 1/78 [1978] ECR 2151 on the Euratom Treaty, where the ECJ held that: 'The Member States, whether acting individually or collectively, are no longer able to impose on the Community obligations which impose conditions on the exercise of prerogatives which thenceforth belong to the Community and which therefore no longer fall within the field of national sovereignty.'

20 See also case 294/83 *Les Verts*. Cf also the comparable statement by the BVG in BVerfGE 2 BvR 2661/06 (2010) *Honeywell* par. 53: 'The primacy application also corresponds to the constitutional empowerment od art. 23.1. of the Basic Law, in accordance with which sovereign powers can be transferred to the European Union.' or BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*, par. 100.

has been reconfirmed in Opinion 1/09. Reiterating the autonomy of the EU legal order the Court holds:

> 'It is apparent from the Court's settled case-law that the *founding treaties* of the European Union, *unlike ordinary international treaties*, established a new legal order, possessing its own institutions, for the benefit of which *the States* have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (…) The essential characteristics of the European Union legal order thus constituted are in particular its *primacy* over the laws of the Member States and the *direct effect* of a whole series of provisions which are applicable to their nationals and to the Member States themselves'[21]

Following this internal, confederal logic the supremacy and potential direct effect of EU law should also not come as a surprise, just as the supremacy or direct effect of national law does not.[22] In any event the internal perspective of a sovereign people delegating power to both their state and the EU fully squares with the notion of conferral, and the fact that the EU lays claim to certain 'sovereign prerogatives' without claiming sovereignty as such.

3.2 The normative fit: The value of democracy, popular rule and identity

Normatively a confederal conception of sovereignty fits with the respect for national identity and the democratic values and principles which underlie the EU.

The EU is 'founded' on the value of democracy.[23] This foundational value requires the EU to recognise not just the national democratic systems, but also the sovereign position and ultimate authority of the member peoples that underlies these national democracies.[24] This duty is confirmed by the 'strict observance and the development of international law, including respect for the principles of the United Nations Charter' required by Article 3(5) TEU. These principles include the right to self-determination, and with

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21 In addition: 'In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the *constitutional charter* of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the *States have limited their sovereign rights* and the subjects of which comprise not only Member States but also their nationals.'

22 See further chapter 10, section 8.

23 Art. 2 and 10 TEU. The functioning of the EU is even *founded* on representative democracy. Already see as well the 1973 Copenhagen Declaration on European Identity, which in par. 2 defines as central to that identity: 'the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights.'

24 For the fundamental and superior status of such principles in the legal order see the forceful language of the ECJ in C402/05 P en C415/05 P *Kadi I*, par. 283-285, and especially 303.

that the ultimate authority of a people.[25] As stated, for instance, in Article 21(3) of the Universal Declaration of Human Rights (1948): 'The will of the people shall be the basis of the authority of government (…).'

In line with this respect for the member peoples, the consecutive Treaties have consistently aimed to create an ever closer union *among the peoples* of Europe.[26] The peoples are to remain the ultimate – and separate – building blocks. The new Article 4(2) TEU cements this recognition by requiring the EU to respect the different *national* identities.[27] A clear attempt to safeguard the ultimately confederal authority and sovereignty structure of the EU.

Basing the EU on a confederal conception of sovereignty equally provides a normative fit with the *national* political and legal systems. All Member States ascribe to democracy as a fundamental value. In fact they have reaffirmed so by ratifying the EU Treaties.[28] Article 7 TEU even creates an EU mechanism, political as it may be, for the EU to monitor and *enforce* these values of democracy and self-rule against a Member State. Embryonic as it is, this allows the EU to protect a sovereign people against their *own* state.

More fundamentally, however, democracy, and the related assumption of popular sovereignty, are already of foundational importance to the Member State legal systems.[29] Sixteen Member State constitutions and the Croatian Constitution explicitly acknowledge the sovereignty of the people and

25 See also Petersmann (2006), 146: 'The universal recognition of inalienable human rights to self-government legally limits state sovereignty by requiring respect (…) for popular sovereignty including rights to individual and democratic participation in the exercise of government powers.'

26 Art. 1 TEU. The preamble of the Rome Treaty already spoke of 'an ever-closer union among the peoples of Europe.' Even more interestingly the second paragraph of the preamble referred to the Member States as 'their countries', i.e. the countries of the member peoples. The preamble of the Single European Act talks of 'the democratic peoples of Europe', and that of the Maastricht Treaty of deepening 'the solidarity between their peoples while respecting their history, their culture and their traditions' as well as repeating the desire to 'to continue the process of creating an ever closer union among the peoples of Europe.' Amsterdam also consistently speaks of the 'peoples' in the European Union. Nice does not mention the people at all. Even the Constitutional Treaty, perhaps the most unifying in its aims and understanding of the EU (see for instance art. 1 speaking of 'the will of the citizens and States of Europe'), retains its basis in multiple peoples. Its preamble, for instance, still speaks of 'the peoples of Europe'. See for instance, also art. I-3 or III-280 for this focus on multiple peoples.

27 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government (…).'

28 Art. 2 and 6 TEU, as well as art. 49 TEU.

29 Heringa and Kiiver (2012), 15.

the fact that all public authority derives from these people.[30] Six other Member State constitutions nominate 'the Nation' as sovereign. Without denying the conceptual and historical significance of such 'Nations', they can largely be equated with accepting the sovereignty of the People which make up the Nation, certainly for the normative dimension discussed here.[31] Similarly, even the famed 'Sovereignty of Parliament' in the UK has become increasingly linked to the notion of representation of the Community, and hence with representing the people.[32] The Dutch Constitution does not mention sovereignty at all, yet if a notion of sovereignty were to be included it is difficult to imagine any other candidate than the people.

The Cypriot and Danish Constitutions provide a slightly different picture. For obvious reasons the Cypriot Constitution does not declare 'the people' sovereign. Instead it declares a sovereign republic, which respects both the Greek and the Turkish 'Communities'. Section 12 of the Danish Constitution places 'supreme authority' in the King, who is nevertheless bound by the Constitution. Twenty-four out of twenty-seven Member State constitutions, therefore, either directly or indirectly acknowledge the ultimate authority of the people. The three exceptions, furthermore, also fully acknowledge the value of democracy and popular representation, which in itself creates a strong link between public authority and the people.

Two remarks on the proposed use of *popular* sovereignty for an EU conception of confederal sovereignty, however, must be stressed at this point. First, it is a conception intended for the EU legal order. As such it remains compatible with Member State systems that rely on a non-popular internal sovereign. The proposed conception of confederal sovereignty, however, is at its strongest and most appealing where the national and EU conception of the internal sovereign are aligned along the lines of popular sovereignty.

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30 See art. 1 of the Austrian Constitution, art. 1(2) and 1(3) of the Bulgarian Constitution (but also see art. 9 and 44(2)), art. 1 of the Croatian Constitution, art. 2 of the Czech Constitution, art. 1 of the Estonian Constitution, Section 2(1) of the Finnish Constitution, Art. 20(2) of the German Basic Law, art. 1(2) of the Greek Constitution, art. 2(2), 5 and 68(1) of the Hungarian Constitution, art. 1 of the Italian Constitution, art. 1(2) of the Latvian Constitution, Art. 1 and 3 of the Portuguese Constitution, art. 2 of the Romanian Constitution, Art. 2(1) of the Slovak Constitution (but also see art 43(3) and 106), art. 3(2) of the Slovenian Constitution, art. 1(2) of the Spanish Constitution, and art. 1 of the Swedish Instrument of Government.

31 See art. 33 of the Belgian Federal Constitution, art. 3 of the 1958 French Constitution and art. 3 of the Declaration of Human and Citizen's rights of 1789, which still forms part of that Constitution, art. 1 of the Irish Constitution, which also refers to the 'Most Holy Trinity, from Whom is all authority', art. 2 of the Lithuanian Constitution, art. 32 of the Luxemburg Constitution, and art. 2(1) of the 1989 Polish Constitution and art. 4(1) of the 1997 Polish Constitution. De Witte notes for instance that, '(…) the sovereign 'Nation' in Belgium '(…) would now, if the article had to be rewritten, be called the 'people'. (B. de Witte, 'Do not Mention the Word: Sovereignty in Two Europhile Countries: Belgium and the Netherlands', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 353.

32 J. Goldsworthy, *The Sovereignty of Parliament* (Clarendon Press 1999), 231.

Second, and related, a popular conception of confederal sovereignty purposefully contains an element of idealism. Where a national system does not recognize popular sovereignty, the EU may be a source of inspiration. In this way as well the EU can positively contribute to democratisation, instead of threatening it.[33]

3.3 *The evolutionary fit: The increasing relation between the EU and the individual*

Having established the respect of the EU for the sovereign peoples in their *collective* capacities, a last element of fit concerns the increasing relation between the EU and the individual. This increasing relation forms a clear trend throughout the evolution of the EU. The famous direct effect of EU law already created an unmediated link between individuals and the EU legal order. Contrary to the norm in 'international' law, the individual became a subject, and not just an object of EU law.[34] A link that broadened and deepened with the expansion of EU law itself.

Already under the ECSC, furthermore, the peoples were directly involved politically as well. The Assembly was composed of 'representatives of the peoples of the Member States'.[35] Art. 10 TEU continues this line with a more individual twist, declaring that 'Citizens are directly represented at Union level in the European Parliament.' Several other innovations under Lisbon have deepened this political link. The inclusion of national parliaments into the constitutional structure of the EU directly involves the national representatives of the member peoples.[36] Article 10(3) TEU gives each citizen the right (or perhaps implores him) to 'participate in the democratic life of the Union.' Article 11 TEU obliges EU institutions to 'give citizens and representative associations' an opportunity to make known their views.

The new citizens' initiative forms another clear attempt to more directly involve individuals at the European level.[37] Though weak, the initiative creates a direct channel between the peoples and the EU level. In a sense it forms a confederal check where the peoples feel that either the EU institutions, or their own statal representatives, are not doing their job properly. Now the required number of one million citizens must represent 'a significant number of Member States'. In other words, even in a citizens' initiative,

33 For this potential see in more detail below chapter 10 section 9 and chapter 12.
34 See for a relativization of this 'uniqueness' De Witte (2011) and De Witte (2012).
35 Art. 20 ECSC.
36 Art. 12 TEU and Protocol No. 1 on the role of national parliaments in the EU.
37 Art. 11 TEU. Also see now Regulation 211/2011 on the citizens' initiative *OJ* (2001) L 65/1, and for discussion of its uses and (many) weaknesses M. Dougan, 'What are We to Make of the Citizens' Initiative? 6 *CMLRev* (2011), 1807, and J. Mendes, 'Participation and the role of law after Lisbon: A legal view on Article 11 TEU', 6 *CMLRev* (2011), 1849.

as in the election of the EP, individuals are still acting as representatives of their sovereign member peoples, not just as EU individuals. At the same time this direct involvement of the peoples at the EU level, nascent as it may be, does underscore that the EU is not based on the sovereign states alone, but more confederally on the sovereign peoples that underlie these states as well.

The strongest direct relation between the EU and the individual is obviously formed by EU citizenship. The derived status of EU citizenship captures the secondary, but direct, relation between the EU and the individual: 'Citizenship of the Union shall be additional to and not replace national citizenship.'[38]

For on the one hand EU citizenship is hereby structured as a secondary citizenship. The EU does not have the power to create an own citizenry independent from the Member States. Nor can it refuse anyone citizenship that has been granted that status nationally. The EU has to build on the existing citizenship relations. Limits that underscore the confederal respect for the sovereign peoples described above, and for the existential relation between the member peoples and their own states.

On the other hand, and notwithstanding its derived status, EU citizenship does establish a direct link between the EU and the individual. Furthermore, largely in the hands of the ECJ, EU citizenship is gradually evolving towards a stronger and more meaningful status, which even provides increasing rights against the own Member State.[39] One example of this development can be found in the gradual pressure on the scope of EU law exerted by EU citizenship. Especially the developments in *Rottman* and *Zambrano* and are telling in this regard.[40] They underscore the increasing importance of the direct link between the EU and the citizens, and the believe that this link should not be curtailed too easily.[41]

A confederal conception of sovereignty fully accords with this direct though secondary link between the EU and the citizen. As the sovereign peoples have directly delegated part of their sovereign authority to the EU, it only makes sense that the EU enjoys a direct – and two directional– link with these peoples. At the same time it is equally logical in a confederal system that this link remains secondary to the one enjoyed by the Member States and their peoples. As discussed in part I it is the essence of a confederal

38 Art. 9 TEU. Also see art. 20 TFEU. Even though 'destined to be the fundamental status' it remains subordinated to citizenship of a Member State (See cases C-85/96 *Martinez Sala* and C-184/99 *Grzelczyk*).

39 C-184/99 *Grzelczyk*.

40 See C-34/09 *Zambrano*, C-434/09 *McCarthy*, C-256/11 *Dereci and others*, C-40/11 *Iida* [2012] nyr, and C-356/11 and C-357/11 *O.E.A* [2012] nyr.

41 For a (willingly) rather extreme extrapolation of EU citizenship in this regard see Von Bogdandy *et al*, (2012) 489 et seq.

system that the constituent parts remain primary and are not subsumed in a single superior authority.[42] It are these constituent parts that, as pre-existing and self-referential entities, join in a confederal bond with other such entities.

Consequently the confederal perspective both fits with and explains the direct link that exists between the EU and the member peoples, and places logical limits on this link. As will be further explored below and in part III, however, it is becoming increasingly urgent that, in true confederal style, this link is better conceptualized and organized at the *national constitutional* level.

Despite the remaining challenges of properly organizing confederal sovereignty, however, it can be concluded that this concept, and the confederal approach that underlies it, show a sufficient fit with the EU and its legal order. Combined with the conceptual fit already established, this provides a sufficient basis to further engage with the potential advantages of confederal sovereignty set out above. Advantages to which we now turn in more detail, beginning with the capacity to dissolve some of the theoretical deadlocks that flow from the apparent contradiction between sovereignty and integration, including the related clash between statism and pluralism.

4 Dissolving the clash between statist sovereignty and plural integration

Chapter 8 discussed the apparent deadlock between sovereignty and integration: you cannot have your sovereign cake and let it be eaten by others. It further showed how this juxtaposition of sovereignty and integration leads to a deadlock in the theory of European Union, and for example forced both statism and pluralism to either defend the sovereign state and limit integration, or to embrace integration and reject sovereignty.

Chapter 9 subsequently demonstrated how integration does not inherently conflict with the concept of internal sovereignty, but how the real conflict is between integration and external sovereignty, and even between external sovereignty and internal sovereignty as such.

To build on these findings, and to further test and illustrate the capacity of confederal sovereignty to dissolve the conflict between sovereignty and integration, we return to the schools of statism and pluralism. Below it will be shown how both rely on unsuited external concepts of sovereignty, and how this forces statism and pluralism into positions that are untenable and counterproductive. Positions furthermore, that are also unnecessary. For as will subsequently be suggested, both schools can successfully switch to a

42 See chapter 1, section 5.1.2.

confederal conception of sovereignty. This would help them overcome the false choice between sovereignty and integration they now force themselves to make, and would actually allow them to better achieve their respective core objectives. What is more, it would also reduce the contradiction between statism and pluralism as such. An outcome that is especially valuable because both camps defend important values and field convincing arguments, certainly so for a confederal understanding of the EU that seeks to combine respect for the Member States and peoples with a plural organization of public authority.

4.1 Statism and confederal sovereignty

Chapter 8 demonstrated how the BVG, applying the key tenets of statism, postulated the sovereign state as a *conditio sine qua non* for democracy. Only a sovereign state, which controls a critical mass of competences, can provide and guarantee a democratic process. EU integration, therefore, is only compatible with the German constitution as long as the German state retains a controlling say in certain key competences.

The BVG thereby raised a legitimate and necessary question: how much power can be outsourced before the state, and the democratic process that controls it, loose their relevance?[43] Its statist stance also contains many other valuable points, certainly for a confederal thinking of the EU. The attempt of the BVG to protect the state, and with it the German people, against ever expanding EU powers fits with the fact that in a confederation primary authority and legitimacy should remain with the sub-units.[44] As a result it is highly important to counterbalance the risk of centralization that seems inherent in federal systems.[45] The choice for sovereignty as a regulating concept in this regard also seems sensible.

From the great responsibility it carries for the German people and their constitution, its critical and conservative approach can also be more than understood: why change a system that works and replace it with a still emerging system of which even the proponents cannot agree on its *finalité* or nature, let alone guarantee its stability. After all we are not playing for

43 See for a factual relativiztion of the Courts fears for the relevance of Germany: Moravscik (2005), 349, and Moravscik (2001).

44 The Member States have also spent significant time and energy in creating this primary link with the people, for instance through the creation of national identities and social securities. Not only is the EU incapable of matching this link, the Member States will not want to give up this primacy, and are certainly capable of defending it precisely because of their primary legitimacy. Cf. also on this point Van Middelaar (2009), 314, 359.

45 Note that the argument here is not that the EU must necessarily remain confederal, and should therefore respect the status of the member states. The more limited point is that, as long as the EU remains a confederation or desires to remin one, it should respect this status. Obviously the sovereign member peoples retain the option of joining a federate EU, and relinquishing their sovereign status.

nickels. On the table are fundamental questions on democracy, identity, and the rule over more than 500 million people. The position of the BVG within the German legal order, furthermore, also leads to a necessary bias. The BVG has been established to protect and uphold the German constitution, not to surrender it. All in all, the reluctance of the German Constitutional Court to erode the foundations of the current statal system appears responsible. It rightly places the burden of proof on those hailing a new order of things.

At the same time the *Lissabon Urteil* contains several weaknesses.[46] Its reasoning, for instance, rests on a number of rather general, undeveloped and opportunistic definitions of core notions as democracy or the state. Notions which are nevertheless asked to carry quite some weight. The most relevant weakness for the present discussion, however, is the BVG's unhelpful and unnecessary reliance on an external and statal notion of sovereignty.[47] For as shown earlier, it is the state that ultimately forms the sovereign in the framework developed by the BVG.[48]

Its choice for a statal sovereign traps the BVG in an unfruitful external paradigm. One unsuited to conceptualize European integration, or to lay down realistic and effective limits to that integration. As will be illustrated below, in the longer run this unfortunate choice of sovereign even threatens some of the very values the BVG tries to safeguard, such as democracy and national identity.

In this regard two specific problems that result from the BVG's application of external sovereignty to the EU must be discussed in more detail. To begin with the static and defensive position the Court locks itself into. Second, and most fundamentally, the way the BVG locks up both the people and the democratic process in the state. A form of conceptual protective custody that only blocks their necessary evolution, and removes any opportunity for the EU to be founded on a stronger democratic basis.

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46 The judgment was also criticized right from the start. Very critical see: W.T.E. Eijsbouts, 'Ein Land, ein Volk, ein Richter', *Het Financieele Dagblad* (3 juli 2009), 7 and further refined, W.T.E. Eijsbouts, 'Wir Sind das Volk: Notes About the Notion of 'The People' as Occasioned by the *Lissabon-Urteil*' 6 *European Constitutional Law Review* (2010), 199. Further see Schönberger (2009), 1202. Bieber (2009), 391, Grimm, (2009), 353, Thym (2009), 1796.

47 For the importance of external sovereignty generally for the German debate on sovereignty see Aziz (2006), 279-280, emphasizing the fact that Germany had just reacquired 'full' sovereignty in 1990 only.

48 Or at least is provided with an automatic monopoly on sovereignty. See chapter 8 section 4.4.3.

4.2 The statist Maginot line against integration

By opting to preserve the sovereignty of the German state in order to protect the German democracy and identity the BVG opts for an inherently defensive strategy. Although European integration can play an (important) role, the core of political and democratic life must remain within the state. A position that results from the far from evident claim, common to statism, that democracy is only possible within the sovereign state.[49]

Even more problematic is that this approach forces the BVG into an herculean, counterproductive and not really judicial task of defining these core competences, and with them the essence of democracy and the political process. A substantive exercise that sits uncomfortably with the more procedural and self-determining essence of democracy. Not surprisingly the parts of the *Lissabon Urteil* outlining these core competences are amongst the least convincing. To begin with the selection of the 'essential areas of democratic formative action'[50] is almost not supported by arguments. Why are these enumerated competences so essential, and why are other viable candidates not? [51] As most areas mentioned by the BVG happen to coincide with those powers still largely remaining under the competence of the Member States at the time of the judgment, it is difficult to suppress the suspicion of theoretical opportunism.

Furthermore, the idea of a fixed list of competences that together form the essence of democracy, and the German identity, does not seem very promising in itself. And as it is static, it will inevitably run into difficulty in the future, certainly considering the current pace of integration. The constitutional *Maginot* line of sovereignty and democracy can be outflanked all too easily. A fact already illustrated by the difficulties of the BVG in actually holding the fort in the *Lissabon Urteil*. A clear gap, for example, exists between the logic of and rhetoric of boundaries, and the eventual conclusion that the Lisbon treaty stays neatly within the limits prescribed.[52] It is very difficult to see how the current level of integration has not removed several competences from the German State that are not at least as important for the democratic process as those mentioned by the BVG. The *Honeywell* judgment and the EMU judgments have made it even more obvious

49 This chapter will not discuss the second leg of the BVG test for democracy, being if the EU itself is democratic enough, and which democratic standard should be applied to a non-statal entity as the EU.

50 Lissabon, 248.

51 Schönberger (2009), 1209.

52 Idem, 'there is probably no other judgment in het history of the court in which the argument is so much at odds with the actual result.'

that the BVG will only police these boundaries in highly grievous cases, or frontal attacks.[53]

Naturally the tactic of formulating a hard limit and then virtually nuancing it away in application should also be seen as a wise and pragmatic solution, and as part of a dialogue with the ECJ.[54] At the same time it underscores the weakness of the limiting strategy chosen by the BVG.[55] Where the aim is to actually limit integration, the defence chosen should be able to do so. To that end the limit itself should be flexible enough to adapt to changing circumstances. For as static defences have proven throughout history: once breached they loose much of their value.

4.3 Trapping the people and the democratic process in the state

Second, and partially due to this static and defensive strategy, the external and statist approach of BVG traps the people, and the democratic process, in the state. As a result the BVG again endangers what it seeks to protect.

The reproach that the BVG is locking up the people in the state is perhaps unexpected. The *Lissabon Urteil* explicitly refers to the sovereign people that, as the sole *pouvoir constituant*, are the source of all public authority.[56] The people are even given the power to dissolve the German state, despite the eternity clause in the Constitution.[57] The actual authority of the people, however, is clipped significantly by the way in which the BVG welds democracy and sovereignty to the state. The people have no choice but to delegate 'their' authority to a state. Within this statal paradigm, furthermore, the only two choices the German people are given are between the German state or a European federation.[58] The second alternative of dissolving Germany into a European federate state is so far-reaching, that *de facto* the current German state remains as the sole alternative. This severely restricts the peoples' freedom of delegation. Politically speaking the people can be compared to consumers in a communist regime: free to spend their political capital with the sole supplier available, being the German State.

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53 BVerfGE 2 BvR 2661/06 (2010) *Honeywell*, BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package* par. 200 and 206, BverGE 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 be 6/12 (2012) *ESM Treaty*. Also see in this regard the rather flexible acceptance of art. 8(2) TESM and the possible loss of German voting rights in par. 237. Further see Payandeh (2011), 10.

54 Compare in this regard also the equally open and cooperative approaches to the ESM by the Estonian *Riigikohus* (Constitutional Judgment 3-4-1-6-12 of 12 July 2012, *ESM Treaty*), and to the Fiscal Compact by the French *Conseil constitionell* (decision No. 2012-653 DC 9 August 2012).

55 BVerfGE 2 BvR 2661/06 (2010) *Honeywell* par. 66.

56 Lissabon, 231 and 234.

57 Lissabon, 228.

58 Lissabon, 228.

Yet why should the people themselves not be allowed to decide on the delegation of powers? And why should the limits of such delegation not be determined by the democratic process itself, instead of by some judicially determined limits?[59] Is the desire to centralize such core competences not an outdated notion of democracy, originating in a time that the myth of autarky was at least somewhat plausible? For in today's world, increasingly defined by interdependence, the question which authority should lie at what level seems like a particularly crucial question for the democratic process to engage with.[60]

Moreover, even after a power has been delegated to the EU the question remains for national politics how to *use* the influence that has been acquired in return for the delegated powers. What the BVG does not substantiate, and probably also cannot substantiate, is why the application of national competences is the sole possible substance of national democracy: Why can the use of voting rights in regional organisations not make democracy worthwhile? The national discussion on, for instance, the services directive, the Lisbon Treaty itself, or the financial crisis for that matter, seem to suggest otherwise.[61]

The limitation on national democratic decision-making regarding delegation is additionally problematic considering its weak basis. The rather opportunistic selection of 'essential' competences was already commented upon. Even more problematic, however, is the entire idea of a substantive core of competences itself. An idea that implies that there can only be *one core per democratic entity*, and consequently also only one truly democratic entity per geographic unit. There can, after all, only be one centre of authority that exclusively holds the required preponderance of essential competences.[62]

This statal swaddling of democracy is so restrictive that it would not even be compatible with the democratic reality in existing federate systems, including the German one. [63] It is, after all, the essence of the federate form that essential competences, such as social security, criminal law or family law, are divided over multiple governments. Under the logic of the BVG, this would mean that there is either no full democratic process in a federate system, or that only one of the levels of government in a federation could be really democratic. Yet in democratic federations, such as the US or Germany

59 See for a further discussion of this point below chapter 10 section 6 and chapter 12.

60 Habermas (1996), and Habermas (2001), 58. As will be discussed below such questions can thereby provide extra substance to the national process, partially replacing control over outsourced competences.

61 See Barnard (1998), 323 et seq.

62 Logic that in a sense follows Bodin's argument from indivisibility. See Bodin, Book I, chapter 10.

63 See above chapter 2 section 2.1.2. and chapter 9 section 5 for the sovereignty arguments leveled against the US federation as well.

the states and the central government do have autonomous democratic processes.[64] Fully appreciating the difficult position of the BVG, which simultaneously needs to protect a German unity externally and a federate diversity internally, this seems an ultimately indefensible position.

The external conception of sovereignty relied on by the BVG, therefore, traps both the people and the democratic process within the – declining – state. It does so at a time where it is becoming obvious that the relatively random scope of the state no longer forms the sole level at which influence needs to be exercised to be effective. In other words, the net effect of the BVG's approach is to safeguard democratic control at a level that may often guarantee little real world power or actual influence.[65] Yet what is the value of a German vote that determines the national political outcome on, say, social security, but cannot determine, or even affect, reality? Though with the best of intentions, the external conception applied by the BVG thus undermines its own central aims and only threatens democracy in the long run. For as a result of its protective stance neither the role of the people or the democratic process can evolve and adapt to the changing circumstances that necessitate integration in the first place.[66]

4.4 The potential benefits of confederal sovereignty for statism

A transition towards a confederal conception of sovereignty may help statism in better achieving several key aims, whilst reducing some of its weaker spots. That is, even the statist aims and objectives may be better served by applying an internal, and 'softer' confederal conception of sovereignty than by sticking to seemingly more forceful and absolute external conceptions.

First of all the confederal perspective may not recognize the ultimate authority of the Member States, but it does recognize the ultimate authority of the member peoples. It thereby empowers the people, who are also the intended beneficiaries of statism, directly. In addition, it also accepts that the Member States form the primary, if not exclusive, embodiment and representatives of these sovereign people. As such it not only provides protection to the people, but also to the Member States, as should be done in a

64 Elazar (2006), 33.

65 This forms the opposite of the descriptive fallacy: It assumes that sovereignty can be fully separated from actual power.

66 The warning of Grimm, himself a former judge in the BVG, on the need for law to respect the political becomes of even greater interest here: 'Total legislation is neither desirable nor possible. The task of politics consists in the production of a just social order in changing circumstances. With complete legal binding this task could not be carried out. That would instead confine politics to the implementation of norms and thus ultimately reduce it to administration. A society so organized would render itself incapable of adaptation or even survival. (Grimm (1995), 287).

confederal system. Protection that includes the national (judicial) power of safeguarding the ultimate authority of the people where truly threatened.[67]

Contrary to the statist perspective, however, confederal sovereignty can actually empower the people instead of trapping them in the state. It offers them more choices in delegating their power, and allows them to extend their influence, and legitimacy, beyond the state.[68] It thereby creates at least a starting point for the further evolution of the democratic process itself, and does so in a way that includes European integration in the democratic process instead of excluding it. A potential further explored in part III. This is of vital importance as democracy will have to keep pace with global developments, and cannot be protected by locking it into the state for safe keeping.[69]

Internal sovereignty also allows more flexibility than the BVG's approach of setting fixed limits to integration. The level and limits of integration may become part of the democratic process, preventing courts from having to define and defend democracy. Simultaneously it opens up a path for the EU to ground its authority in the people directly without dismantling the states, and for the people to exert democratic control on the EU. In fact the concept of a *Staatenverbund* could form a useful starting point here, especially when coupled to the BVG's idea that power in the EU should derive from 'the peoples of Europe with their democratic constitutions in their states.'[70] Of course, as will be seen below, many problems attach to such flexibility and inclusion as well, but at least it seems to offer more perspective than a retreat within the state.

Before further exploring such applications of a confederal conception of sovereignty, however, it is useful to first return to the opposing school of pluralism. As with statism, it would appear that several of its weaknesses relate to a reliance on external sovereignty, whereas its valuable insights could be strengthened by incorporating an internal notion of sovereignty.

5 Pluralism and the confederal perspective

As discussed, pluralism, to the extent that it has a shared core, stresses the lack of an ultimate authority or hierarchy. Our current reality is one of multiple levels of interacting legal orders and actors. A point of view that direct-

67 See on the secondary primacy of EU law chapter 10 section 8.

68 See also on this 'augmenting' potential Loughlin (2006), 81.

69 For a prime example of such an approach which ostentatively protects democracy and national identity but in reality only guarantees their demise by welding them to the state, see T.H.P. Baudet, *The significance of borders: why representative government and the rule of law require nation states* (Doctoral thesis Leiden University 2012).

70 BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil* par. 231.

ly clashes with the sovereign claims of the BVG, and seemingly leaves little space for any form of sovereignty at all.

Pluralism thereby makes some very convincing points, and fits with several facts that appear beyond denial. We are seeing a plural reality where multiple centres of authority are engaged in a dialogue, where different public authorities maintain public views that are clearly incompatible with each other, and where no single actor seems capable of imposing its view on all others. States are losing power and influence as events force them to cooperate and compromise.[71] In that light the EU does seem a credible crown witness against any statist view, and sovereignty with it.

Just as statism this pluralist perspective also has much to offer to a confederal model. For a confederation logically knows multiple centres of authority. And because all these rely on separate authority bases they do not stand in a clear hierarchy to one another, nor do they need to. In the confederal model developed here, for example, both the Member States and the EU receive sovereign authority directly from the member people. They do not depend on each other for this authority in any hierarchical way. As a result, in a confederation the constitutional value and importance of procedural principles such as loyal cooperation, subsidiarity or mutual respect increases, as does the value of dialogue in general.

Yet despite its useful insights and accurate description several problems surround this popular school of thought as well. As with statism, some of these problems can be traced back to the (implicit) use of an external notion of sovereignty. In the case of pluralism, however, this concerns the resistance against such an external notion. Resistance that leads to an overreaction, and to an overstatement of the tension between sovereignty and integration. As a result pluralism might reject far more of what is valuable in sovereignty than is necessary to sustain its key values and insights.

Two problematic points in pluralism are especially relevant in this regard. First, it removes instead of provides a proper foundation for political authority, even though its search for alternative foundations for EU authority through notions of citizenship contains interesting leads. Second, some of the key descriptive truths it draws on are not as antithetical to sovereignty as it claims, but rather require a basis in internal sovereignty.

71 This is a fact even acknowledged by those who argue that the state remains as the central actor, and that, for instance, organisations as the EU only 'rescue' the nation state. Even in such arguments, after all, the state is in need of some saving or support to retain its central position in a globalizing reality. Cf. for example A. Milward, *The European Rescue of the Nation State* (Routledge 1992).

5.1 Free floating authority

As a post-modern logic pluralism seems better suited to deconstructing our existing foundations than creating sufficiently powerful new ones. After traditional notions such as sovereignty have been debunked, we are generally left with a daunting conceptual, political, and legal hole.[72]

By denying ultimate hierarchy, for instance, pluralism must also deny the ultimate sovereignty of the people. A denial that directly attacks the basis for *national* democracy. It also removes any chance of grounding the EU, including its federate superstructure, in these member peoples. As discussed above, however, these sovereign peoples seem one of the few foundations strong enough to carry that burden. Equally no final authority is left to settle conflicts, no matter how fundamental their challenge may be to the polity as a whole.[73]

Once traditional foundations for political authority have been rejected, furthermore, legitimacy must be derived from other and much weaker sources such as output, procedural concepts, or abstract shared values.[74] The denial of ultimate popular authority, therefore, explains the tendency of pluralists to revert to more technocratic or procedural sources of authority.[75] Yet there is a realistic concern that these alternative sources are too thin, at least for a fairly large majority of the population. In any event this is what the recent rise of populism and, to say the least, less than enlightened politics, so far seems to indicate. Rational citizenship and enlightened values seem to hold a limited attraction, certainly in times of crisis. Furthermore, basing the EU on a different legitimacy structure than its Member State systems could create a conflict, and could undermine the legitimacy of those Member States as well.

The request to the European peoples to commit themselves to such an alienating, post-modern Europe that continues to defy qualification understandably lacks appeal. Where integration nevertheless continues, without providing more convincing answers as to the foundation of its authority, legitimacy naturally remains a problem.[76] Instead of finding a stronger foundation to carry the federate superstructure of the EU, the Union becomes a free floating entity. In this regard the somewhat clinical basis of

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72 Cf Loughlin (2006), 76. Especially so where sovereignty is seen as the answer to the constitutive act / challenge of creating unity in a plural chaos. That is: Without sovereignty, or another conceptual answer to the same question, we do not even have unified entities that can interact, dialogue or interpenetrate. We just have, ultimately, individuals. See to this end especially Van Roermund (2006), Lindahl (2006), and Huysmans (2006).

73 Lindahl (2006), 105, Baquero Cruz (2008), 398.

74 Habermas (1995), Habermas (2001), Kumm (2009), 258.

75 Habermas (2001), Maduro (2006), Kumm (2005), 262, MacCormick (1999).

76 See for instance: Habermas (1996), 126 et seq., Douglas-Scott (2002), 255 et seq.

postmodernism in epistemology perhaps remains too dominant in pluralism; how to base trust in a political system on a fundamental distrust of all knowledge remains difficult to see.

5.2 *The descriptive basis and prescriptive weakness of pluralism*

The strength of pluralism lies in its accurate description of the heterarchy in the legal reality of the EU. As we saw, however, sovereignty is a prescriptive concept not a descriptive one. It contains a normative claim of how power should be organized and who should have the ultimate say. As a result the descriptive claims of pluralism do not directly affect sovereignty.

Even where the descriptive basis of pluralism is turned into a normative command – thou shall not desire hierarchy– the descriptive foundation of this command eventually undermines it. For the command cannot offer a *solution* where a fundamental conflict does arise. If we take, for instance, the not fully imaginary situation of an open conflict between a national constitutional court and the ECJ. Even though pluralism might celebrate the capacity for such a conflict to arise, it provides no solution once the conflict is there. Yet it is part of the *function* of a constitutional and legal system to solve such conflicts, and to prevent extra-legal escalation. In this sense pluralism reflects the Kantian dream of civilized republics that will never go to war: although highly desirable it fails to be *political* theory as it assumes that those factors of the human condition making a political system necessary will disappear.[77]

Similarly pluralism does not solve the need for hierarchy, and therefore sovereignty, in law. It simply assumes hierarchy will not be necessary as no dispute will arise or escalate, and that not providing an answer will remain a viable option.[78] Consequently pluralism is not a prescriptive or a *legal* theory. It is a description of the current reality in the EU, based on the hope that this reality will remain stable.

Where the EU is in clear need of a stronger legitimacy for and foundation of its authority, pluralism is, therefore, incapable of providing these. Instead it removes what foundations we thought we had. The thinner, rational and rather optimistic alternative foundations it offers, be they procedural, value based or advanced forms of multiple citizenship, also seem incapable of providing the legitimacy required. At least they are not doing so at the moment, even though there is no shortage of EU values. Conversely, pluralist accounts of European integration may even contribute to an anti-EU sentiment. The enlightened picture pluralism paints can all too easily be perceived as, or turned into, an attack on national foundations. Some of the optimism underlying these alternatives, furthermore, especially where reli-

77 Cf Keating (2006), 201.

78 See the bridging attempts by Kumm and Maduro discussed in chapter 8, section 6.

ance is based on overarching values, may even conflict with the epistemological scepticism underlying the pluralist approach itself: Where does the substantive supremacy of these values come from, where hierarchy itself is anathema?

At the same time the fact that we might not like some of its outcomes does not in itself prove that pluralism is wrong. For if hierarchy has indeed become factually impossible in our new global order, undermining the intelligibility of sovereignty as a prescriptive concept, we would need to accept that reality. The weak alternatives suggested by pluralism would not, in themselves, undermine the problem identified, but would only deepen our predicament.

Fortunately, the pluralist approach may be far more compatible with sovereignty than generally thought. Several of its key aims and values may even be better achieved by combining it with a confederal notion of sovereignty. A conclusion that, if correct, also means that pluralism might be more compatible than it seems with accepting some ultimate foundation, as long as it does not undermine factual plurality and the valuable processes this plurality allows in daily reality.[79]

5.3 The plural reality of confederal sovereignty

Just as statism, pluralism implicitly engages with an external notion of sovereignty. It derives part of its strength from the way it deconstructs this prominent concept. Yet as set out above external sovereignty is the wrong concept to challenge. The process of European integration can best be understood from an internal conception of sovereignty. The pluralist critique on external sovereignty only reaffirms this suggestion. Illustrating how the EU undermines external sovereignty does not, therefore, proof that sovereignty should be scrapped from EU discourse altogether.

Once approached from a confederal perspective, furthermore, it becomes apparent that the core phenomena pluralism aims to describe and explain – multiple related, yet not hierarchically organized centres of political authority and the occurrence of authority conflicts between them for which the system offers no solution – do not intrinsically conflict with internal sovereignty. The plural reality *within* most states clearly illustrates this point.

79 Note in this regard also that it is in such daily practice that habits are formed (in the Aristotelian sense). In that regard the moral strand of pluralism, hoping to educate people and build tolerance through dialogue and interaction, is served by *daily* dialogue, but is not undermined by the existence of an ultimate hierarchy in *exceptional* cases.

From the internal perspective, after all, the possibility of a conflict *within* a constitutional or legal system – that is the fact that there is no definitive solution for such a conflict within the system– does not prove that there is no sovereign. Rather it is a logical and expected consequence where human intelligence tries to device any system, let alone a complex one for dividing and checking public authority.

Prior to joining the EU, Member States did not have flawless hierarchies either.[80] To give only some examples: Before the judicature act of 1873, England had two parallel court systems, the Common Law Courts and the Courts of Equity, with no common court of last instance. Until 1783 there was no mechanism within the legal system to solve a conflict between these two courts. In the Netherlands we see something comparable, albeit less dramatic, where the Supreme Court (*Hoge Raad*) and the Council of State (*De Raad van State*) may come to conflicting outcomes, without any judicial mechanism to resolve the conflict. The Spanish, French and Belgian systems provide further examples of different courts, supreme within their respective jurisdictions, who *inter alia* disagree on the status of EU law in their national legal system.[81] Federate systems are another case in point where uncertainty and political struggle over the delineation of powers is even purposely built in to the system.

A more fundamental example, however, can be found in such common and fundamental constitutional doctrines as the separation of powers or checks and balances. The entire logic of these doctrines is *premised* on the hope that powers will control and block each other. They purposely create the possibility of a stalemate that cannot be solved within the system, and thereby protect the internal sovereign. Were a system really to deadlock, after all, the only remaining option would be to go back to the people, the ultimate source of authority. [82]

80 This follows a more general pattern of sometimes applying demands and requirement to the EU that are not even met by the most well developed Member State.

81 France does have the institution of the'Tribunal des conflits', which consists of members of the *Conseil d'État* and the *Cour de cassation* and aims to resolve conflicts of competence between both high Courts. This body does not, however, remove the plurality in the French judicial system, as the diverging French case law on the effect of European Law in the French legal order has aptly demonstrated.

82 One example that has become acutely relevant with the war against terror(ism), is the tension between the executive power to declare war, declare an emergency and secure security with the obligation of the judiciary and the legislator to safeguard rights and procedures. On the one hand a level of comity is required, yet the executive cannot be limitless.

The sole existence of multiple centres of authority that may irreconcilably conflict, therefore, does not mean that there is no more sovereign, but only that the system of delegation is not flawless, or that such conflict was deemed desirable.[83]

In the case of the EU the system for the delegation of sovereign authority now includes an external, non-statal entity.[84] No ready blueprint exists for such a constitutional structure.[85] Much of the structure, furthermore, has been made up along the way, often in response to crises. Even more often decisions were based on a compromise between conflicting, or confused, preferences for the *finalité* of the EU. What coherent theory, after all, would model a constitution after an asymmetrical temple, or use a 'hidden' pillar, only somewhat understandable to experts if they manage to simultaneously keep in mind all earlier Treaties?[86] It should not come as a surprise, therefore, that the EU system contains many gaps, overlaps and uncertainties, especially when compared to the tried and tested schemes of delegation found within national systems.

