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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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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.