Rather than making it obsolete, therefore, the EU, and the experiment in delegation it comprises, *increases* the role and need for sovereignty. The new found appeal of referenda only confirms this, as the need is increasingly felt to consult with the people directly where the system itself no longer provides an answer, or must be redesigned in some part.[87]

Even if factually and descriptively correct, therefore, pluralism does not lead to a necessary rejection of internal sovereignty. It only raises the question what level of pluralism is still bearable within internal sovereignty, and

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83 In addition, post-modernism cannot just begin at the border: Either sovereignty has never been plausible, also not within the state, meaning the EU cannot have brought any fundamental changes in this respect. In this sense the debate mirrors that of internal sovereignty against internal pluralism such as the type developed by Laski. See in this respect also the criticism of Schmitt, which can today also be scaled up to the EU level: 'That is the pluralism of his theory of state (…) its entire ingenuity is directed against earlier exaggerations of the state, against its majesty and its personality, against its claim to posses the monopoly of the highest unity, (…). Schmitt (2007), 44.

84 Cf John P. McCormick, 'Fear, Technology, and the State: Carl Schmitt, Leo Strauss, and the Revival of Hobbes in Weimar and National Socialist Germany' 22 *Political Theory* (1994), 641. This is also not so much of a problem once one accepts that the state was only a tool, an instrument to certain objectives, and not the goal itself.

85 Cf the warning by Van Roermund. The delegation that takes place outside the state can also not refer to, or rely on, the (more) strongly perceived objectives of 'shared co-operative activity' within the national polities. As a result the shared discourse authorizing authority claims is much more fragile: 'I would call this *deferred* (rather than late) *sovereignty*, because such shared co-operative activity is a precarious equilibrium that continues to exist only by virtue of meeting the Bratman parameters when push comes to shove.' Van Roermund (2006), 53. The resulting danger that the system will break down in times of crisis must be taken seriously, but are hopefully addressed by the modifications and proposals discussed in part I and III.

86 Dougan (2008), 617 et seq.

87 See the proposals in chapter 12, section 4 and 5 below.

how we could manage the pros and contras of pluralism using the tools that have been developed within national constitutional systems.

This deprives pluralism of one of its main claims, as it is the obvious descriptive truth of pluralism that underlies much of it credibility. At the same time an internal conception may also strengthen the pluralist cause. It may allow for a stronger foundation than the thin and perhaps overly civilized alternatives for sovereignty it has come up with so far, yet without having to accept some form of overall *linear* hierarchy: the plural reality it values normatively may perhaps be combined with some form of ultimate foundation. And in line with the pluralist intuition this basis is then not found in the state, but in the citizens, albeit not as rational and detached global citizens, but as sovereign member peoples acting through their states. As will be further developed below and in part III, the declining role of the state that pluralism rightly points out, can then also be fully accommodated under an internal conception of sovereignty.

5.4 Sub-conclusion: Where statism and pluralism meet?

Both statism and pluralism engage with an external conception of sovereignty. The apparent juxtaposition that these views land us in – sovereignty or integration– is linked to this external conception. Only where sovereignty is perceived as indivisible and absolute in the external sense are we required with statism to 'defend' the sovereign state, or with pluralism to exorcise sovereignty altogether. Both schools, therefore, lock our understanding of the EU into an unsuitable external paradigm. An external paradigm developed to abstract from the complexities of the internal constitutional system, and therefore incapable of accommodating the demands of democracy and legitimacy posed by the constitutional and confederal nature of the EU.

In a certain way this is good news. The conflict between statism and pluralism, and between integration and sovereignty, is not inherent and unavoidable. Once external sovereignty is replaced with a more suitable notion of confederal sovereignty this conflict is significantly softened, as are some of the unconvincing extremes in both approaches.

Most importantly for statism a confederal notion of sovereignty provides a sufficient level of protection for the member peoples and their states as primary entities within the constitutional system. These entities, therefore, also remain as foundations for public authority. The safeguarding of these entities, however, can now be based directly on the peoples, making it far more flexible and convincing than the external defence of the state. A more flexible basis that enables statism to accept a more plural reality in the EU, no longer tied to an absolute state, and enables the people to escape their conceptual entrapment in that state.

For pluralism confederal sovereignty may retain the plural reality, and the spirit of cooperation and dialogue it requires, yet at the same time provide it with a much needed but not too restrictive foundation. The delega-

tion of sovereign powers necessary within confederal sovereignty allows more than enough space to divide and share authority and create a plural reality in the daily exercise of authority. As the system for delegation improves, furthermore, less direct appeals to the authority of the people, and to direct hierarchy, will be necessary. This confederal plural reality, however, does not have to challenge the ultimate authority of the people, and with it one of central tenets of democratic theory. Unlike external pluralism, it can respect the limits laid down by internal statism, and rely on the sovereign foundation of the peoples where a conflict cannot be solved by dialogue alone.

These conclusion free the way to further develop our notion of confederal sovereignty. It also brings us to the second central aim of this thesis. Can confederal sovereignty assist in creating a more stable yet still confederal basis for the EU?

6 Grounding the Union: A sufficient popular foundation for the EU

Part I outlined the growing gap between the authority demands of the EU's federate superstructure and the authority capacity of the EU's confederal foundation. A problem that did not arise in the US, where the federate superstructure was based on the federate basis of a single American people. Yet, as also discussed in part I, this federate solution to close the gap is currently not available to the EU. A purely statist approach cannot provide a sufficient foundation either, as it must contain the authority of the EU within the too narrow boundaries of an international organization. Pluralism cannot even accept the idea of a foundation itself, let alone provide one to the EU.

Confederal sovereignty may offer a way out of this conundrum. It can provide a subsidiary but sufficient popular foundation to the EU. A foundation that is capable of carrying the EU's federate superstructure, but can also respect the autonomy and elemental status the Member States need to retain in a confederal system. As a consequence, such a confederal foundation can also combine a high level of operational heterarchy within an overarching confederal hierarchy.

Confederal sovereignty does so by establishing a direct but subsidiary link between the member peoples and the EU. The link is direct because the EU is directly incorporated into the national constitutional schemes via which the people delegate their sovereign authority. The explicit clauses in many Member State constitutions allowing delegation of sovereign powers to the EU underscore this fact. This link between the EU and the member peoples, therefore, is *as direct* as that between the member peoples and their respec-

tive states, which also receive their authority from the people through the constitution.[88] On this point, therefore, the EU and the Member States stand on an equal level, both receiving a certain amount of sovereignty authority directly from the people.

Yet, in true confederal style, the direct link between the EU and the member peoples remains subsidiary to, or conditional on, the relation between the member peoples and their respective states. As a result, the Member States also retain a certain principal, or primary, status themselves, as should be the case in a confederal system.

It is important to stress, however, that the terms subsidiary and principal are used here in a specific and confederal meaning. To begin with, these terms certainly do not indicate that the Member States hold some form of higher or more real sovereign authority than the EU. As indicated above, both the EU and the Member States directly receive sovereign authority from the member peoples, and both do so at the constitutional level. Equally, as will be further discussed below, this principal link between the member peoples and their states does not mean that the states always trump the EU, or enjoy some form of inherent supremacy.[89] Where the EU receives sovereign authority from the people, it equally receives the claim to final authority that comes with it. Lastly, it is also not claimed that this primary link between the member peoples and their states is a necessity or a constitutional constant for the EU. If they so desire, the member peoples could transfer their primary loyalty and political existence to the EU, for example by jointly creating a federate European state. The principal status of the Member States, therefore, is contingent, and derives from the will of the sovereign member peoples to remain sovereign.

What is claimed, however, is that in the current confederal reality in the EU, and for as long as the member peoples desire to keep the EU confederal at its core, the Member States retain a principal relationship to the member peoples, and through that relation a certain primary and protected status. Several factors combine to establish this relation and status. These factors relate to the nature of the EU confederal system set out in part I, and together shape the direct but subsidiary popular foundation that confederal sovereignty can provide to the EU.

Firstly, there is what can be termed the existential, or home-base, factor. The Member States are intimately involved in the political existence, identity and self-government of the member peoples. The member peoples, at least for an important part, exist and act through their state and its institutions.

88 Except for Cyprus, The Netherlands and Denmark that do not have an (explicit) popular internal sovereign.

89 See below section 8 on confederal primacy.

As such the member peoples have their principal political existence at the national level, and not at the EU level.

This argument does not claim that a people can only exist in, or be created by, a state. It also recognizes that some states contain more than one people, or that some people are spread out over multiple states. It is only claimed that, within the established states in the EU, a principal or existential relation between the member peoples and their states does generally exist.[90] Even in those Member States that do not fully qualify as a nation-state, a close relation exists between the existence and identity of the people and their state. A claim that is supported at the national level by the common reliance on popular sovereignty as the foundation of the state set out above, as well as by the many constitutional courts that recognize and protect such an existential relation between their people and their states.[91]

At the EU level, the existential importance of the national is, *inter alia*, evident in the derivative nature of EU citizenship, and in the explicit recognition and protection of national identity in Article 4(2) TEU. Similarly the preambles of the TEU and TFEU speak of the Member States and 'their peoples', and vice versa of the member peoples and 'their states', capturing the close relation between both. The requirement of unanimity for amendment,[92] and the right of a people to secede under Article 50 TEU further underscore the existential primacy of the national level.[93] Within a state, after all, constitutional change generally does not require unanimity, and secession is far more problematic as well.[94]

In addition, the existential primacy of the national is borne out by a simple thought experiment. Were one to abolish the EU tomorrow, the different member peoples would continue to exist and act within their own states. The collapse of the EU would rob them of a substantial, but ultimately subsidiary and complementary status and identity. Were one to abolish the Member States tomorrow, however, political life would be far more disrupted, and it seems unlikely that the EU could step in as the new primary habitat of all member peoples. It seems more likely that new sub-units would be established, and that these would once again house the principal political existence of the different member peoples, even if these might not

90 Here Belgium might form the exception that confirms the rule, as there the EU might actually play a role in keeping the different 'peoples' within a single state.

91 See the discussion of judicial statism above in chapter 8, section 4.4, as well as the case law mentioned there. For particularly strong examples of this existential relation see the Polish Constitutional Tribunal in judgment K18/04 of 11 May 2005, *EU Accession* and K32/09 of 24 November 2010, *Lisbon*.

92 Art. 48 TEU. For a detailed overview of all procedures for amendment see chapter 2, section 2.4.3.

93 Art. 50 TEU further stipulates that this right is to be exercised under the *own constitutional requirements*. Also see Art. 46(5), where the withdrawal from any permanent structured military cooperation is also foreseen.

94 Maduro (2005), 348.

be identical to the current ones in all cases. So where the EU depends on the existence of the Member States, the Member States do not depend on the EU in the same manner.

This existential link between the member peoples and their states, and the principal status of the Member States that flows from it, conforms to the nature of a confederal system as set out in part I. It is part of the essence of a confederal system that the sub-units remain the principal hubs of legitimacy, political organization and identity, and the foundational political building blocks on which the central system is built. Again this does not mean that the EU must necessarily remain confederal, or that the EU could never establish a primary or existential link with the member peoples itself. It only means that, as long as the member peoples remain separate sovereign entities, their principal statal shells also retain a certain elemental status.

A second factor that underlies the principal status of the Member States is closely related to the existential factor. It could be labelled the default factor. The Member States remain the default option for delegation: all sovereign authority not delegated to the EU, or other entities, remains with the states.[95] This arrangement further indicates that these states remain the principal political shells of their member peoples and their authority. It further relates to the fact that the member peoples only retain a certain level of unilateral control over the exercise of their sovereign authority within their states. As soon as authority is delegated to the EU, after all, it will be exercised jointly, with no single member people controlling the way in which the EU will exercise the authority. Where a people considers a certain competence as vital, for instance for its identity, it will generally prefer to keep that competence under unilateral control. This will, of course, not always be feasible, but nevertheless increases the chance that the national level will retain certain competences that are considered existential, further increasing its principal status.[96]

Thirdly, and again related to the existential factor, there is the fact that the Member States play a vital role in the functioning of the EU. The merged system of EU government was already discussed in part I.[97] This merged system means that the EU would not be able to function without the primary institutions, legitimacy and political processes of the Member States. Equally, the member peoples would have no, or very limited means to act on the European level without their statal exoskeleton. Conversely, and

95 Art. 5(2) TEU.

96 Note that this factor does not require one to establish a quantative or qualitative list of competences that must remain at the national level. Rather, as will be further explored in chapter 13, it calls for a rigorous national democratic process on which competences a member people itself wants to delegate.

97 See chapter 2, section 3.2.

again in line with the confederal nature of the EU, the Member States are not dependent on the EU for the exercise of the sovereign authority delegated to them.

It in this sense, therefore, that under a confederal approach the Member States retain a principal and existential link with the member peoples.[98] And it is in this specific sense as well that the link between the people and the EU is qualified as subsidiary, since it does not equal, nor needs to equal, the more existential connection between the peoples and their respective states.

As stated, however, the subsidiary nature of this link in no way diminishes the direct link between the people and the EU, or the importance and potency of this link. Quite to the contrary, it is the subsidiary nature of this direct popular link that makes confederal sovereignty such an interesting construct. For through its direct connection, confederal sovereignty provides the EU access to probably the only foundation strong enough to democratically support its federate superstructure: the sovereign member peoples. At the same time, the subsidiary nature of this connection means that it does not aspire to the supreme and principal status of a federate foundation, nor has to challenge the principal status of the Member States.

Equally, confederal sovereignty does not threaten the sovereignty or identity of the member peoples either. Rather it respects and reinforces it. The people are confirmed as the foundation of public authority both nationally *and* at the European level. Contrary to statism, they are not trapped in their states. Contrary to pluralism, no alternative source of authority than the people has to be developed. Popular sovereignty, a core construct of democratic theory and the peoples national status, does not have to be deconstructed to legitimize the EU. As a consequence, confederal sovereignty would really allow the EU to be 'an ever closer union among the peoples of Europe'[99] A Union based on the sovereign peoples directly, who reciprocally share part of their sovereign authority in the EU.[100]

98 Cf. Weiler (2000), 57, where he states that, although there formally is a hierarchy of norms with EC law on top, 'this is not rooted in a hierarchy of normative authority or in a hierarchy of power'.

99 Art. 1 TEU.

100 For the risk, and to a certain degree reality, that the Member States will usurp the central position of the people, as they wield power nationally, and for a discussion of how to avoid this risk, see the discussion on confederal democracy in part III.

As indicated, such a confederal conception of sovereignty also fits with the explicit basis of the EU in delegation, and with the increasingly direct relation between the EU and the individual.[101] Confederal sovereignty explains and justifies this link: as direct recipients of sovereign authority the EU should have a direct link with the member peoples. Yet it also shows why his link remains subsidiary to the one between the member peoples and their states, and why the EU should not even strive to change that fact by seeking a stronger foundation that would undermine either the Member States or the ultimate sovereignty of the member peoples.

6.1 Counter arguments: The people, really?

The direct link between the EU and the member peoples logically raises two objections. One relates to the initial delegation by the people, and the other to the situation after delegation. Both need to be addressed.

6.1.1 Statal instead of popular delegation

First, can one really claim that the people delegated authority to the EU? Is it not closer to reality to say that national governments, or even courts, have done so, and often without knowledge of the people or even against their wishes? Sadly, especially the first part of this claim may hold a painful truth, the consequences of which the EU is increasingly confronted with.[102] Indeed, important steps in the development of the EU were based on statal consent alone, or were driven by the internal (legal) dynamic of integration itself.[103] At the same time this historical reality should not be *overstated*, and for the other part should be *overcome*.

6.1.2 Overstating the exclusion of the people

The exclusion of the people should firstly not be overstated in the sense that the actions of the Member States cannot be so easily disassociated from their peoples. The Member States, and their elected governments, represent the people and exercise their sovereign authority. As we saw, furthermore,

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101 Obviously this direct link to the people also allowed the Court to grant them benefits and 'create a pro-Community constituency of private individuals'. See A-M Burley and W. Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', 47 *International Organization* (1993), 41.

102 See for example the German decision to join the EMU, and to admit Italy in the Eurozone. The German government did so without publicly acknowledging the serious risks this enterprise involved, even though the government had received clear warnings from different sides, and this clearly concerned a momentous decision. See S. Böll, C. Reiermann, M. Sauga and K. Wiegrefe, 'Operation Self-Deceit: New Documents Shine Light on Euro Birth Defects', in *Der Spiegel Online*, May 8, 2012, available via: http://www.spiegel.de/international/europe/euro-struggles-can-be-traced-to-origins-of-common-currency-a-831842.html.

103 Also see the discussion on the self-expanding effects of the federate superstructure in chapter 3, section 3.4.

several Member States have accepted constitutional clauses allowing delegation of sovereign powers to the EU. More importantly, the perceived lack of direct popular consent almost completely derives from the situation in the six original Member States, and ignores the increasing practice of direct popular consent since.

Germany, France,[104] Italy and the Benelux countries[105] started the EU without a referendum.[106] They did so, however, at a time where the, then ECSC and EEC, were far less developed, and fitted more logically within the boundaries of an international organization. In line with the evolution of the EU, however, a clear trend has since then developed to acquire direct popular support before accession. In 1973 Denmark[107] and Ireland[108] held referenda on their accession to the EU. The UK did not hold a referendum immediately, but continued membership was supported in a 1975 referendum by 67.2% of the votes.[109] Greece, Spain and Portugal did not hold referenda on accession, yet as these countries had recently emerged from dictatorial regimes, membership of the EU was seen as an important step to achieve and secure democratic rule.[110] In 1994 Austria and Finland did hold referenda on their 1995 accessions,[111] as did Sweden.[112] With the

104 Since then France has, however, held three referenda. In 1972 68.32% of voters supported accession by the United Kingdom, Denmark and Ireland with a turnout of 60.24%. In 1992 51.05% said yes to Maastricht, with a 69.7% turnout. The Constitutional Treaty was rejected by 54.68% of the vote in 2005, with 69.34% voting.

105 Luxemburg did hold a compulsory referendum in 2005 on the Constitutional Treaty, whereby 56,52% voted in favour of ratification.

106 On 17 December 1952, however, the Netherlands did hold a pilot-referendum in the two municipalities of Delft and Bolsward. Based on the last elections, these were deemed representative for the Netherlands as a whole. The people were asked to vote on the following question 'Do you think that the Peoples of Europe should henceforth jointly serve certain shared interests, and do you support to that end: a UNITED EUROPE under a UNITED GOVERNMENT and with a DEMOCRATIC REPRESENTATION to be laid down in a EUROPEAN CONSTITUTION?' (My translation, capitals in original). Though voluntary and non-binding, turnout was high: 88,2% in Bolsward, and 74,8% in Delft. The outcome was a resounding yes: In Delft 93.1% voted in favour, in Bolsward it was 96.6%. The 2005 Dutch referendum on the Constitutional Treaty, of course, showed a markedly different outcome, with 61.54% voting No.

107 63.4% of voters supported accession, with a turnout of 90.1%. Since then Denmark has held five further referenda on EU issues, with varying results.

108 83.1% voted for accession, with a turnout of 70.9%. Since then Ireland has held six referenda on subsequent treaties, four voting yes (including one overturning a previous 'no' to Nice) and two no to ratification.

109 Turnout was 64%.

110 Spain did hold a referendum in 2005 on the Constitutional Treaty. 76,73% voted yes, turnout was 42,32%.

111 In Finland 56.9% voted for accession with a turnout of 74% (respectively 73.6% and 49.1% for the Aland Islands). A probably not symbolic 66.6% of Austrian voters supported accession, turnout being 81.3%.

112 52,8% supported accession. Turnout was 83,3%. In 2003 Sweden held another referendum in which 55,9% voted against the introduction of the Euro, turnout being 82,6%.

eastern enlargements referenda became the norm. The Czech Republic,[113] Estonia,[114] Latvia,[115] Lithuania,[116] Hungary,[117] Malta,[118] Poland,[119] Slovakia[120] and Slovenia[121] all asked and received direct popular support for accession. Cyprus was the only exception, relying on parliamentary ratification alone. In 2007 Romania and Bulgaria did not organize referenda, yet this was largely because public support was so overwhelming it was not felt necessary. In a 2003 referendum in Romania, furthermore, 91.1% of voters supported the changes to the Romanian constitution required to accede to the EU. This was generally also seen as a referendum on accession itself. In 2012 Croatia also held a referendum on accession, in which 66.27% of voters supported accession.[122]

All in all, strictly counting pre-accession referenda only, 14 out of 27 member people directly voted in favour of accession. More realistically including Great Britain, Bulgaria and Romania in this list, the total comes to 17 out of 27, or 63% of member peoples. Counting the ex-dictatorial regimes of Spain, Portugal and Greece, and the future member Croatia, one would come to 21 out of 28, or 75%. In these cases (though with decreasing force) one could say that the delegation of sovereign powers to the EU can even be based on a direct delegation by the people, and not just by the states as representatives.[123] Most crucial in this overview, however, is the clear trend towards a direct consultation of the people. A trend that follows and supports the evolution of the EU into a constitutional confederal organization.

Overall, therefore, the so called exclusion of the people should not be overstated, and cannot be relied upon to reject the confederal perspective. At the same time there remain clear weaknesses and gaps in the direct delegation of authority from the member peoples to the EU, also because often the EU has developed significantly after popular consent to membership was given. As in all constitutional systems, however, part of the function of a constitutional theory is to overcome such gaps.

113 77,33% voted in favour of accession, turnout was 55,21%.
114 66,83% in favour of accession, turnout was 64,06%.
115 67% in favour, turnout was 72,53%.
116 91,07% in favour, turnout was 63,37%.
117 83,76% in favour, turnout was 45,62%.
118 53,65% in favour, turnout was 91%.
119 77,45% in favour, turnout was 58,85%.
120 92,46% in favour, turnout was 52,15%.
121 89,61% in favour, turnout was 60,29%.
122 Turnout was, however, low at 44%.
123 It should be noted, however, that in many of these referenda no (super-)qualified majority was reached, as is often required for constitutional changes.

6.1.3 Overcoming past shortfalls in popular consultation

A confederal perspective can also be of value in *overcoming* these past shortfalls in popular consultation. Especially so in the six founding members that joined when referenda did not seem necessary. These shortfalls can be lamented, begrudged, and probably have been counterproductively ignored. At some point, however, a constitutional system must overcome such original sins. It must replace them with a positive narrative – and reality – which justify them with retroactive effect.

The US again provides a prime example. The federate Constitution flatly violated the Articles of Confederation. Its ratification was fraught with bitter disputes and involved quite some political handiwork above and below the belt. It was ultimately affirmed only by a civil war.[124] Yet its normative, almost mythical status, as well as the democratic system it eventually produced,[125] retroactively compensated for these points, at least for most US citizens.

Similarly the democratic shortfalls that have marred the establishment of the EU in the past can, per definition, never be undone. Yet they might be overcome by proving the ultimate attractiveness and usefulness of their outcomes. And this usefulness is not meant in a narrow output sense, as in lowering cell phone costs. The confederal perspective may provide a normatively attractive understanding at a more fundamental level. An understanding in which member peoples are not robbed of their influence, but empowered to engage with a globalizing reality. That is, the original sins of the EU will have been worth it because they will increase the democratic control and influence of the people in the longer run.

This normative appeal of a confederal approach will be further developed below and in part III, but also leads us to the second objection against the direct link between the member peoples and the EU claimed by a confederal approach: what remains of this direct link *after* power has been delegated to the EU?

6.2 Institutionalizing confederal sovereignty

In the US federate system the people delegated their sovereignty to the different governments. In turn they received back certain rights and a certain level of popular control as the electorate and *pouvoir constituant*. In this non-sovereign capacity the people retained a level of control over the exercise of the sovereign authority they had delegated. As a result the direct link established between the people and their governments by the delegation of authority was further substantiated and translated in daily political reality.

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124 See on the process of American federation below chapter 5.

125 Current malfunctions left aside for the moment.

One must equally ask how the direct link that has been established between the EU and the member peoples has been translated and substantiated into daily reality. For if this direct delegation is not counterbalanced by political control in some way, the EU remains open to the challenge that it is a one-way relation. One that takes sovereign authority from the people, perhaps even with their consent, yet subsequently exercises this authority without their further control or assent. Here the challenge shifts from the undemocratic transfer of authority to the undemocratic exercise of delegated authority. Additionally, if we do require effective and ongoing political control by the member peoples, does this not require an overarching statal system? A question that brings us back to the statist challenge to the EU?[126]

If the direct link between the EU and the member peoples would only amount to such one-sided surrenders of authority, confederal sovereignty would indeed be no more than a conceptual fig leave. A confederal conception of sovereignty, however, can precisely assist in structuring and institutionalizing this political link between the member peoples and the EU. Though a major challenge that can only be tentatively discussed in part III of this thesis, confederal sovereignty does so by directing our attention to the national constitutional level. There it points to ways in which the control of national electorates over the EU activities of their statal representatives can be improved, and ways in which the delegation of competences to the EU can be made an integral part of national democracy. Confederal sovereignty, therefore, is not just one way traffic where the member people lose competences and are brought under direct EU control in return for some free movement rights. As federate sovereignty, it can also support a political model where the member people receive active political influence in return for their sovereign authority.

6.3 Sub-conclusion: A direct and subsidiary link

A confederal conception of sovereignty can establish, justify and structure a direct but subsidiary link between the EU and the member peoples. The EU is directly endowed, at the constitutional level, with sovereign authority by the people. Although it might not always have been established in an ideal manner, and though the system for political control must be improved, a direct connection is thereby established between the EU and the member peoples. A connection that can form a stable and sufficient basis for EU authority, whilst respecting the principal and even existential status of the national level.

To further test and illustrate the potential of this confederal basis, and before further developing it in part III, three further advantages that flow from this

126 See the statist views of Kirchof and Grimm set in chapter 8, section 4.1.

direct link must first be discussed here as well: its explanatory value for the simultaneous fit and conflict between the EU and constitutionalism, its suggestion of a confederal-style primacy for the EU, and its normative appeal for the evolution of democracy.

7 To constitute or not to constitute: Why does constitutionalism fit the EU?

Though it is based on treaties, is not a state, does not hold original *kompetenz-kompetenz*, nor has a population of its own, constitutional language and concepts are increasingly applied to the EU.[127] What is more, these have proven suitable and fruitful. [128] They are useful, for instance, in analyzing the entire institutional apparatus that is set up at the EU level, or to conceptualize the relation between the Member States and the EU. [129] At the same time, this constitutionalization has proven highly contentious. It arouses fears, for instance, of the EU claiming a normative foundation that is equal or even superior to that of the Member States. For statists as Kirchhof or Grimm, therefore, claiming the EU has a constitution in the true meaning of the word necessarily entails an attack on the sovereign state and national democracy.[130]

This tension between the treaty basis and the constitutional functioning of the EU came to a head with the Constitutional treaty.[131] As the name itself already indicates, this document tried to straddle both elements, igniting a

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127 Weiler and De Búrca (2012), Von Bogdandy and Bast (2010), Von Bogdandy (2010b), 95, R. Barents, 'The Precedence of EU Law from the perspective of Constitutional Pluralism', *5 European Constitutional Law Review* (2009), 421, Maduro (2005), Walker (2002), 317, Timmermans (2002), 1, Weiler (1999), or Pernice (1999), 703. This does of course not mean that approaching the EU from a constitutional perspective is new. See, for instance, already Stein (1981), 1, or F. Mancini, 'The Making of a Constitution for Europe' 26 *CMLRev* (1989), 595, or the ECJ itself recognizing / proclaiming the constitutional nature of the Treaties in Case 294/83 *Les Verts*.

128 Cf. also Maduro (2006), 504, expounding the vision of the Court of Justice: 'The Court of Justice grounded the direct effect and supremacy of Community law in a direct relation between Community norms and the peoples of Europe. (…) *Van Gend en Loos* is, in effect, the declaration of independence of EU law with regard to he authority of the Member States. The Treaty is presented as much more than an agreement between States; it is an agreement between the peoples of Europe that established a direct relationship between EC law and those peoples.'

129 L. Besselink. *Een samengestelde Europese constitutie/A composite European constitution* (Europa Law Publishing 2007).

130 See supra chapter 8, section 4.1. Interestingly, on the other end of the spectrum the pluralist use of the term constitution often risks denaturizing it, as they cannot ground or accept the hierarchical claim that attaches to the concept of constitution.

131 For a much earlier discussion, however, see already E. Stein, 'Towards Supremacy of Treaty-Constitution by judicial Fiat: On the margin of the Costa case' 63 *Michigan Law Review* (1964-65), 491.

heated debate. Was the Treaty actually a constitution, should the EU have a constitution, or did the EU perhaps already have a constitution, no matter what the Treaties called themselves?[132]

Obviously much of this debate centred around the different conceptions of constitution that exist. Some of these are ultra-thin, qualifying anything that establishes something, be it a golf club or a nation-state, as a constitution.[133] Others are padded to the hilt with contested conceptions like nation, identity or *Volk*.[134] Much of the tension underlying this debate, however, turned on the assumption that having a constitution implied statehood or ultimate sovereignty, and consequently involved cannibalizing the Member States.

Those in favour of a European constitution tended to decouple the idea of a constitution from a state. The fact that the Treaties function as a constitution for the EU, does not mean they overrule or degrade national constitutions. Often such reasoning leads to the conclusion that the Treaties of Rome should already be considered a constitution.[135] A line of reasoning supported by the definition of the Treaties as the 'basic constitutional charter' by the ECJ. A legal fact providing an authority argument for any one looking for an easy exit in the big 'C' or small 'c' debate .[136]

These thinner notions have the advantage that they recognize the constitutional *functioning* of the Treaties. They also square with the significant authority granted and controlled by the Treaties. Yet they tend to be so thin that they cannot resolve the underlying questions on, for instance, the ultimate relation between national constitutions and the EU constitution. Neither do they engage with the legitimacy aspect of constitutions. For constitutions do often play a foundational role in justifying and grounding public authority, precisely because they rely on thicker normative notions. As a result such thinner notions may preserve the term constitution for EU use, but loose much of the terms usefulness.

A confederal perspective contributes to this discussion by showing how the Treaties may be of a constitutional nature without embodying or claiming

132 Cf N. Walker, 'Big 'C' or small 'c'' 12 *European Law Journal* (2006), 12, M. Andenas and J. Gardner, 'Introduction: Can Europe have a Constitution?' 12 *King's College Law Journal* (2001), 1, P. Craig, 'Constitutions, Constitutionalism, and the European Union' 7 *European Law Journal* (2001), 125, or already J. Shaw 'The Emergence of Postnational Constitutionalism in the European Union, 6 *Journal of European Public Policy* (1999), 579.

133 For the golf club example see the contribution by former British foreign secretary Jack Straw, 'A constitution for Europe' in the *Economist*, 12 October 2002, who notably does not use a capital 'C'.

134 See, for instance, Kirchof (2010), and Kirchof (1993).

135 Note the difference in Opinion 1/2009 made between treaties and *founding* treaties.

136 Case 294/83 *Les Verts*, par. 23, as confirmed in *inter alia* joined cases C-402/05 P & C-415/05P *Kadi I*. Also see N. Walker, 'Big 'C' or small 'c'' 12 *European Law Journal* (2006), 12.

the original and ultimate power ascribed to constitutions by thicker conceptions. From the perspective of confederal sovereignty, after all, what happens is that sovereign powers are relegated from the Member States to the EU. As a result, the EU is *incorporated* into the internal scheme of delegation that traditionally took place within the Member States alone.[137] Instead of superimposing a new and higher constitutional order, the EU treaties became an *integral part of multiple national constitutions*, whilst also linking those constitutional systems to each other in an overarching confederal framework.[138]

Consequently the EU Treaties are not *principal* constitutions in the meaning just described. They lack the existential dimension, as they do not constitute the member peoples, and do not form their principal political habitat. Rather the Treaties build on the existential basis of the principal national constitutions. They do, however, form an integral part of multiple national constitutions, and as such share in their constitutional nature and function. In that sense they are derived, or secondary, constitutions.[139] A secondary nature that again becomes obvious when one considers that a dissolution of the EU constitution would not undermine the national constitutions, whereas the EU constitution could not survive without the national ones.[140]

Based on this derived constitutional status, the Treaties do perform several *functions* of a constitution. They distributes public authority and provide procedures and safeguards for its use.[141] The EU Treaties are, therefore, are constitutional in that important sense of the words that they form part of

137 Cf also Schmitt (2008), 385: 'The federation agreement is a contract of a particular type, a constitutional contract specifically. Its conclusion is an act of the constitution-making power. Its content is simultaneously the content of the federation constitution and a component of the constitution of each Member State.'

138 In this regard already see Case 6/64 *Costa v E.N.E.L.*: 'By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became *an integral part of the legal systems of the Member States* and which their courts are bound to apply.'

139 Cf also Chalmers: 'Real power' in the Union remains firmly with the national administrations.' Chalmers, Davies and Monti (2010), 187.

140 Cf Weiler noting that, different from national law, EU law is 'not rooted in a hierarchy of normative authority or in a hierarchy of real power.'(Weiler (2000), 57 or Von Bogdandy (2010a), 39: 'The dependence of the Union's constitution on the Member States' constitutions is greater in law and in fact than that of a federal state in its constituent states. In terms of positive law, this results from, for instance, Article 6(2) and (3) EU or Article 48 EU, and conceptually from the principle of dual legitimacy, which implies that the Union's legitimacy depends on the legitimacy organised by the national constitutions.' On the power and authority of the national systems also see Loughlin (2006), 83 and Kumm (2012). Strongly emphasizing the secondary authority of a Member States, albeit from a very different approach, see P.L. Lindseth 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community.' 99 *Columbia Law Review* (1999), 628, and Lindseth (2010), for instance 21 et seq.

141 Cf also Burgess (2009), 39.

the network of legal rules established to delegate and control public authority. To perform this function, however, they do not *need* to make the same normative claims as a national constitution. The subsidiary but direct link with the people set out above, together with the related incorporation of the Treaties in national constitutions, are sufficient to explain why constitutional discourse is so suitable, and at least one of the necessary ones, in understanding and analyzing the EU and its founding Treaties.

The direct inclusion of the EU at the national constitutional level also helps to explain and circumscribe EU primacy. Especially so once it is combined with a further characteristic of the EU highlighted by the confederal perspective: the *reciprocal* nature of the extra-statal delegation by the sovereign member peoples of the EU.

8 The confederal primacy of EU law

The contested issue of primacy was already touched upon above. The ultimate primacy of their respective constitutional charters is claimed by both the ECJ and most national courts.[142] The resulting supremacy conundrum forms one of the beloved battlegrounds of EU law. At the same time the supremacy of EU law is generally accepted by these same national courts for day to day affairs.[143] A daily reality which sharply contrasts with the intensity of the clash at the level of theory and principle.[144]

142 Case 6/64 *Costa v E.N.E.L.*, Case 11/70 *Internationale Handelsgesellschaft*, Case 106/77 *Simmenthal*, and for the national dimension Oppenheimer (1994) and (2003), and De Witte (2011).

143 See supra chapter 8 section 1, as well as Besselink (2007), 9. The degree to which national lower courts really respect primacy, consciously or not, remains one of the intriguing blank spots, and perhaps safely so for the overall image of EU law. For recent high level judgments clearly signaling respect for EU law see the Constitutional Chamber of the Supreme Court of Estonia, Opinion No. 3-4-1-3-06 of 11 May 2006 *Euro Decision*, *Conseil d'Etat* (France), 30 October 2009, *Mme Perreux*, (2009) Revue française de droit administratif, 1125, overruling the notorious line adopted in *Conseil d'Etat* (France), 22 December 1978, *Cohn-Bendit* 1 CML Rev (1980), 543, *Conseil constitutionnel* (France), Decision 2012-653 DC of 9 August 2012, *Fiscal Compact*, or German *Bundesverfassungsgericht* BVerfGE 2 BvR 2661/06 (2010) *Honeywell*.

144 See again also the difference between the reasoning and the outcome in BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil* or a similar gap in the case law of the Polish Constitutional Court, for instance in its judgment of 11 May 2005, K18/04 on *Polish membership of the EU* or its judgment of 24 November 2010, K32/09 on *The Treaty of Lisbon*, and the Hungarian Constitutional Court, for instance in its Decision 143/2010 (VII. 14.) AB of 12 July 2010 *Lisbon Treaty*. For an example where high flying principle did lead to a very real conflict see the Czech Constitutional Court judgment of 31 January 2012, *Landtova* Pl. ÚS 5/12, whereas in its earlier judgments the Czech court had followed the same line of sharp and firm principles and supple application. See, for instance, its Decisions of 26 November 2008 *Lisbon I* Pl. ÚS 19/08 and 3 November 2009, *Lisbon II* Pl. ÚS 29/09.

A confederal perspective can at least reduce this supremacy conundrum. It allows us to distinguish the different bases, and therefore nature, of the national and EU supremacy claims. Once distinguished in this manner, furthermore, these claims are not as conflicting or mutually exclusive as might be expected.

8.1 The narrow but ultimate normative primacy of the national constitution

National constitutional supremacy is based on the supreme normative authority attributed to the national constitution. In turn, this authority is based on the principal and existential link between a national constitution and a member people set out above. An existential link that endures as long as the member peoples desire to remain independent sovereign entities, and therefore to keep the EU confederal at its core. National constitutions are, therefore, intertwined with the people in a way that the EU constitution cannot be, and represent the full and ultimate sovereign authority of the people. Not incidentally, national constitutional courts point to the *original* authority (or *kompetenz-kompetenz*) of the national constitution, as contrasted to the derived authority of the EU.

This primacy claim on behalf of the national constitution quite simply makes sense. It is only fitting and logical that it is defended by national constitutional courts charged with upholding their national constitutions. It is also fully compatible with a confederal understanding of the EU, which expressly leaves ultimate authority with the members. But what is especially interesting is that such an ultimate primacy claim at the national level does not inherently conflict with the sort of confederal, or secondary, primacy claimed by, and necessary for, the EU either. A confederal primacy that can be accommodated within the ultimate primacy that the national constitution must retain.

8.2 The weaker but broader claim of EU supremacy

As shown above the EU does not have a principal constitution, but does form part of multiple national constitutions. It receives sovereign prerogatives directly at the constitutional level. Already based on this constitutional level of delegation, the EU could claim some form of primacy over 'ordinary' national legislation. Just as constitutional norms trump lower national legislation, so do EU norms that derive from a constitutional level delegation to the EU. Such normal, or operational, primacy has also proven relatively uncontroversial.

Yet a certain primacy for EU law is supported by two additional grounds as well. First, unlike Member States, the EU receives reciprocal grants of sovereign authority from *multiple* member peoples. As a result where Member States only speak for one sovereign, the EU represents – one part of– many

sovereigns. This grants it another claim to a less intense but broader kind of primacy.

Second, these multiple grants are *reciprocal*. Each member people has delegated its parcel of authority in exchange for the delegation of similar authority to the EU by the other member peoples. These reciprocal delegations, therefore, form part of a contract (or compact) between these sovereigns, and thus are reinforced by the principle of *pacta sunt servanda*.[145] Interestingly, it was already accepted by Bodin that in principle even sovereigns should honour their contracts. Or in other words, the contract has a certain kind of primacy over the sovereign.[146] What is more, as Bodin also accepted, sovereigns can be bound by judicial interpretations and enforcement of their contracts. Interpretation that will require the relevant Court to assess the scope of the obligation undertaken by the sovereign, and hence the scope of the contractual limitation of his sovereignty.

Interestingly, these different and mutually reinforcing bases for EU supremacy – reciprocal, and contractual delegation of sovereign powers at the constitutional level– can all be found in the case law of the Court of Justice. The Court, furthermore, has gladly used the opportunity this composite basis offers to combine two different canons for judicial interpretation. On the one hand the Court can rely on the canon for constitutional interpretation. On the other hand it can also revert to the international law canon for the interpretation of treaties or contracts more generally. A combination which offers the ECJ an impressive array of options, and the ability to pick and choose from either the international or the constitutional depending on which fits or suits best. For instance the ECJ can combine principles as *pacta sunt servanda* and effectiveness.[147] Nevertheless the Court's defence of EU supremacy always remains within the confederal bandwidth, as the confederal inherently combines and merges the international and the constitutional.

To begin with, the Court's defence of EU primacy does not rest on any EU claim to ultimate normative authority. Rather in *Costa v. E.N.E.L.* the Court begins by stating that the EU legal order 'became an integral part of the legal systems of the Member States'. A finding that supports the confederal picture of the EU being included in the national constitutional systems.[148]

145 Cf the BVG in BVerfGE 2 BvR 2661/06 (2010) *Honeywell*, par. 53: 'Article 23.1 of the Basic Law permits with the transfer of sovereign powers – if provided for and demanded by treaty – at the same time their direct exercise within the Member States' legal systems. It hence contains a *promise* of effectiveness and implementation *corresponding* to the primacy of application of Union law.' (my emphases).

146 See chapter 9, section 3.1.

147 In a sense the rule of *pacta sunt servanda* can perhaps itself be understood as a rule of effectiveness, being a *condition sine qua non* for effective social behavior.

148 Case 6/64 *Costa v E.N.E.L.*

In line with this approach the Court then stresses the transfer of sovereign authority from the Member States to the EU. The EU (EEC) holds 'Real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community.' A defence of EU primacy which follows the first limb of constitutional delegation and interpretation.

The ECJ then continues its defence of primacy with the second limb: the reciprocal and contractual nature of the Community:

> 'The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over *a legal system accepted by them on a basis of reciprocity*. Such a measure cannot therefore be inconsistent with that legal system . The executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without *jeopardizing the attainment of the objectives* of the treaty (…).'

Supremacy is needed to safeguard the 'obligations undertaken under the Treaty'. Effectiveness, which most national constitutions simply assume, still had to be created in the EU using such teleological treaty interpretation.

The primacy of EU law, therefore, does not derive from a claim that the EU has a higher normative force, or a more fundamental power than the Member States. It derives from the constitutional nature of the powers delegated to the EU, the fact that the EU receives constitutional authority from multiple member peoples on a basis of reciprocity, and the related notion of *pacta sunt servanda*.[149] EU primacy, therefore, rest on a different basis than national supremacy. A basis which is subsidiary to national supreme authority, but nevertheless justifies an independent claim of supremacy over national law in most cases.

8.3 Confederal primacy: The peaceful coexistence of EU and national primacy

Starting from a confederal perspective, both the national and the EU claims to supremacy can be explained and supported. A conclusion that fits with the choice of most highest national courts to respect the supremacy of EU law over 'ordinary' national law but not over (core) constitutional law, and the intuition that this is not such an awkward idea. The different claims, furthermore, do not have to conflict, and if they do the outcome should generally be rather clear.

149 De Witte (1999), 183.

As indicated national constitutional primacy is based on the ultimate and supreme authority of the sovereign people.[150] Though more fundamental, it is therefore also more narrow, and largely concerned with preserving this ultimate authority and autonomy. It is consequently relatively untouched by EU supremacy at the operational level over non-existential issues.

The supremacy claimed by EU law is based on very different grounds, which provide the EU with a viable if not absolute claim to primacy. This confederal primacy of EU law, therefore, does not have to deny the ultimate supremacy of Member State constitutions and the sovereign people behind them. After all, part of the supremacy that the EU can claim is based on the same ultimate primacy of the sovereign people. Equally, the supremacy EU law does claim is not contrary to the confederal nature of the EU. Confederal sovereignty, after all, entails the delegation of sovereign powers outside the state, and, therefore, such primacy claims at the confederal level. Again, both at the national and the EU level it is the same sovereignty of the people that ultimately is at work, and that demands recognition in the form of primacy.

For most concrete cases this confederal distinction between forms and grounds of supremacy will provide an evident result. This is exemplified by the practical approach of national courts, including the BVG, to accept primacy of EU law over non-constitutional law, or even non-essential constitutional law, in all cases except grievous examples of ultra vires action.[151] Conversely, the common sense that the EU should not violate (the core of) its members' constitutions is now supported by art. 4(2) TEU.

The confederal approach does mean, however, that in the case of an ultimate conflict the ultimate authority of the national constitution should prevail over the less fundamental confederal primacy of the EU. The existence of such a fundamental conflict, furthermore, will logically have to be ultimately determined and resolved by national highest courts. Here confederalism, therefore, ends up in the statist camp, as it does accept an ultimate hierarchy, even though this hierarchy will more often than not remain latent. Fortunately this also means, however, that the confederal approach also remains in line with the current power and legitimacy reality as well.[152]

150 A distinction could be made here between the national constitutions which hold the sovereign command of the Member People, and the states, which are also created by these constitutions or at least derive their competences from the constitution. In that sense states have attributed powers only as well. In relation to the concept of a 'Verbund', which also hinges on the continued normative independence and primacy of the members, see Von Bogdandy (2000), 29.

151 See especially BVerfGE 2 BvR 2661/06 (2010) *Honeywell* par. 52-53.

152 A reality further underlined by the possibility of succession under art. 50 TEU, the use of which might perhaps even be demanded by a national supreme court.

Obviously this ultimate national authority, and the power of national courts to wield it, creates the possibility of conflict and abuse. As an inherent effect of their judicial *kompetenz-kompetenz*, for instance, national courts could declare any part of EU law in violation of constitutional core values. But more importantly, honest disagreements could also arise. This risk, and one can debate its magnitude and acuteness, partially comes with the confederal nature of the EU, which requires cooperation between multiple sovereigns. In part such conflicts should be buffered by the political process and made unappealing by the substantive benefits of confederation. The law can only be there to support and accommodate integration, and cannot be its *raison d'être*.

At the same time, however, law itself may be of assistance in further pre-empting any risk of such primacy disputes arising. To this end, for instance, it could be suggested to formulate EU primacy as a principle and not as a rule. Within this principle conceptual space would then be freed to allow a balancing between EU primacy, which after all is a means and not an end, and national constitutional values.[153] A suggestion that should not be mistaken, however, for a rejection of either the ultimate primacy of national constitutions or the secondary primacy of EU law in operational matters, both of which can be logically traced and supported from the confederal structure of ultimate authority in the EU. Two constructs, furthermore, that in many cases do not conflict, but do leave the eventual decision on the existence of conflict and on what to do in case of conflict at the national level.[154]

9 The normative appeal of confederal sovereignty

Potentially the most far-reaching advantage of confederal sovereignty is the positive normative understanding, or even ideal vision, of the EU it allows. An understanding where the EU is not an enemy of democracy, but an imperative for its survival in today's world. An understanding where the EU can become a vehicle which allows the member peoples to escape the confines of their states and to project their authority outside its borders,

153 See for an exploration of this option, and its fit with the case law of the ECJ, Cuyvers (2011), 49 et seq.

154 Again see BVerfGE 2 BvR 2661/06 (2010) *Honeywell*, par. 57: 'That in the *borderline cases* of possible transgression of competences on the part of the Union bodies – which are infrequent, as should be expected according to the institutional and procedural precautions of Union law – the constitutional and the Union law perspective do *not completely harmonise*, is due to the circumstance that the Member States of the European Union also remain the masters of the Treaties subsequent to the entry into force of the Treaty of Lisbon, and that the *threshold to the federal state was not crossed* .The tensions, which are basically *unavoidable* according to this construction, are to be harmonised cooperatively in accordance with the European integration idea and relaxed through mutual consideration.' (my italics).

thereby reinforcing their ultimate authority and making it 'globalization-proof'.

The normative and democratic potential of confederal sovereignty derives from the direct link it establishes between the EU and the member peoples combined with two further insights. First, the federal insight that a people can be empowered by having multiple governments. Second, the confederal insight that these governments do not have to be part of a single state.

As in the US federation, the EU could be understood, and developed, as a rival champion for the people, and as a second venue for them to exercise their authority. A rival champion that can check the existing statal one, which not incidentally is facing legitimacy problems itself, as the EU competes with the Member States for the favour of the people.[155] From such a perspective, the choice to delegate sovereign authority directly to the state and the EU can be seen as a safeguard for democracy, and a means of empowering the people. Unlike the US federation, furthermore, this second government of the peoples does not have the be part of a federate state. Confederalism, therefore, allows the federate benefit of multiple competing governments, but without the need for the member peoples to subsume themselves into a single sovereign people or a federate state. The member peoples are given a means to extend their reach beyond the state, and to check their own state, without having to sacrifice their ultimate independence or authority.[156]

Under such a confederal, and admittedly normative, understanding the EU could make the vital shift from an external threat to national democracy to an internal solution for the democratic challenges of today's world. A shift that would not just be rhetoric, but would form an actual part of the EU's constitutional theory, as it pertains to the self-understanding and ultimate aim of the EU project. Again the prescriptive nature of sovereignty must be stressed here: Such vistas of confederal democracy purposefully contain prescriptive elements that still need to be realized, yet this does not make them any less real or relevant for current EU theory.

Of course here the problem occurs that, under a perfect application of popular sovereignty, the people must also be the *original actors* underlying the constitution. As in the US we prefer a (mythical) moment where the people, as an actuality, constitute public authority. In such cases the timeline of authority overlaps with its conceptual foundation.

155 Elazar (2006), 29.

156 Although some restriction of ones own freedom (understood as liberty to do as one wants) will always be necessary for any form of effective cooperation.

Yet in EU this has not happened.[157] And considering the enduring irrevocability of time it cannot happen: We can never go back and create a (confederal) founding moment à la US. As discussed, however, it is essential to accept the prescriptive power of sovereignty to *restore* this lacuna.[158] What can be seen as a hypocritical myth, twisting history to mask an elite coup, can also be welcomed as the necessary capacity of social constructs such as sovereignty to go back in time, and to provide a normative foundation for a historical fact. A necessary solution for the chicken and egg problem of self-constitution.[159]

9.1 The importance of self-understanding for democratic legitimacy

A more appealing normative self-understanding of the EU is important for legitimacy in itself. For currently integration is often primarily justified as factually inevitable. Resisting it, therefore, betrays a form of naivety and other-worldliness automatically disqualifying one's opinion for serious consideration.

Yet even if integration is indeed factually inevitable, this does not automatically make it normatively or emotionally acceptable for the member peoples. Finding the narrative that transforms the necessary into the desirable is a vital part of constitutional mythology and politics. It is an important ingredient for generating legitimacy, as once again shown by the US experience. In the US the need to establish a more effective system for governance needed to be translated into a more appealing and normatively convincing narrative as well. A narrative of democracy and federalism which, in its turn, ended up significantly influencing the political reality and eventual constitutional nature of the US.

The confederal approach, including its focus on internal and popular sovereignty, can provide such an attractive democratic narrative of the EU. One that might convince the people that they, as the internal sovereigns, are empowered by integration, and by convincing them in fact contributes to achieving that end.[160]

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157 See, however, the overview of the significant direct popular support for accession described in chapter 10, section 6.1.2.

158 See also chapter 9, section 3.3. and 3.4. for this prescriptive potential and essence.

159 See in this regard also the analysis of this temporal trick in the 'judicial' constitution of the EU in *Van Gend & Loos* in H. Lindahl, 'Acquiring a Community: The Acquis and the institution of European legal order', 9 *European Law Journal* (2003), 433, 439 et seq.

160 Cf also Van Middelaar (2009), 294, 301 on the importance, and creative potential, of perception for social and institutional facts, and admitting that any claim to represent the *pouvoir constituant* requires an element, or episode, of bluff.

Creating such a convincing narrative is also important for the legitimacy of the *national* systems comprising the EU. For the longer national self-understanding and political discourse cling to the notion, or desire, of an absolutely sovereign and omnipotent state, the bigger the discrepancy with reality will become. For though the inevitability of globalizing forces does not in itself create legitimacy for integration, it cannot be ignored either. The state is no longer able to singlehandedly determine outcomes on many issues that its citizens do wish to influence. Continued national promises that the state is able to determine these outcomes can, therefore, only lead to an increased disillusionment of the people in national politics: It can never deliver what it promises, nor can it 'protect' them from the outside world. By clinging to a myth of statal autarky, in other words, national systems are undermining their own long term legitimacy. Instead they need to embrace new venues and methods for serving the interests of their people, an they must endow these new venues with the legitimacy required to make them work.

A last benefit of a positive confederal narrative of the EU is that it bases the Member States and the EU on *compatible normative foundations*. Both will be based on internal and popular sovereignty. The EU can then link to the normative structure of the Member States, without needing a people of its own, or developing a competing basis for authority that might undermine the ultimate claim of the member peoples at the national level. Instead both the national and the EU level can be conceptualized as two complementary servants serving the same popular masters.

The direct link with the member peoples, therefore, opens a channel for the EU to ground its authority in these peoples. To actually connect itself with these fountains of popular authority, however, the EU should embrace a confederal narrative. A narrative that includes internal and popular sovereignty, and the democratic self-understanding that comes with it. A narrative which allows the EU to be envisioned, developed, – and sold –, as a development to safeguard the sovereignty of the people and their democratic influence in a globalizing reality.

9.2 A confederal fairytale?

It can be objected that this picture from confederal sovereignty appears a very theoretical, normative, and abstract construct. And it is. It can equally be objected that this analysis requires a rather hopeful disposition, and some wishful thinking to boot. And in a sense it does. The confederal perspective purposefully includes an element of idealism, and is further based on the normative assumptions that authority should be based on the people, and that it is valuable in itself to preserve the distinct member peoples in the EU.

Against such understandable objections, however, it must first be replied that the idea of a sovereign people, or that of sovereignty in general, is highly abstract and theoretical.[161] Qualities that have not prevented these constructs from playing vital roles nationally over the past centuries. Second, to fully appreciate the potential of confederal sovereignty it is necessary to bear in mind its prescriptive nature. Sovereignty does not aim to simply describe a power reality. It prescribes the authority structure as it should be.[162] Although it cannot deviate from reality too much, it does aim to steer reality, and to provide a normative framework to justify it.[163] Confederal sovereignty can play such a prescriptive and legitimizing role for European integration. Besides justifying the current reality in the EU, it should act as a rudder and compass in developing or correcting the EU system to better conform to the confederal democratic ideal.

In that regard it is important that moving in the right direction, or even striving for the right goal, can already provide a certain level of legitimacy. Certainly for an ongoing project as the 'ever closer' Union, which is in need of a goal and positive dynamic. Even the US federate system was, and is, partially legitimized by a continued strive towards a future aim, towards an ever 'more perfect Union'.[164]

At the same time these defences obviously remain rather theoretical as well, just as most of the advantages of confederal sovereignty set out above. Although at this point one can conclude that confederal sovereignty at least offers the possibility of a more normatively appealing understanding of the EU, namely as a democratic imperative to liberate democracy and the member peoples from the increasingly inadequate confines of the state, the question remains how to operationalize confederal sovereignty, and how to realize these benefits of a confederal approach.

Fully acknowledging the tendency of reality to spoil perfectly good theory, part III of this thesis will therefore apply the confederal approach outlined so far to two challenges of reality: how to implement confederal sovereignty constitutionally and institutionally, and how to respond to the EMU crisis from a confederal approach. Before engaging these challenges, however, let us first provide a concluding overview of part II.

161 Hinsley (1986), 156 et seq.
162 See chapter 9, section 3.3 and 3.4.
163 CF also Börzel and Risse (2000), 5.
164 See the preamble to the US Constitution, as well as the 2008 inauguration speech by Obama still hailing 'A More Perfect Union'.

11 Conclusions part II: Sovereignty as part of the solution

1 The possibility and possibilities of confederal sovereignty

Part II has established the *prima facie* feasibility and value of confederal sovereignty for the EU. Contrary to popular belief, European integration does not inherently conflict with sovereignty. The EU can be seen as a logical and attractive confederal evolution of internal and popular sovereignty. An evolution that emulates the federate evolution of sovereignty in America and holds the potential to help realign the national democratic process with a globalizing reality, liberate the sovereign member peoples from their entrapment in a declining state, and establish a direct if secondary popular foundation for the EU.

As a result a confederal conception of sovereignty can help meet the main challenge identified by part I: To close the increasing gap between the EU's confederal basis and its expanding federate superstructure. Closing this gap is vital to sustain the modified confederal form developed by the EU. Without a sufficiently strong basis, the confederal experiment in the EU will in time be forced to federate, or to scale down its federate superstructure and take a step back into the unstable waters of traditional confederation or international organization.

To establish these conclusions, part II first introduced the contradiction generally assumed between sovereignty and integration, and the theoretical deadlocks that flow from this contradiction. It did so by setting out the key tenets of statism and pluralism, which represent two influential yet opposing approaches in the debate on sovereignty and the EU. Statism, as championed by *inter alia* the German *Bundesverfassungsgericht*, postulates the sovereign state as the *conditio sine qua non* for democracy and viable government. Integration must, therefore, remain within the limits required to protect the sovereign state. Pluralism, on the other hand, starts from the reality and desirability of far-reaching integration. Since sovereignty obstructs such real integration pluralism is forced to reject sovereignty altogether. Instead we should embrace a plural reality based on heterarchy, and rely on non-hierarchical mechanisms to coordinate the different authority centres within this pluriverse. Between the convincing arguments of statism and pluralism, however, we seemed forced to abandon either sovereignty or real integration.

Both schools seem to capture one half of EU integration, which simultaneously relies on its Member States and transcends them. At the same time both approaches also fall short, partially because of their inability to incorporate each others strong points. Statism, for instance, is forced to formulate to all kinds of sovereignty-based limits on integration. Limits that tend to be far too sweeping and static, and when applied honestly seem incapable of recognizing even the current reality of integration, let alone guiding its future development. Pluralism seems incapable of establishing any realistic foundation, even though it directly undermines the existing sovereign foundations of authority at the European and the national level.

The sovereignty either/or both schools force us into, therefore, results in a rather unattractive deadlock, and certainly seems incapable of providing the flexible foundation required by a modified confederation as the EU.

To escape this stalemate between sovereignty and integration part II then returned to the concept of sovereignty itself. Chapter 9 provided a conceptual and historical analysis of sovereignty. This analysis demonstrated how internal and external sovereignty form two distinct concepts with very different characteristics and histories, which have nevertheless become increasingly confused over time.

Internal sovereignty has always been concerned with regulating public authority within the polity. The internal sovereign was never absolute, not even under Bodin. Over time, furthermore, internal sovereignty has become increasingly flexible. Through the use of abstract sovereigns and constitutions it eventually allowed total delegation and division of sovereign authority. The synthesis of popular sovereignty, democracy and federalism achieved in the US further increased this flexibility: By locating sovereignty in the people sovereign prerogatives could be freely divided over multiple governments.

External sovereignty, by contrast, only became possible after the invention of internal sovereignty. Only when there was an 'internal' could the 'external' be created. As such external sovereignty is conceptually related to internal sovereignty. Yet at its core it forms a fully distinct concept that has also evolved into the opposite direction of internal sovereignty. To begin with external sovereignty does not concern itself with the key question of internal sovereignty, which is the organization of internal public authority. Instead internal sovereignty is simplified into the assumption that an absolute internal sovereign exists, and that this internal sovereignty is represented by the external sovereign. Where, furthermore, internal sovereignty became increasingly flexible and interlinked with constitutionalism, democracy and the people, external sovereignty moved towards an absolute, indivisible and statal sovereign. This is a powerful construct, which over time has come to dominate our understanding of sovereignty. As such it even eclipsed the internal sovereignty, which receded behind the increasingly seamless legal systems within the state.

Based on this analysis of internal and external sovereignty it was then suggested that the EU should be understood as a next step in the evolution of internal sovereignty. For where from the perspective of external sovereignty the EU indeed seems impossible to square with sovereignty, from an internal conception of sovereignty a far more logical and appealing picture emerges. One that fully fits with the confederal approach developed in part I and the evolution of internal sovereignty itself, and which reveals that it is not so much the EU and sovereignty that are colliding, yet the realm of internal and external sovereignty. A collision that causes some to reject the concept of sovereignty altogether, instead of returning to its primary and flexible internal core.

2 The fit and advantages of confederal sovereignty

Chapter 10 subsequently did return to this flexible core. It provided an outline of confederal sovereignty, its fit with EU law, and its different advantages.

In line with the internal and popular elements explored in this thesis, this outline of confederal sovereignty took the different member peoples as the sovereign starting point. It is in these peoples that ultimate and primary sovereignty resides. What has then essentially happened with European integration is that these peoples have relocated some of their sovereign authority from their states to the external and non-statal entity that is the EU. They have done so, moreover, reciprocally and in a confederal union with other sovereign member peoples.

This is an important departure from the traditional Westphalian arrangement, premised as it was on the state as the sole recipients of direct sovereign authority and exclusive nexus of internal and external sovereignty. Confederal delegation outside the state undermines the absolute external sovereignty of the Member States, as it propels the internal sovereign directly into the realm of the 'external'. The difference between internal and external sovereignty is, therefore, no longer masked by the state, and the normatively primary internal can come into conflict with the conceptually more absolute external.

Nevertheless this departure does not create a conflict between European integration and internal sovereignty. Quite the opposite: It upgrades internal sovereignty and adapts it to the current global reality it needs to shape. The internally sovereign member peoples are once more placed at the basis of political authority, after their position had been increasingly eroded by the growing dominance of the externally sovereign state, and the decreasing relevance of the internal in today's interdependent world. Any statement that 'the EU conflicts with sovereignty' therefore misses the point: integration fits logically within the federal evolution of internal and popular sovereignty, but empowers internal sovereignty at the expense of external sovereignty.

In addition to its conceptual fit within sovereignty, furthermore, confederal sovereignty also provides a strong legal, normative and evolutionary fit with the EU Treaties and the case law of the Court of Justice. Legally confederal sovereignty conforms to the foundation of the EU in the delegation of sovereign powers, and not sovereignty itself, as also held by the ECJ. Normatively it shares the respect for democracy and self-determination on which the EU is founded. Evolutionary it explains and justifies the increasing and intensifying relation between the EU and the individual.

Having established the overall feasibility and fit of confederal sovereignty chapter 10 subsequently demonstrated and explored several of its advantages and uses for the EU. In line with the two core objectives of part II it was first shown how confederal sovereignty can reduce the apparent tension between sovereignty and integration and the untenable positions that this tension forces us into. To this end we returned to the opposing schools of statism and pluralism. It was illustrated how both rely on unsuitable notions of external sovereignty, and how this leads to the extreme and untenable positions discussed. Then it was shown how both schools might actually be strengthened by switching to a confederal conception of sovereignty.

Statists, for instance, can develop a stronger and more convincing understanding of sovereignty that is based on the normative authority of the people instead of the state. An understanding that will support current and future integration, yet also provides a more flexible and therefore viable defence against excessive integration. This in contrast to the current static and undemocratic defence of the sovereign state, which forms a conceptual and political dead end and traps the people and democracy in the state.

Pluralist, in their turn, may retain most of the cherished plurality in the day to day reality of the EU, but can nevertheless ground and safeguard this pluralism in the ultimate foundation of the people. A foundation that can intervene in the case of fundamental conflict, the Achilles heel of pluralism, but does not reduce the EU to a linear hierarchy. For under a confederal approach neither the EU nor the Member States are to be ultimate or supreme authorities.

From a confederal perspective, therefore, not only the tension between sovereignty and integration is reduced, but so is the tension between statism and pluralism. An outcome that may suggest at least a partial synthesis between the two approaches, and thereby allow the EU to benefit from the strong points in both.

Resolving the contradiction between sovereignty and integration is also instrumental for the second core objective of part II: Grounding the federate superstructure of the EU. Sovereignty stops being one of the obstacles

that integration needs to overcome. Instead sovereignty, with its enormous potential to legitimize and structure public authority, becomes available as part of the solution. It enables a direct if secondary link between the EU and the member peoples. Although the states remain their principal political habitat, the member peoples have directly included the EU in their constitutional system for the delegation of sovereignty authority. The direct connection between the individual and the EU, for instance through citizenship the European Parliament or the direct effect of EU law, form a logical *quid pro quo* for this delegation. It is this link which opens up a path to a sufficiently stable yet still confederal basis for the EU in the sovereign member peoples. Even though it needs to be further developed and institutionalized, it offers the potential for direct though secondary popular legitimacy.

Such a confederal foundation in the sovereign member peoples, furthermore, has several additional advantages. To begin with it explains the relevance of constitutionalism for the EU, even though it is not a state. The EU Treaties after all form an integral part of the national constitutional systems, fulfil the constitutional task of delegating and controlling sovereign authority from the Member Peoples to the EU, and establish a confederal constitutional bond between the members. At the same time the Treaties lack the normative primacy and intensity of national constitutions. The Treaties can, therefore, be seen as subsidiary or secondary constitutions. Labels aside, and comparative caveats applying, constitutional logic and theory can therefore be usefully applied to the EU Treaties.

Second, and linked to the constitutional nature of the EU Treaties, confederal sovereignty can also help in reducing the supremacy conundrum. It allows us to distinguish between the narrow ultimate normative primacy of the national constitutions, and the broader operational primacy of EU law. This primacy of EU law is based on the mutually reinforcing bases of its constitutional nature, the fact that the EU holds sovereign authority from multiple member peoples at the same time, and the fact that these multiple delegations are reciprocal, and hence buffeted by the principle of *pacta sunt servanda*, a classic limit on sovereignty.

Crucially the ultimate primacy retained by the national constitution is not incompatible with this secondary and confederal form of primacy demanded by the EU. Constitutional courts have demonstrated as much by consistently accepting the supremacy of EU law over non-existential national law. They just cannot accept any challenge to the ultimate authority of the national constitution. This is only logical and suitable in a confederal system, which also does not have to make this ultimate claim. Obviously this retains the potential for conflict between the national and EU level as to what constitutes an existential issue, and where national primacy therefore trumps EU primacy. Yet the existence of a zone of possible disagreement does not alter the fact that, outside this penumbra of doubt, the national and EU claim to supremacy are different and compatible. By allowing us

to distinguish between the primary national supremacy and secondary EU supremacy, therefore, confederal sovereignty softens the primacy conundrum, even if it cannot solve the potential for conflict inherent in a confederal order.

Lastly, and vitally, it was shown how a confederal conception may offer a positive and normatively attractive narrative for the EU. One which casts the EU as a necessary tool for the sovereign peoples to escape the confines of their state, and to realign their influence with the global reality that needs governing. For what use is a purely national vote, no matter how 'sovereign' the state, where the national political decision it determines has no impact on reality? And how sovereign are a people really when they have no choice but to delegate all their authority to an increasingly absolute state?

From this perspective the EU can be understood as a crucial evolution in internal and popular sovereignty that safeguards democracy by updating it. Democracy 2.0 so to speak. Instead of a necessary evil that erodes the democratic glory days of old, the EU can be envisioned as, and subsequently developed into, the entity that saves popular sovereignty and democratic control from globalisation. It becomes a democratic imperative that empowers the people, whereas the rejection of confederal integration equals a refusal to evolve, which historically is a path to extinction only.

Obviously this last advantage of confederal sovereignty contains a significant prescriptive element, and does certainly not describe current popular sentiments. Yet precisely this element of idealism is also in line with the prescriptive nature of internal sovereignty outlined in chapter 9. Just as the federate conception of sovereignty provided a positive democratic narrative for the US, so a confederal conception of sovereignty may provide one for the EU. A narrative that may help realize the democratic potential of a modified confederation by providing direction and impetus for its future development, and allowing people to welcome it.

3 The confederal promise and challenge

Obviously the discussion of confederal sovereignty here has been selective. Even within the limited points discussed more research and analysis is possible and necessary. It is, therefore, most certainly not claimed that anything close to a solution, or even a full conception of confederal sovereignty, has been developed. What has been illustrated, however, is the *prima facie* feasibility and potential of the confederal perspective, and how the notions of internal and popular sovereignty may be part of any more complete confederal conception of sovereignty.

Yet the potential held by the confederal form must still largely be realized. The purposefully abstract confederal construct developed in this thesis must be translated, operationalised and institutionalized. In a sense it forms an artificial skeleton which needs to be supported by constitutional and institutional muscles and tendons, and especially but most complexly, brought to life by some political spirit.

It flows from the nature of confederalism that the confederal potential must be primarily realized at the national level. How to do so requires far more study and specific knowledge, also of the different national constitutional systems, than can be provided here. Accepting these limitations part III will nevertheless apply the central findings of this thesis to two key challenges of reality, for it is there that constitutional theory should aim to contribute.

First part III will engage with the dilemma of adapting the democratic process itself to a confederal reality. For it is in the area of democracy – and therefore the political spirit required to bring the EU constitutional framework to life – that a fundamental weakness still lies. One which needs to be addressed for the long term stability of a confederal union, and to substantiate the direct link between the EU and the member peoples established in part II. To this end, part III will analyze the capacity of the confederal perspective to adapt the focus and content of the democratic process – both at the European and at the national level– to a confederal organization of public authority. A potential that flows precisely from rediscovering the people as the ultimate locus of political authority, at least at the conceptual constitutional level.

Second, and as a final challenge, the confederal approach developed in this thesis will be applied to the EMU crisis. To what extent can the Euro crisis be explained from a confederal perspective, and even more tentatively, what would be a proper confederal response?

Part III

Towards a democratic union of sovereign member peoples: Application and Conclusions

12 A confederal evolution of the democratic process

1 Applying confederalism: The democratic process and the EMU crisis

So how do we put the confederal approach into practice? It is with this task in mind that part III turns to the *application* of the confederal approach to two central challenges posed by that nemesis of theory: Reality.

The first challenge this chapter engages is the need to adapt the democratic process to a confederal distribution of sovereign authority. How to make sure that the people can indeed extend their democratic control beyond the state, and fulfil the confederal potential for a positive democratic narrative set out above? For it is of little use to establish a confederal-conceptual bond between the EU and the sovereign member peoples if this bond is not properly institutionalized and operationalized within the democratic process.

The second challenge is provided by the EMU crisis. Chapter 13 applies the confederal approach to this crisis, which literally strikes at the EU's confederal core by simultaneously pressuring several of the confederal Achilles heels identified in part I. As such the value of understanding the EMU crisis as a perfect confederal storm will be illustrated, and some confederal responses will be explored.

If possible these two challenges lead us into even more complex territory than the contested terrain we have already crossed. The EMU crisis, for example, is constantly developing, and raises several political and economic questions on which precious little agreement exists. The concept of democracy, or the best way to achieve and maintain democratic government, have been contested since inception, and this contestation might even be part of their essence.

The ideas and suggestions developed below are, therefore, to be considered as highly tentative and exploratory. A caveat that applies most of all to some of the concrete proposals made, which primarily serve as instruments of exposition: they illustrate the general confederal approach suggested, and some of the ways and directions in which the confederal approach might be constructively developed in the future. As such they may also serve as an inspiration for further research, that could go far deeper into the required detail of particular confederal applications. The suggestions made below, therefore, certainly do not intend to provide any complete or even sufficient

answers to the challenges identified. They are fully conscious of the shifting and complex reality they engage, and the sacrifice of analytical purity this sortie into actuality entails. A cost, however, that is deemed acceptable to test and explore the potential contributions of the confederal approach to the current challenges facing the Union and its member peoples. For it is in such bridges between theory and reality that constitutional theory must eventually prove its worth, even if it entails the risk of falling into the very fissure it hopes to span.

2 A confederal evolution of the democratic process

Our first challenge in a sense reflects the central challenge posed by the *Bundesverfassungsgericht* and the statist camp more generally: How to retain a sufficient democratic process whilst delegating significant sovereign authority outside the state, and therefore outside the full control of the national democratic system?

To help meet this challenge this chapter first establishes its confederal root cause. Instead of the declining power of the state, a confederal analysis points to the inadequate incorporation of European integration at the national level, and the resulting inability of the member peoples to control the sovereign powers they have delegated via the national democratic process (section 3). Subsequently, building on the ideas developed in part I and II, some tentative proposals will be developed to improve this incorporation at the national level, and establish a national political process that allows for democratic control over EU affairs (section 4). Section 5 then explores how some changes at the EU level might support this confederal evolution of the national democratic process, before section 6 provides a brief conclusion, and we continue to the challenge of the EMU crisis in the next chapter.

3 Confederal causes: The lack of a national process to control

Statists rightly point out that the democratic woes of the EU relate to the declining and changing role of the state.[1] Yet from a confederal perspective this decline of the state is only a symptom, and not the root cause.

If we once again start our analysis from the member peoples instead of from the member states, another more fundamental challenge becomes apparent: The fact that the extensive delegation of sovereign authority outside the state has not yet been properly translated into the national constitutional level. As a result no sufficient national mechanisms have been created to allow the member people democratic control over the powers they have

1 See chapter 8, section 4.3.

delegated to the EU, or over the way their own national institutions behave at the EU level.

Two related issues have to be appreciated and further analyzed in this regard. First, how the delegation of sovereign authority to the EU means that no single national democratic system has full control any longer over the exercise of this authority. As such no single national democratic process can fully determine the political outcome in these delegated fields, causing these processes lose some of their traditional content. And what is the point of a political process if it cannot determine outcomes?

Second, there is the important new role which integration has bestowed on national institutions as representatives and guardians of outsourced power. A role which has not yet been properly integrated into the national constitutional system or democratic process. Yet it is precisely this new role for national institutions that might be valuable in providing new content and meaning to the national democratic process, and to help establish a stronger link between the national electorate and the EU. Let us look at both issues in some more detail.

3.1 The democratic disconnect: An irrelevant national democratic process?

As discussed, part of the genius of the American evolution in popular sovereignty lay in its capacity to dovetail sovereignty with democracy and federalism. By encasing the popular sovereign in a single state, furthermore, it was ensured that the *pouvoir constitué* overlapped with the *pouvoir constituant*. In other words, the sovereign people delegated power to the state, which was in turn controlled by the people, albeit not in their role as sovereign but in their role as the electorate. In this way a double democratic legitimacy was achieved.

First, power *derived* from the people, and the people could alter the delegation of powers if they so desired. They could do so either by instigating a constitutional amendment, or more radically, by going outside the system of the existing constitution and, as the *pouvoir constituant*, establish a new constitution altogether.[2]

Second, within the system established by the Constitution, the people controlled the *exercise* of the power they had delegated as the electorate. At least to the degree that elections equal control, the people could thereby determine the use of these powers, or at least sanction this use afterwards.

2 Cf. the power of the German people to do so as recognized in BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil* par 228, as well as the beautiful discussion of such events by J. Finnis, 'Revolutions and Continuity of Law', in: A. Simpson (ed), *Oxford Essays in Jurisprudence, Second Series* Clarendon Press 1973, 44 et seq.

Importantly, the EU affects both these links between the people and the authority they have delegated.

First the powers of the EU still derive from the member peoples, at least under the confederal approach developed above. If they choose to do so, furthermore, the people can reclaim all powers delegated.[3] As we saw in part I, however, national constitutional legislators cannot themselves amend EU treaties or determine the scope of the powers delegated to the EU. Such changes require unanimous assent from all other sovereign member peoples or the ECJ. At the same time the EU treaties do form an integral part of national constitutions.[4] As a result, the member peoples have lost full control over one part of their own constitutional structure, except for the extreme, and perhaps unrealistic, option of leaving altogether. Although the people remain the original holders and delegators of power, therefore, they have lost the (relative) control that constitutional amendment offers.

The EU also impacts on the second link, i.e. the power that the people retain as the electorate. After all, before European integration, the state, however composed, held a virtual monopoly of all delegated sovereign powers. As a result, the entire machinery of exercising and controlling these powers was developed within the state as well, and could rely on the coherence this brought.[5]

Outsourcing sovereign powers to the EU changes this picture. The exercise of authority is no longer fully controlled by the system developed within the national state. As rightly pointed out by the statists, this also means that the national democratic process no longer fully controls the exercise of these delegated powers.[6] At the same time the member peoples have not received an equivalent democratic control at the European level. At this EU level they only represent one of many voices. Unlike in the US, therefore, the people, as electorate, no longer directly control all the power they delegate as sovereigns. They have lost final control over a large and increasing chunk of sovereign competences that derive from them, or at least their control at the EU level does not match the level of control they have over authority that is delegated to the state.[7] The result seems a democratic disconnect between the people and their authority.

Of course one could argue that the aggregated EU powers are in the end democratically controlled by the representatives of the member peoples jointly, as well as by the European Parliament. Yet this deceptive statement

3 Art. 50 TEU. See more elaborately chapter 2, section 2.5.3.
4 See chapter 10, section 7.
5 See chapter 9, section 6.3 and 7.2.
6 See chapter 8, section 4.
7 Of course the level of actual control within the national system should not be exaggerated either, yet clearly exceeds the situation pre-delegation.

fails to distinguish between two meanings of the term democratic control. For on the one hand, there is indeed the fact that all individuals who exercise power in the EU are under some form of democratic control: Political power in the EU is not wielded by unelected despots. A true but relatively irrelevant conclusion, as the same would be true if we delegated all EU authority to the Swiss.

The second meaning of democratic control compares the amount of control a people has at the EU level with the control they would have over a purely national competence. Clearly, under this more relevant standard, the electorate has lost some control. From this perspective the fact that the ministers and MEP's that have a say over your future have all been democratically elected by *other* member peoples is – apparently– of little relevance or comfort to most citizens.[8] Expecting the Bulgarian people to feel as represented by a Danish minister or a Spanish MEP as by a Bulgarian representative implicitly assumes precisely the federate bond between member peoples that is lacking in a confederal system.

From the confederal perspective, which starts from the member peoples, a loss of democratic control over the exercise of authority does, therefore, occur once a power is delegated to the EU. A loss, furthermore, that occurs even where unanimity is required for the exercise of this competence. For though a requirement of unanimity prevents the initial use of the competence against one's will, it still removes the national capacity to decide on the *positive* use of a competence. In addition, once legislation has been adopted, changing that legislation will again require unanimity, reducing the capacity of a member people to effectuate a change.[9] Consequently a veto may offer some level of control as long as no action has been taken at the EU level. But once the competence has been used the veto tends to *reduce* the political capacity of a single national electorate to change the EU measure. The root causes of the democratic challenge, therefore, go deeper than just qualified majority.[10]

8 Cf also Von Bogdandy (2000), 50, concluding that the EU still relies on the national systems for primary democratic legitimization.

9 What is more, where a shared competence is concerned the Member States will be preempted from acting nationally as well, whereas any remaining national competences will have to respect the action taken at the EU level. Where a competence has been delegated as an exclusive EU competence, furthermore, Member States will not be able to act at all, and therefore become fully dependent on agreement at the EU level for action to be taken.

10 Here the BVG, therefore, is mistaken where it deems the requirements of German democratic control satisfied where unanimity is required. See BVerfGE 89, 155 (1993) *Maastricht Urteil* and BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil*.

This mismatch between the powers delegated by the people and the controlling capacity of the national democratic process is problematic, and contributes to the much debated democratic deficit of the EU.[11] It also leads to a conundrum: EU integration is so far-reaching that it undermines national democratic control. Yet it is not far-reaching enough to establish full democratic control at the EU level. As with sovereignty, somewhere in the process of integration, democracy seems to have left the building.

To a certain extent such a mismatch between delegated powers and the different constituent powers should simply be accepted. It is the price to be paid for desiring far-reaching cooperation without creating a European people and giving up one's national sovereignty. For retaining this sovereign position means relying on reciprocally delegating powers, and therefore shared central government.

It must also be recognized that, even without the EU, national electorates would have lost the *de facto* capability to determine outcomes in many of the fields now under EU control.[12] Globalization has undermined any such power in areas such as economic policy, trade, environment and security.[13] The Swiss example is illustrative here: Staying outside the formal decision-making process of integration does not protect national autarky, but only limits your voice in decisions that will ultimately control your own actions anyway.[14]

Lastly, it must also not be overlooked that *even full federation would not increase the actual controlling influence of the different member peoples*. Just as the influence of the Virginians or the New Yorkers at the federate level did not equal their control within their respective states, so the influence of the Belgian or Slovak people on the use of EU authority would not be increased by European federation. Federation would, therefore, not repair the loss of control outlined above. Federation would only declare this loss to be democratic, as these groups would have become part of one European people. A declaration that would ring hollow as long as it does not represent social reality.[15]

11 Cf also J. Tully, 'The Unfreedom of the Moderns in Comparison with the Ideals of Constitutional Democracy', 65 *Modern Law Review* (2002), 204.

12 Craig (1999), 26.

13 Also see W. Wessels, 'The Modern West-European State and the European Union: Democratic Erosion or a New Kind of Polity?', in: S. Andersen and K. Eliassen (eds), *The European Union: How Democratic is It?* (Sage 1996), 84 et seq.

14 I am grateful to Professor Christa Tobler, who is uniquely qualified to assess this dynamic, for her thoughts on this topic.

15 Cf also Tully (2002), 204.

Nevertheless, the current loss of control is more than can be accepted, whilst EU authority is still increasing. Moreover, the EU should help to regain democratic control over the invisible hands now pushing national governments around.[16] It should not, therefore, sacrifice democracy to the aim of simply establishing some control at all.

Yet how to address this gap between the constituent power and actual democratic control? How to democratically substantiate the direct but subsidiary link between the EU and the sovereign member peoples?[17]

One response, which might be perceived as pro-integration, would be to try and close the gap at the EU level. Such a response would entail creating a European democratic system that could compensate the democratic control lost nationally. As we saw however, an equivalent democratic control at the EU level would require fully federating in the sense of creating one sovereign European people, and would only solve the loss of control by a member people in name. As discussed, this is not a viable, desirable, or necessary option, and certainly does not fit with the current confederal reality in the EU.[18]

Consequently, the EU should not even attempt to create the primary democratic control required at the European level. The EU would position itself as a rival to the very same national political authority its confederal foundation relies upon. Indeed the failure of the 'Constitutional' Treaty, and the apprehensive reactions it inspired at the national level, demonstrate this all too clear.

As we also saw, however, the statist solution of retaining all powers that should be controlled by a democratic process at the national level is not feasible either.[19] Such an approach leads to a defensive and inflexible position that traps the democratic process in the state. It tries to shut out global realities rather than addressing them. But if neither retaining powers at the statal level nor democratizing the EU seem feasible, what to do? A question which

16 See for the importance of integration in this regard Habermas (2001) and Habermas (1996).

17 See chapter 10, section 6 for a discussion of this link.

18 Compare in this regard also the, perhaps abrasive and cynical, but also realistic confidence of Mitterrand and Andreotti in the primacy of their own national legitimacy over that of the European Parliament. Mitterrand, talking to Major, stated that the European Parliament would not be legitimate 'in a hundred years' and that 'The Commission is zero, the Parliament is zero, zero and zero is zero', or Andreotti, who referred to the European Parliament as a 'demagogic' concession to federalist rhetoric. Obviously these statements are extreme, and deny the very real link that does lie between the member peoples and the EU. Nevertheless they do capture the ultimate political confidence, which befits a confederation, of the primary national political order. (Both quoted in Van Middelaar (2009), 169, my translation.

19 See chapter 10, section 4.3.

leads to the second issue indicated above: The new roles and functions that national institutions have acquired due to integration, and the failure to properly translate these into the national constitutional systems.

3.2 The unconstitutionalized double role of the state

As discussed in part I, the EU does not have a separate representational system of its own. Instead, the merged EU system largely utilizes Member State institutions.[20] Accordingly these national institutions have acquired important new tasks and powers due to integration. They now wield the power that has been received at the EU level, and that gives a voice in determining how the aggregated competences of the EU will be applied.

The national constitutional and institutional structures, however, have not been designed with these new tasks and powers in mind.[21] Most were either established, or have evolved, under a situation of near statal monopoly on public authority. Nor have these systems been redesigned to incorporate the confederal reality of the EU.[22] For example the *relation* between the two different roles – that of exercising national powers and controlling the ones delegated to the EU– is generally not well developed or institutionalized. Quite the opposite: Generally, EU responsibilities have simply been grafted on to an existing national institution without any changes to its organization, imbedding, or its electoral control.[23]

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20 See chapter 2, section 3.2.3.

21 M. Claes, *The National Constitutional Mandate in the European Constitution* (Hart Publishing 2006), 189.

22 There are significant differences between Member States as to how *within* the existing system control over EU delegation has been incorporated. The Danish parliament, for instance, plays a very active role through its existing powers of control over the government. Equally the British parliament also applies close scrutiny, where other parliaments do not. For the Netherlands see, for instance, the report by the Council of State on the consequences of the EU for Dutch state institution (Tweede Kamer, vergaderjaar 2005–2006, 29 993, nr. 27), The report by the *Wetenschappelijke Raad voor het Regereingsbeleid* (WRR) of 5 June 2007 on 'Europe in the Netherlands' and the final report of the Dutch Commission of State on the Dutch Constitution of 12 November 2010, especially part III. The argument here does not deny the differences in the Member States nor the progress made within some systems. The argument is that the changes caused by the EU require more formalized and explicit constitutional and institutional responses.

23 Obviously this is also due to the fact that the Treaties link certain powers directly to the national function. The point, however, is that the national constitutions have often not yet, or at least not yet more fundamentally, internalized or incorporated these EU powers. In this regard Maduro also rightly points out that one of the main impacts of the EU on competences is not a shift from national to EU competences, but: 'Frequently what changes is the balance of representation and participation between different national actors in the definition of a certain policy and not so much the European or national character of the policies. (…) Strategic Europeanisation alters the national actors that dominate certain policies and in this way represents a difference challenge to sovereignty.' (Maduro (2006), 520.

Consequently, the confederal foundation of the EU, which must necessarily rest on the national constitutional structures of its members, has not been refitted for its task. This rather remarkable fact has several problematic consequences. To begin with, it distorts the pre-existing institutional and political balance within national constitutions, which was calibrated for a monopoly position of the state. This distortion is especially acute where the impact of the delegation is asymmetrical on the different national institutions. The relative empowerment of the executive and the bureaucracy by European integration are well known in this regard.[24]

Even more fundamentally, however, the effects of European integration have also not been translated into the national systems for *acquiring, exercising and accounting for* political power.[25] As a consequence, the national constitutional system, and the political process it structures, do not sufficiently take into account the crucial importance of the EU and the significant authority that is wielded at the EU level, also by national representatives.

No special offices, for instance, have been created to deal with the national dimension of integration, nor has the national electoral systems been changed to take account of EU membership. Political power is won in general national elections, and these elections are logically dominated by national issues. No separate system for awarding and controlling the EU dimension of national competences exists, nor is the EU very relevant to acquire national political power.[26] As a result there also *cannot be* a full national democratic process on EU issues: There simply are no national EU elections to win or EU powers to conquer. Instead EU power is included in the spoils of national political victory, like a complimentary cookie with your coffee.

This system might perhaps have been a logical approach in the early days of integration, but has become increasingly unworkable with the growing relevance of the EU. The cookie is reaching rather epic proportions, and cannot remain complimentary. Politicians should be forced to fight for this power, and through such contests allow the member people to influence the way this power is used. After all, as long as politicians can only acquire and maintain political power in elections primarily geared towards national topics, we should not be surprised at politicians hiding or selectively representing their European record, refusing to explain or take responsibility for unpopular European measures, or even to invest in educating the electorate on EU issues.

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24 Craig (1999), 24 or Weiler, Haltern and Mayer (1995), 32.

25 See on the importance for a matching system of accountability also Keating (2006), 206.

26 See for a discussion of this point, including a comparative perspective to the US, chapter 5, section 2.

The continuing, and often decried, failure of the national political debate to include EU affairs can, therefore, be linked to the relative lack of incentives to do so, and the lacking incorporation of European integration in national constitutional systems.[27] It poses a significant risk for the hollowing out of the national democratic process, and thereby the confederal foundation of the EU.[28] As long as national politics is not incentivized to incorporate EU issues, one should conclude, in a variation on the *Bundesverfassungsgericht*, that the value of a national vote is undermined: For what use is a vote on an irrelevant national competence? And what use is my vote if I cannot use it to directly indicate my EU preferences? If my national vote does not carry some real EU impact, I have truly lost part of its value.[29]

To create a confederal democratic process, therefore, the constitutional systems of Member States should be better adapted to their new functioning within a confederal constitutional system. For even though many constitutions contain explicit clauses recognizing the constitutional importance of EU membership,[30] this confederal reality demands more far-reaching adaptation at the national level than has been realized so far.[31]

3.3 The missing national link in confederal democracy

As the preceding analysis shows, the real challenge for a viable confederal democratic process in the EU is twofold. First, to deal with the loss of ultimate control on political outcomes suffered by the member peoples, and the loss of traditional political content this causes. Second, to better incorporate the reality of European integration into national constitutional and democratic structures.

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27 See in this regard also the repeated attempts by national constitutional courts to draft national parliament into the EU discourse, as for instance discussed in D. Piquani, 'Arguments for a Holistic Approach in European Constitutionalism: What Role for National Institutions in Avoiding Constitutional Conflicts between National Constitutions and EU Law' 8 *European Constitutional Law Review* (2012), 493, and Cuyvers (2011a).

28 See also S. Andersen and T. Burns, 'The European Union and the Erosion of Parliamentary Democracy: A Study of Post-Parliamentary Governance', in: S. Andersen and K. Eliassen (eds), *The European Union: How Democratic is It?* (Sage 1996), chapter 13.

29 BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil*, for instance paras. 218, 226, 244 and 246, as well as BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*, par. 98.

30 See for example art. 34 of the Belgian Constitution, art. 88 of the French Constitution, art. 23 of the German Basic Law, art. 11 of the Italian constitution, art. 90 of the Polish Constitution, or art. 93ff of the Spanish constitution, all *authorizing* delegation to the EU. As further discussed below, however, they do not sufficiently adapt their own systems to this delegation.

31 See also on this need to adapt the national level to support EU powers Lindseth (2010), for instance, 12-14.

As will be illustrated below it is this second challenge that might also hold part of the answer to the confederal democratic conundrum. By better incorporating EU integration into national constitutional systems and democratic processes, one could envision a more confederal notion of what democratic control and legitimacy should entail.

4 Building blocks of a confederal democracy

Fully accepting the objections that can be raised to any such presumptuous exercise, and reiterating their primary function as tools of exposition, this next section proffers two confederal suggestions to meet the democratic challenges set out above.[32] First, how the delegation of authority could provide an alternative substance for the national democratic process. Second, how to better institutionalize and embed EU integration at the national constitutional level, and create the incentives required to establish a national political process on such delegation of authority.[33] Though these suggestions will inevitably fall short, if only as this is not the place to fully develop them, they clarify and illustrate the kind of confederal exercise suggested, and the direction in which further research may look for further confederal solutions.

4.1 Building blocks: Delegation as democratic substance

The first suggestion points to the potential of delegation to provide new substance for national democracy.[34] Both decisions on *whether* authority should be delegated to the EU and decisions on *how* to exercise and control authority once it has been delegated should be developed into important content

32 In that regard it also responds to the challenge of Bellamy that 'Instead, attention should be focused on improving the EU's mixed constitution in ways that further enhance the reciprocal interaction and dialogues between its multiple *demoi* and levels of governance.' It does so, however, *within* the concept of sovereignty, and not of pre-sovereignty. More generally it is believed that the benefits his republican notion of 'pre-sovereignty' is designed to achieve can be better secured in a confederal model, which provides both dialogue and necessary stability. See Bellamy, (2006), 189.

33 Here a solution, therefore, is sought in improving the system of representation. An option believed to be more promising and realistic than a more radical shift towards participation as the basis for legitimacy. See for such a proposal J. Cohen and C. Sabel, 'Directly-Deliberative Polyarchy', 3 *European Law Review* (1997), 313. The benefit of staying within the scheme of representation, thereby, is that there actually are stable and self-constituted units to represent.

34 Cf also Van Middelaar (2009), 398: 'De opdracht aan de gezamenlijkheid is de stemmen van dit oude publiek – eerste de parlementen, dan de kiezers daarachter – in de Europese democratie te laten meeklinken. Dit is niet eenvoudig, maar veel keuze hebben de lidstaten niet.' Also see the (Schmittian) question that Huysmans correctly links to transnationalism when he talks about the '(..) re-emergence of the question of the political: that is, where, and what is politics?' Huysmans (2006), 216.

for national democracy. These decisions can then replace some of the substance of national democracy that is lost due to integration, allowing the content of the democratic process to evolve along confederal lines as well.

This suggestion refocuses part of the national democratic process on the new role and powers that national institutions have acquired due to EU cooperation. After all, these roles and powers more than deserve democratic scrutiny, and can provide new and important substance for democratic debate.[35] New substance that could also alleviate the fears of *inter alia* the *Bundesverfassungsgericht* that the national political process might be reduced to insignificance by integration. New substance that nevertheless remains on the national level, and thereby also avoids the many obstacles statists have identified for fully fledged democracy at the European level.[36] Instead of trying to create a primary democratic process at the EU level, this new substance utilizes the national democratic system, and relies on the preconditions for democracy that pertain in the national context.

The ways in which delegation can be transformed into new substance for national democracy are many and depend on a multitude of national factors. At the core of any suggestion, however, should be the objective of ensuring that the national democratic process engages with two questions. First, which authority should be delegated to the EU. Should, for example, the EU regulate banks, social security, cross-border crime, healthcare, social housing, environmental pollution or coordinate defence and external policy? And if so, to what level and in what way? And if authority on these issues is not delegated, what scope is realistically left for national policy?

Second, how should national representatives operate at the EU level? Here a national process can never determine the outcome of a political decision at the EU level, but this does not mean that such decisions provide no substance for democratic debate. Especially not if the decision to delegate a certain power has first been democratically debated and decided as well: The electorate might care more for the use of a European competence if they themselves have supported delegating this competence to the EU level. With time and practice, furthermore, both the electorate and the political operators will become more informed and adept at discussing and deciding such decisions on delegation and EU manoeuvring.

Surely these questions deserve democratic debate, and surely they contain sufficient substance for such debate. At the same time such political debate on delegation *can* only take place where there are suitable procedures and fora, and they *will* only take place where there are sufficient incentives.

35 Cf, coming from a republican angle, Craig (1999), 40.

36 See in particular the statist critiques set out above in chapter 8, section 4, and especially the variant of Kirchhof (2010), 736 and Grimm (1995), 296.

From the confederal perspective, two complementary developments are, therefore, necessary as well to allow a confederal democratic process to develop and function, namely the national institutionalization of EU delegation, and the corresponding flexibilization of delegation at the EU level.

4.2 Three guidelines for the national institutionalization of integration

So how to remedy the current lack of constitutional and institutional embedding of European integration at the national level, and how to create the necessary incentives to ensure that delegation and the use of delegated powers become politicized?[37]

Clearly any solutions on this point must heavily depend on the specifics of the national constitution involved. Imposing one uniform system would also go against the confederal nature of the EU, certainly as the required modifications concern vital political issues. The often intense battles over voting rights, voting districts, campaign finance or voting systems in general attest to the difficulty in changing such authority-allocating rules and the fundamental importance they carry for a constitutional system.

Nevertheless, three general guidelines or guiding principles could be formulated. Guidelines which contribute to creating an institutional home base for European integration at the national level, and providing the member peoples with a national handle on integration as a starting point for politicization and confederal democratization.

In line with the confederal approach, a first principle should be to ensure the fit of any institutional modifications with the national system and its unique characteristics. Ideally the modifications would build on existing institutions and their specific roles within the national system, which could then be refocused or amplified to take European integration into account.

Second, the primary aim of any modifications should be to create an institutional nexus for EU issues to which a national political process can attach itself. European integration should have a visible location and place in the national system where political battles can be fought. This requires that sufficient and real EU related competences are bundled in this institutional nexus, and that sufficient 'events' such as elections, important decisions and public procedures are created to allow for real political debate over these competences. These elements are absolutely vital: One simply cannot expect a political process to develop if there is no real power to fight over,

37 Cf in this regard also the intuition of Van Midellaar that, by introducing a blocking power for national parliaments in the passerelles, they in a sense also become part of the EU *pouvoir constitué*, a role which fits in the confederal model of popular sovereignty, yet needs to rest on a national constitutional mandate. Van Midellaar (2009), 180. Further see on this issue Besselink (2007), 17 et seq.

or if there are no venues to fight in. We need both a prize and an arena, and instead of blaming national politicians for not politicizing the EU on their own accord, we should create the constitutional sticks and carrots that would allow them to do so.

Thirdly, and closely related to this second guideline, control of this EU nexus should remain indispensable for the exercise of national political power. EU related powers should not be separated from the exercise of national authority, to the extent this is even possible. The objective must be to align and merge the national and the EU process, and to allow the EU political process to share in the energy and vitality of the national one. In addition to granting real powers to this EU nexus, the overall control of national government should therefore require control of the EU nexus as well.

By interlacing the national and EU in this manner, EU affairs are injected into the primary national political process. Acquiring and maintaining control of government will require winning at least one election that is primarily concerned with EU affairs, and thereby forces and rewards those striving for political power to establish a coherent and balanced narrative that encompasses both the national and the EU dimension. It allows the people to choose which of these narratives they prefer.

Of course these guidelines are far from conclusive or complete, yet they do capture what should be the primary focus of modifications intended to recalibrate national constitutional systems to their life in a confederal system. To further illustrate these guidelines it is useful to briefly, and again highly tentatively, provide one concrete example of how they might be implemented in a national system through the establishment of EU senates.

4.2.1 EU senates

In line with the first guiding principle the idea of EU senates starts from the different national equivalents of senates, such as the House of Lords, the *Bundesrat*, the Dutch First Chamber (*Eerste Kamer*), the Polish *Senat* or the *Senado de España*. Alternatively, for the 12 Member States that do not have an upper house, a larger modification would be required, or another public body, such as a council of state, could be upgraded to a level where it could function as a democratic EU nexus.[38] The central suggestion is to transform these senates into the required EU nexus by increasing their profiles as EU chambers.

Starting from these senates is logical since the primary national chambers cannot be transformed into EU chambers, and because precisely these national chambers are in need of an EU counterweight. Senates also tend

38 Bulgaria, Cyprus, Denmark, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Slovakia and Sweden do not have upper houses.

to have a certain aptitude for technical and legal EU affairs. This aptitude of upper chambers as EU nexus seems at least to be confirmed by the way in which some of them, like the House of Lords, have already started to play an increasing role in their national EU policy.[39] Such scrutiny, however, still depends on the use of pre-existing powers. It is not institutionally embedded or supported, for instance, via special powers or procedures, let alone that such EU roles have been incorporated into the electoral system, or other mechanisms to acquire political power.

Starting from the national senates also creates a logical confederal mirror image of a federate system. Where in a federate system primary control of the central government lies at the federate level, in a confederal system this control lies at the national level. A confederation should then rely on multiple national senates instead of one federate senate at the central level, as it is on the national level that primary political authority remains.[40]

4.2.2 Competences

In line with the second guideline, such EU senates should receive serious EU related competences. These competences should provide these chambers with real political power worth fighting over, or at least provide them with the constitutional tools to conquer this power nationally. In addition, by concentrating multiple EU powers in one body, a clear and visible hub for EU affairs will be created nationally.

Obviously the precise powers of such chambers should depend on the specific national context, but several possibilities can be envisioned. To begin with, these chambers could receive the *exclusive* power, or even obligation, to mandate the EU activities of national representatives such as ministers. The EU senate should determine which votes are important, provide binding voting instructions, and receive the capacity to sanction ministers that do not loyally ask for or follow instructions.[41] In this manner, EU decisions could be politicized nationally. Similarly, the EU senate could be empowered to hear and instruct other high ranking representatives at the EU level, including members of COREPER I and II, or the different committees.

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39 See, for example, the impressive reports on the Lisbon Treaty: House of Lords, European Union Committee, The Treaty of Lisbon: an impact assessment (London, HL, 10th Report, session 2007-08, 2008).

40 In those Member States that already have a federate system nationally this suggestion would have the additional benefit of better incorporating the different regions into the process of integration, countering the current risk that European integration undermines the national federate system.

41 Compare in this regard also the confederal habit under the Articles of Confederation to provide delegates to Congress with written instructions.

In addition, these EU chambers could receive the power, to the exclusion of the 'national chamber', to make EU appointments such as the European Commissioner. The national senates jointly could then appoint EU positions such as the President of the European Council, the President of the Commission, or the EU Ombudsperson. Going even further far-reaching, these senates could receive the power to instruct or elect the members of the European Parliament, or receive double mandates themselves.[42] This option, of course, faces the objection that it removes the direct link between the citizen and the European Parliament. Yet in practice it may strengthen this bond, as creating a link between the European Parliament and a national chamber might bring the European Parliament closer to national citizens as well.

Most fundamentally, the EU senate could receive specific budgetary powers, the classic root of all parliamentary power. These powers could include approving the EU budget, instructing the national representatives to make specific budgetary proposals at the EU level, determining the way in which EU subsidies are used nationally (earmarking), or the method of collecting and financing EU obligations. More far reaching, EU chambers could also receive special powers in the national budget, for instance in relation to EU budgetary rules. Again much will depend on the specifics of such powers, which hide more than one devil, but the general objective should be to connect the EU chambers to this ultimate parliamentary power source.

Lastly, such EU senates could be interconnected, and receive certain joint powers at the EU level. For example, members of the respective senates could be awarded observer status in other national senates or at the European Parliament (where double mandates are not adopted). In addition, a certain number of senates could jointly receive a right of initiative at the EU level, or even receive the power to table Treaty amendments.

Clearly these are only some possibilities, and it will be for each national system to decide which particular competences to grant, and how to design each specific competence. What is crucial, however, is that a critical mass of competences is granted, and that these EU chambers become directly elected in separate elections, so that their use of these powers becomes subject to direct political contestation. There should be an open political process to compete for these powers, so that a political discourse can develop, political parties are forced and enabled to develop a constructive, or at least coher-

42 At least some of the traditional arguments against double mandates would not apply to such specific forms of mandating, and they would have the automatic benefit of linking the European Parliament to national politics, and ensuring that national political decision making would be better informed. See in this regard also the practice of the double mandate in the beginning of European integration under art. 20 ECSC, which dovetailed very nicely with the confederal conception of sovereignty. The Assembly was: 'composed of representatives of the peoples of the Member States of the Community.'

ent, vision on the EU, and the member people can choose which one they like best.

4.2.3 Prerequisites for national control

Lastly, and in line with our third guideline, EU senates are easily linked to the exercise of national power. Control of the Dutch senate, for instance, is necessary to securely govern in the Netherlands. Retaining control of the senate is, therefore, required to secure effective national political power, and to realize one's national agenda. In a similar fashion the consent of EU senates could be made a prerequisite for all, or a selection of, national legislation, including the budget.

As soon as control of the EU senate becomes necessary for national control, political actors are further incentivized to acquire control of the senate. This stimulates them to develop, promote and explain their positions on EU integration, even if only during elections for the EU senate. After all, losing a majority in the EU chamber would endanger the national agenda, and thereby what shall and should remain the primary focus of national politicians in a confederal Europe: National political power.

As a result of the interlinking between national and EU chambers the energy of the national political process is partially diverted to EU affairs, which helps to politicize the EU, and develop a confederal democratic process. For the EU will only become politicized where this is necessary to win and exercise national power.[43]

Through this democratic process the member peoples will then be enabled to exercise democratic control on EU affairs at their own national levels. Via EU senates, and the options developed and propagated by the different political actors to acquire control of these senates, they can indicate their preference on the delegation of authority to the EU, and the use of authority that has been delegated. As a result their national vote will acquire more impact on EU affairs, and become more valuable because of it.

4.2.4 Conclusions EU Senates

Clearly, these proposals are highly underdeveloped, limited to only one option, and merrily gloss over a host of problems and challenges. For example, granting such far-reaching powers to a second chamber will have a significant impact on the overall balance of powers and the dynamics within a constitutional and political system. It rides roughshod over complex and finely attuned national systems and conventions, and may cause all kinds of new problems, such as stalemates between the national and the EU cham-

43 A thesis also supported by our US example. As we saw, after all, one of the key political reasons for supporting the move towards a US federation was the need for the former elites to regain political power. In other words, the drive for a federation was linked to, and fuelled by, clear political interests. See above chapter 5, section 2 and 3.

bers, or deadlock at the EU level because of purely national politics being played out in EU senates. Equally, the separation between national and EU powers may not be as logical as implied.

The limited objective here, however, was merely to illustrate the direction in which confederal solutions could be sought to address the democratic gap outlined earlier. In line with the confederal approach developed here, these solutions should be primarily sought at the national level, and the establishment of national senates is one particular option in this regard that could be further explored. At the same time the focus on the national level does not mean that no improvements could be made at the EU level to support the development of a confederal democratic process.

5 EU contributions to confederal democracy

This next section zooms in on two possibilities for the EU to support a confederal democratic process at the national level. First, it considers how the EU may help to create the political space required for national politics to engage with delegation as new substance. Second, it discusses some ways in which the EU can stimulate and support a confederal evolution of the national democratic process, including the gradual development of an obligation under EU law for Member States to realign their national constitutions with certain requirements of confederal democracy.

5.1 Political space: De-constitutionalization at the EU level

National politicization of the EU requires the *possibility* for normal, non-constitutional politics on EU matters. As far as the exercise of EU voting rights is concerned, this is not a problem. The national political process can fully determine the way a national representative will utilize the national voting rights, or any other EU influence for that matter.

When it comes to the actual delegation of powers, however, the situation is more problematic. This delegation is largely contained in the Treaties. As has been abundantly proven by now, these Treaties are hard to change. In addition, the question which powers have been delegated is ultimately determined by the Court of Justice, whose case law is entrenched by the same veto that protects the Treaties.

Rather than a flexible ebband flow pattern, visible in federal systems,[44] delegation to the EU thereby acquires a one-off 'give them a finger lose the whole hand' character. The fact that delegation is part of a constitutional process,

44 Elazar (2006), Burgess (2006), or Watts (1999), even though the trend line is generally upwards towards more central powers.

is ultimately determined by a legal process and logic,[45] and this one way dynamic of delegation makes ordinary day-to-day politics concerning delegation almost impossible. For example, it becomes difficult to take back certain competences, or to arrive at a politically desirable but legally impossible compromise on which powers to delegate and which to retain. It also creates a general fear and distrust of further delegation. A fear that radiates from the Lisbon treaty, which almost seems to equate delegation with amputation, and abounds with repetitive and legally superfluous subsidiarity statements.[46]

Two options to make delegation more flexible, and more of a two-way street, can be envisaged. One alternative would be to make changing the Treaties easier. An option that, though in a very limited way, is pursued by the Lisbon Treaty.[47] Nevertheless this option does not seem feasible on any significant scale. Real flexibilization of the amendment procedure can only take place by removing the requirement of unanimity. A move that would undermine the ultimate control of the different member peoples on delegation of powers, and therefore be a major step in creating a federate union.

The confederal nature of the EU, it seems, would be better served by another route. One which would reduce the *need* for Treaty change, and open the process of delegation up to more daily politics. This second option involves relocating competences and prohibitions from primary to secondary law, which is far easier to amend.

Relocating part of the allocation of competences from primary law to secondary law, and opening them up for politics, would also seem logical in itself, certainly for a more established EU. Which constitution, after all, contains a full set of rules on free movement that subsequently interfere with social issues such as labour rights or social security?[48] Which constitution contains the rules on agriculture, fisheries and tourism? Removing such issues from the Treaty, and organizing them via secondary legislation, would make it easier to alter and adapt these delegations of authority. Such changes will still require at least a qualified majority, and convincing the Commission, yet they at least make it more feasible to establish a national political debate on these issues, and to make delegation a continuous political process instead of a one-off event.

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45 See above chapter 2, section 4.2.3 and chapter 3, section 2.4.3. on the expansive and entrenching effect of legal logic on this point.

46 Cf. typically the repetition in art. 5(2), 6(1) and (2), 48(2) TEU, Protocol 2 on the application of the principles of subsidiarity and proportionality, and art. 51(2) of the Charter of Fundamental Rights of the European Union. Also see Dougan (2008), 617 et seq.

47 See chapter 2, section 2.4.3. for a detailed overview.

48 The counter argument that normal constitutions do not need to remove national borders and barriers is acknowledged, but does not undermine the point being made.

Clearly, making it easier to take away competences from the EU creates the risk that the EU will be gradually dismantled, or rapidly cut to size in times of anti-EU sentiment.[49] Besides the safeguards in the Treaty and the general principles underlying the legal order, however, such a risk is the inevitable price for a truly political and democratic process, and therefore democratic legitimacy. For only if there are real decisions to be made, can a political process develop.

5.2 Guiding and compelling national democratic evolution

In addition to de-constitutionalizing delegation, the EU could also stimulate and support the confederal evolution of the national democratic process within its Member States. Several options can be envisioned in this regard, in addition to soft-law and non-binding guidelines.

To begin with, the criteria for accession as set out in Copenhagen and Madrid could be further developed to take these confederal insights into account.[50] These criteria could provide further guidelines on how the national democratic process is to be adapted to its inclusion in a confederal system. Yet the biggest challenge does not lie with new members but with the existing ones. Fortunately, even though the EU does not have the leverage provided by conditionality, and even though it should be very mindful of the primary legitimacy of the national constitutional systems, it could also play a post-accession role.

For the Treaties contain clear obligations for the Member States to respect and promote democracy. Article 1 TEU, for instance, requires decisions to be taken 'as openly as possible and as closely as possible to the citizen'. Article 2 founds the EU on 'democracy', whereas article 10(1) bases 'the functioning of the Union' on 'representative democracy'. An EU right for EU citizens to have sufficient national democratic influence could also be read in article 10(2) and (3), which hold that 'Heads of State or Government and 'governments' are 'themselves democratically accountable either to their national Parliaments, or to their citizens', and that 'every citizen shall have the right to participate in the democratic life of the Union.'

These Treaty inspirations could be further supported by the duty of sincere cooperation. Article 4(3) TEU requires Member States to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations

49 Here an EU chamber, the political powers and interests of which are aligned with that of the EU, could also provide vital stability and countervailing force.

50 These now require that 'the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (…). On the practical application see Kochenov (2008) and Smith (2003), 105 et seq.

arising out of the Treaties', and to 'facilitate the achievement of the Union's tasks and refrain from any measure

which could jeopardise the attainment of the Union's objectives.' As indicated above, the creation of a sufficiently stable confederal foundation is vital for the viability of the EU, and creating this foundation requires a confederal democratic process to substantiate the direct constitutional bond between the EU and the member peoples. In addition, as demonstrated in part I, stable member states are essential for a confederal system in any event.[51] Ensuring this national stability, which includes establishing a sufficient national democratic process, could therefore also be considered a legal obligation arising from the duty of sincere cooperation.

Considering the vital importance of the stability of its Member States, the EU would also be more than justified in supporting and guiding the required evolution of the national democratic process. Taking into account the relative impotence of confederal systems to engage in direct and prolonged conflict with their members, it is also important that the EU does so pre-emptively, and before open conflicts arise.[52] The EU would be further justified in undertaking action in this field by its direct responsibility towards the EU citizens.[53] As indicated above, the Treaties guarantee these citizens democratic government. And although the Treaties do not go as far as the US Constitution, which allows central intervention in the States to 'guarantee a republican form of government', art 7 TEU does provide at least a starting point for EU action in this field.[54]

Although the EU would more logically act through non-binding suggestions and best-practices, and though the EU could never directly amend the primary national constitutions itself, some basis might therefore also be developed for binding legal action at the EU level. The infringement proceedings against Hungary provide one example of this possible development, although, as indicated, the EU would ideally act before such confrontations become necessary.[55]

In this regard one could even imagine a more far-reaching development whereby EU law would grant a directly effective right to EU citizens to an effective democratic influence on EU affairs at the national level. This development could follow the logic of the *Rewe* case law. In these cases the Court of Justice held that the effectiveness of EU law also requires effective national

51 See chapter 4, section 3.4.
52 Idem.
53 See on the evolution of this direct bond above, chapter 10, section 3.3.
54 Art. 7 TEU refers to serious breaches of the values in art. 2 TEU, which include democracy.
55 See Press release IP/12/24 of 17/01/2012, and C-286/12 *Commission v. Hungary* [2012] nyr.

remedies, including state liability.[56] In a similar vein, it could be held that the democratic rights that the Treaties grant to EU citizens require effective democratic remedies, also at the national level. Whilst obviously recognizing a very broad national procedural autonomy, Member States could, for instance, be obligated to guarantee an equivalent and effective influence via the national democratic process on EU decisions. Alternatively Member State liability could be established where no such equivalent and effective national democratic remedies exist.[57]

Clearly such an individual action remains highly theoretical at the moment.[58] They do form a nice illustration, however, of the potential of the confederal bond between the EU and its citizens. In addition, they provide an appealing symmetry with the logic of the *Bundesverfassungsgericht*. Where the German Court fears that integration might undermine national democracy, the Court of Justice could answer by turning EU law in an instrument to strengthen national democracy. This could lead to a similar dynamic as with the *Solange* cases and the subsequent development of fundamental rights in the case law of the ECJ.[59] The Court of Justice could then join the national constitutional courts in their current quest to improve the national democratic and political process as far as European integration is concerned.[60]

6 Conclusion: The democratic potential of confederal rule

Regional integration removes a significant amount of authority from direct national democratic control by the sovereign member peoples. By delegating sovereign powers to shared central rule, they necessarily give up exclusive control over the application of this authority. This loss of control, which is not compensated by equivalent control at the EU level, can logically be perceived as a threat to democracy.

56 Case 33/76 *Rewe*, and *inter alia* C-213/89 *Factortame*, C-479/93 *Francovich* [1995] ECR I-3843, C-46/93 and C-84/93 *Brasserie du pêcheur* [1996] ECR I-1029, C-453/99 *Courage and Crehan* [2001] ECR I-6297, and C-453/00 *Kühne & Heitz*. For the clear limits of this logic also see C-432/05 *Unibet* [2007] ECR I-2271, and for its uncertainties and complexities M. Dougan, *National Remedies Before the Court of Justice* (Hart Publishing 2004), 25 et seq.

57 A finding that obviously would have quite an impact seeing how a similar compensation could then be claimed by all individuals affected.

58 The vagueness of the democratic right, furthermore, could also form an obstacle to direct effect, at least where the Court so desires.

59 See the evolution running through case 4/73 *Nold* [1974] ECR 491, case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, C-185/95 P *Baustahlgewebe* [1998] ECR I-8417, C-112/00 *Schmidberger*, and Joined cases C-402/05 P & C-415/05 P *Kadi I*. For an attempt to discern some patterns in the relation between the BVG and the ECJ see Payadeh (2010).

60 See chapter 8 section 4.4. as well as Piquani (2012).

Yet, from a confederal perspective, such delegation also provides valuable new content for national democracy, and allows it to evolve alongside the confederal and globalizing reality it needs to control. To capitalize on this potential, however, the national democratic process should be structured and institutionalized properly. The new double role of the state in delegating authority to the EU and exercising the EU powers received in return should become part of national democratic substance. This requires anchoring and controlling the exercise of these national powers in the national constitutional and institutional structures.

In a confederal system like the EU this structure must logically form a mirror image of a federate system. To illustrate this logic, it has been shown how one potential way forward would be to anchor this new EU content of national democracy in EU senates, which would be based on independent and EU focussed elections. In addition, several modifications at the EU level could assist and guide the confederal evolution of national democracy. For example the delegation of competences could partially be relocated to secondary law, and the EU could actively step in by providing guidelines and incentives for Member States to modify their constitutional systems. More far reaching, one could even envision legally binding rules on a minimum of confederal democracy that should be guaranteed at the national level.

These suggestions, even if underdeveloped, do illustrate how the confederal form can be a means of safeguarding democratic control in a globalizing world by expanding the reach of democratic control outside the confines of the state, and thereby creating new content for an evolved democratic process. A potential that builds on the direct link between the EU and the member peoples enabled by confederal sovereignty, and fully utilizes the democratic potential of this link.

Having established at least this potential for a confederal evolution of the democratic process, we turn to the second challenge for the confederal approach: The EMU crisis.

13 The Sovereign Debt and EMU crises: A perfect confederal storm?

1 A perfect confederal storm?

Obviously, this chapter cannot provide a complete picture of the multifaceted and ongoing financial crisis that is facing the EU and the world at large. *A fortiori*, it does not hope to provide anything close to a full solution. Considering the complexity and speed of developments, including the unpredictable reactions by that unimaginable amount of interactions jointly known as 'the market', any form of prediction is intrinsically presumptuous. Our excursion into this financial crisis, therefore, must be highly mindful of these limitations, including the very real chance that some of the assumptions it relies on will be radically changed in the near future.

Fortunately, the primary aim of applying the confederal prism to the financial crises is also not to predict. Instead, the goal is to illustrate the explanatory value of the confederal approach for grasping some of the constitutional roots of the crises, and the directions in which confederal solutions might be sought. Nevertheless, even this limited exercise requires a real engagement with the crisis. This at least entails formulating what confederalism has to say about the crisis and what a suitable confederal response would look like.

Before applying our confederal approach to the sovereign debt and EMU crises, a brief historical overview is in order, starting from the banking crisis that kick-started both crises, and eventually lead to the different measures that have so far been taken to combat the crises (section 2). Subsequently section 3 illustrates how the crises logically fit with, and flow from, the confederal weaknesses identified in part I. Once these confederal problems have been set out we turn to some potential confederal cures in section 4. Building on the strong points of the modified confederal form and the confederal conception of sovereignty developed in part II, some directions for confederal solutions to the crises are suggested, and some confederal pitfalls demarcated, after which section 5 ends with a brief conclusion.

2 A tale of three crises

The banking crisis, now conventionally linked with the fall of Lehman Brothers on 15 September 2008, was a costly one for most Member States.

Large rescue packages were required to prevent banks, and entire financial systems, from collapsing. As a result the financial position of many Member States was weakened, which contributed to and aggravated the sovereign debt crisis.

This second crisis erupted in January 2010 when Greece, 'correcting' its earlier reports, announced a deficit of 12.7%, and a debt of over 120% of GDP. [1] After this announcement, interest rates on its sovereign debt rose quickly. This further deteriorated its financial position, but also increased pressure on the Euro.[2] As Member States continued to disagree on what measures to take, the crisis deepened and spread. The interest rates of other Member States such as Ireland, Portugal and Spain came under increasing pressure as well. Fear of a domino effect arose. The sovereign debt crisis, for instance in the case of a sovereign default, could hit the banks and pension funds in all Member States. Yet these financial institutions were still reeling from the banking crisis, and would, therefore, require public support if faced with further losses. And, to finish the downward spiral, this public support would further increase public debt and lead to further increases in interest rates, potentially pushing large but weakened Member States like Spain over the edge as well. In other words the 'Greek' crisis was threatening all Member State economies.

Despite its general unpopularity in most Member States, and despite doubts as to the legality of aid to Greece under art. 125 TFEU, [3] an aid package of €110 billion was agreed on 2 May 2010.[4] As the markets proved thoroughly unimpressed, a much larger *temporary* emergency fund of €500 billion was then quickly established to back up distressed sovereign debt.[5] Providing

1 See generally, and including a warning for a 'true and severe European Union Crisis' which 'goes far beyond earlier difficulties of the integration process.', M. Ruffert, 'The European Debt Crisis and European Law' 48 *CMLRev* (2011), 1777-78.

2 Greek interest rates dropped sharply after accession to the EMU, coming close to the rate paid by Germany. In itself a clear indication that the markets were not taking art. 125 TFEU seriously. In the beginning of 2008 for instance, Greece paid just over 4%. After the eruption of the crisis rates skyrocketed again, for instance reaching more than 19% in September 2011.

3 See J.V. Louis, 'The No-bailout Clause and Rescue Packages', 47 *CMLRev* (2010), 984 et seq. and V. Borger, 'De eurocrisis als katalysator voor het Europese noodfonds en het toekomstig permanent stabilisatiemechanisme', 59 *SEW* (2011), 211.

4 Of this package €30 billion was provided by the IMF, the remaining €80 billion by Eurozone Members utilizing a system of bilateral loans. As of April 2012, the last formal Commission figures available to the author, 73 billion of these funds had been disbursed. Also see the 'Statement by President Van Rompuy following the Eurogroup agreement on Greece' Brussels, 2 May 2010, PCE 80/10. Further see Louis (2010), 971. The facility has been reduced by 2.7 billion, furthermore, after Ireland and Portugal stepped down.

5 €60 billion of this sum is provided by the EU itself, the other €440 billion being guaranteed by the Member States.

external backbone, credibility and money, the IMF participated in this fund for another €250 billion, bringing its total capacity up to €750 billion.[6]

Both the inception and the nature of this temporary fund were rather extraordinary. The system eventually adopted was drafted within 48 hours, as it had to be finished before the Tokyo exchange opened for trade on the 9th of May.[7] At €15,625 billion per hour, this probably qualifies as some kind of record.[8] In addition, the peculiar nature of the fund reflects the challenge the crisis formed, and forms, for the EU.

The fund had two elements. On the one hand there was the European Financial Stability *Mechanism* (EFSM). This mechanism formed the EU side of the fund. Based on Article 122(2) TFEU it could guarantee up to €60 billion.[9] It was open to all Member States, including those not participating in the Euro.[10] The second, and largest, element was the European Financial Stability *Facility* (EFSF).[11] The facility is based on an *intergovernmental agreement* between the members of the Euro-zone. It is not based on an EU decision and does not form part of the EU itself.[12] The ESFF is a private corporate entity, a 'Special Purpose Vehicle' established for three years as a 'société anonyme' under Luxembourg law.[13] This private corporate entity, in turn, operates under its own statute and another *private law agreement* between the Member States involved and the ESFS. This agreement is governed by English law.[14] Backed by guarantees of the participating Member States, the EFSF is authorized to raise up to € 440 billion.[15]

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6 Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union, Brussels, 10 May 2010, 9614/10, ECOFIN 265, UEM 179.

7 Based on presentations by parties directly involved at the LLX (Leiden Law Exchange) round table on the EMU crisis on 11 February 2011. Chatham House rules applied.

8 Or as Ruffert calls it 'perhaps the most dramatic week-end in EU history' Ruffert (2011), 1779.

9 As of April 2012 the EFSM had committed €22.5 billion for Ireland, and €26 billion for Portugal of which respectively €18.4 and €15.6 billion had been disbursed. Remaining capacity was, therefore, €11.5 billion.

10 Council Regulation 407/2010 of 11 May 2010 Establishing a European financial stabilisation mechanism *OJ* (2011) L 118/1.

11 Although the permanent stability mechanism (ESM) became operational as of 8 October 2012 (see further below), the EFSF will remain in operation until 30 June 2013. During this time it will run in parallel with the ESM.

12 Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union, Brussels, 10 May 2010, 9614/10, ECOFIN 265, UEM 179.

13 Council Document 9614/10 of 10 May 2010.

14 Framework agreement between the euro area Member States and the EFSF, 7 June 2010 (www.efsf.europa.eu/about/index.htm. See Borger (2011), 208-209.

15 As of April 2012 the EFSF had committed a total of €189.4 billion of which €62.5 billion had already been disbursed. It further covered an unused Greek loan facility of 24.4 billion. Consequently it had a capacity of €275 billion left.

Interestingly the initial proposal of the Commission, at the beginning of this 48-hour period, had been to bring the fund fully within the framework of the EU, and to largely place it under the control of the Commission itself.[16] The Member States, however, went to considerable length to keep the EFSF, and with it the bulk of the money, *outside* the EU framework. At the same time, and to complicate the resulting picture further, the Member States agreed that 'the Commission will be allowed to be tasked by the euro area in this context', and indeed important powers were given to the Commission.[17] As a result the Commission, as an EU institution, received a role in a non-EU body designed to rescue a monetary Union at the centre of European integration itself.[18]

Both Ireland (€85 billion)[19] and Portugal (up to €79.1 billion)[20] received financial assistance under this temporary scheme.[21] With the situation in Greece remaining highly precarious, furthermore, agreement on a second Greek aid package of up to €130 billion was reached on 21 July 2011.[22]

16 See the proposal of 9 May 2010 for a Council Regulation establishing a European financial stabilization mechanism (COM (2010) 2010 final). This fund would contain €500 billion, €440 billion being guaranteed by the Eurozone Members.

17 Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union, Brussels, 10 May 2010, 9614/10, ECOFIN 265, UEM 179.

18 Such an 'external' role of the Commission was already accepted by the Court of Justice in joined cases C-181/91 and C-248/91 *Bangladesh* [1993] ECR I-3685 and C-316/91 *Lomé* [1994] ECR I-625. It has now been explicitly confirmed in C-370/12 *Pringle* [2012]. For a discussion of this use of EU institutions see V. Borger and A. Cuyvers, 'Het Verdrag inzake Stabiliteit, Coördinatie en Bestuur in de Economische en Monetaire Unie: de juridische en constitutionele complicaties van de eurocrisis.' 60 *Tijdschrift voor Europees en Economisch Recht (SEW)*, (2012), 370 et seq.

19 As of March 2012 the IMF had committed €22.5 billion (€19.4 billion disbursed). €17.7 billion was committed to Ireland from the EFSF (€9.4 billion disbursed), and €22.5 billion from the EFSM (€18.4 billion disbursed). €3.8 billion had been bilaterally committed by the UK (€2 billion disbursed), €0.6 billion by Sweden (€0.2 billion disbursed), €0.4 billion by Denmark (€0.1 billion disbursed) and €17.5 billion by Ireland itself (€17.5 billion also disbursed).

20 As of December 2010 €27.1 billion was committed by the IMF of which €22.1 billion had been disbursed. €52 billion was committed by the EU, of which €26 billion was committed from the EFSF, and the other €26 billion from the EFSM (€41.1 billion disbursed in total).

21 For the Irish package, which also includes bilateral contributions from the United Kingdom, Sweden and Denmark and funding from the IMF, see the Statement by the Eurogroup and ECOFIN Ministers of 28 February and the Council implementing decision of 7 December 2010 on granting Union financial assistance to Ireland, 17211/1/10 Rev 1, ECOFIN 796, *OJ* [2010] L 30/34. For Portugal, which aid includes funds from the EU/EFSM, the EFSF and the IMF, see the statement of the Council, Brussels, 17 May 2011 10231/11.

22 Of this sum up to €101 billion was guaranteed by the EU, and up to €28 billion by the IMF.

The details of this program were further outlined in the next months, and included a significant 'voluntary' contribution from the private sector.[23] On June 9th 2012, agreement was reached on an ESM aid package of up to a maximum of €130 billion for Spain and its banks.[24] On 25 June 2012 Cyprus also requested aid, primarily to recapitalize its banks. After initial opposition, an aid package of €10 billion was finally established on 12 April 2013.[25]

During the crisis, furthermore, the European Central Bank also played a vital role, largely by acquiring bonds from distressed member states, and eventually expressing its total commitment to upholding the euro, *inter alia* through its 'Outright Monetary Transactions' program.[26]

2.1 A permanent stability mechanism

In light of the ongoing crisis, and based on a report by a special task force lead by Herman van Rompuy,[27] plans were then developed to replace these temporary rescue mechanisms with a *permanent* 'European Stability Mechanism' (ESM).[28] Unlike the temporary measures such a permanent

23 Statement by the Heads of State or Government of the Euro area and EU institutions. Brussels, 21 July 2011. Agreement with a sufficient percentage of the private creditors was finally reached through the IFF on February 21. Private creditors will forgive 53.5 percent of their principal. In addition they exchange their remaining debt for new Greek government bonds and notes from the European Financial Stability Facility with lower interest and longer duration. Also see the Statement by Commission Vice-President Olli Rehn on private sector participation in the second Greek programme, Brussels, 9 March 2012, MEMO/12/174.

24 Interestingly this package did not contain an IMF contribution, and also lacked an austerity package similar to the ones imposed on the other aid recipients, and above all Greece. So far €100 billion has been committed by the ESM, and €41.4 billion has been disbursed.

25 €9 billion of this sum was committed from the ESM, €1 billion was committed by the IMF. The conditions for this bailout included the forfeiting of all deposits over €100.000 in the Cyprus Popular Bank (or Laiki) and a large part of these uninsured deposits in the Bank of Cyprus as well. This after an earlier plan to levy all uninsured deposits had met heavy criticism, was rejected by the Cypriot Parliament, and was withdrawn. The Cypriot Parliament accepted this second package on 30 April 2013, the German *Bundestag* did so on 18 April 2013.

26 See for instance Decision (2010/281/EU) of the European Central Bank of 14 May 2010 establishing a securities market program *OJ* [2010] L 124/8, and further ECB/2009/16 , ECB/2009/16, ECB/2010/5, and ECB/2011/18. Further see the ECB Press releases 'Technical features of Outright Monetary Transactions', Frankfurt, 6 September 2012 and 'Measures to preserve collateral availability', Frankfurt, 6 September 2012. For a discussion on the legality of these actions see zie M. Seidel, 'Der Ankauf nicht markt – und börsenängiger Staatsanleihen, namentlich Griechenlands, durch die Europäische Zentralbank und durch nationale Zentralbanken – rechtlig nur fragwürdig oder Rechtsverstoss?', 14 *EuZW* (2010), 521 and C.H. Herrmann, 'EZB-Programm für die Kapitalmärkte verstösst nicht gegen die Verträge – Erwiderung auf Martin Seidel', 17 *EuZW* (2010), 645.

27 Final report of the Task Force to the European Council of 21 October 2010, 15302/10, ECOFIN 649.

28 European Council Conclusions, Brussels, 28-29 October 2010, EUCO 25/1/10, para. 2.

fund apparently did require a Treaty amendment, or at least the prospect of one.[29] In another far-reaching step, Member States agreed on such an amendment of article 136 TFEU in December 2010.[30] By utilizing the new 'simplified' amendment procedure of article 48(6) TEU, and emphasizing the 'surgical' nature of this amendment, a re-enactment of the Lisbon drama was to be prevented.[31] The amendment entered into force belatedly on 1 May 2013 after the Czech Republic finalized its ratification process..[32]

Anticipating the eventual entry into force of the amendment, however, the ESM treaty was already signed on July 11th 2011. Before becoming operational, however, both the anticipated amendment of article 136 TFEU and the ESM Treaty had to jump through quite a number of legal hoops, or perhaps more accurately forced others to do so. One major hurdle was cleared when the German *Bundesverfassungsgericht* found the ESM in conformity with the German Constitution.[33] The second major hurdle was lowered and subsequently overcome in *Pringle*.[34]

29 Doubting the legality of the temporary measures, especially under art. 125 TFEU, also see Ruffert (2011), 1785 et seq, or H. Kube and E. Reimer, 'Grenzen des Europäischen Stabilisierungsmechanismus' *NJW* (2010), 1913.

30 European Council Conclusions, Brussels 16-17 December 2010, EUCO 30/10, par.1-2, and European Council Decision of 25 March 2011 (2011/199/EU) amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro *OJ* (2011) L 91/1. The proposed new art. 136(3) TFEU reads: 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.' Also see the European Council Conclusions of 4 February 2011, EUCO 2/11, especially annex I, as well as the declaration following the extraordinary meeting of the European Council on 11 March 2011, 11/3/2011, EUCO 7/1/11 and the statement after the meeting of heads of state or government of the Euro area on 21 July 2011.

31 This despite the fact that art. 48(6) still requires full ratification by all Member States and their parliaments. Even under the ordinary amendment procedure, furthermore, the European Council may decide, by a qualified majority, not to convene a convention (art. 48(3) TEU), although the role of the European Parliament is larger in the ordinary procedure.

32 Art. 2 of European Council Decision of 25 March 2011 (2011/199/EU). The amendment was approved by the Czech Senate on 25/04/2012 and by the Chamber of Deputies on 5/06/2012, but long held up by the refusal of President Klaus to sign it.

33 BverGE 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 be 6/12 (2012) *ESM Treaty*. See also the cooperative approach by the Estonian *Riigikohus* in its Constitutional Judgment 3-4-1-6-12 of 12 July 2012, *ESM Treaty*.

34 C-370/12 *Pringle*. See for a thorough and highly enlightening discussion V. Borger, 'The ESM and the European Court's Predicament in Pringle' , 14 *German Law Journal* (2013), 113.

Following these judicial *fiats* the ESM became operational on 8 October 2012.[35] It has been initially concluded between the seventeen Euro area countries, but is open to non-Euro area members for ad-hoc participation. It creates a permanent fund with in principle a maximum capacity of €750 billion.[36] The aim of the fund is to guarantee financial support to members in distress where such support is 'indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.'[37] By doing so, under strict conditionality, the fund is intended to increase the trust of the markets in the sovereign debt of the Euro area.

2.2 *Of six-packs, duo-packs and plus-pacts*

The establishment of such a permanent fund is nevertheless only one element in a larger attempt to address the structural problems behind the sovereign debt and EMU crises.[38] Already at its inception several experts warned that there was a dangerous imbalance between the comprehensive Monetary Union and the far more limited Economic Union that accompanies it.[39] Existing mechanisms such as the original Stability and Growth Pact have failed to remedy this imbalance, as the EMU crisis has made abundantly clear.[40] Consequently, one major question has become how to strengthen the overall system so that emergency funds will become unnecessary. A veritable flurry of legislative activity has resulted.

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35 Treaty establishing the European Stability Mechanism, Brussels, February 2 2012 T/ESM 2012/en 1, art. 38.

36 €500 billion of this sum is provided by the participating states, and the IMF has agreed to a maximum contribution of €250 billion. Under art. 8 the maximum authorised capital stock is €700 billion. In March of 2012 the 17 ministers of finance of the ESM states announced that the capacity of the fund would actually be €800 billion, yet this sum also includes all previous aid to Greece, Ireland and Portugal.

37 Idem, Preamble section. 6, art. 3.

38 On this imbalance see among many others, F. Snyder, 'EMU revisited: Are we making a constitution? What constitution are we making?', in: P. Craig and G. De Búrca (eds), *The Evolution of EU Law* 1st ed. (OUP 1999), 449 et seq, as well as the newer version, F. Snyder, 'EMU – Integration and Differentiation: Metaphor for European Union', in: P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011), 687 et seq.

39 See for instance the insightful analysis by A. Szász, *De Euro. Politieke achtergronden van de wording van een munt* (Mets en Schilts 2001) (although the live version is greatly recommended). Also see J-V. Louis, 'The Economic and Monetary Union: Law and Institutions', 41 *CMLR* (2004), 1075 and F. F. Ambtenbrink and J. de Haan, 'Reforming the Stability and Growth Pact', 31 *European Law Review* (2006), 402 et seq.

40 Resolution of the European Council on the Stability and Growth Pact Amsterdam. 17 June 1997. (97/C 236/01) and art. 121 and 126 TFEU and Council Regulation 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure *OJ* (1997) L 209/6 as amended by Regulation 1056/2005 of 27 June 2005 *OJ* (2005) L 174/5. On the failure and need to strengthen the EMU also see J-V. Louis, 'The Review of the Stability and Growth Pact', 43 *CMLRev* (2006), 104 and F. Ambtenbrink, 'Naar een effectievere economische governance in de Europese Unie' 59 *SEW* (2011), 433.

First several proposals to address this imbalance were developed, including by the Commission and the Special Taskforce headed by Council President Van Rompuy.[41] These led to the adoption of the so called six-pack, which includes mechanisms to improve both the preventative and the corrective arm of the Stability and Growth Pact and to improve economic convergence.[42] One of the central innovations in this new legislation is the possibility to impose a sanction by reversed qualified majority. Following a recommendation of the Commission, a sanction must be imposed, except where a qualified majority of the Council decides *not* to impose a sanction.[43]

Second, an additional 'duo-pack' with further measures has been adopted as well, and entered into force on May 30 2013. This package aims to further enhance the coordination and surveillance of budgetary processes.[44]

Third, and building on the Europe 2020 framework,[45] a Euro+ Pact was signed between the 17 Euro area members and 6 non-Euro area members.[46] The pact intensifies economic coordination for competitiveness and convergence, also in areas of national competence, and is integrated into the European semester.

More was nevertheless deemed necessary to adequately prop up the Monetary Union. The further measures envisioned, however, did not prove feasible within the existing Treaty framework. Nor was further EU Treaty amendment

41 Final report of the Task Force to the European Council of 21 October 2010, 15302/10, ECOFIN 649. Also see European Council Conclusions, Brussels, 21 July 2011.

42 Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area *OJ* (2011) L 306/ 1, Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area *OJ* (2011) L 306/8, Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, *OJ* (2001) L 306/12, Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances *OJ* (2001) L 306/25, Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, *OJ* (2011) L 306/33, and Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States *OJ* (2011) L 306/41.

43 See art. 4, 5, and 6 of Regulation (EU) No 1173/2011.

44 See Regulation 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, *OJ* (2013) L140/1 and Regulation 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, *OJ* (2013) L 140/11.

45 Communication from the Commission on Europe 2020, Brussels, 3 March 2010, COM(2010) 2020 final.

46 Conclusions of the Heads of State or Government of the Euro area, Brussels, 11 March 2011. These six non – Euro area members are Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania.

possible, mostly due to a British veto.[47] As a result, and highly interesting from the confederal perspective, a more intergovernmental route was chosen.

2.3 A new outer circle of EU law: The TSCG

On 2 March 2012, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union was signed between 25 Members States, excluding the UK and the Czech Republic (the SCG treaty).[48] Formally this is a separate Treaty, established outside the EU framework. At the same time it is intimately connected with EU law.[49] Not only is it explicitly aimed at strengthening the EMU, it also incorporates multiple EU obligations, employs several EU institutions, and is highly mindful, at least in word, of the duty of sincere cooperation.[50] Most far reaching, the SCG Treaty envisions the incorporation of its own substance into the legal framework of the EU within a period of five years after entry into force.[51]

The SCG Treaty easily justifies a separate study in its own right.[52] The most interesting themes for our purpose are its dual relation to the EU framework, already mentioned above, and the inclusion of the so-called 'Golden Rule.' Starting point for this Golden Rule is that parties are obligated to have a balanced budget or run a surplus.[53] A national mechanism must

47 Two options for a primary law solution were on the table. First, to use art. 126(14) TFEU to amend Protocol No. 12 on the excessive budget procedure. Second, going for an amendment of the Treaty, either though the ordinary amendment procedure of art. 48 TEU, or through one of the simplified alternatives in that provision. In the end the intergovernmental approach won the day, this in no small part due to the UK's demands to protect the interest of the UK's financial sector in the City, and its related veto of any primary law solution.

48 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Brussels 2 March 2012, T/SCG/en, Preamble.

49 For a discussion of this Treaty, and the suggestion that this may be the start of a new form of EU law that holds quite some potential, see Borger and Cuyvers (2012), 370. Further see the French *Conseil constitutionnel*, Decision 2012-653 DC of 9 August 2012, *Fiscal Compact*.

50 See, for instance, SCG Treaty art. 1(1), 2, 3, 4, 5, 7, 8, 9, 10, 12 and 13. Also see Editorial Comments 'Some thoughts concerning the Draft Treaty on a Reinforced Economic Union' 49 *CMLRev* (2012), 5.

51 SCG treaty, art. 16. A fact that also reflects the initial desire, *inter alia* by Germany and France, to choose a primary law solution.

52 Its relation to, and conformity with EU law, for instance, deserve further attention, as do its broader implications for the constitutional nature and future development of the EU, including the question how to incorporate this Treaty into EU law. On these points see P. Craig, 'The Stability, Coordination and Governance Treaty: principle, politics and pragmatism', 37 *European Law Review* (2012), 231, as well as the interestingly conflicting evidence given by Paul Craig and Michael Dougan to the European Scrutiny Committee of the House of Commons. House of Commons – European Scrutiny Committee, Treaty on Stability, Coordination and Governance: impact on the rule of law (62nd report, 27 March 2012). Further developing the more positive line of Dougan see Borger and Cuyvers (2012).

53 SCG Treaty art. 3(1)(a) and (b). See art. (3)(1)(c) and (d) for some softening around the edges.

be created to correct any deficit that might nevertheless occur. In the event of an excessive deficit this mechanism must be triggered automatically.[54] This national mechanism must, furthermore, follow the common principles established by the Commission.[55] The Court of Justice, acting under art. 273 TFEU, can be invited to rule on whether a Contracting Party has correctly implemented this obligation.[56] It is the nature of this mechanism that is of special relevance here:

> 'The rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, *preferably constitutional*, or otherwise *guaranteed* to be fully respected and adhered to throughout the national budgetary processes. The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1(e) on the basis of *common principles to be proposed by the European Commission*, concerning in particular the nature, size and time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the rules set out in paragraph 1. Such correction mechanism shall fully respect the prerogatives of national Parliaments.'[57]

As will be discussed further below, both the creation of the SCG Treaty and this Golden Rule fit with the confederal perspective developed in this thesis. Both also contain some important confederal strengths and weaknesses. Before returning to our confederal application, however, we must first outline the last batch of measures and proposals developed to reinforce the Economic and Monetary Union.

2.4 From Banking Unions to a 'deeply' 'genuine' EMU

Considering the importance of a stable financial system for overcoming the current crisis and preventing future ones, a new supervision architecture for the financial sector was established.[58] More far-reaching measures were

54 SCG Treaty art. 3(1)(e). Note that this obligation, and hence the Golden Rule, only concerns the deficit, and not the debt ratio. SCG Treaty art. 3(1)(e).

55 See art. 3(2) TSCG, and for the guidelines themselves the communication from the Commission of 20 June2012 on the Common principles on national fiscal correction mechanisms, COM(2012) 342 final.

56 SCG Treaty art. 8. For a discussion of the actual nature and effect of any ruling by the Court of Justice, and the standard it should apply, see Borger and Cuyvers (2012).

57 SCG treaty art. 3(2).

58 See for an assessment of this need the de Larosière report of 25 February 2009, available at: http://www.esrb.europa.eu/shared/pdf/de_larosiere_report_en.pdf?27c60c4c7ddf5de635cbd4d8be381c0c. This new system consists of the European Systemic Risk Board (ESRB), the European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Securities and Markets Authority, the Joint Committee of the European Supervisory Authorities, and the relevant national authorities. More restrictive norms for capital requirements for banks, investment firms and insurance companies have also been set.

nevertheless considered necessary,[59] which lead to the discussion of a full 'Banking Union'.[60] This Banking Union is to be based on a 'Single Supervisory Mechanism' (SSM) under the auspices of the ECB,[61] and is currently set to also include a 'Single Resolution Mechanism' (SRM).[62] The ESM can then be envisioned as a back stop to these mechanisms.

Incorporating these ideas for a Banking Union, more comprehensive blueprints for a more stable EMU have subsequently been presented as well. On 24 October 2012 the European Parliament published its relatively ignored recommendation 'Towards a genuine Economic and Monetary Union'.[63] More attention was paid to the Commission's 'blueprint for a deep and genuine Economic and Monetary Union' launched on 30 November 2012,[64] and especially to the Van Rompuy plan entitled 'Towards a Genuine Economic and Monetary Union' that was presented shortly afterwards on 5 December 2012.[65]

The Van Rompuy plan matches the Commission's blueprint on many points. Yet as could be expected, it is less far reaching on several important points, such as the introduction of Euro bills, binding control over national budgets and deeper political integration, or in the longer term allowing the

59 See in this regard also the Green Paper on Stability Bonds, nibbling around the edges of the much debated 'Euro bonds' (Green Paper on the feasibility of introducing Stability Bonds – COM(2011)818 final).

60 Also see the Commission communication of 12 September 2012 on 'A Roadmap towards a Banking Union', COM(2012) 510 final, and the European Council Conclusions of 18 October 2012.

61 See the Commission Proposal of 12 September 2012 for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM(2012) 511 final, 2012/0242 (CNS).

62 See, including this suggestion on an SRM from the European Council, the Commission communication of 12 September 2012 'Roadmap towards a Banking Union' COM(2012) 510 final, finding that: 'Further steps are needed to tackle the specific risks within the Euro Area, where pooled monetary responsibilities have spurred close economic and financial integration and increased the possibility of cross-border spill-over effects in the event of bank crises, and to break the link between sovereign debt and bank debt and the vicious circle which has led to over €4.5 trillion of taxpayers money being used to rescue banks in the EU.' And that 'mere coordination is not enough, in particular in the context of a single currency and that there is a need for common decision-making.'

63 European Parliament, Plenary Session, A7-0339/2012, RR\917057EN.doc.

64 COM(2012) 777 final.

65 Van Rompuy had been invited to submit such a plan by the European Council in June 2012 It has been expressly drafted 'In close collaboration with Barroso, Juncker, and Draghi, and expressly refers to the Commission blueprint. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf.

EU to generate revenue through taxation.[66] Differences that apparently distinguish a 'genuine' EMU from a 'deep and genuine' EMU.[67]

During the European Council summit of 13 and 14 December 2012 the Van Rompuy plan was discussed, relieved of its most daunting teeth, and transformed into a 'Roadmap for the *completion* of EMU'.[68] This roadmap largely focuses on implementing and effectuating existing legislation and treaties, as well as on creating more effective supervision on the financial sector. The 'immediate priority', for example, is to 'complete and implement the framework for stronger economic governance, including the 'six-pack', the TSCG and the 'two-pack', and to create a 'more integrated financial framework' including the 'Single Supervisory Mechanism'.[69] The European Council further 'urges' the establishment of 'a Recovery and Resolution Directive' and a 'Deposit Guarantee Scheme Directive' and to enable the ESM to 'recapitalize banks directly' so as to 'break the vicious circle between banks and sovereigns.'[70] Van Rompuy also received the assignment to draft another 'Roadmap' to be presented at the European Council summit in June 2013. Not wholly unconnected to the *entrée* of Mr. Hollande, this roadmap must focus on ensuring 'economic growth, competitiveness in the global context and employment in the EU', and thereby act as a kind of social counterpart to the focus on budgetary discipline so far.[71]

None of the more far-reaching plans of the European Parliament, the Commission or Van Rompuy, therefore, made it directly into the European Council conclusions. At the same time, the conclusions do state that the process of completing the EMU, which requires 'deeper integration', 'will *begin*' with these measures, implying that further measures will be taken in the future.[72] Many of the more far-reaching proposals will undoubtedly

66 Cf the statement on p. 5 on the Van Rompuy plan that, regarding further and deeper integration, the Commission's Blueprint offers 'a basis for debate'. The plan does stress, however, the need for a central fiscal capacity, and the ability to borrow and 'common debt issuance without resorting to the mutualisation of sovereign debt' (p. 12.).

67 The transformative objectives of the Commission proposal become especially evident where it describes the ultimately desired outcome and 'solution' on page 40: 'In contrast, that problem would no longer arise in a *full fiscal and economic union* which would *itself dispose of a substantial central budget*, the resources for which would be derived, in due part, from a *targeted, autonomous power of taxation* and from the possibility to *issue the EU's own sovereign debt*, concomitant with a *large-scale pooling of sovereignty* over the *conduct of economic policy* at EU level. The European Parliament would then have reinforced powers to co-legislate on such autonomous taxation and provide the necessary democratic scrutiny for all decisions taken by the EU's executive. (My italics).

68 See the European Council conclusions on completing EMU of 14 December 2012, EUCO 205/12.

69 Idem, paras. 5-7.

70 Idem, paras. 8 and 10.

71 Idem, point 12.

72 Idem, introduction.

resurface in this process, as solutions to the current structural imbalance will have to be found. At the moment, however, they have not yet been embraced by the European Council, which seems rather unwilling to make any real leaps of faith just yet.[73]

Taking stock of the developments since 2008, therefore, one can conclude that many measures have been adopted or are in the pipeline. Many of these measures would not even have been imaginable several years ago. At the same time the sovereign debt and EMU crises, as well as the debate on how to solve them, are still on-going, with several of the real fundamental decisions still ahead, and with multiple pundits continuing to suggest this thesis might end up as a work of legal history disturbingly soon.

This ongoing debate and uncertainty, coupled with the multifaceted nature and complexity of the crises already mentioned, might argue against any attempt to analyse the EMU phenomenon, or at least against doing so before it can be approached with the much needed wisdom of hindsight. Precisely because it is ongoing, however, and precisely because it fundamentally challenges the constitutional framework of the EU, it is interesting to see how this crisis should be understood and approached from the confederal prism developed above. For what use are theoretical rudders that only work in calm waters, and what better means than crises to test the limits of a constitutional system? The caveats set out above, however, obviously intensify as we shift from description to analysis.

3 The EMU crises: Confederal diseases?

So what light, if any, can our confederal prism shine on the many questions that these crises, and the responses to them so far, raise. Why, for instance, did this crises hit so hard, and why is it so difficult to overcome? But conversely, why has the EU survived so far, and where should it go from here? It is suggested that the three general propositions on the constitutional framework of the EU outlined in Part I –its internal focus, incorporation of federate modifications, and rule by law – can be of direct use here in outlining some confederal 'diseases' of the EU constitution that contribute to the crises. Similarly, the confederal perspective, including the notion of confederal sovereignty developed in part II, can indicate some directions in which to look for a cure, as well as some confederal pitfalls that should be avoided in this search.

73 In contrast see the blueprint of the Commission openly pleading for 'the necessary elements and the steps towards a full banking, economic, fiscal and political union.' and the creation of 'a new taxation power at the EU level, or a power to raise revenue by indebting itself on the markets'.COM(2012) 777 final., 3 and 33.

3.1 *The internal focus and the momentum of self-deepening*

To begin with, and in line with our first general proposition, the origins of the crisis fully fit with the internal and economic focus of the EU, and with the self-deepening federate competences that were granted to achieve them.[74] Not incidentally the common currency was a crowning achievement in completing the internal market. This internal market logic and dynamic, of course combined with the other interest involved, was even so strong that it trumped clear warnings over creating a full Monetary Union without a sufficiently strong Economic Union.[75] And indeed market integration was enhanced by the Monetary Union, as was the economic dependence of the Member States on this currency, the internal market, and therefore each other. In other words, the Monetary Union deepened the very same dependence and economic interrelation that contributed to its own adoption.

Interestingly, this same dependence now plays an important role in weathering the crisis. Market integration has created a powerful incentive for the Member States to protect the EMU. The cost of letting the Euro fail is uncertain, but could be so high that it might better not be risked. As a result, it has so far been accepted that the Monetary Union has to be secured, even if it means saving Greece or other 'sinners' in the process. The grudging and tardy manner in which aid has so far been given only demonstrates just how loath the other Member States were to step in, and how large their self-interest in saving the Euro must have been.[76]

Here the mechanism described in Part I – how the dependence on the internal market keeps pace with the level of integration – is clearly visible. An incentive that is now so strong that it forces political leaders to transfer billions of Euros to other Member States at a time when they already have to cut national budgets. Measures they then have to explain to their far from enthusiastic constituents, without any proper national foundation for doing so. It is difficult to imagine a traditional confederal system, with its external and defence focus, ever providing such a strong incentive for continued cooperation and increasing investments, except in times of full out war. Here the inverted focus of the EU seems to have contributed to the survival of the Union.

The sheer power of this internal mechanism can, at the same time, also pose a risk. Especially once it is further enhanced by the increasing control

74 See above chapter 3, section 2.4.3. and chapter 4, section 2.

75 Clearly many more (political) factors also contributed to the eventual establishment of the EMU. See Szász (2001), and Ambtenbrink and De Haan (2006).

76 See the very late reaction of the European Council first only limited to supportive statements. Only with a market crisis imminent was real action taken on May 9th 2010.

of markets over governments that we seem to be witnessing.[77] The direct response to the market in Europe on May 9th 2011 demonstrates the impressive power of that market.

The far-reaching controls established, and the many increasingly radical suggestions on further economic integration aired during the crisis, some by very senior political figures, further illustrate the enormous impetus for cooperation and integration provided by the internal perspective. One of the most far-reaching was the suggestion to establish a full-blown European Economic Government with independent powers to sanction Member State governments.[78] Suggestions that stand in stark contrast to the political sentiment so tangible still in Lisbon, with subsidiarity, less Europe and national identity as its rallying cries.[79]

These far-reaching proposals, however, make perfect sense from the logic of the (internal) market and economic integration.[80] If one economically depends on a Monetary Union, and this Monetary Union requires shared economic government, then one should create it. But how far can, and should, one go in creating a full-blown Economic and Fiscal Union to match the Monetary one? Especially where the sentiment in most national electorates has firmly remained in a sceptical mode towards increased European integration, or has deteriorated even further precisely due to the EMU crisis? It will be those national electorates that many decision makers in the EU will have to convince or at least answer to, and whose support and legitimacy is so necessary for the long-term prospects of the EU.

Constitutionally, therefore, what we might be seeing is the internal market engine of the confederal system going dangerously fast, and potentially disappearing over the horizon of its confederal foundation. Yet simultaneously, this internal market engine is becoming ever more central to sustaining the integration that has been achieved so far against (political) backlashes. Slowing it down might, therefore, threaten the whole European construct as well. In this way the confederal perspective fits with the broader feeling of the EU being trapped between a dangerous leap forward and an equally dangerous slide backwards. To complicate matters further, however, some of the other confederal problems discussed above are also brought into play by the crisis.

77 See also chapter 4, section 2.

78 See for instance the comments Merkel and Sarkozy on establishing an economic government on 16 August 2011, or even more far reaching the earlier comments by German economy minister, Philipp Roesler on August 10, proposing an – unelected – 'stability council' for EU. http://euobserver.com/19/113251 and http://euobserver.com/19/113327.

79 Dougan (2007).

80 Cf already the language in the Commission blueprint: 'Over the longer term, the *logic* of aiming for a full banking union for all banks is compelling.' (COM(2012) 777 final., 30).

3.2 *Hitting the weak spots: Money*

The debt and EMU crises precisely hit the weak spots in the confederal armour of the EU. Chinks that were discussed in relation to our second and third general proposition: The reliance of the EU on the rule by law and stable Member States, and the gap between the confederal basis and the federate superstructure of the EU.[81]

To start with, these crises concern money. As discussed in part I, the financial position of the EU is far better than that of the US Confederation, but only because the Member States pay their dues, and because the EU can make do with a very small percentage of GDP due to its regulatory nature. Like the US Confederation, however, the EU still lacks the authority and the legitimacy to conduct massive financial operations, particularly of a redistributive character. The amounts involved in the crisis far exceed this capacity.[82] Not surprisingly, therefore, the financial crisis clearly reaffirmed the ultimate financial power of the Member States. Most noticeably we saw how the European Council stepped in and took control, sometimes almost relegating the Commission to a role as secretariat.[83] An increased role for this confederal powerhouse is logical from the confederal perspective, as it must compensate the expanding federate element of the EMU.[84] And even though these developments may further encapsulate the European Council within the federate superstructure of the EU, they also create the danger of over-compensation. The confederal elements may use the momentum available to undermine too much of the federate superstructure of the EU.[85]

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81 See chapter 3, section 3 and 4.

82 See above. Certainly so when we also include the massive operations of the ECB so far. Though more screened from direct political responsibility, masked by technical complexity, and of vital interest in preventing a further melt-down, these operations do concern, at the end of the day, very real money. See for instance Decision (2010/281/EU) of the European Central Bank of 14 May 2010 establishing a securities market program *OJ* [2010] L 124/8 as well as the Outright Monetary Transactions' program.

83 Editorial Comments 'An ever Mighty European Council' 46 *CMLRev* (2009), 1383.

84 In fact the very development of the European Council, from its relative formalization in 1974 under the initiative of Giscard d'Estaing, can of course be seen as a confederal counterweight. Not incidentally it was the French interest that was served by a more direct political mechanism such as the one offered by the European Council.

85 Though no clear parallel can be proven, or causality shown, the comparison with the empty chair crisis of 1965-66 comes to mind. Not coincidentally, certainly not from the confederal perspective, the crisis erupted in relation to two significant federate modifications: the Court of Justice had just established direct effect and primacy (*Van Gend & Loos* and *Costa v. E.N.E.L.*) and under the rules of the EEC Treaty the Council of Ministers was about to move to QMV on some important fields. The confederal, statist counter-move by De Gaulle (partially) countered at least one of these developments through the Luxemburg Accords. Equally it was the Commission that suffered the greatest set-back in power, and the political institution of the Council that gained the most. In that regard the move by De Gaulle may have been a constructive one (in the longer run) in maintaining a certain overall balance. In any event this dynamic may be at work again, and too strong a resistance against the apparent need for confederal counterweights should not be rejected too easily.

Such a shift towards a more fiscally oriented Union, therefore, forms a clear risk. It not just endangers EU effectiveness, but may also undermine the federate elements in the system, and may subjugate them to pure confederal power in the fiscal field. In other words: Once the EU largely becomes about redistributing money directly instead of regulating a market, Member States, or their political leaders, may start putting their principal authority to use. They may increase control and re-confederalise more federate elements. Elements that, as we saw above, play an important role in stabilizing the overall EU system in the longer run. The clear power play by the European Council fits with such a scenario. The confederal nature of the ESM, and the intergovernmental SCG Treaty similarly follow this pattern, even though the inclusion of the EU institutions in these instruments also testifies to the importance of a federate superstructure for the effectiveness of a confederal system.

Although no alternative solution to the path chosen so far may have been readily available, and though the risks flagged up here do not have to materialize, they are risks that should be taken into account, and of course already are being taken into account, for instance by the Commission. [86] The limited point here is that any attempt to deal with these risks might benefit from a confederal understanding, which includes placing individual events in the larger context of the balance between confederal and federate elements in the EU.[87]

3.3 Politics and conflict

In addition to the serious money involved, the crisis combined two further weak points of the confederal form: Politics and conflict.

To begin with, the crisis concerns a highly political area where law has so far played a secondary role at best. Budgetary decisions and public spending form the core of national politics, and are not often brought into the legal arena.[88] As our second proposition pointed out, however, the EU largely governs through rule by law. A mechanism that only works where a field is subject to legal, or at least bureaucratic, scrutiny.

86 In the terms of Van Middelaar (2009), 42-43, some content of the 'internal' circle (*de binnensfeer*) is transferred to the middle sphere, and/or, perhaps more worryingly, the middle sphere itself is drawn more towards the external sphere, at least in terms of self-understanding and process.

87 Editorial Comments 'Some thoughts concerning the Draft Treaty on a Reinforced Economic Union' 49 *CMLRev* (2012), 5 et seq.

88 See also recognizing this the Van Rompuy plan, page 16: 'Decisions on national budgets are at the heart of Member States' parliamentary democracies.'

The spectacular failure of the stability and growth pact sadly makes the point.[89] Forced to fall back on a truly confederal and political policing system, the pact failed, and the Monetary Union was left out in the cold. [90] The clear limits of the restraining power of law in this political field, especially in times of crisis, further illustrates the point. Right or wrong, the precise meaning of, for instance, Article 122(2) or 125 TFEU did not seem a primary concern, or a concern at all, for political decision making during the crisis. Ruffert provides an illustrative quote by Lagarde, the then Minister of Finance of France, 'We violated all the rules because we wanted to close ranks and really rescue the euro-zone.'[91] And as a matter of fact, the Courts followed.[92]

The many creative experiments now ongoing with the ESM and SCG Treaties, merrily blending EU law and intergovernmentalism, betray an equal pragmatic approach to law. Again we can remain agnostic here on the ultimate correctness of this approach. The sole point made here is that such a clear shift to political decision making, and the subsequently reduced role for law, greatly reduce the capacity for the confederal rule by law. Yet (confederal) alternatives do not seem available either.

In addition, and partially as a result of its political nature, the crisis seems to force the EU to directly control, and come into conflict with, the Member States. It must do so, furthermore, on one of the most sensitive issues possible: The budget. Again, this challenges the EU in one of the major confederal weaknesses established above: The limited capacity of the centre to control Member States, or to pit itself against one or more Member States in a direct, non-legal confrontation.

Economic Union itself, in other words, seems to be a problematic area for the confederal rule by law on which the EU depends. Despite the clear failure of all previous attempts to have the confederal centre control its mem-

89 Whereby it should not be forgotten that the European Court of Justice also rejected the invitation to legally police the Stability and Growth Pact at the European level. See C-27/04 *Commission v. Council (Stability and Growth Pact)* [2004] ECR I-4829, and D. Doukas, 'The Frailty of the Stability and Growth Pact and the European Court of Justice: Much Ado About Nothing' 32 *LIEI* (2005), 293.

90 In this regard a further blow to the rule by law should be noted, only this one at the EU level. This is the easy way in which the restraints of art. 125 TFEU were set aside by the European Council. Although the extreme conditions make this readily understandable, such deviations from the rule of law can have a very damaging long-term effect.

91 Ruffert (2011), 1788. Cf also Van Middelaar (2009), 160: 'the political force that keeps everyone onboard simply is stronger than the legal logic.' (my translation).

92 See especially C-370/12 *Pringle*, BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*, BverGE 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 be 6/12 (2012) *ESM Treaty*, Conseil constitutionnel, Decision 2012-653 DC of 9 August 2012, *Fiscal Compact*, and Estonian *Riigikohus* (Constitutional Judgment 3-4-1-6-12 of 12 July 2012, *ESM Treaty*.

bers, many of the solutions now proposed precisely force the EU further into such a controlling and conflicting role; a role highly unsuited for confederal systems.[93] The EU, and specifically the Commission, are asked to police national politicians on an issue that lies at the heart of national politics. A job, and even a power, that the Commission should perhaps not wish to obtain. In that sense the path of the Golden Rule, which will be discussed below, might hold more of a promise for confederal rule, even if it is far from risk free.

3.4 The schism between confederal basis and federate superstructure

Lastly, and most importantly, part of the crisis may ultimately be said to have its roots in a schism between one element of the EU's federate superstructure that became too large, and the confederal basis that must support it. The strongly federate Monetary Union, which includes an independent European Central Bank with exclusive powers over all monetary policy,[94] was based on the completely confederal basis of an intergovernmental Economic Union.[95] A schism, furthermore, that reflects, and flows from, the more fundamental schism within the constitutional structure of the EU discussed above.

After all, there was a very good reason *why* a full Fiscal and Economic Union was not established together with the Monetary Union. Member States were not willing to surrender such a key element of their national political process to the EU, and rightly so.[96] Not only do these powers belong at the principal level of the Member States, the EU also lacks the normative authority required to support such far-reaching powers.[97]

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93 See chapter 4, section 3.4.

94 Notice in this regard also the enormous increase in the role and power of the ECB in this crisis. The ECB is required to inject the trillions of Euros required, yet for which national politicians cannot accept open political responsibility, and hence is significantly empowered and intrinsically politicized.

95 See on the federal nature of the monetary union already the language of the Werner rapport in 1969, par 30, explicitly calling the ECB federal 'Considering the political structure of Community and the advantages of making existing central banks part of a new system, the domestic and international monetary policy-making of the Community should be organized in a federal form, in what might be called a European System of Central Banks (ESCB).'

96 The necessity of further political integration was of course already seen at the time, and even proposed, leading to Maastricht. See the proposal for further political union made in the European Council of 1990 in Dublin (*EC Bulletin* 6-1990, 1.11). Also see R. Corbett, 'The Intergovernmental Conference on Political Union' 30 *JCMS* (1992), 271 and W. Buiter, '"The Sense and Nonsense of Maastricht" Revisited: What Have We Learnt about Stabilization EMU? 44 *JCMS* (2006), 687.

97 See chapter 10, section 3.2., 8 and 9.

As experience has shown, however, even the Monetary Union itself already taxed the legitimacy of the EU to a very high degree. Removing something as vital and sensitive as budgetary powers from the national political arena, and placing that power, or control over that power, at the EU level, therefore, should perhaps not be something the EU desires. At least not if it does not want to explode the already wide gap between foundation and superstructure.[98] Yet unlike in other areas, the existing schism between the Monetary and the Economic Union already seems to have reached a critical level anyway. As a result the EU is confronted with the fundamental question of how to respond to such a constitutional challenge. Propelled by the internal dynamic of the market described above, it now appears faced with the choice between two potentially fatal evils: Either abandoning the Monetary Union or making a leap of faith, and a rather desperate one at that, for full Economic Union. It is to explore the outlines of an alternative confederal response to this dilemma that we turn to some of the confederal pitfalls and responses that can be developed to the crisis based on the work done so far.

4 Confederal pitfalls in responding to the crisis: Mind the gap…please

The analysis of the modified confederal system of the EU in part I revealed several inherent weak spots. As shown above, the Euro crisis simultaneously puts pressure on several of these. Responses to the crisis, however, should be very mindful of these weaknesses as well. They should take care not to aggravate existing weaknesses or base remedies on the weaker parts of the confederal basis. Two pitfalls that should be especially avoided are focused on here. First, the risk of exploding the federate superstructure in order to stabilize the EMU. Secondly, the related risk of subsequently trying to create a sufficient democratic authority at the EU level to support this expanded superstructure. Both risks are usefully illustrated by the Commission's blueprint for a deep and genuine EMU.

4.1 Exploding the federate superstructure

The first pitfall is to delegate too many new and far-reaching powers to the EU level, and thereby enlarge the already impressive federate superstructure of the EU outlined in part I. This pitfall is particularly dangerous as increasing central powers seems such a logical response. After all, the fundamental imbalance between the weak Economic Union and the federate

98 Also see the warning by the German BvGH in this connection, who held that members of the *Bundestag*, carrying the primary political authority and responsibility 'must remain in control of fundamental budget policy decisions.' BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*.

Monetary Union forms one of the structural causes of the entire crisis.[99] Elevating the economic leg of the EMU to the same federate level as the monetary leg would solve this imbalance.

In line with this logic, and its own institutional reflexes, the Commission strongly supports such further and deeper integration. A 'significant additional transfer of political powers' is necessary.[100] A 'full fiscal and economic union' is the desired 'final destination, it would involve a *political union* with adequate *pooling of sovereignty* with a *central budget as its own fiscal capacity* and a means of *imposing* budgetary and economic decisions on its members, under specific and well-defined circumstances.'[101] Such deep integration would also entail the common issuance of debt, and eventually the right of the EU to tax individuals directly.[102]

These proposals would significantly expand the federate superstructure of the EU, both quantitatively and qualitatively. They even provide for a right to tax, one of the fundamental federate modifications adopted at Philadelphia, and allow the EU to directly interfere in the budgetary heart of national politics.

As we saw, however, the current federate superstructure is already writing cheques the confederal foundation is barely able to cash. In addition, it is precisely the federate market competences of the EU that have the tendency to expand at the expense of the confederal elements in the EU Constitution, and that by doing so helped to create the entire crisis in the first place. These new federate elements, furthermore, would concern exactly those areas, like money, politics, conflict and enforcement, where a confederal system remains weak.

In other words, proposals to create a federate Economic Union expand the federate superstructure beyond what the confederal basis can carry, and would do so in some of the most dangerous and problematic areas imaginable for a confederation. Besides overburdening the confederal foundation of the EU, such an approach would force the confederal elements in the constitutional system to fight back. The central role that the European Council has claimed during the Euro crisis was already noted above, and provides a clear illustration of this risk. Where the powers at the European level become so significant, and start to include vital political issues like the budget and taxation, these political actors will quickly find ways to re-establish

99 This assumption also underlies the proposals from the European Parliament, the Commission Blueprint and the Van Rompuy Plan.

100 Commission 'blueprint for a deep and genuine economic and monetary union.' COM(2012) 777 final, 11.Cf also page 11 (progressive pooling of sovereignty' leading to 'a deeply integrated economic and fiscal governance framework'.

101 Idem, 31.

102 Idem, 31, 33 and 40.

control. As shown in part II, EU institutions will have no means of defeating the principal national authority and legitimacy of these actors once it is fully deployed. The net result might well be less central control than more, and a dangerous undermining of the entire federate superstructure on which the EU depends.[103] The fall out of such a power struggle could also tarnish the rule by law and general culture of legal compliance and cooperation that the EU relies on.

4.2 Relocating democracy to the EU level

Obviously the parties suggesting such an expansion of the EU superstructure are well aware of these risks. Yet in line with their desire to expand the superstructure, their solution generally is to jump into the second confederal pitfall as well by trying to establish the necessary democratic legitimacy for an expanded superstructure at the EU level.

Again, the proposals of the Commission provide a clear example. The choice to create a primary EU democracy to support deeper economic integration is already inherent in the two 'basic principles' the Commission formulates:

> 'First, in multilevel governance systems, accountability should be ensured at that level where the *respective executive decision* is taken, whilst taking due account of the level where the decision has an impact. Second, in developing EMU as in European integration generally, the level of democratic legitimacy always needs to *remain commensurate with the degree of transfer of sovereignty* from Member States to the European level.' Consequently it is the European Parliament 'that primarily needs to ensure democratic accountability (…).'[104]

It is still acknowledged that 'the role of national parliaments will always remain crucial in ensuring legitimacy (…)'. Yet it is not exactly clear what this crucial role entails because it is the European Parliament that must provide the real legitimacy at the EU level.[105] For this legitimacy 'requires a parliamentary assembly representatively composed in which votes can be taken. The *European Parliament, and only it, is that assembly for the EU* and hence for the euro.'[106]

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103 See above chapter 3, section 6.

104 Commission 'blueprint for a deep and genuine economic and monetary union.' COM(2012) 777 final, 35.

105 Cf in this regard also the almost mystical statement in art. 3(2) TSCG that the required correction mechanisms 'shall fully respect the prerogatives of national Parliaments', even though they must *guarantee* that the deficit does not become excessive.

106 Commission blueprint, 35.

Yet it fails to be seen, or demonstrated, how the European Parliament will provide this legitimacy. A gap illustrated by the interesting claim that the 'Lisbon Treaty has *perfected* the EU's unique model of supranational democracy'.[107] A somewhat optimistic assessment of the current legitimacy of the EU and the European Parliament. This assessment is also immediately contradicted by the second half of this sentence, which finds that this perfect system '*in principle* set[s] an appropriate level of democratic legitimacy in regard of today's EU competences.'[108] In practice, however, the European Parliament seems incapable of generating sufficient legitimacy to even support the current federate superstructure, let alone a greatly expanded one.

As demonstrated in part II, it is also impossible for the European Parliament to do so in the confederal authority structure of the EU. Unlike in a federate system there simply is no supreme central authority to represent at the EU level, and to draw legitimacy from.[109] The national parliaments therefore remain the principal representative bodies of the different sovereign member people.

Because there is no sufficient central authority to represent or legitimize such far-reaching central powers, it also comes as no surprise that the Commission struggles to concretize and substantiate the strengthened role of the European Parliament or the legitimizing effect expected. Achieving further legitimacy will require 'further reflections' on the 'EU's model of democratic legitimacy', despite its current perfection.[110] Later on, only some less than convincing suggestions are made, for instance ensuring that the European Parliament is 'more directly involved in the choice of the multiannual priorities of the Union', that it is 'regularly informed' on adjustment programmes, or the 'possibility of adapting its internal organisation to a stronger EMU.'[111] Nor does the suggestion to increase the control of the European Parliament over the new supervisory functions of the ECB seem likely to achieve the desired democratic result.[112] As a result, we are left with the general need to 'foster the emergence of a genuine European political sphere'.[113] The same challenge the EU has been facing all along.

Besides their ineffectiveness, however, two more fundamental shortfalls undermine such attempts to establish primary democratic legitimacy at the EU level, at least as long as the member peoples want to retain a confederal Union and their individual sovereignty.

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107 Idem, 35.
108 Idem, 35.
109 See chapter 4, section 4.
110 Commission blueprint, 35-36.
111 Idem, 37.
112 Idem, 39.
113 Idem, 37.

To begin with, it diverts the focus from the national level, though it is there that confederal democratic legitimacy could perhaps be best sought. Instead of investing in the confederal evolution of the national democratic process, as suggested in chapter 12, attention remains focussed on the EU level.

Second, the attempts to create legitimacy at the EU level automatically *challenge* the principal legitimacy of the national democratic system. The implicit claim is that this national level can be supplanted by an EU process. As part II of this thesis demonstrated, this is impossible within a confederal system.[114] Such claims can, as a result, lead to dangerous conflicts, that might undermine the modified confederal model of the EU.

Essentially these challenges, jointly shaping the second confederal pitfall, all flow from the flawed assumption that 'accountability should be ensured at that level where the respective executive decision is taken.' As long as a confederal system is to be maintained, however, accountability on such vital points must be ensured at the level where the principal political authority lies: The national one. As demonstrated in part II and chapter 12 above, the solution then lies in connecting decisions at the EU level to this principal national authority through a confederal evolution of the national democratic process.

4.3 Only conquer what you can defend

Jointly, these two confederal pitfalls may balloon the federate superstructure without providing any additional democratic legitimacy to support it. What is more, the existing legitimacy that lies at the national level may be challenged and undermined. The confederal potential of a direct and democratic basis for EU authority outlined in part II is not realized, and the national democratic processes cannot evolve in a way that allows them to expand their control beyond the borders of the declining state. The responsibility to develop effective budgetary controls that meet the requirements of the confederal centre, a task which could provide important content to a national democratic process on integration, is transferred to the central level.

In its turn the centre may be tempted to bite off far more authority than it can chew. Far-reaching authority to control national budgets may very well prove a Trojan horse, as the centre will be unable to provide the required legitimacy, and such authority may induce a countermove from the national

114 Of course one could reply that a federate foundation should therefore be established, and this might also be the implicit hope underlying the Commission blueprint. As has been discussed in part II, however, such a shift is considered neither feasible nor desirable for the foreseeable future. Nor, furthermore, should it be realized through stealth or trying to establish a *fait accompli*, which would be an extremely risky and undemocratic strategy.

political actors that the EU centre will not be able to repulse. Conquering ground now that some Member States are in disarray might be easy and tempting, but defending such conquests will be impossible, and future withdrawal will be costly.

The next section therefore attempts to provide a confederal contribution to this key challenge, and to the sustained group effort that will be required to tackle it.

5 Confederal cures?

For, in addition to highlighting some of the causes and pitfalls, and with the caveats set out above, the confederal prism might also help by indicating some alternative directions for solutions, at least at the constitutional level. Solutions that avoid some of the main weaknesses in the modified confederal system of the EU, and instead try to build on its particular strengths.

To this end two suggestions will be discussed here. First, establishing the checks on national economic discipline at the national level, and bringing them under more effective secondary EU control. Second, relying on automaticity, rather than any form of political decision making at the European level in enforcing Member State obligations.

Both of these suggestions concern the narrow issues of *enforcing* economic coordination and budgetary control. The lack of effective enforcement is one of the key weaknesses of the EMU, but of course not the only one. Consequently, even if the proposed approaches might be effective, they would not address other structural problems of the Euro such as the disparity in the balance of payments or the different level of competitiveness between Member States economies. Nevertheless improving the effectiveness on this point may go some way to softening the unattractive and seemingly impossible choice between either a federate 'E', or no 'M'. It may strengthen the economic limb of the EMU without transferring impossible amounts of federate powers to the EU. In addition, if the underlying logic and approach are correct, it may also be of use in addressing some of the other structural problems facing the EMU.

5.1 Designing confederal checks at the national level

As indicated above, switching to a full Economic and Fiscal Union seems out of the question. Aside from the fact that such a measure would likely not make it through public consultations at the moment, it might very well tax EU and national legitimacy beyond its breaking point. The more logical approach from the confederal perspective would seem to stop burdening the confederal level with enforcement tasks, and instead look for a solution at *the national level*, where the principal authority, the financial power, and the spending problem lies.

A '*Schuldenbremse*' forms one example of the kind of rule that could be adopted at the national level. Budgetary rules of this kind were already included in the Swiss Constitution in 2002 and the German Constitution in 2009[115] Poland has also constitutionally capped its public debt to three fifths of GDP, [116] and a similar proposal was accepted by the Spanish Senate in 2011.[117]

Now the precise functioning of such rules and budgetary control procedures should be left to the national democratic process, but they should take the limits set by the EU into account. The national rules should be developed with the aim of ensuring these limitations, but must do so at the national level. With such national rules in place the EU could then revert to its confederal rule by law; it could *connect* with these national rules and systems of control, and influence their application and interpretation. Rather than pitting itself against its Member States in a field where the EU does not have a hope of trumping them, the EU could then work with the Member States, or at least their legal systems, to fortify their own national measures.

The benefits of such an approach are perhaps best illustrated by the absurdity of their opposites, such as the plan of Dutch Prime Minister Rutte to turn indebted Member States into EU wards under direct control of a European Commissioner.[118] The focus of the EU should be to stimulate Member States to take appropriate national measures, not to superimpose itself as a higher level of economic government.[119] As demonstrated in part I, it is vital that a confederation is based on stable and responsible states, instead of trying to increase its powers to control unstable ones.[120]

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115 Art. 115(2) of the German Basic Law now provides that revenue and expenditure must be balances, which is the case if not more than 0.35% of GDP has been borrowed. In exceptional circumstances a larger deficit may be allowed. The *Länder* will not be allowed to run any deficit at all. Under the transitional scheme of art. 143(d) of the Basic Law, however, the 0.35% limit will only bindingly apply to the Federal Government in 2016, and to the *Länder* in 2020. Italy and Austria have similarly included debt brakes.

116 Art. 216(5) of the Polish Constitution. Instead of such substantive caps one could also think of more procedural or transparency requirements.

117 Under this amendment, proposed by Zapatero on August 23 of 2011, the Spanish government will not be allowed to run a deficit of over 0.40% of GDP, and is under a constitutional obligation to reduce the deficit to under 60% of GDP. The amendment has not yet been passed.

118 See the letter of the Dutch Government to the Second Chamber of Parliament of September 7th 2011, co-signed by the Prime Minister, the Minister of Finance, the Minister of Economic Affairs, Agriculture and Innovation and the State Secretary of foreign affairs (i.e. not the Minister for Foreign Affairs). Ref 3106274.

119 For future members of the Euro zone, and even future Members of the EU such measures can, of course, be turned into accession requirements. See in this regard chapter 17 of the negotiation framework for the accession of Montenegro.

120 See chapter 4, section 3.4.

The 'Golden Rule' now incorporated in the SCG Treaty, which was inspired by the German and Swiss *Schuldenbremse*, and was coincidentally incorporated after this proposal was first formulated in this thesis, follows this confederal logic.[121] It effectively utilizes several important confederal tools.

First, it *legalizes* budgetary decisions. An obligation is created for Member States to bring their national budget procedure under national legal control. As we saw, this is an initial requirement to open a field up for confederal rule by law.[122]

Second, it subsequently relies on the Member States' own control mechanisms and enforcement capacity to self-police these budgetary limits. Primary enforcement, therefore, lies with the Member State. This also allows for a broader variety of controls and sanctions than the inevitable fines, and allows the mechanism to be more tailored to the specific national system it needs to keep in check.

Third, instead of being the primary enforcer, the Commission, acting outside the framework of the EU Treaties, is given the task of setting the standards that the national control mechanism should conform with.[123] In the same vein the Court of Justice, acting under Article 273 TFU, is not asked to rule directly on the national budgets, but on the national mechanisms established.[124] The confederal institutions are, therefore, used for second-level norm setting and enforcement in a highly legal manner, a task to which they are more suited than direct enforcement on politically sensitive fields.

Fourth, as the TSCG cannot rely on the supremacy that EU law claims, it contains the direct obligation to *constitutionally* elevate the Golden Rule, or at least to give it an equivalent status. A status that would guarantee, as much as legally possible, its effectiveness within the national legal orders.[125] As such, the legal supremacy required for effective national budgetary control is derived from the primary authority and legitimacy of the national constitution, and not from the broader but weaker supremacy of EU law.[126]

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121 Clearly not implying any form of causality whatsoever.

122 See chapter 4, section 3.1.

123 See art. 3(2) TSCG, and for the guidelines themselves the communication from the Commission of 20 June2012 on the Common principles on national fiscal correction mechanisms, COM(2012) 342 final.

124 For the indirect review of budgets this could give rise to via the logic of effectiveness see Borger and Cuyvers (2012).

125 See also chapter 3, section 4 on the rule by law and the reliance of the Member States themselves on the rule of law.

126 See chapter 10, section 8.

The entire approach and logic underlying the Golden Rule, therefore, conforms with the confederal rule by law approach described earlier, and therefore with the most effective enforcement mechanism available to a confederal system. Consequently, if constituted effectively, a Golden Rule can make do with the relatively light footprint the rule by law approach leaves in general. In turn this means that the federate superstructure of the EU can remain lighter, and a further widening of the gap between superstructure and foundation is prevented.

Two more general confederal benefits, therefore, also flow from this approach. To begin with, the Golden Rule anchors the EMU, and therefore part of the internal market, in the national constitutions. Second, and related, it also relocates part of the burden and responsibility for the EMU onto the national systems. It will not just be 'Brussels' demanding budget cuts, but national institutions and national judges. And it will be the national democratic process in which the debate over the necessity of such measures will take place, and where the crucial specifics of the Golden Rule will be decided.

At the same time, the Golden Rule system also knows clear risks and costs. To begin with such national measures share in the confederal risk of overlegalizing areas that should be largely left in the hands of politics. A proper balance should, therefore, be found between European (legal) controls on spending and national political discretion to decide on spending. In this regard the rather open phrase that the Golden Rule '(…) shall fully respect the prerogatives of national Parliaments' may ring a bit hollow: How to curb parliamentary spending power without limiting their prerogatives? Again, however, this balance should also become part of the national democratic process.

Much will also depend on the specifics of the clauses adapted, and the constitutional practice that develops around them. If national control mechanisms fail to be generally effective, which seems to be a real risk in several Member States, the secondary enforcement by the Commission and the Court of Justice will *de facto* revert to a primary role anyway.[127]

127 Regarding the interpretation, application and effectiveness of these national control mechanisms, furthermore, the interaction between such (constitutional) norms and EU law should be duly considered, certainly where such a Golden Rule is indeed to be incorporated from the TSCG into EU law proper. Although it cannot be explored here, these questions at least deserve to be flagged. For because national budgetary control mechanisms will then formally implement EU law, such national norms would have to comply with EU law, or at least be interpreted in conformity with EU law to the extent possible. The complete supremacy claimed by EU law, furthermore, combined with the potential direct effect of clearly worded European debt limits, could have far-reaching effects. The question could even be raised to what extent Member States would be forced to create legal remedies to enforce such rights and obligations. In other words, when bringing the budget under the EU rule by law, all the principles, doctrines and effects that accompany that rule by law make their entree as well.

Most fundamentally, however, the very same anchoring in national institutions and constitutions that forms the strength of the Golden Rule also forms an important risk. As we saw earlier, the EU already seems to be eating into the legitimacy of national institutions.[128] Asking them to take on another heavy task, and one that will remain of a clear 'external' signature, might be placing too big a burden on them as well, at least in their present status.[129] Even where sufficient national measures will be taken in all Member States, it will still be necessary, therefore, to increase the legitimacy, or 'carrying weight' of the confederal basis of the EU at the national level more generally.

As a result, the success of a Golden Rule will also depend on an improved confederal foundation for the EU more generally, and therefore on a confederal evolution of the national democratic process as outlined in part II and chapter 12. The member peoples should not just be empowered to engage in the precise formulation and modalities of the Golden Rule, but in a national democratic process on the EU more generally. Once such a national process is in place, after all, the electorate can also be properly informed about the necessity of a Golden Rule, and weigh the overall benefits, both national and European, against the likely costs. A debate can then also be had on the best way to structure such a Golden Rule, and what kind of exceptions and flexibility should be included. This opens up the field for national tailor-made solutions and creativity. One could imagine a more procedural mechanisms, for instance requiring new elections or a referendum on cuts where an excessive deficit occurs. Alternatively legal limits might be buffeted by political incentives, such as an automatic increase in income taxes and VAT where an excessive deficit is projected. Creating such a debate about the modalities and costs and benefits will also help the desired sense of EU solidarity to develop on the basis of enlightened self interest, at least if the assumptions underlying such rules are correct.[130] A Golden Rule can, in other words, form an important part of a confederal democratic process, but also needs to be grounded in precisely such a process.

5.2 The alternative of automaticity

One confederal alternative to national control mechanisms might be the inclusion of automatic sanctions at the EU level. This might be a counterintuitive suggestion, as automatic sanctions are generally seen as a far-reaching limitation of Member State control. Constitutionally, however, it can be argued that such automatic sanctions actually remain fully confederal in the sense that they are simply another method for the Member States to police

128 See chapter 4, section 3.5.

129 Where a new national institution is created, as is not unlikely given the wording of the SCG Treaty, furthermore, this new institution will not have any existing legitimacy to fall back on, and might be perceived even more as a European *Fremdkörper*.

130 See also the Van Rompuy plan, page 14.

themselves. The only difference with national sanctions would be that they are using the EU level to police themselves more effectively.

The imposition of an automatic, predefined fine, after all, would not so much be the application of an EU competence. It would be the execution of a direct and clear will of the Member State itself to be sanctioned when violating a certain rule. Especially where interpretation and application are relatively clear, this would be comparatively unproblematic, and would not require the EU claiming the normative authority to overrule or sanction the Member States in the area of public spending (at least not formally so, public perception will of course be a different matter altogether).

Automatic sanctions also reduce the political dimension, at least at the EU level, of imposing sanctions, and keep the imposition of sanctions within the legal domain. A domain that is much more amenable to confederal rule. In this sense the use of automatic sanctions could be compared to the important role played by negative integration more generally.[131] It could remove the need for political decision making, thereby removing the potential for political deadlock, provide a clear base line, and allow the legal institutions involved to gradually develop an Acquis that might guide and spur future decision making. Even more than with national sanctions, however, and as with negative integration in general, such automatic sanctions also raise issues of legitimacy, and also require a stronger confederal foundation.

6 A confederal course to weather a perfect confederal storm

The sovereign debt and EMU crises formed the second challenge and whetstone for the confederal approach developed in this thesis. Based on the findings above it can be concluded that a confederal approach can indeed provide useful insights and guidance.

First of all, it helps to reveal the confederal roots of the sovereign debt and EMU crises. As was shown, these crises precisely hit the major weak spots of the modified confederal system identified in part I. They were caused by a self-propelling federate superstructure that challenged the normative primacy of the national level and forced the EU into fields for which its confederal system is particularly unsuited: Money, politics, conflict and direct enforcement. A confederal approach hence helps to increase our understanding of why these crises arose, and why they form such a challenge to the EU.

131 See chapter 3, section 3.1.

Second, such improved understanding allows us to identify several pitfalls that should be avoided in the current struggle to combat the ongoing crises. Two understandable temptations should be resisted in particular: First, burdening the EU with a full-blown federate economic union, and then to, secondly, try and establish a federate democratic process at the EU level capable of supporting this expanded federate superstructure.

Both responses would be based on a deceptive logic, and would fail to grasp and respect the confederal nature of the EU. As a result they could widen the already dangerous gap between the EU's confederal foundation and its federate superstructure, without providing anywhere near the required level of democratic legitimacy. Equally, they would risk challenging the ultimate foundation of confederal authority in the sovereign member peoples.

Consequently, such centralizing responses to the crisis might lead to dangerous confederal readjustments in the entire EU system. In addition they might overburden the confederal foundation far beyond its maximum carrying capacity. Either way, such aggressive centralizing responses might win the battle to stabilize the EMU in the short run, but they would lose the war for a stable and democratic European Union in the long run. A conclusion that can be visualized by imagining the European Commission actually trying to restrain the German, French, Spanish or Polish parliaments and governments in an open conflict over the national budget, and doing so in the face of an overwhelming national electoral support not to give in to Brussels. A looe-lose situation for integration.

Third, and taking into account these pitfalls, a confederal approach points to some more promising solutions. In line with the modified confederal system of the EU, the focus should shift to the national level, and to ways of linking a more effective economic union to the primary authority of the member people. In line with the earlier conclusions on a confederal evolution of national democracy, effective budgetary checks should be established at the national level. Guided by its confederal obligations the national democratic process should be challenged and allowed to create effective control mechanisms, preferably at the constitutional level. Such national mechanisms should fit with the national system, and find a proper balance between the different interests involved. Clearly the result will not be as tight or unified as under a completely centralized system, and failures may occur. Yet a sufficient level of effectiveness might be possible, and any limits on effectiveness must also be accepted as the price to pay for respecting national identity and democracy, and the long term stability this would bring to the EU and its EMU on the whole.

A further potential benefit of such a confederal approach would be its contribution to the necessary confederal evolution of the national democratic process. Determining how and to what extent a Golden Rule should be incorporated in the national constitutional system provides important new

substance for such a political process, and also forces this process to engage with European integration. Whats more, by relying on national processes and mechanisms for enforcement, the EU can revert to the subsidiary role for which the confederal form is generally best suited.

Combining these insights, it is important that the political energy and opportunity provided by the crises is used wisely. Where possible it could be channelled into improving the confederal foundation of the EU in the national constitutional and democratic systems. In this way the leverage provided by the crises could be partially used to improve the stability of the national systems, both in terms of economic discipline and in terms of promoting a confederal democratic process more generally. For it is on the stability of these national systems, and their capacity to provide democratic legitimacy for European integration, that the EU largely depends. Hence it is important that the temptation is resisted to use the crises to further expand the federate superstructure of the EU, and to achieve short-term results. Instead, a long term investment in the confederal foundation of the EU might pay substantially higher and more sustainable dividends.

Conclusion: The EU as a Confederal Union of Sovereign Member Peoples

1 The challenging potential of European integration

The European Union is rearranging the rule of a continent. Increasing amounts of public authority are transferred from the Member States to the European level. Authority that is no longer under the exclusive control of national political systems, and further removed from their legitimacy creating mechanisms. Remaining national competences are more often than not affected by European norms, or become increasingly irrelevant due to globalization. The gravity pull and internal dynamics of integration, furthermore, are far from exhausted, as the increasing EU control over national budgets and economic policy illustrates. We are, in other words, in the middle of a major experiment in government.

Reorganizing government on such a grand scale offers great opportunities. Certainly at a time where the scope and structure of government needs to be realigned with the reality that needs governing. Tremendous challenges, however, accompany such change as well. Meeting these challenges is also becoming increasingly urgent. For the EU is not just a theoretical exercise. It is a life test, which carries immediate responsibilities. More than five hundred million people find themselves citizens of a still ongoing and ever-expanding experiment. They wonder how the EU will compensate for the national political and constitutional arrangements it has uprooted. And it appears they are becoming somewhat impatient. Not unreasonably so, one might add. After more than fifty years of relatively blind trust, the EU is still under construction; its nature and intended destination still unknown.

Meanwhile, existing constitutional and legal theory struggle to catch up. Considering the magnitude and speed of developments, furthermore, the ongoing pursuit of the EU is often guided by the understandable assumption that, to comprehend the EU, we need a completely new theory of political and constitutional organization. Brave new thinking beyond the statal framework and existing concepts seems called for.

This thesis, however, took a different approach in its attempt to help recapture the EU. Rather then burning our theoretical bridges behind us, it aimed to *reconnect* the EU to two classic and powerful, yet thoroughly unfashionable constructs: confederalism and sovereignty. Instead of forcing the EU to overcome history, these two constructs were used to connect the EU to existing theory, human experience, and the normative force they contain.

Two constructs, therefore, that could form part of a constructive confederal theory of the EU that builds on and improves existing structures, rather than spending most of its energy on demolishing them.

The findings above have demonstrated the *prima facie* potential of confederalism and sovereignty to contribute to such a constructive constitutional theory of the EU, and to a positive and democratic narrative for the EU more generally. The EU can indeed be usefully understood as a modified confederal system, and can be grounded on a confederal conception of popular sovereignty. Jointly, these constructs help to conceptualize a descriptively useful and normatively attractive confederal middle ground for the EU to rest on. A constitutional middle ground which can embrace a plural reality within the EU, yet without surrendering its necessary foundation in the sovereign member peoples and the national democratic process. One which actually shows how the EU can be conceived, and hence developed into, a necessary update of democratic government that protects the authority of the people from irrelevance in a global age. An update that empowers them to go beyond their nation state whilst retaining it as an existential safe haven, and to create a government of the peoples and for the peoples outside the state.

The confederal approach developed, furthermore, also helps to dissolve several theoretical deadlocks that currently obstruct our understanding of the EU and its peculiar strengths and weaknesses. Sovereignty and integration stop being an either/or, plurality and hierarchy stop being intrinsically incompatible, and the EU does not have to deny or erode the ultimate authority of the sovereign member people or the principal status of their Member States. Although much work remains, the path towards a more constructive and symbiotic understanding of the EU as a logical and attractive confederal evolution of public authority has thereby been demonstrated. A path that fits with the reality and necessity of a Neo-Westphalian world where states must surrender their near monopoly on public authority but nevertheless remain of central importance, and where increasing demands of democracy have to be reconciled with decreasing national power and factual interdependence.

2 Confederalism and the EU: The modified confederation as a model

To support these conclusions, part I first returned to the rich notion of confederation: The classic label for a *constitutional* union between entities that each retain their ultimate authority and independence.[1] A Union therefore,

1 For more detailed conclusions on part I see chapter 6.

that goes beyond the 'intergovernmental', certainly is 'supranational', but falls short of statehood or federation.

By comparing the EU against the concrete example of the US Confederation and its evolution into a federate state it was shown how the EU has retained a fully confederal foundation, yet reinforced and burdened this foundation with a federalized superstructure.

For on the one hand, the EU has not incorporated any of the foundational modifications that together grounded the American transition to a federation. The EU does not create a single European people, is not allowed to tax directly or use force, the Treaties cannot be amended by majority and secession is allowed. On this foundational level, therefore, the EU remains wholly confederal.

On the other hand, the EU does claim supremacy and direct effect, utilizes a federate doctrine of attributed powers, wields significant powers to regulate commerce, and incorporates a supreme federate court with a final say on the interpretation of the Treaties. Jointly these federate modifications form an innovative and crucial federate superstructure. They help to understand how the EU remains confederal at its heart, yet is also federate in some sense. In addition, this federate superstructure modifies the classic confederal system in several important ways, which helps to better understand the evolution and functioning of the particular EU system. Jointly, the comparative findings of part I thereby supported three key findings on the EU constitutional framework.

2.1 Three comparative key findings

First, the EU can best be understood as an *inverted confederation*. Contrary to the US confederation, it has an internal and economic focus, not an external and military one. This provides the EU with a far more continuous and stable basis for confederal cooperation than the traditional external focus: In the marketplace there are no times of peace. What is more, the impetus for continued cooperation provided by an internal market also has the crucial capacity to keep pace with integration. The deeper economic integration becomes, the higher the benefits of cooperation and the costs of a breakdown become as well. A finding that helps to explain the remarkable stability of the EU for a confederal system, and its capacity so far to overcome significant crises. The sheer limitless of the economy and the market, however, also explain the complexities in circumscribing the scope of EU integration. An unlimited market should not result in an unlimited EU.

Second, the EU rests on a confederal basis, but has both reinforced and burdened this basis with a federate superstructure. It has included several of the federate constitutional elements which made the US federation more effective, yet without incorporating the foundational elements which sup-

ported these elements in the US, such as a single people or a separate federate government.

This federate superstructure further explains the remarkable stability and effectiveness of the EU. It protects the EU against several of the classic confederal weaknesses. At the same time it also explains some of its main weaknesses, including the EU's continuous quest for legitimacy. After all, a clear gap exists between the authority capacity of the confederal foundation and the authority demand of the federate superstructure. A constitutional imbalance that, as discussed, resembles armouring a car without increasing its engine capacity.

Third, the EU has used these federate modifications to develop a truly *confederal rule by law*. Not incidentally almost all of the federate modifications identified concern law and the legal system. This method of governing builds on the capacity of the administrative and legal systems of the modern welfare state to self-police. A vital mechanism, as it reduces the need for the EU to enforce, and thus reduces stress on several classic Achilles heels of confederal systems: Money, conflict and enforcement. A conclusion, therefore, that also helps to further understand the vital role of law for European integration, as well as why the EU has achieved a level of stability and effectiveness that most classic confederal systems could only dream of. Here modified confederalism really does form an impire of law. At the same time, it also exposes some major weaknesses of the modified confederal form, including its reliance on stable Member States and national legal systems, its limited capacity to control non-legal domains, or to engage in direct political conflict where a conflict escalates from the legal to the political domain.

Jointly, these confederal findings provide a high explanatory power for many of the well-known strengths and weaknesses of the EU system. Additionally, they identify some less obvious ones, which might be better exploited or will provide future problems if not attended to. The primary risk identified, however, is the growing schism between the confederal basis and the gradually expanding federate superstructure of the EU. A schism that increasingly taxes the confederal foundation of the EU, and should be addressed before it threatens the viability of the entire system.

2.2 Three confederal key conclusions

Based on these confederal findings, three central conclusions were drawn. First, the confederal prism provides a suitable and instructive prism to approach the EU with. It can explain and accommodate its pluralist characteristics, as well as the ultimate hierarchy of its member peoples in their states. It also contributes to understanding the continuous expansion of EU integration, which can partially be explained as a process whereby the federate superstructure, not sufficiently contained by the confederal basis, self-

expanded. At the same time the federate superstructure also allowed the EU to survive several deep crises where traditional confederations would likely have failed.

Second, many of the familiar EU weaknesses are so hard to address because they are linked to the very modifications that protect the EU against the traditional confederal weaknesses. A catch–22 results, for by weakening the federate modifications underlying some of the EU woes, such as the ever-expanding internal market, even worse systemic risks may return in their place. Instead of removing these federate modifications, therefore, further modifications within the confederal system as a whole are required. These need to take into account, however, all the outer limits inherent in the confederal form. Confederal overstretch, that is burdening the confederal foundation of the EU beyond its carrying capacity, will only deepen the problems of the EU in the longer run, and therefore harm its long-term viability.

Third, and related to this second conclusion, the EU is in fact approaching, or perhaps already overstepping, the limits of its current framework. The gap between the federate superstructure and the confederal foundation has become dangerously large. This puts a high level of strain on the legitimacy of the EU, but also on the national institutions that carry integration at the statal level. As legitimacy and trust are already in short supply in the political arena today, bridging this gap must become a priority for politics and theory alike. An exercise to which a confederal approach to the EU can again contribute, both by providing a better understanding of the risks, and by identifying different means to address them.

2.3 The lack of federate driving forces

To complement this substantive comparison, part I also considered the process of American federation. Though based on a selective sample, this analysis showed how several of the key procedural components that drove and enabled federation in the US are lacking in the EU. Most important in this regard is the reversed elite structure in the EU. In the US several pre-independence elites saw federation as their way back to political power. In the EU the national elites depend on their national power bases, and therefore will not weaken these in favour of EU integration: Not enough actors would gain more power from federation than from maintaining the status quo. The national democratic and elite structure in the EU, therefore, prevents rather than propels a federate shift in political authority, and cements the confederal authority structure of the EU.

In addition, it was shown how the primary normative argument generally used to defend federation – making the EU more democratic – is largely based on confusion between *having* a central normative authority and *how* this authority is represented. For federation simply does not equate with

democracy. In several important respects, American federation should be seen as a check on democracy, or even as an anti-democratic coup intended to reign in the overly democratic states, and return authority to an ordered central system.

Consequently, these process elements only confirmed both the improbability of European federation, at least in the foreseeable future, and the normative risks that federation would entail. As such, they confirm the necessity of finding confederal solutions to the woes and weaknesses of the EU.

A conclusion which also leads to the second key challenge of this thesis: How to create a confederal basis strong enough to carry a significant federate superstructure? A challenge that, as shown in part II, should build on the specific strengths of the EU's confederal foundation, yet avoid its inherent weaknesses. A worthwile challenge, however. If found, such modifications would open up the confederal form as a highly interesting model for a globalizing reality, one where the federal capacity to combine unity and diversity should be taken to the next (confederal) level. It was to address this challenge that part II engaged with the second central concept in this thesis: sovereignty and the potential evolution towards a confederal conception of sovereignty. An evolution that should emulate the federate evolution of sovereignty in the US, and enable the sovereign member peoples to reassert their position both at the national and at the EU level.

3 A confederal evolution of sovereignty

Inspired by the federate evolution of sovereignty in the US, part II subsequently established the potential of such a confederal conception of sovereignty. A conception that enables a direct and popular foundation for the EU in the sovereign member peoples, and thereby prevents the need for the EU to choose between federating or taking a step back into the unstable waters of traditional confederation. Sovereignty, in other words, is part of the solution for creating a stable and democratic EU, not part of the problem.

To support these findings, part II developed two necessary, though not sufficient, definitional elements of a confederal conception of sovereignty, being *internal* and *popular* sovereignty. It subsequently illustrated their capacity to overcome the apparent contradiction between sovereignty and integration suggested by the current theoretical framework, and the statist-pluralist divide that shapes it.

3.1 The conceptual fit of confederal sovereignty

First, it was shown how a confederal conception logically fits with the concept of sovereignty and its evolution over time. A fit that became apparent

once the increasingly confused concepts of internal and external sovereignty were separated, and the EU was approached from the conceptually and normatively more fundamental concept of internal sovereignty alone.

For, as was demonstrated, internal sovereignty does not conflict with the division of sovereign authority that integration entails. Within the logic of internal sovereignty, sovereign prerogatives are perfectly capable of being divided over multiple levels and governments. This even more so after the popular and federate innovations to internal sovereignty, as developed in the US, are taken into account.

As was then further demonstrated, it is only the concept of external sovereignty that conflicts with integration. For where internal sovereignty became increasingly flexible, external sovereignty evolved towards an absolute, indivisible and statal sovereign. A powerful construct, which over time has wrongly come to dominate our understanding of sovereignty, eclipsing the concept of internal sovereignty. Yet external sovereignty is intrinsically unsuited to understanding an entity like the EU, and ultimately remains secondary to internal sovereignty, which it must assume.

Consequently, it was shown that European integration, with its dividing and sharing of far-reaching public authority outside the Member States, does not conflict with sovereignty as such. Rather it forms a logical and necessary confederal evolution of internal and popular sovereignty. One that reasserts the control of the normatively primary internal sovereign over the external sovereign, or more plainly put, of the people over their states. A conclusion that can also be normatively welcomed, as the external sovereign had become increasingly dominant, in theory and in fact, even though it is inherently less democratic and certainly less suited to order an interdependent and interconnected reality.

3.2 De-complicating reality

Based on this conceptual analysis, it was then demonstrated how the EU can indeed be understood as a further confederal evolution of internal sovereignty. Instead of delegating all their sovereign powers to a single state, the member peoples now delegate part of their sovereign authority directly to an external, non-statal entity. Moreover, they do so reciprocally in a confederal union with other sovereign member peoples. This development forms an important modification of the traditional Westphalian arrangement, but it does not deviate from the basic structure or logic of internal sovereignty. As such, it also presents a far more logical, if less spectacular, picture of the EU: Instead of seeing the EU as a radical break from all that came before it, the EU can be understood as a gradual evolution of sovereignty and confederal organization. It becomes a logical, if not necessary or inevitable, development in the exercise of public authority.

The analysis from internal sovereignty also provides an important legal, normative and evolutionary fit with the realities within the EU. Legally it fits with the basis of the EU in attribution, and the case law of the Court of Justice on this point. Normatively it provides a crucial fit with the national authority structures in the Member States, almost all of which explicitly recognize the sovereign authority of the people. Evolutionarily it fits with the direct but secondary bond that is being increasingly established between the EU and its citizens. In addition to this overall fit, a confederal conception of sovereignty was also shown to provide several further distinct advantages for a constitutional theory of the EU.

3.3 Advantages of confederal sovereignty: From technocratic frog to democratic prince

First of all, building on the conceptual analysis above, it has been shown how a confederal conception of sovereignty can dissolve the commonly assumed incompatibility between sovereignty and integration, and thereby the clash between statism and pluralism that largely derives from this contradiction. What is more, once approached from an internal and confederal conception of sovereignty, both statism and pluralism can actually be strengthened, relieved of some of their less convincing purist streaks, and made more compatible with each other.

For example, the member peoples can retain ultimate sovereignty, and they can hence intervene in the case of fundamental conflict between the EU and a Member State. Yet this does not reduce the daily reality in the EU to a linear hierarchy. For *neither* the EU, nor the Member States turn out to be ultimate authorities, but the member peoples. So in the relation between the EU and the Member States a high level of fundamental heterarchy can remain. With sovereign hierarchy in place as the necessary hierarchical exception (statism), heterarchy can remain the daily reality between the Member States and the EU (pluralism).

Second, and as a result of this reconciliation between sovereignty and integration, sovereignty stops being one of the obstacles that the EU needs to overcome. Instead, sovereignty, with all its potential to legitimize and structure authority, becomes available as a building block for a constructive constitutional theory of the EU. A conclusion that leads to the second key advantage of confederal sovereignty: Its capacity to provide the sufficient confederal foundation required to support the federate superstructure of the EU.

For as was shown, with the help of confederal sovereignty the EU is enabled to establish a direct, if subsidiary, link between itself and the sovereign member peoples. A link which explains and substantiates the increasingly direct connection between the individual and the EU. Even though it needs to be further developed and institutionalized, this link opens up a path to a sufficiently stable, yet still confederal basis for the EU in the sover-

eign member peoples, and with it the potential for direct, though secondary, popular legitimacy.

In addition, it was shown how confederal sovereignty dovetails with the contested issues of EU constitutionalism and the conflicts surrounding primacy. From a confederal perspective, the EU Treaties can logically be understood as secondary constitutions. They partake in the constitutional structures of the Member States, fulfil the constitutional task of dividing and controlling sovereign authority, and derive additional and uniquely confederal authority from the multitude of sovereign mandates simultaneously held. At the same time, the Treaties lack the existential dimension and intensity of national constitutions, which form the principal political shells of the sovereign member peoples.

This conclusion also allows us to distinguish between the ultimate normative primacy of national constitutions, and the secondary, though broad, primacy of EU law. The confederal primacy of EU law is based on several mutually reinforcing bases, such as its constitutional nature, the principle of *pacta sunt servanda*, and the possession of multiple reciprocal delegations of authority. National systems can generally accept these arguments, and hence the supremacy of EU law in daily operational practice. They can just not accept an EU claim to ultimate normative authority, which the EU fortunately does not have to make.

The distinction between the different types of supremacy enabled by confederal sovereignty, therefore, explains the seemingly conflicting supremacy claims at the national and the EU level. It further demonstrates how both claims are based on different, and largely compatible grounds, which allow a broad and powerful operational primacy to the EU, but retain an ultimate primacy for the national constitution. In the case of a conflict, furthermore, the risk of which cannot be completely eliminated, the sovereign people now provide a sovereign back stop.

Lastly, and also crucially in light of the challenges raised by part I, it was demonstrated how a confederal conception assists in developing a positive normative and democratic narrative for the EU. It conceptualizes the EU as an evolution in internal and popular sovereignty necessary to safeguard democracy in a globalizing world. Member peoples are empowered to escape the confines of their states. Even though their states remain, in confederal style, their principal habitats, extra-statal delegation should be seen as a democratic imperative and popular empowerment. Its rejection would be a refusal to evolve, historically a path to extinction only.

Consequently the EU can be construed as the 'saviour' of popular sovereignty and democratic control over globalisation. Confederal organization can thereby be seen as the current optimum between self-rule and the cooperation necessary to remain relevant.

4 Confederal tests and application: Democracy and the EMU crisis

Parts I and II therefore established the *prima facie* feasibility and attractiveness of confederalism and a confederal conception of sovereignty for the EU. Constructs, furthermore, that could clearly be of value for the EU in some of its most problematic dimensions. At the same time the potential held by the confederal form must, to a large extent, still be translated, operationalized and institutionalized. The confederal link between the member peoples and the EU needs to become a democratic reality and a political actuality. A democratic reality, however, that in keeping with its confederal basis must retain its principal existence at the national level. To further test and illustrate this potential of confederalism, part III subsequently applied the confederal approach to two major challenges: Reconciling integration with national democracy, and the sovereign debt and EMU crises.

4.1 A confederal evolution of the national democratic process

Concerning the potential for a confederal evolution of the democratic process, chapter 12 first illustrated the confederal root causes of the current democratic deficit. Root causes which were found not to lie in the decline of the state or limited representation at the EU level, but in the failure to institutionalize the reality of confederal integration at the national constitutional level. Three guiding principles were then formulated that could guide a better national embedding of European integration, and to allow a national democratic process to develop and exert control over a confederal application of public authority. To illustrate these principles and their underlying confederal logic they were combined into one concrete suggestion: the creation of EU senates within the Member States. These senates which would be directly elected at the national level, would not incidentally form the mirror image of a central federate senate. These bodies could be developed into the required political and institutional nexus to which a national political process on EU matters could attach itself. An aim for which they need to fit within the national system, receive a critical mass of EU powers but also remain necessary to the exercise of national political authority. In this manner, EU senates could provide both the prize and the arena required for a much needed national political fight over the EU at the national level, and hence the chance for the member peoples to pick their political champions and democratically engage with European integration. The EU could then revert to a confederal role of supporting and guiding the national institutionalization of confederal democracy, for instance by creating guidelines and minimum requirements. A role which it should in any event claim with more vigour in the future, both to protect its own confederal foundation in the member peoples, but especially to guarantee its citizens the democratic control, also at the national level, they are entitled to under the Treaties.

4.2 *A confederal answer to the sovereign debt and EMU crises*

Lastly, the confederal approach was applied to the sovereign debt and EMU crises. It was first shown how, from the confederal perspective, these crises can be logically understood as a perfect confederal storm. First of all, these crises logically flow from the fault lines between the confederal foundation and the federate superstructure of the EU. They clearly illustrate the risk that a gradually expanding federate superstructure poses for the EU, as well as just how powerful an incentive for continued cooperation is generated by the inverted focus of the EU. For equally remarkable as the development of these crises is the confederal determination to overcome them so far.

In addition, it was shown how these crises simultaneously hit several of the EU's confederal Achilles heels, including money, politics, enforcement and direct conflict. The crises are thereby forcing the EU beyond a rule by law and onto the stage of high politics and direct conflict. A stage for which it is poorly suited.

Appreciating these confederal root causes, and placing the crises in their confederal context, also revealed two major pitfalls that should be taken into account when responding to the crises. First of all, the EU should guard against a federate overreaction to the EMU crises. An overreaction, for instance, in the form of creating a fully federate economic union with far-reaching authority over the budgets of its members, and therefore over the political will of its member peoples. Such a move could enlarge the federate superstructure far beyond the carrying capacity of the confederal foundation. Equally, the EU should refrain from trying to establish the primary democratic legitimacy that would be required for any such far-reaching powers at the EU level. An attempt that would not only be likely to fail, but would also threaten the very national democratic authority on which the EU largely depends. An attempt, therefore, that would also be likely to evoke a confederal countermove that could re-confederalize the federate superstructure, which would equally threaten the modified confederal system developed in the EU so far.

Instead, it was argued that the EU should consider a more balanced confederal response to the crises. Such a confederal response logically focuses on the national constitutional level, and leaves it up to the national democratic process to establish the necessary safeguards for a responsible economic policy that meets the confederal obligations of the member peoples. One option would be to establish national debt brakes, but part of the power of a confederal response would be its capacity to allow for measures that are tailored to the different national systems. The energy and leverage of the crises should, therefore, be utilized to establish such national mechanisms, and to improve the national democratic systems along the confederal lines set out in chapter 12 more generally.

5 Strengths and weaknesses of confederalism

Overall, therefore, the confederal perspective developed in this thesis holds much of value for a constitutional theory of the EU. It provides a logical fit with the EU, placed as it is between a 'normal' international organization and a federation. As a result it also holds a strong explanatory power, both for the strengths and the weaknesses of the EU. Especially the dynamic between the confederal foundation and the federate superstructure is instrumental in this regard.

The explanatory fit and value of the confederal approach also provides a concrete framework when considering future developments in the EU. It not just sheds light on the weak points that must be addressed, but also on the strengths and opportunities within the confederal form that should be relied upon to do so. Instead of entering conceptual and constitutional no man's land whenever we engage the EU, we can rely on past experiments, albeit with all the caveats that come with such comparative exercises. Suggesting modifications to the EU may start to feel less like operating on E.T, where one would have no idea if our understanding of human medicine has any use, or might only pose a tremendous risk when applied. Instead, the EU can be brought closer to earth by identifying those parts that can usefully be described and understood from existing knowledge and categories. As a flexible approach, furthermore, confederal insights can be readily applied to other more general theories of the EU, for instance those defending a hybrid understanding of the EU, or notions of composite constitutionalism.

At the same time, a confederal understanding of the EU also brings several weaknesses and threats to the fore. To start with, it points to the growing schism between the authority capacity of the EU's confederal foundation and the increasing authority demands of the federate superstructure. This superstructure is largely linked to the internal market, which is itself expanding and knows little inherent limits. The federate force of this superstructure, furthermore, means it cannot easily be contained by the confederal foundation. Consequently, there is a real risk of the superstructure exceeding a critical size, the precise boundary or threshold of which is hard to predict. Both controlling this superstructure, and strengthening the confederal foundation along the lines set out above are, therefore, necessary.

A necessity which, unfortunately, leads to a second central weakness. The continuing failure up till now to realize the democratic and constructive potential of the confederal form. For whilst the federate superstructure was increasing, the necessary confederal foundations have not been sufficiently strengthened at the national level. Neither the national constitutional or institutional structure, nor the national democratic process were sufficiently adapted. With the passing of time, however, several of the traditional normative foundations of the EU, such as fear (and German guilt) of war, desire for peace, hopes of prosperity or fear of the Russians, which carried part of

the federate superstructure so far, have decreased in force. In its place, and unopposed by strong confederal foundations, a certain resentment against the EU has been gradually building. Resentment which is now being effectively cultivated politically to acquire national political power.

In other words, the rather unique constitutional grace period following world war II, further supported by the enormous economic growth the EU experienced over the past decades, has not been used to set in place a more lasting national foundation for the EU. Unfortunately this means that this more lasting foundation must now be erected, and urgently so, under far less ideal circumstances, including a severe economic crisis. A major challenge and risk for the confederal model.

The risk of increasingly unstable and uncooperative Member States, and the resulting threat of a breakdown in the rule by law, can amplify another inherent risk for a confederal system, such as the imbalance in actual power between the members and the potential for unregulated power play.

In a federation, after all, the differences between the constituent parts are taken into account in an institutional compromise. In the US the more populous states, for instance, were awarded more votes in the House of Representatives, whereas equality between states was respected in the Senate. Differences in size, population or power are further neutralized by the creation of one overarching federate people, which possesses greater authority than even the largest Member State. In the EU this last safeguard is absent. There is no overarching authority, so smaller Member States are protected by the rules of the Treaty, and therefore (the rule of) law, alone.

Consequently, if large Member States such as France, Spain, Poland, or especially Germany were to become unstable, or for other reasons would start to ignore EU rules and predominantly rely on (political) force, the confederal system of the EU would be seriously challenged as well. This is not to ignore the reality of political power, which of course has always played a role within the EU, but only to indicate the risks for a confederal system where the rule of law would be undermined. Besides strengthening the confederal basis and respect for the rule of law within each Member State, however, such power imbalances are hard to address for a confederal system. One alternative would be to take another leave from the US federalists, and to allow different factions within each Member State to cooperate with factions in other states, for instance via the confederal senates proposed. This to break up the political power of larger states into several, sometimes opposing, factions. Although such a scheme would require far more study, it could be seen as a next step in confederal democracy as well, allowing the sovereign peoples to interact and form mutual coalitions. Even so, however, the imbalance of power between Member States will remain a risk factor from the confederal perspective.

6 Towards a democratic confederal union of sovereign member peoples, or the confederal come back!

Several challenges, therefore, face the confederal experiment of the EU. At the same time, the strengths and opportunities offered by the modified confederal form may well be capable of meeting these challenges, especially once combined with a more developed conception of confederal sovereignty. What is more, the normative and democratic potential of the modified confederal form certainly makes it worth our while to try.

As such a confederal theory of the EU deserves to be developed further, either separately or as part of a broader and more encompassing theory. Now that proof of principle has been provided, the EU could, for instance, be compared against further (con)federal systems, and specific means of strengthening the national basis of the EU confederal system can be explored based on experiences in different con(federal) systems.

An improved understanding of the modified confederal form is also of interest for the organization of extra-statal authority more generally. For the EU is only one polity in which the organization of public authority must be realigned with reality. The modified confederal form, as developed within the EU, provides a powerful tool for such exercises. What is more, it has the unique advantage over federate or statist approaches that it allows sovereign member peoples to simultaneously participate in multiple forms of extra-statal cooperation: As long as the centre of sovereign gravity remains with the member peoples, nothing stands in the way of delegating authority to multiple external entities at different levels and with different objectives, as long as the national constitutional system is kept up to date with these different delegations.

For now, however, it suffices to conclude that confederalism does allow a constructive and attractive understanding of the EU. Although it needs to be further developed, the EU can be usefully understood as a confederal union of sovereign member peoples, both as a reality and as an aspiration. As a result, our neo-Westphalian reality may indeed be the perfect time for a veritable confederal comeback. A time when this ugly duckling of constitutional theory can finally come into its own, and provide a constitutional model for effective and democratic government in a globalizing world.

Summary

Executive summary

This thesis explores a conception of the EU as a modified confederal system of sovereign member peoples and their states. A confederal conception which demonstrates how, contrary to popular belief, European integration does not conflict with sovereignty or democracy. For, properly conceived and constituted, the EU reasserts the sovereignty of the member peoples, and liberates national democracy from the confines of the state.

To this end, this thesis reconnects the EU to two classic constructs of constitutional theory: confederalism and sovereignty. Two powerful but unfashionable constructs whose joint potential for European integration remains largely unexplored and undervalued. The primary instrument to explore this potential is comparative. The EU is contrasted with the rather unknown but rich example of the American Articles of Confederation, and their evolution into the now famous American federate system. A comparison with the confederal roots of the United States which is revealing for both confederalism and sovereignty, and illustrates the potential of linking both for a constructive constitutional theory of the EU. A theory which does not have to overcome history and the statal system it has created, but connects with it. A theory, therefore, that may help to recapture the EU and the increasing authority it wields, both in theory and in practise.

The thesis is subdivided in three parts. Part I addresses confederalism. It demonstrates how the constitutional system of the EU combines a confederal foundation with a federate superstructure, and explores the particular strengths, weaknesses and limits of this modified confederal system. Part II discusses sovereignty. It first demonstrates how the EU forms a logical confederal evolution of popular sovereignty, and how European integration does not conflict with sovereignty. Subsequently, it shows how the concept of confederal sovereignty equally helps to dispel the presumed conflict between statism and pluralism, how it respects and conciliates national and EU claims to supremacy, and how it allows a confederal evolution of national democracy, which updates democracy to the global reality it is to control. Part III applies the findings of Part I and II to the EMU crisis and the challenge of establishing an effective democratic foundation for the EU at the national level. An application which demonstrates the concrete and attractive contributions a confederal approach can make to addressing some of the core challenges facing the EU.

Part I: the (con)federal cocktail

Part I of the thesis concerns confederalism, and the question if the EU should be understood as confederal or not. Using the American Confederation and the current US Federation as concrete benchmarks, it first establishes a 'comparative grid' of sixteen constitutional markers. These markers are derived from the key constitutional modifications, which together constituted the American transition from a confederation to a federation, and can hence be used to trace the relative position of the EU between the US confederation and the US federation.

Based on a point by point comparison on these sixteen markers, chapter 2 finds that the EU remains on the confederal side of the equation for eight of them (No single people, no use of force, no direct taxation, no amendment by majority, secession allowed, use of a merged government, the executive, and the representational scheme). On five markers the EU scores as federate, or at least predominantly so (Supremacy, direct effect, broad doctrine of attribution and implied powers, internal commerce competences, and a central judiciary). On three markers the EU is qualified as mixed (objectives, external powers, and the legislature). Here the EU wholly blends the confederal and the federate, conforms to neither, or equally to both.

Importantly, this comparison demonstrates that the EU has not incorporated any of the five *truly foundational* modifications that underlay US federation. As far as its foundation is concerned, therefore, the EU has remained fully confederal. Most of the five federate modifications that have been taken over, on the other hand, concern *legal infrastructure and competences*. These include the -mutually reinforcing- federate modifications of supremacy, direct effect, attribution, and the internal market competences. Many of these modifications were made possible by the *institutional* modification of a central court with the competence to rule on the interpretation of the Treaty. These findings are summarized in the table below:

Category		Modification	US CF	Blended	US Fed.
Institutional	16	Judiciary			
	15	Executive			
	14	Legislature			
	13	Representation			
Competences	12	Internal / commerce comps			
	11	War and external comps			
	10	Doctrine of attribution			
	9	Specific objectives			
Structural	8	Direct effect			
	7	Supremacy			
	6	Separate or merged gov			
Fundamentals	5	Enlargement / secession			
	4	Amendment by majority			
	3	Taxation			
	2	Use of force			
	1	Single people			
			8	3	5
			US CF	Blended	US Fed.

Chapters 3 and 4 aggregate the results of this comparison into three central analytical propositions on the modified confederal nature of the EU. First, how the EU forms an *inverted* confederation, which has reversed the traditional confederal focus from the external to the internal. Second, how the EU has modified the traditional confederal form by *reinforcing and burdening its confederal basis with a partially federalized superstructure*. Third, how this inverted and adapted structure *heavily relies on a rule by law*, and therefore on the very stable legal and administrative systems of its Member States. Subsequently, these chapters explore and demonstrate the explanatory power of these propositions: All three help to understand the particular strengths and weaknesses of the modified confederal system of the EU.

Chapter 3 thereby sets out for each proposition, and the modifications underlying it, how they have helped to strengthen the EU's constitutional set-up. After all, confederal systems are not exactly known for their longevity, but normally seem to rival the Panda bear in their determination to go extinct. Hence, it must be wondered how the EU has managed to survive and thrive so far, and it becomes vital to grasp the constitutional factors contributing to this success. Both to build on them in the future, and to prevent future changes from (accidentally) undermining the very factors that support confederal stability.

To this end chapter 3 returns to the brilliant analysis by Madison of the flaws and weaknesses of confederations, which directly informed the discussion in Philadelphia. It is shown how the federate modifications in the EU system have indeed addressed several of the flaws in the conventional confederal form.

To begin with, the EU suffers far less from a lack of power and energy in the centre, and a lack of compliance in the states, the primary confederal weaknesses identified by Madison. Here the inverted focus of the EU created a more effective, constant and self-deepening impetus to cooperate, which provided more 'energy' to the centre and ensured that the self-interest of Member States in cooperating kept pace with the demands of deepening integration. Simply put, an internal and economic focus appears to be a much better power source for a confederation than external policy and defence.

In addition, a broad array of purposefully interpreted competences allowed this energized centre to act. Effective negative integration manned the fort and shocked the system back into action where the centre was nevertheless immobile. A mechanism that enabled the EU to survive periods of crisis and stagnation that would have toppled most traditional confederations. Rule by law over stable states, furthermore, significantly increased compliance, and reduced the need for the EU to create effective central enforcement. Although far from perfect, the general energy, robustness and compliance within the EU thereby is far higher than anything Madison could probably have ever envisioned in a confederal system.

A second weaknesses concerned weak finances. Here as well the EU is in much better shape, even though it was not granted the right to tax. Rather, due to better compliance and the rule by law, the Member States simply pay their share, even if the 'net payers' do so increasingly grudgingly. In addition, the rule by law, and the regulatory focus of the EU also means that it does not need that big an income, at least not in relative terms. As a result the EU reduces the stress on its confederal system for collecting revenue.

Madison's third woe, the *unstable states* that made up the Confederation, also troubles the EU, but to a lesser degree. More contextual providence than actual modification, the relative stability of the Member States has removed some of the stressors on the confederal basis of the EU.

The fourth confederal weakness concerns the general lack of internal competences of confederations. Again, this problem has to a large extent been addressed through several federate modifications, especially the grant of explicit internal market competences to the EU, and the broad doctrine for determining competences as developed by the federate Court of Justice. In fact, the EU now has such far-reaching market powers that the problem has rather become the absence of *non-market competences*, which now seem necessary to flank and counterbalance the market ones, as well as a lack of external competences to project the authority of the EU externally.

The last major flaw Madison noted was the inability of confederations to amend their own shortcomings. The modified system of the EU at least reduces this weakness. Formal amendment, in line with its confederal basis, still requires unanimity. Yet the EU system has enough internal flexibility to adapt through judicial interpretation and political compromise. In addition, the internal focus, negative integration as developed by the Court of Justice, and the relative stability of the Member States have helped in achieving several important formal Treaty amendments. Compared to the US Confederation, therefore the EU system is far more flexible and adaptable, although future challenges await, and recent attempts at major Treaty changes do not bode well.

Scoring the EU against the archetypal weaknesses of the (American) Confederation, chapter 3 therefore shows how the EU has been able to contain, or at least soften, most of them. It did so by incorporating a mix of federate modifications and utilizing its very different context. The cumulative increases in effectiveness and stability these modifications have brought may well have impressed a Madison, and perhaps even surpass the expectations that some founding fathers had of the federate system at Philadelphia.

At the same time, a free lunch is rare, even in constitutional theory. Can one simply place a federate superstructure atop a confederal basis, or is this the constitutional equivalent of armouring a *deux chevaux* with six inch steel plates?

Chapter 4 therefore analyses the flaws and inherent weaknesses retained by the modified confederal form, as well as the new problems that flow from the federate modifications in the EU system. These weaknesses and risks deserve to be explored as they assist in better understanding the problems facing the EU, and the limits that remain inherent in modified confederal forms. As chapter 4 demonstrates, furthermore, several well-known ailments of the EU may be partially understood as logical consequences of its modified (con)federal set-up.

The self-deepening of the EU's inverted focus, for example, might lead the EU to unsustainable levels of integration and federalisation: the internal power source of the EU sometimes seems to powerful, and not very amenable to legal containment. The tendency of the federate elements in the EU system to increase in relative weight and importance *vis-à-vis* their confederal counterparts only reinforces this dynamic. This tendency, furthermore, also explains the risk for (federate) market objectives to trample on (confederal) non-market objectives. Elements that also help to better understand the evolution of the EU constitutional system more generally. In addition, a rule by law may be no match for direct political challenges, may actually undermine the political dimension needed to sustain EU integration, and in any event depends on several preconditions that may not hold. In addition, a rule by law is inherently unsuited to control fields that are not, or not fully, amenable to legal control, such as budgets or foreign policy. Most fundamentally, however, the growing schism between the federate superstructure and the confederal foundation of the EU puts an increasing strain on the overall constitutional structure of the EU and its legitimacy. After all, the confederal foundation of the EU is asked to legitimise an ever increasing federate superstructure. All in all these are serious challenges that need to be addressed or at least taken into account in the future development of the EU.

Before exploring some potential suggestions and solutions to these challenges in part II and III, however, chapter 5 first turns to a second crucial, and so far unexplored dimension, of the confederal comparison: The *process* of American federation. A better grasp of this process not only sheds light on the nature of (con)federal systems and the European modifications. It also provides some concrete foundation for debates over whether Europe could or should 'federate', and if so how.

Chapter 5 thereby discusses four process elements that are of particular relevance for the EU. First and foremost, it arrives at the vital conclusion that the national democratic and elite structure in the EU prevents rather than propels European federation. In the US, federation was largely conceived, promoted, and realized by powerful national elites that had lost their hold on the state legislatures after independence from Great Britain. Federation, and ensuring control over the new central government to be created, was seen by these cross-state elites as the only way to regain political power.

In the EU, however, there is no critical mass of unified elites that stand to benefit from federation. There are no sufficient (political) elites that derive their power from the EU, or ultimately aim to derive such power from the EU within the time span of their (political) future. What is more, this elite structure is consolidated rather than challenged by the confederal organization of political power in the EU, which protects and empowers the current national elites. Federate ideals for the EU, therefore, face an uphill battle.

The second process element discussed in chapter 5 deflates the democratic myth of American federalism, as it unearths the anti-democratic nature and objectives of US federation. For in fact, one could describe American federation as an *anti-democratic revolution*. It was emphatically not intended to increase democracy, but to decrease the radical democracy that had developed in the states after independence. These anti-democratic objectives behind American federation should be taken into account when contemplating a federate Europe, especially when the stated objective is democratization. For *federation is not the same as democratization*, even though the founding fathers have done a truly impressive PR-job in linking both concepts. The democratic level of any federate polity will depend on *how* the federate system is developed, and not on federation as such. In any event the democratic weight and autonomy of the individual member peoples will be reduced by federation. Rallying cries for European federation, furthermore, will have to honestly acknowledge that federation carries an inherent aristocratic tendency.

In addition to these two central procedural issues, chapter 5 discusses several more practical lessons that might be learned from the US process. To begin with it points out the benefits of the US procedures for drafting and ratifying the federate constitution. This procedure combined confidential dialogue and drafting, and therefore space for honest compromise and changes of view, with a rigorous public debate of the eventual texts adopted. A system that seems to lead to better results than the current EU system for amendment. An almost complete mirror image, which envisions a highly public and visible drafting process, which complicates compromise and changing positions, to be followed by parliamentary ratification, especially where referenda are deemed too risky.

In addition, the EU could benefit from the concept of attached amendments as developed in the US, as well as from the focus on *aemulatio* over *innovatio*. For, to a very large extent, the new American constitution built on, and even copy-pasted, existing materials. We should abandon the romantic myth, therefore, that new constitutions can be devised in the abstract, from scratch, and without using existing concepts and theories, if only one just has enough smart people. What the US process learns, in fact, is that the best change lies in practical yet well thought through and informed, emulation.

Part II: confederal sovereignty

Part II engages the second core construct of this thesis: Sovereignty. It demonstrates how sovereignty does not inherently conflict with European integration. Rather, the EU forms a logical confederal evolution of sovereignty. What is more, a confederal conception of sovereignty can be instrumental in addressing the confederal challenges identified in part I, in overcoming some of the current deadlocks in EU theory, and developing a constructive constitutional theory of the EU. This because confederal sovereignty can provide a sufficiently stable, legitimate, and flexible basis for EU authority without undermining the Member States as primary centres of public authority or the member peoples as independent and sovereign entities.

To explore this potential, and after chapter 7 has introduced these objectives and the potential benefits of confederal sovereignty in more detail, chapter 8 first sets out the apparent conflict between sovereignty and European integration. It does so by discussing the statist and pluralist schools, two of the currently most dominant schools on EU integration, which perfectly represent the presumed clash between sovereignty and integration. For the moment one supports a meaningful notion of sovereignty, as statists like the *Bundesverfassungsgericht* do, one is seemingly forced to establish and defend all kinds of untenable limits to integration. Rejecting sovereignty altogether in a plural embrace of integration, however, also leaves one with some rather fundamental gaps and problems. For once the anti-hierarchical genie is out of the lamp, it is hard to prevent it from spiriting away all formal hierarchy, authority or legitimacy. As a result, statism increasingly struggles to accommodate the current realities of integration within a statal framework. *Vice versa*, pluralism struggles to relate its claims to the existing, and still vital, statal system or any other form of foundation for that matter. As a result it remains rather ethereal and academic, lacking the capacity to solve conflicts or carry much weight. Consequently, we seem trapped in an unattractive dichotomy: Statism or pluralism, established theory or *tabula rasa*, sovereignty or the EU.

To escape this dead end, chapter 9 returns to a conceptual analysis of sovereignty itself. Looking behind the simplistic myth of absolute sovereignty, it first demonstrates how internal and external sovereignty are two distinct, albeit related, concepts, which have become increasingly confused over time. It does so by tracing the development of internal and external sovereignty through five different stages of their historical development and conceptual entanglement. These five stages include the development of sovereignty by Bodin and especially the federal evolution of internal sovereignty which underlay US federation, and which allowed internal sovereignty to be divided over multiple governments.

Based on this conceptual analysis of sovereignty, chapter 9 draws three core conclusions. First, it concludes that European integration does not conflict with sovereignty as such. The EU fully fits with the concept of *internal sovereignty* and its tradition of constitutionally dividing powers over multiple actors. The common assumption that the EU conflicts with sovereignty is based on unsuitable notions of external sovereignty, and the absolute myths that surround them. Such absolute external concept of sovereignty, logically, cannot accommodate the EU, and hence lead to the false contradiction between sovereignty and integration. Fortunately, such external notions are also irrelevant for a proper understanding of the EU, which forms a confederal, and hence constitutional, system, and should therefore be approached from internal sovereignty, just like national constitutions.

Second, chapter 9 concludes that a *con*federal notion of sovereignty forms a logical evolution of internal sovereignty. The evolution of internal sovereignty is one of increasing abstraction and delegation. The 'federate twist' in popular sovereignty, as invented in the US, has even enabled the division of sovereign powers over multiple governments. Confederal sovereignty takes this federate evolution of sovereignty one step further. It incorporates extra-statal, and even non-statal, entities into the national constitutional framework for the delegation of sovereign powers. As a result the state loses some of its sovereign competences, but the people do not lose their sovereignty.

Third, chapter 9 shows how a confederal evolution of sovereignty also fits with the *prescriptive* nature of internal sovereignty. Just as in the US, it can therefore be used to indicate how public authority *should* be organized and legitimated, and to subsequently help create that desired reality for the EU.

Combining these conclusions, chapter 9 subsequently shows how the EU should not be understood as a clash between sovereignty and integration, but as a clash between internal and external sovereignty. In the confederal system of the EU, the organizing principles of internal sovereignty are being applied in what was previously considered part of the 'external' domain: The relation between the Member States. As a result, the state no longer forms a complete barrier and controlling nexus between the internal and the external domain. Instead, the internal sovereign (the peoples) openly challenges the external sovereign (the state). The traditional conceptual framework, which sees internal and external sovereignty as part of the same concept, cannot explain this collision. As a result, this traditional framework falsely forces one to choose between integration or sovereignty, and between the EU or the Member State. A false choice, which also underlies the juxtaposition described in chapter 8 between statist defenders of sovereignty and pluralist defenders of integration.

In reality, however, we are not witnessing the decline of sovereignty as such, and sovereignty is not anathema to integration. Rather, we are witnessing a relative decline of external sovereignty, and a relative ascendance

of internal sovereignty. This confederal ascent of internal sovereignty, furthermore, holds great potential for supporting and organizing far-reaching integration between states.

Chapter 10 further unpacks confederal sovereignty, and explores its explanatory and normative potential for the EU. It starts with an introductory overview of confederal sovereignty, and its fit with the EU Treaties and the case law of the European Court of Justice. Subsequently, the idea of confederal sovereignty is further developed and tested by examining several potential advantages. To begin with, chapter 10 further discusses the potential of confederal sovereignty to reduce the misconceived contradiction between sovereignty and integration, and with it the conflict between statism and pluralism. A confederal approach can thereby combine the different strengths of both schools, inter alia allowing for a high degree of pluralism within an overarching confederal hierarchy. Next, and even more fundamentally, it discusses the capacity of confederal sovereignty to provide a more stable, potent, and democratic confederal foundation for the EU, which might be able to support the increasing federate superstructure of the EU outlined in part I. A foundation which also fits with the concept and evolution of EU citizenship as developed by the Court of Justice.

In addition to these two primary points, chapter 10 also examines three further and mutually related benefits of confederal sovereignty. First, how it explains the fit between constitutionalism and European integration. Second, the potential of confederal sovereignty to conceptualize a distinctly confederal form of supremacy for EU law. A form of primacy which grants a sufficient operational primacy to EU law, without undermining a narrow but ultimate supremacy of national constitutions. Lastly, but certainly not least, the capacity of confederal sovereignty to create a normatively attractive narrative of and for the EU. A narrative that builds on the potential of the EU to modify and improve the national democratic process, and make it 'globalization-proof'.

Chapter 11 provides a summary of part II, and concludes that the EU can be understood as a crucial evolution in internal and popular sovereignty that safeguards democracy by updating it. Democracy 2.0 so to speak. Instead of a necessary evil that erodes the democratic glory days of old, the EU can be envisioned as, and subsequently developed into, an entity that saves popular sovereignty and democratic control from globalisation. It becomes a democratic imperative that empowers the people, whereas the rejection of confederal integration equals a refusal to evolve, which historically is a path to extinction only. At the same time, chapter 11 also recognizes that the potential held by the confederal form must still largely be realized. The confederal construct developed in this thesis must be translated, operationalised, and institutionalized, especially at the national level that remains primary in a confederation. How to do so requires far more study than can be done in this thesis, but part III takes some limited and highly tentative steps in this direction.

Part III: application and conclusions

Fully acknowledging the tendency of reality to spoil perfectly good theory, part III therefore applies the confederal approach developed in part I and II to two challenges of reality: Supranational democracy and the EMU crisis.

Chapter 12 explores a confederal response to the challenge of democracy beyond the state. Here our confederal analysis first points to the inadequate incorporation of European integration *at the national level* as the root of the problem. The national constitutional structures of the member states have not been sufficiently refitted for life in a confederal system. This rather remarkable fact has several problematic consequences. To begin with, EU membership now distorts the pre-existing institutional and political balance within national constitutions, which was calibrated for a monopoly position of the state. Even more fundamentally, however, the effects of European integration have also not been translated into the national systems for *acquiring, exercising and accounting for* political power. As a result, there also *cannot be* a full national democratic process on EU issues: There simply are no national EU elections to win or EU powers to conquer. Instead, EU power is included in the spoils of national political victory, like a complimentary cookie with your coffee.

To create a confederal democratic process, therefore, the constitutional systems of Member States should be better adapted to their new functioning within a confederal constitutional system. Here, chapter 12 first suggests that decisions on *whether* authority should be delegated to the EU and decisions on *how* to exercise and control authority once it has been delegated, should be developed into important new content for the national democratic process. Second, chapter 12 provides three general guidelines on how to remedy the current lack of constitutional and institutional imbedding of European integration at the national level, and to create the necessary incentives to ensure that delegation and the use of delegated powers become politicized. The first principle requires the fit of any institutional modifications with the relevant national system and its unique characteristics. The second principle requires the creation of an *institutional nexus* for EU issues to which a national political process can attach itself. This requires that sufficient and real EU related competences are bundled in this institutional nexus, and that sufficient 'events' such as elections, important decisions, and public procedures are created to allow for real political debate over these competences.

The third principle is that control of this EU nexus should remain indispensable for the exercise of national political power. The objective must be to align and merge the national and the EU process, and to allow the EU political process to share in the energy and vitality of the national one.

To illustrate these guidelines and the logic behind them, chapter 12 further suggests one concrete, if highly tentative, way to implement these guidelines: The creation of *EU senates*, which would be based on independent and EU focussed elections, and would provide a national democratic platform for European integration. In addition to such national solutions, chapter 12 suggests several flanking measures at the EU level, which could assist and guide the confederal evolution of national democracy. For example, the delegation of competences could partially be relocated to secondary law, and the EU could actively step in by providing guidelines and incentives for Member States to adapt their constitutional systems to the confederal reality they find themselves in.

Chapter 13 subsequently engages the second challenge: The EMU and sovereign debt crises. It first provides a brief historical overview of the different crises and the responses so far. Subsequently, it discusses some confederal causes, confederal risks, and potential confederal cures for the crises.

As to confederal causes, chapter 13 first shows how the crises logically fit with, and flow from, the confederal weaknesses identified in part I. To begin with, the origins of the crisis fit with the internal and economic focus of the EU, and with the self-deepening federate competences that were granted to pursue this focus. The internal logic and dynamic of economic integration created a push for monetary union, and once established, a powerful incentive to maintain it. At the same time the confederal foundation was not capable of establishing a real economic union, let alone a political one. The resulting schism between a confederal economic union and a federate monetary union reflects, and flows from, the more fundamental schism between the confederal foundation and the federate superstructure discussed in part I. Constitutionally, therefore, what we might be seeing is the internal market engine of the confederal system going dangerously fast, and potentially disappearing over the horizon of its confederal foundation. Yet simultaneously this internal market engine is becoming ever more central to sustaining the integration that has been achieved so far against (political) backlashes. Slowing it down might, therefore, threaten the whole European construct as well. In this way the confederal perspective fits with the broader feeling of the EU being trapped between a dangerous leap forward and an equally dangerous slide backwards.

In addition, the debt and EMU crises precisely hit the weak spots in the confederal armour of the EU: Money, politics, and direct conflict. In addition to the serious money involved, the crises concern budgets: A highly political area where law has, and can, play a secondary role at best. A fact sadly borne out by the spectacular failure of the stability and growth pact. In addition, and partially as a result of its political nature, the crises forced the EU to directly control, and come into conflict with, the Member States, and to do so on the very sensitive issue of the budget. Like the situation in Hungary, this challenges the EU in one of the major confederal weaknesses, the limited capacity of the centre to engage into a direct political conflict with its Member States.

Chapter 13 subsequently warns that, in our desire to combat the crises, we should be mindful of the inherent limits of the confederal form. Two confederal pitfalls, which are illustrated based on the Commission and Van Rompuy Blueprints, should be especially avoided. First, the risk of exploding the federate superstructure in order to stabilize the EMU, which would overburden the confederal foundation of the EU, and undermine its long term viability. Second, there is the related risk of subsequently trying to create a sufficient democratic authority *at the EU level* to support this expanded superstructure. Such attempts are not only doomed to fail as long as the EU retains its confederal foundation, they will also be counterproductive and will destroy far more legitimacy than they will create. Far-reaching authority to control national budgets may, therefore, very well prove a Trojan horse for the EU, as the centre will be unable to provide the required legitimacy, and such authority will induce a countermove from the national political actors that the EU centre will not be able to repulse.

Lastly, chapter 13 then explores two confederal answers to the crises, which are designed to avoid some of the main weaknesses in the modified confederal system of the EU, and instead try to build on its particular strengths. First and foremost, it is proposed to establish the checks on national economic discipline at the national level, and to bring them under more effective but confederal EU control. In addition, such confederal mechanism should rely on automaticity, rather than any form of political decision making at the European level, which would reduce stress on the political process, and respect national autonomy more. Primary responsibility, and the required space to tailor mechanisms to the national system, are left to the Member States, whilst the confederal institutions are used for second-level norm setting and enforcement in a highly legal manner, a tasks for which they are more suited than direct enforcement on politically sensitive fields. Here the 'golden rule' as currently laid down in the Treaty on Stability, Coordination and Governance, forms a good starting point, even though further confederal modifications must be made to this system.

Combining these insights, it becomes vital that the political energy and opportunity provided by the crises is used to improve the confederal foundation of the EU in the national constitutional and democratic systems, and not for a federate power grab. For it is on the stability of these national systems, and their capacity to provide democratic legitimacy for European integration, that the EU largely depends, and a long term investment in the confederal foundation of the EU will, therefore, pay substantially higher and more sustainable dividends than short-term federate responses.

Lastly, chapter 14 summarizes the key findings of this thesis, and provides an overall conclusion. Confederalism and popular sovereignty do allow a constructive and attractive understanding of the EU. Although it needs to be further developed, the EU can be usefully understood as a confederal union of sovereign member peoples, both as a reality and as an aspiration. As a result, our neo-Westphalian reality may indeed be the perfect time for a veritable confederal comeback. A time where this ugly duckling of constitutional theory can finally come into its own, and provide a constitutional model for effective and democratic government in a globalizing world.

Nederlandse samenvatting

Executive summary

Dit proefschrift ontwikkelt een conceptie van de EU als een gemodificeerde confederale unie van soevereine lid-volkeren en hun staten. Een confederale conceptie die aantoont dat, anders dan tegenwoordig vaak wordt aangenomen, Europese integratie niet in strijd is met soevereiniteit of democratie. Sterker nog, mist juist begrepen en constitutioneel vormgegeven, kan de EU de soevereiniteit van de lid-volkeren herwinnen, en de nationale democratie bevrijden uit de steeds beperkendere staat.

Voor de ontwikkeling van deze conceptie keert dit proefschrift terug naar twee klassieke concepten uit de constitutionele theorie die onterecht verdwenen zijn uit het discours over de EU. Twee fundamentele maar uit de mode geraakte concepten, wier gezamenlijke potentieel voor ons begrip van Europese integratie daarom grotendeels onderschat en ondergewaardeerd is gebleven. Het primaire instrument om deze potentie te ontginnen is de rechtsvergelijking. De Europese Unie wordt vergeleken met het relatief onbekende, maar zeer rijke voorbeeld van de Amerikaanse confederatie (*The Articles of Confederation*) en hun evolutie tot de inmiddels beroemde Amerikaanse federatie. Deze vergelijking met de confederale wortels van de Verenigde Staten is verhelderend voor zowel confederalisme als soevereiniteit en illustreert de potentie van een combinatie van beide concepten voor een constructieve constitutionele theorie van de EU. Een constitutionele theorie die niet het einde van de geschiedenis hoeft aan te tonen, noch de huidige staten hoeft te overwinnen, maar die kan aansluiten en voortbouwen op de bestaande werkelijkheid in Europa. Een theorie, derhalve, die kan helpen om de EU, en de toenemende autoriteit die de EU uitoefent, weer te ankeren en in te kaderen, zowel in theorie als in de praktijk.

Dit proefschrift is onderverdeeld in drie delen. Deel I gaat in op confederalisme. Het toont aan hoe het constitutionele systeem van de EU bestaat uit een confederale basis die is versterkt met een federale 'bovenbouw', en onderzoekt vervolgens de sterke punten, zwakke punten en grenzen van een dergelijk gemodificeerd confederaal systeem. Deel II betreft soevereiniteit. Dit deel toont eerst aan hoe de EU gezien moet worden als een logische confederale evolutie van volkssoevereiniteit (*popular sovereignty*), en waarom Europese integratie derhalve niet in strijd komt met soevereiniteit.

Vervolgens toont deel II aan hoe een confederale conceptie van soevereiniteit de schijnbare tegenstelling tussen *statism* en *pluralism* op kan heffen en de nationale en Europese claims betreffende voorrang kan respecteren en verzoenen. Ook maakt deze conceptie een cruciale confederale evolutie van de nationale democratie mogelijk, en kan deze de nationale democratie toerusten voor de globale werkelijkheid die zij moet controleren. Deel III past de bevindingen van deel I en II toe op de Euro crisis en de uitdaging om de Unie te voorzien van een effectief democratisch fundament op nationaal niveau. Twee toepassingen die de concrete en overtuigende bijdragen tonen die een confederale benadering van de Unie kan leveren.

Deel I: De (con)federale cocktail

Deel I van dit proefschrift ziet op confederalisme, en op de vraag of de EU begrepen kan worden als confederatie. Om deze vraag te beantwoorden, worden eerst de concrete voorbeelden van de Amerikaanse confederatie en de huidige Amerikaanse federatie gebruikt om een matrix van 16 constitutionele vergelijkingspunten (*markers*) te maken. Deze punten voor vergelijking zijn gebaseerd op de cruciale constitutionele modificaties die tezamen de Amerikaanse transitie van een confederatie naar een federatie vormgaven. Als gevolg stellen zij ons in staat om de EU relatief te positioneren ten opzichte van de Amerikaanse confederatie en de Amerikaanse federatie, en, daarmee beter te plaatsen op het spectrum tussen confederatie en federatie meer in het algemeen.

Op basis van een puntsgewijze vergelijking toont hoofdstuk 2 aan dat de EU voor acht van deze zestien markers volledig in het confederale spectrum blijft, te weten: geen EU *demos*, geen recht op gebruik geweld, geen directe belastingen, geen constitutionele wijziging bij meerderheid, uittreden is toegestaan, gebruik van een gemengde overheid, de opzet van de executieve macht, en het vertegenwoordigende systeem. Op vijf punten valt de EU (overwegend) in het federatieve spectrum, te weten: voorrang van het Unierecht, directe werking van het Unierecht, brede doctrine voor het bepalen van bevoegdheden, expliciete bevoegdheden voor het reguleren van het interne economische verkeer en een federaal hooggerechtshof. Op drie punten moet de Unie gekwalificeerd worden als gemengd, te weten qua doelstellingen, externe bevoegdheden en de structuur van de wetgevende macht.

Van bijzonder belang is dat deze vergelijking laat zien dat de EU geen enkele van de vijf *waarlijk fundamentele modificaties* heeft overgenomen die de Amerikaanse federatie fundeerden. Op dit funderende niveau is de Unie derhalve volledig confederaal gebleven. De vijf federale modificaties die wel zijn overgenomen betreffen bovendien alle de juridische infrastructuur en de bevoegdheden van de Unie. Deze federale infrastructuur omvat

onder andere de –elkaar versterkende – federale modificaties inzake voorrang, direct effect, attributie en interne markt bevoegdheden. Modificaties die voor een belangrijk deel weer mogelijk werden door de *institutionele* modificatie van een centraal hooggerechtshof met de bevoegdheid te oordelen over de uitleg, en daarmee grenzen van, de verdragen. Deze bevindingen zijn in onderstaande tabel samengevat:

Category		Modification	US CF	Blended	US Fed.
Institutional	16	Judiciary			
	15	Executive			
	14	Legislature			
	13	Representation			
Competences	12	Internal / commerce comps			
	11	War and external comps			
	10	Doctrine of attribution			
	9	Specific objectives			
Structural	8	Direct effect			
	7	Supremacy			
	6	Separate or merged gov			
Fundamentals	5	Enlargement / secession			
	4	Amendment by majority			
	3	Taxation			
	2	Use of force			
	1	Single people			
			8	3	5
			US CF	Blended	US Fed.

Hoofdstukken 3 en 4 aggregeren vervolgens de resultaten van deze vergelijking in drie algemene analytische proposities over de gemodificeerde confederale aard van de EU. Ten eerste, dat de Unie een *geïnverteerde* confederatie is die de traditionele externe focus van confederaties heeft ingewisseld voor een interne en economische focus. Ten tweede, dat de EU de traditionele confederale opzet heeft gemodificeerd door de *eigen confederale basis te versterken en te belasten met een deels federatieve bovenbouw*. De derde propositie stelt dat dit geïnverteerde en gemodificeerde confederale bestel van de EU sterk leunt op een *rule by law*, en daarmee op de zeer stabiele rechtssystemen en bureaucratische structuren van de lidstaten. Vervolgens wordt de verklarende kracht van deze drie proposities nader onderzocht en onderbouwd: alle drie dragen zij bij aan een beter begrip van de specifieke sterktes en zwaktes van het gemodificeerde confederale bestel van de EU.

Hoofdstuk 3 ziet daarbij op de *versterkingen* van het bestel. Voor ieder van de drie proposities, en de specifieke modificaties die eraan ten grondslag liggen, wordt nader bekeken hoe deze de constitutionele structuur van de Unie hebben versterkt. Immers, confederale systemen staan nu niet bepaald bekend om hun overlevingsvermogen. Zij lijken eerder, als de pandaberen onder de constituties, een zekere aandrang te hebben tot uitsterven. Als gevolg is het van groot belang om de constitutionele factoren te isoleren en begrijpen die aan het relatieve succes van de EU bijgedragen, en die tot nu toe hebben geleid tot verdergaande integratie in plaats van desintegratie.

Dit zowel om in de toekomst verder te kunnen bouwen op deze succesfactoren, als om te voorkomen dat deze factoren bij toekomstige wijzigingen in het bestel (per ongeluk) ondergraven zouden worden.

Met dit doel voor ogen keert hoofdstuk 3 terug naar de briljante analyse van Madison over de gebreken van confederale systemen. Een analyse die bovendien een centrale rol speelde in de beraadslagingen in Philadelphia. Op basis van deze analyse toont dit hoofdstuk aan hoe de federale modificaties in de constitutionele structuur van de Unie inderdaad meerdere van de klassieke confederale gebreken hebben ondervangen, en als gevolg een sterk verbeterd confederaal bestel in het leven hebben geroepen.

Om te beginnen wordt de Unie minder geplaagd door een gebrek aan autoriteit of 'energie' op het centrale niveau. Ook heeft de Unie veel minder last van een gebrekkige naleving door de lidstaten. Dit waren volgens Madison juist de twee primaire gebreken van confederale systemen. Op dit punt toont de analyse in hoofdstuk 3 aan dat de geïnverteerde focus van de EU en dus de focus op markt in plaats van defensie, een meer effectieve, constante en zichzelf verdiepende prikkel geeft aan de lidstaten om samen te werken en de confederale samenwerking tot een succes te maken. Deze interne focus levert daarmee meer 'energie' voor de EU om te handelen. Bovendien zorgt deze interne en economische focus ervoor dat lidstaten een evident eigenbelang hebben bij een effectieve confederatie en dus bij loyale samenwerking, en dat dit belang van lidstaten *gelijke tred houdt* met de eisen die steeds verdergaande integratie stelt. Naarmate de interne markt groeit en meer voordelen biedt, wordt het ook belangijker onderdeel van die markt te blijven, en wordt de eigen economie steeds afhankelijker van die markt. Een interne markt lijkt daarmee eenvoudigweg een betere energiebron voor confederaties dan extern beleid en defensie.

Een indrukwekkend scala aan breed geïnterpreteerde bevoegdheden stelt de Unie vervolgens in staat om deze energie in wetgeving om te zetten. Effectieve negatieve integratie, gehandhaafd door het federale Hof van Justitie, beschermt eenmaal bereikte integratie en houdt het proces van integratie in beweging waar het politieke proces even stilvalt. Een mechanisme waardoor de Unie, beter dan klassieke confederaties, perioden van crisis kan overleven Het gebruik van een *rule by law*, in combinatie met de stabiele en geoliede rechtssystemen en bureaucratische apparaten van de lidstaten, verhoogt de nationale naleving van Unierecht aanzienlijk, en vermindert daarmee de *noodzaak* voor centrale handhaving door de EU. Hoewel verre van perfect of compleet, kan de EU als gevolg van deze modificaties dus beschikken over een centrale energie, robuustheid en een niveau van naleving dat Madison waarschijnlijk nooit voor mogelijk had gehouden in een confederaal systeem.

Een tweede confederale zwakte betrof financiën. Ook op dit vlak functioneert de Unie relatief goed, ook al heeft de Unie niet de bevoegdheid gekregen om directe belastingen te heffen. Anders dan in de meeste confederaties, en mede gezien de goede naleving en de *rule by law*, betalen lidstaten

in de EU echter wel gewoon de eigen bijdrage, al doen de nettobetalers dit met steeds frissere tegenzin. De *rule by law* en de regulatoire focus van de EU betekenen bovendien dat de EU ook maar een relatief laag percentage van het BNP nodig heeft om te functioneren. Dit zeker in vergelijking met de kosten voor het garanderen van een effectieve defensie, of het percentage van het BNP dat de lidstaten controleren. Als gevolg kan de Unie makkelijker inkomen genereren, en verlaagt het tegelijkertijd de behoefte aan confederale inkomsten.

De EU lijdt ook minder aan Madisons derde confederale euvel, instabiele staten die het centrum tot handhaving en confrontatie dwingen. Hoewel meer contextuele voorzienigheid dan constitutionele modificatie, is het zo dat de Unie door de relatieve stabiliteit van de lidstaten tot nu toe gevrijwaard is van de noodzaak al te direct in te grijpen in onstabiele lidstaten, en daarmee van dit soort ernstige bedreigingen voor het confederale bestel.

De vierde confederale zwakte betrof het gebrek aan interne bevoegdheden van confederaties, en dan met name het gebrek aan bevoegdheden om de handel tussen de lidstaten te reguleren. Wederom is dit confederale gebrek in de EU in belangrijke mate verholpen door verschillende federale modificaties. Dit met name door de expliciete en vergaande bevoegdheden van de EU om de interne markt te reguleren, welke weer zeer ruim worden uitgelegd door het federale Hof van Justitie. De Unie heeft nu zelfs zulke vergaande bevoegdheden rondom de interne markt dat juist het relatieve gebrek aan niet-markt gerelateerde bevoegdheden een probleem lijkt te worden, net als het gebrek aan algemene externe bevoegdheden om de intern gecreëerde macht ook extern te projecteren.

Het laatste centrale gebrek dat Madison in confederaties ontwaarde was het onvermogen om de eigen tekortkomingen op te lossen, in het bijzonder door het amenderen van de confederale constitutie. Het gemodificeerde confederale systeem van de EU heeft ook dit confederale gebrek voor een belangrijk deel weten te omzeilen. Formele amendering van de verdragen vereist natuurlijk nog steeds unanimiteit. Tegelijkertijd beschikt het EU systeem over een dermate *interne flexibiliteit* dat deze formele belemmering minder beperkend werkt. Met name door de soepele en teleologische interpretatie van de verdragen door het Hof van Justitie kan de Unie zich vergaand ontwikkelen binnen de bestaande verdragen. Daarnaast hebben de interne focus op de interne markt, samen met de steeds verdergaande negatieve integratie middels de rechtspraak van het Hof van Justitie, ook bijgedragen aan verschillende cruciale verdragswijzigingen. In vergelijking met de Amerikaanse confederatie is het constitutionele systeem van de EU daarom veel flexibeler en aanpasbaar, hoewel hier nog grote uitdagingen wachten en de recente ervaringen met verdragswijzigingen niet bepaald hoopvol stemmen.

Door op deze wijze de EU af te zetten tegen de archetypische gebreken van de confederatie, toont hoofdstuk 3 aan hoe de EU in staat is gebleken om de meeste van deze gebreken te ondervangen, of in ieder geval de gevolgen ervan te verzachten. De Unie heeft dit vooral gedaan door verschillende federale modificaties te incorporeren, en door gebruik te maken van de relatief gunstige context. Het cumulatieve positieve effect van deze modificaties op de effectiviteit en stabiliteit van de Unie zouden indruk moeten maken op een Madison, en overtreffen wellicht zelfs de verwachtingen die veel van de *founding fathers* hadden van het federale systeem dat zij ontwierpen in Philadelphia.

Tegelijkertijd is een 'free lunch' zeldzaam, zelfs in de constitutionele theorie. Kan men nu gewoon een federale bovenbouw op een confederale basis schroeven, of is dit het constitutionele equivalent van een met staalplaat bepantserde *deux chevaux*? Hoofdstuk 4 analyseert daarom de *beperkingen en inherente zwaktes* die het gemodificeerde confederale bestel van de Unie heeft behouden, alsmede de *nieuwe problemen* die door de verschillende federale modificaties zijn gecreëerd. Begrip van deze zwaktes is noodzakelijk voor goed inzicht in de grenzen en beperkingen die inherent blijven aan de confederale vorm, en voor een beter besef van de risico's en uitdagingen die het bestel van de Unie nog te wachten staan. Zoals hoofdstuk 4 bovendien aantoont, kunnen ook veel van de reeds bekende problemen van de EU verklaard en begrepen worden als logische gevolgen van de gemodificeerde confederale structuur van de Unie.

Om te beginnen zet het vliegwieleffect van de interne markt de Unie bijvoorbeeld vaak aan tot veel te vergaande integratie of federalisering: de interne krachtbron van de Unie lijkt soms te sterk, en ook moeilijk juridisch in te dammen. Een dynamiek die alleen maar versterkt wordt door neiging van de federale elementen in de bovenbouw van de Unie om te blijven verbreden en verdiepen, dit vaak ten koste van hun confederale tegenhangers. Een proces dat ook de neiging verklaart van (federaal vormgegeven) mark gerelateerde doelen om een loopje te nemen met (confederaal geregelde) sociale of andere niet-markt gerelateerde doelen, en daarmee mede een logische verklaring geeft voor de typische constitutionele evolutie van de EU meer in het algemeen.

De afhankelijkheid van de Unie van een *rule by law* creëert ook verschillende zwaktes. Zo kan een *rule by law* moeilijk omgaan met een directe politieke uitdaging, kan een excessief vertrouwen op het recht de politieke dimensie ondermijnen, terwijl deze wel noodzakelijk is voor de legitimatie van integratie op langere termijn, en is een *rule by law* weer afhankelijk van bepaalde randvoorwaarden, zoals stabiele staten, waaraan wellicht niet altijd voldaan zal zijn. Bovendien is een *rule by law* inherent ongeschikt voor terreinen die zich niet of nauwelijks lenen voor juridische controle, zoals het bepalen van het budget of buitenlands beleid. De Unie heeft dan ook evident problemen met het reguleren van dit soort terreinen.

De meest fundamentele en bedreigende zwakte van het gemodificeerde confederale systeem ligt echter in het toenemende gat tussen de federale bovenbouw en de confederale basis van de EU. De confederale fundering van de Unie moet immers een steeds grotere federale bovenbouw dragen en legitimeren, en kan daarbij zelf niet de toevlucht nemen tot federale modificaties. Dit toenemende gat legt een zware last op de constitutionele structuur van de Unie en de lidstaten en bedreigt de legitimiteit van beide.

Naast evidente versterkingen leidt de gemodificeerde confederale structuur van de Unie daarom ook tot serieuze problemen. Deze problemen zullen geadresseerd moeten worden voor de lange termijn houdbaarheid van Europese integratie. Daarnaast moeten de verschillende inherente zwaktes en beperkingen van het confederale bestel in het algemeen goed in het oog gehouden worden bij de verdere ontwikkeling van de Unie.

Alvorens in deel II nader in te gaan op mogelijke confederale antwoorden op deze uitdagingen en problemen, kijkt hoofdstuk 5 echter eerst nog naar een tweede essentiële, en tot nu toe nog nauwelijks onderzochte, dimensie van de confederale vergelijking: het proces van federatie in de VS. Een beter begrip van dit proces is op zich al verhelderend voor de aard van (con)federale systemen en de Europese modificatie daarvan. Daarnaast biedt het ook enkele concrete aanknopingspunten voor de vraag of Europa nu wel of niet zou moeten federeren, en zo ja, hoe dit dan zou moeten verlopen.

Hoofdstuk 5 bespreekt in dit verband vier proceselementen die met name relevant zijn voor de EU. De eerste en belangrijkste bevinding hierbij is dat, anders dan in de VS, in Europa de structuur van nationale elites en democratische systemen juist in de weg staan aan Europese federatie. In de VS werd de federatie voor een belangrijk deel ontworpen, publiek verkocht en verdedigd, en uiteindelijk gerealiseerd door invloedrijke elites die hun grip op de statelijke politiek hadden verloren na onafhankelijkheid van Groot Brittannië. Deze interstatelijke elites zagen het creëren van een centrale federale overheid, waar zij vervolgens weer controle over konden verkrijgen, als de enige manier om hun politieke macht te heroveren op de nieuwe democratische elites in de staten. In de EU, daarentegen, bestaat er geen kritische massa van eensgezinde nationale elites die gebaat zouden zijn bij Europese federatie. Er zijn eenvoudigweg niet afdoende (politieke) elites die hun macht via de EU verkrijgen, of die hopen dergelijke macht nog tijdens hun politieke bestaan via de EU te veroveren. Bovendien wordt deze nationaal georiënteerde elitestructuur juist geconsolideerd door de confederale organisatie van politieke autoriteit in de EU. Deze organisatie beschermt en versterkt immers de huidige nationale elites, die Europese autoriteit verkrijgen als bonus bij nationaal politiek succes. Anders dan in de VS moeten ambities voor een Europese federatie dan de huidige elite structuur overwinnen, en kunnen zij niet meeliften op de wens van machtige elites om de politieke macht te heroveren.

Het tweede procedurele element dat hoofdstuk 5 bespreekt ontkracht de democratische mythe die de Amerikaanse federatie omringt, en toont de antidemocratische aard en doelen van deze federatie. In werkelijkheid kan men de Amerikaanse federatie zelfs kwalificeren als een *antidemocratische* revolutie. De federatie was namelijk nadrukkelijk niet bedoeld om de democratie verder te bevorderen, maar om paal en perk te stellen aan de radicale en directe democratie die na de onafhankelijkheid was ontstaan in de meeste staten. Deze antidemocratische doelen achter de keuze voor een Amerikaanse federatie moeten ook goed voor ogen worden gehouden bij het overwegen van een Europese federatie, met name waar het doel van deze federatie zou zijn om de democratie te bevorderen. *Federaliseren staat namelijk niet gelijk aan democratiseren*, ook al zijn de *founding fathers* er indrukwekkend goed in geslaagd beide concepten in het publieke debat aan elkaar te koppelen. In werkelijkheid zal het democratische gehalte van een bestel echter afhangen van *hoe* het federale systeem is vormgegeven, en niet de federale vorm als zodanig. In ieder geval moet daarbij ook erkend worden dat het democratische gewicht en de autonomie van de verschillende lid-volkeren juist zal worden beperkt door een federatie. Daarnaast zullen oproepen tot een Europese federatie ook eerlijk moeten erkennen dat federatie juist een inherent aristocratische ondertoon heeft. Een ondertoon die niet onverenigbaar is met moderne opvattingen over democratie, maar wel moet worden toegegeven en gerechtvaardigd.

Naast deze twee fundamentele procedurele elementen gaat hoofdstuk 5 ook in op enkele meer praktische lessen die getrokken kunnen worden uit het Amerikaanse proces. Om te beginnen wijst dit hoofdstuk op de voordelen van de Amerikaanse procedure voor het ontwerpen en ratificeren van de federale grondwet. Deze procedure combineerde een vertrouwelijke en besloten dialoog *tijdens* het ontwerpen met een intens publiek debat *nadat* de definitieve tekst van de grondwet was aangenomen. Een systeem dat tot betere resultaten lijkt te komen dan het huidige EU systeem voor wijziging van de verdragen. Dit systeem vormt bijna het spiegelbeeld van het Amerikaanse. Het combineert een zeer publieke en *high profile* procedure voor het opstellen van verdragswijzigingen, dat in de weg staat aan constructieve compromissen, met een veel meer gesloten en minder publieke ratificatie middels parlementaire goedkeuring, waarbij referenda vaak te riskant blijken.

Mede in dit verband zou de Unie ook haar voordeel kunnen doen met het idee van 'attached amendments' zoals ontwikkeld in de VS, net als met de Amerikaanse nadruk op *aemulatio* in plaats van *innovatio*. Onderkend moet worden dat de Amerikaanse federale grondwet in de praktijk sterk voortbouwde op bestaande grondwetten en materialen, en delen hiervan zelfs volledig overnam. Wij moeten daarom de romantische mythe verwerpen, die deels in de VS is ontwikkeld om de federatie aan het volk te verkopen, dat nieuwe grondwetten in abstracto en uit het niets ontwikkeld kunnen worden, en dat zij geheel afstand kunnen doen van bestaande con-

cepten, structuren en theorieën, tenminste als men maar genoeg slimme mensen bij elkaar zet (of zelf slim genoeg is). Wat de werkelijkheid van het Amerikaanse proces juist leert is dat de beste resultaten bereikt worden met pragmatische, maar goed doordachte en onderbouwde emulatie van bestaande praktijken, en niet met radicale innovatie.

Deel II: Confederale soevereiniteit

Deel II ziet op het tweede kernconcept van dit proefschrift: soevereiniteit. Dit deel toont aan dat soevereiniteit niet inherent strijdig is met Europese integratie, maar juist een logische evolutie van soevereiniteit vormt. Een confederale conceptie van soevereiniteit levert bovendien een cruciaal instrument om de in deel I geïdentificeerde confederale zwaktes op te vangen, enkele huidige theoretische impasses te doorbreken, en meer in het algemeen een constructieve constitutionele theorie voor de Unie te ontwikkelen. Confederale soevereiniteit kan namelijk een afdoende stabiele, legitieme en flexibele basis bieden voor de autoriteit van de EU. Het kan dit bovendien bieden zonder de primaire publieke autoriteit van de lidstaten te betwisten en zonder soevereiniteit van de lid-volkeren te ondermijnen.

Hoofdstuk 7 geeft een nadere introductie van de doelen van deel II, tezamen met een overzicht van de verschillende voordelen die een confederale conceptie van soevereiniteit de Unie kan bieden. Vervolgens zet hoofdstuk 8 het schijnbare conflict tussen soevereiniteit en Europese integratie uiteen. Deze uitganspositie – Europa en soevereiniteit gaan niet samen– wordt beschreven aan de hand van de *statism* en *pluralism*, twee van de momenteel meest invloedrijke kampen in de bestudering van de EU. De onenigheid tussen deze kampen, en de schijnbare onverenigbaarheid van de posities die zij innemen, vat de veronderstelde botsing tussen soevereiniteit en integratie, alsmede de argumenten die daarvoor doorgaans worden aangevoerd, perfect samen. Want zodra men soevereiniteit serieus neemt, zoals onder andere het *Bundesverfassungsgericht* doet, dan lijkt het inderdaad noodzakelijk om allerhande onhoudbare en irreële grenzen te stellen aan integratie. Zodra men echter soevereiniteit geheel verwerpt, in een pluralistische omarming van integratie, loopt men ook tegen meerdere fundamentele problemen op. Want zodra het concept van hiërarchie zelf wordt opgegeven, blijkt het lastig om nog enige basis te vinden voor essentiële zaken als autoriteit, gezag, of legitimiteit. Als gevolg van deze tekortkomingen blijkt *statism* niet eens in staat om de huidige werkelijkheid in de EU nog te vatten, laat staan dat het de toekomstige integratie nog kan accommoderen. *Vice versa* slaagt pluralisme er niet in om de blijvende fundamentele rol van staten, soevereiniteit en hiërarchie in de EU te incorporeren. Om die reden blijft pluralisme te vluchtig en theoretisch, en mist het de kracht en capaciteit om een geloofwaardig en robuust alternatief voor de statelijke werkelijkheid te bieden. Daar beide kampen er wel in slagen elkaar

te ondermijnen, maar geen van beide volledig overtuigt, lijken we vast te zitten in een weinig aantrekkelijke of vruchtbare tegenstelling: *statsim* of pluralisme, gevestigde maar tekortschietende theorieën of onacceptabele en onverantwoorde *tabula rasa*, soevereiniteit of de EU.

Om deze onvruchtbare impasse te ontsnappen, keert hoofdstuk 9 terug naar het concept soevereiniteit zelf: wat houdt dit concept nu echt in, en hoe verhoudt het zich tot integratie? Met dit doel kijkt hoofdstuk 9 achter de simplistische mythes omtrent de absoluutheid van soevereiniteit naar de conceptuele evolutie van soevereiniteit zelf. Deze analyse toont ten eerste aan hoe interne en externe soevereiniteit twee gerelateerde maar geheel verschillende concepten zijn, die in de loop der tijd steeds meer verward zijn geraakt. Om dit te staven worden interne en externe soevereiniteit gevolgd door vijf stadia van hun historische ontwikkeling en conceptuele verwarring. Deze vijf stadia omvatten onder andere de ontwikkeling van soevereiniteit door Bodin, en de federale evolutie van interne soevereiniteit in de VS; een evolutie die de Amerikaanse federatie mogelijk maakte door soevereine bevoegdheden te verdelen over meerdere overheden.

Op basis van deze conceptuele analyse, en het daaruit volgende onderscheid tussen interne en externe soevereiniteit, komt hoofdstuk 9 vervolgens tot drie kernconclusies. Als eerste is Europese integratie niet inherent strijdig met soevereiniteit als zodanig. De EU past juist naadloos binnen het concept van interne soevereiniteit en de wijze waarop binnen interne soevereiniteit bevoegdheden constitutioneel worden verdeeld over verschillende actoren. De platitude dat de EU conflicteert met soevereiniteit is dan ook gebaseerd op ongeschikte en onterecht toegepaste concepties van *externe* soevereiniteit, en de absolute mythes die externe soevereiniteit omringen. Zulke simplistische en absolute concepties van externe soevereiniteit kunnen Europese integratie vanzelfsprekend niet accommoderen en leiden dus tot een valse tegenstelling tussen soevereiniteit en integratie. Gelukkig zijn dergelijke externe en absolute concepties van soevereiniteit ook geheel irrelevant voor een juist begrip van de Europese integratie. De EU vormt immers een confederaal en *constitutioneel* systeem, en moet dientengevolge benaderd worden vanuit *interne* soevereiniteitsconcepties, net zoals nationale constituties niet benaderd worden vanuit externe soevereiniteit maar vanuit interne soevereiniteit.

Ten tweede laat hoofdstuk 9 zien dat een specifieke *con*federale conceptie van soevereiniteit een logische evolutie vormt van interne en volkssoevereiniteit. De evolutie van interne soevereiniteit is er een van steeds toenemende abstractie en delegatie. De '*federal twist*' in volkssoevereiniteit, zoals ontwikkeld in de VS, maakte het zelfs mogelijk om soevereine bevoegdheden, namens het volk, te verdelen over meerdere overheden. Confederale soevereiniteit vormt nu de volgende ontwikkeling in deze federale evolutie van soevereiniteit, en betrekt buiten-statelijke en niet-statelijke actoren

in het nationale constitutionele systeem voor de delegatie van soevereine bevoegdheden. Het volk delegeert niet meer alle macht binnen de staat, maar deels ook buiten de staat, waarmee de staat aan soevereine bevoegdheden inboet, maar het volk de soevereiniteit nog steeds niet verliest.

Ten derde toont hoofdstuk 9 aan hoe deze confederale evolutie van soevereiniteit ook aansluit bij de *prescriptieve aard* van interne soevereiniteit. Net als in de VS kan een confederaal concept van soevereiniteit dan ook mede worden gebruikt om aan te geven hoe de publieke autoriteit in de EU georganiseerd en gelegitimeerd zou moeten worden, en om deze gewenste situatie vervolgens tot stand te brengen.

Op basis van deze drie conclusies toont hoofdstuk 9 als laatste aan dat de EU dus niet begrepen moet worden als een botsing van soevereiniteit en integratie, maar als een botsing van interne en externe soevereiniteit. In de confederale constitutie van de EU wordt de logica van interne soevereiniteit toegepast op wat tot voor kort werd beschouwd als het 'externe' domein: de relatie tussen de lidstaten. De consequentie hiervan is dat de staat niet langer een totale barrière en exclusieve *nexus* vormt tussen het interne en het externe domein. De interne soeverein, die zowel conceptueel als normatief primair is, daagt daardoor direct de externe soeverein uit: in plaats van opgehokt te blijven in de staat handelt het volk nu buiten de grenzen. Het traditionele conceptuele kader, dat interne en externe soevereiniteit ziet als twee kanten van dezelfde medaille, kan deze confrontatie tussen interne en externe soevereiniteit niet verklaren. Als gevolg lijken wij onder dit traditionele kader genoodzaakt om te kiezen tussen integratie en soevereiniteit, en tussen de EU of de lidstaten. Een valse tegenstelling die ook mede de onenigheid tussen *statism* en pluralisme onderligt die werd beschreven in hoofdstuk 8.

In werkelijkheid vormt de EU niet het einde van soevereiniteit, en is soevereiniteit ook niet anathema voor integratie. In plaats daarvan zien wij een relatieve terugtred van externe soevereiniteit, en een relatieve opkomst van interne soevereiniteit. Deze groeiende rol voor interne soevereiniteit biedt een enorm potentieel voor het creëren en structureren van vergaande maar democratische integratie tussen staten. Bovendien lijdt interne soevereiniteit ook veel minder aan de absolute en ondemocratische trekken die soevereiniteit als zodanig vaak verweten worden.

Hoofdstuk 10 werkt het concept van confederale soevereiniteit vervolgens verder uit en verkent de verklarende kracht en normatieve potentie van dit concept voor de EU. Het hoofdstuk begint met een inleidend overzicht van confederale soevereiniteit en laat zien hoe dit concept aansluit bij de EU verdragen en de rechtspraak van het Hof van Justitie. Vervolgens worden enkele mogelijk voordelen van confederale soevereiniteit verder ontwikkeld en getoetst. Om te beginnen gaat hoofdstuk 10 nader in op de potentie van confederale soevereiniteit om de valse tegenstelling tussen soevereiniteit en

integratie op te heffen, net als de daaraan gerelateerde tegenstelling tussen *statism* en pluralisme. Een confederale benadering van de EU kan hierdoor de verschillende sterke punten van beide scholen combineren, zoals een hoge mate van praktische heterachie binnen een overkoepelende confederale hiërarchie.

Daarnaast, en nog fundamenteler, toont hoofdstuk 10 hoe confederale soevereiniteit de weg opent naar een meer stabiele, robuuste, en democratische basis voor de EU. Een basis die in staat zou zijn om de reeds in deel I besproken federale bovenbouw van de Unie te dragen en te legitimeren. Een basis die bovendien geheel aansluit bij het Unieburgerschap en de wijze waarop dit concept door het Hof van Justitie is ontwikkeld.

Vervolgens gaat hoofdstuk 10 in op drie verdere en onderling gerelateerde voordelen van confederale soevereiniteit. Ten eerste hoe een dergelijke conceptie verklaart waarom het *constitutionele discours* zo relevant is voor de EU, terwijl de EU toch gebaseerd blijft op verdragen. Ten tweede stelt confederale soevereiniteit ons in staat om een *confederale vorm van voorrang* voor het Unierecht te conceptualiseren. Een vorm die een afdoende operationele voorrang van het Unierecht op nationaal recht kan erkennen, zonder dat het hiervoor de beperkte maar ultieme voorrang van nationale constituties hoeft te verwerpen. Als laatste, maar zeker niet als minste voordeel, kan confederale soevereiniteit bijdragen aan een *normatief aantrekkelijk narratief* van en voor de EU. Een narratief dat voortbouwt op het potentieel van de Unie om het nationale democratische te bevrijden uit de staat, en daarmee 'globalisation proof' te maken.

Hoofdstuk 11 bevat een samenvatting van deel II. Het concludeert dat de EU inderdaad begrepen kan worden als een cruciale evolutie van interne en volkssoevereiniteit. Een evolutie die de nationale democratie juist beschermt door haar te moderniseren en toe te rusten voor een globaliserende werkelijkheid: Democratie 2.0 zeg maar. De EU verwordt als gevolg tot een democratische noodzaak die de lid-volkeren hun soevereiniteit kan teruggeven. De afwijzing van confederale integratie wordt hiermee ontmaskerd als een bescherming van de staat ten koste van de volkssoevereiniteit en als een irrationele weigering ons bestel aan te passen aan een veranderende werkelijkheid.

Tegelijkertijd erkent hoofdstuk 11 dat het potentieel van de confederale vorm voor een belangrijk deel nog gerealiseerd moet worden. Het confederale concept dat in dit proefschrift is ontwikkeld moet nog geoperationaliseerd en geïnstitutionaliseerd worden, met name op het nationale constitutioneel niveau dat primair blijft in een confederaal bestel. Hoe dit te realiseren vormt een enorme uitdaging, en vergt meer onderzoek dan in het bestek van dit proefschrift verricht kan worden. Deel III van het proefschrift neemt echter al een klein, en hoogst tentatief, voorschot op dit noodzakelijke vervolgonderzoek.

Deel III: Toepassing en conclusies

Ondanks de vervelende neiging van de werkelijkheid om geweldige theorieën te verpesten, past deel III de bevindingen in deel I en II toe op twee actuele uitdagingen voor de EU: supranationale democratie en de Euro crisis.

Hoofdstuk 12 verkent de confederale mogelijkheden voor effectieve democratie buiten de staat. Hier wijst een confederale analyse allereerst naar de gebrekkige incorporatie van Europese integratie *op het nationale niveau* als de wortel van het democratische probleem. De nationale constitutionele structuren van de lidstaten zijn niet afdoende aangepast aan hun nieuwe positie in een confederaal systeem. Dit nogal opmerkelijke feit heeft verschillende problematische consequenties. Om te beginnen verstoort EU lidmaatschap momenteel de vooraf bestaande institutionele en politieke balans van de nationale constituties. Deze waren immers gekalibreerd voor een situatie waarin de staat een monopolie had op de uitoefening van soevereine bevoegdheden. Een nog fundamenteler probleem is dat Europese integratie ook niet verdisconteerd is in de nationale mechanismen voor het verkrijgen, uitoefenen, of verantwoording afleggen voor het gebruik van politieke macht. Het logische gevolg hiervan is dat er ook *geen nationaal democratisch proces kan ontstaan* over Europese vraagstukken. Er zijn eenvoudigweg geen nationale EU verkiezingen om te winnen, of Europese bevoegdheden die apart nationaal veroverd moeten worden. In plaats daarvan zijn Europese bevoegdheden een bijvangst van nationaal politiek succes, een soort gratis Europees koekje bij de nationaal verdiende koffie.

Om een confederaal democratisch proces te creëren hoeft het Europees Parlement dus niet nog meer macht te krijgen, maar zijn nationale verbeteringen nodig. De nationale constitutionele systemen moeten beter worden aangepast aan hun functioneren in een confederaal systeem. In dit verband stelt hoofdstuk 12 dan ook als eerste voor dat beslissingen over of te delegeren, hoeveel te delegeren, en hoe Europese bevoegdheden aan te wenden, ontwikkeld moeten worden als belangrijke nieuwe inhoud voor het nationale democratische proces. Nationale politieke discussies moeten deels gaan draaien om deze vragen, wat weer betekent dat nationale politici ook de prikkels moeten krijgen om deze vragen effectief te politiseren. Constitutionele theorie zelf kan er immers niet voor zorgen dat mensen over Europa gaan praten, maar kan wel een politiek systeem creëren waarin politici hiertoe verleid worden dit proces op gang te brengen.

Hoofdstuk 12 formuleert vervolgens drie algemene richtsnoeren die kunnen bijdragen aan dit overkoepelende doel: het verbeteren van de constitutionele en institutionele verankering van Europese integratie op het nationale niveau, waaronder het creëren van de noodzakelijke prikkels en beloningen voor het politiseren van EU vraagstukken.

Het eerste richtsnoer betreft *maatwerk*: iedere constitutionele modificatie moet aansluiten bij de unieke structuur en eigenschappen van het nationale systeem. De Unie kan hier dus wel overkoepelende suggesties of *best practices* leveren, maar zeker niet uniformeren. Het tweede richtsnoer vereist de oprichting van een *institutionele nexus* voor EU vraagstukken op nationaal niveau. Nationale politieke processen over EU vraagstukken kunnen zich dan hechten aan, en plaatsvinden binnen, deze nexus. De oprichting van een dergelijke nexus vereist ook dat er afdoende en serieuze EU gerelateerde competenties gebundeld moeten worden in deze nexus: voor een serieus politiek proces moet er ook serieuze macht te behalen zijn. Bovendien moeten er afdoende 'gebeurtenissen' plaatsvinden binnen deze nexus, zoals verkiezingen, concrete beslissingen en publieke procedures, opdat er een reëel politiek debat over de toepassing van EU competenties kan ontstaan.

Het derde richtsnoer stelt dat de politieke controle over deze nationale EU nexus onontbeerlijk moet blijven voor de uitoefening van de –immers primaire– nationale politieke macht. Het doel daarbij is om het nationale en het EU proces op één lijn te krijgen en aan elkaar te koppelen: het nationale politieke proces omtrent EU vragen moet immers delen in, en gestimuleerd worden door, de energie en vitaliteit van het primaire nationale proces.

Om deze richtsnoeren te illustreren, ontwikkelt hoofdstuk 12 het zeer tentatieve voorstel van *EU Senaten*. Deze senaten zouden beschikken over vergaande EU competenties maar ook noodzakelijk zijn voor de aanname van nationale wetten, zouden gebaseerd zijn op onafhankelijke en op de EU geconcentreerde verkiezingen, en zouden daarmee een nationaal platform creëren voor politisering van Europese integratie. In aanvulling op deze voorstellen suggereert hoofdstuk 12 ook nog enkele flankerende maatregelen op het Europese niveau, die de nationale verankering van Europese integratie zouden kunnen ondersteunen. Zo kan de delegatie van bevoegdheden aan de EU meer plaatsvinden middels secundaire wetgeving. Dit zou meer politieke besluitvorming mogelijk maken in de EU senaten dan bij delegatie via primair recht. Daarnaast kan de Unie actiever betrokken zijn bij het stimuleren en begeleiden van nationale constitutionele modificaties.

Hoofdstuk 13 richt zich vervolgens op de tweede confederale uitdaging: de Euro crisis. Het hoofdstuk geeft eerst een kort overzicht van de verschillende crises die achter dit label schuilgaan, en de acties die tot nu toe zijn ondernomen om deze crises te bestrijden. Vervolgens bespreekt het hoofdstuk achtereenvolgend enkele confederale oorzaken confederale risico's, en potentiele confederale antwoorden op deze crises.

Wat betreft de confederale oorzaken laat hoofdstuk 13 eerst zien hoe de Eurocrisis logisch volgt uit de verschillende confederale zwaktes die beschreven zijn in deel I. Om te beginnen liggen de oorzaken van de crisis mede bij de interne en economische focus van de EU, alsmede bij de zelfverdiepende federale marktbevoegdheden van de Unie. De eigen logica en dynamiek van economische integratie zette aan tot de ontwikkeling van

een monetaire unie, en hielp deze in stand te houden. Tegelijkertijd was de confederale basis van de EU niet bij machte om een volwaardige economische unie te creëren, laat staan een politieke unie. De resulterende kloof tussen een confederale economische unie en een federale monetaire unie is een van de centrale oorzaken van de Euro crisis. Maar deze kloof vormt ook een logische reflectie van de meer fundamentele kloof tussen de confederale basis van de EU en de federale bovenbouw. Vanuit een constitutioneel perspectief lijkt het er derhalve op dat de interne markt 'motor' van het Europese confederale systeem te snel gaat, en niet langer gedragen of afgeremd kan worden door de confederale basis. Maar tegelijkertijd is het juist de diepe afhankelijkheid van de inmiddels gerealiseerde integratie die de EU momenteel lijkt te dragen. Het afremmen of terugschroeven van de interne markt zou daarom de gehele Europese integratie kunnen ondergraven. Op deze manier verklaart een confederaal perspectief mede het breder ervaren gevoel dat de Eurocrisis de EU klem zet tussen aan de ene kant een zeer riskante federale sprong voorwaarts, en aan de andere kant een even gevaarlijke desintegratie.

De Eurocrisis treft de EU bovendien ook precies op enkele van de zwakste plekken in het confederale pantser: geld, politiek en conflict. Want naast de grote bedragen waar het in de crisis om gaat betreft de crisis meer in het algemeen het nationale budgetrecht. Dit is nu bij uitstek een hoogst gevoelig politiek terrein waar recht op zijn best een secundaire rol kan spelen. Een feit dat helaas nogal hardhandig aangetoond is door het spectaculaire mislukken van het groei- en stabiliteitspact. Bovendien, en deels vanwege deze politieke aard van het budgetrecht, dwingt de crisis de EU om direct in conflict te komen met lidstaten op deze hoogst gevoelige politieke terreinen. Net als de situatie in Hongarije raakt dit aan één van de centrale confederale achilleshielen: de gebrekkige capaciteit van het confederale centrum om een direct politiek conflict aan te gaan met een of meerdere lidstaten.

Hoofdstuk 13 wijst er vervolgens op dat, juist gezien het grote verlangen de crisis snel te overwinnen, de inherente beperkingen van het gemodificeerde confederale bestel van de EU wel in acht moeten worden genomen. Twee confederale valkuilen, welke geïllustreerd worden aan de hand van de Commissie en Van Rompuy 'blauwdrukken', moeten met name vermeden worden. Ten eerste is daar het risico dat, in overhaaste pogingen om de EMU te stabiliseren, de federale bovenbouw van de Unie enorm word uitgebreid. Dit zou de confederale basis van de EU (verder) overbelasten, en zou daarmee juist een bedreiging zijn voor de levensvatbaarheid van de Unie op de langere termijn. Ten tweede bestaat het gerelateerde risico dat vervolgens geprobeerd wordt om afdoende democratische legitimiteit te creëren voor deze uitgedijde federale bovenbouw *op Europees niveau*. Pogingen die niet alleen gedoemd zijn om te falen zolang de EU een confederale basis heeft, maar ook contraproductief zullen werken en meer legitimiteit zullen kosten dan opleveren. Een vergaande Europese bevoegdheid om nationale budgeten te controleren zou daarom een Trojaans paard kunnen blijken voor de EU

Als laatste gaat hoofdstuk 13 in op twee mogelijke confederale antwoorden op de crisis. Deze zijn ontworpen om de inherente beperkingen en zwaktes in het gemodificeerde confederale systeem van de Unie te vermijden, en proberen daarentegen te bouwen op de sterke punten in dit systeem. Met name wordt voorgesteld om de controle op nationale begrotingen en economisch beleid primair op het nationale niveau vorm te geven. Deze nationale controles moeten vervolgens onder een effectief maar secundair Europees toezicht komen. Dergelijke mechanismen zouden bovendien meer gebaseerd moeten zijn op automatische sancties dan op politieke besluitvorming op Europees niveau. Hierdoor zou de noodzaak van directe handhaving door de EU worden verminderd, en wordt de nationale autonomie juist meer beschermd. Op deze wijze wordt immers de primaire verantwoordelijkheid, en de noodzakelijke beslissingsruimte, voor het creëren van effectieve en passende nationale controlemechanismen aan de lidstaten gelaten. De confederale instellingen worden daarentegen gebruikt voor secondaire normstelling en toezicht, taken waarvoor ze veel beter geschikt zijn dan directe politieke handhaving. De 'Gouden Regel', zoals opgenomen in het huidige Verdrag inzake Stabiliteit, Coördinatie en Bestuur in de Economische en Monetaire Unie (VSCB) vormt een goede basis voor deze benadering, al zijn verdere confederale verbeteringen nog wel nodig.

Wanneer men deze inzichten uit hoofdstuk 13 combineert, is het van vitaal belang dat de politieke energie van de Eurocrisis wordt gebruikt om de confederale basis van de EU in de nationale constituties en democratische systemen te verbeteren. In ieder geval moet vermeden worden dat deze crisis wordt gebruikt voor een federale Pyrrhus overwinning. Het is immers de stabiliteit van deze nationale systemen, en hun ongeëvenaarde capaciteit om democratische legitimiteit te genereren voor Europese integratie, waarvan de Unie afhankelijk is. Een lange termijn investering in deze nationale wortels van het Europese succes lijkt daarmee het beste antwoord op de Eurocrisis, zeker op de langer termijn.

Hoofdstuk 14 geeft als laatste een overzicht van de kernbevindingen van het proefschrift, en formuleert enkele algemene conclusies. Zo bieden confederalisme en volkssoevereiniteit een constructieve en vruchtbare basis voor de bestudering van de EU. Hoewel dit concept nader onderzocht, uitgewerkt en getoetst moet worden, kan de EU inderdaad begrepen worden als een confederale unie van soevereine lid-volkeren, zowel qua beschrijving als qua aspiratie. As gevolg biedt onze neo-Westfaalse werkelijkheid wellicht de ideale kans voor een confederale comeback. Een werkelijkheid waarin het lelijke eendje van de constitutionele theorie eindelijk tot wasdom kan komen, en een effectief en democratisch constitutioneel model kan leveren voor een globaliserende wereld.

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Curriculum Vitae

Armin Cuyvers was born in 1980 in Nijmegen, the Netherlands. After graduating from the Gymnasium Haganum in The Hague, he chose to study law at Leiden University. Here he graduated *cum laude* in three separate degrees of law: Civil law (*burgerlijk* recht), International and European law, and Jurisprudence. During his studies he was accepted as a visiting student at Harvard College and Harvard Law School, and worked for a Member of Parliament. After graduating in the Netherlands, he received his Magister Juris title from Exeter College, University of Oxford with distinction. He then joined both the Europa Institute and the Department of Legal Philosophy as a PhD Fellow in 2006, and was appointed as an assistant professor in 2011. In 2007 Armin was a visiting professor at Bilgi University in Istanbul. In 2009 he was a visiting professor at Stanford and Berkeley, and in 2013 at UC Hastings College of the Law, during which periods he conducted comparative research on the EU and the American Confederation.

Armin's primary research interests concern EU constitutional law and theory, but he also retains a strong interest in several black letter law issues of EU. These include free movement law, especially the free movement of contentious services such as gambling, and the regulation of Services of General Economic Interest. He also regularly participates in advisory projects on European law, for instance in projects for the European Commission on the free movement of sportsmen in the EU, or for the Asian Development Bank on economic integration in Europe. In 2012, together with Prof. T. Ottervanger, Armin established the Leiden Centre for Legal and Comparative Studies of the East African Community (LEAC).

Armin is married, and the father of one wonderful son, Floris.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2012 and 2013

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