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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2 The Confederal Comparison

1 Introduction: A point by point comparison

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

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

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

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

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

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

2 Foundations: Fundamentals of the constitutional systems compared

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

2.1 Foundations: Ultimate foundation of authority

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

2.1.1 We the peoples

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

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

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

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

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

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

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

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

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

2.1.2 *We the People*

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

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

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

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

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

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

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

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

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

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

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

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

14 Elazar (2006), 35.

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

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

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

2.1.3 We the peoples and/or states?

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

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

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

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

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

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

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

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

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

22 Art. 49 TEU.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2 Foundations: The use of force against the States?

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

2.2.1 The use of force under the Articles

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

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

35 Art. III of the Articles of Confederation.

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

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

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

2.2.2 *Force as a necessary federate backbone*

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

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

2.2.3 *The use of force in the EU*

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3 Foundations: Taxation and the generation of revenue

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

2.3.1 The problem of revenue under the Articles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3.2 Taxation and revenue in the Federation

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

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

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

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

57 Beeman (2010), 20 et seq.

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

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

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

2.3.3 The generation of revenue in the EU

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

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

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

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

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

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

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

66 Now see art. 310(1) TEU.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.4 Foundations: Amendment

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

2.4.1 Unanimous amendment of the Articles

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

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

80 Art. XIII of the Articles of Confederation.

81 Madison (Sketch), 11.

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

2.4.2 A federate process for amendment by majority

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

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

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

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

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

84 Wood (1969), 532.

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

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

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

2.4.3 Amending the EU Treaties

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

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

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

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

88 Also see chapter 9 section 5 below.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.5 Foundations: Secession

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

2.5.1 The possibility of secession under the Articles

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

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

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

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

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

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

2.5.2 The eventual impossibility of secession under the federate Constitution

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

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

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

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

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

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

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

2.5.3 Secession from the EU

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

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

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

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

112 Tribe (1988), 5 et seq.

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

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

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

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

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

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

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

117 Art. 53 TEU.

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

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

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

2.6 Foundations: Expanding the Union

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

2.6.1 Accession under the Articles

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

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

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

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

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

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

2.6.2 Accession under the Federation

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

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

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

123 McDonald (1968), 76.

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

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

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

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

2.6.3 Accession to the EU

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

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

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

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

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

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

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

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

133 Art. 49 TEU.

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

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

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

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

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

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

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

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

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

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

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

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

2.7 *Sub-conclusion foundational modifications*

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

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

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

3.1 *Structure: Legal supremacy and direct effect*

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

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

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

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

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

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

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

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

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

145 Cf Jensen (1970), 279-281.

146 Wood (1969), 460.

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

148 Art. IX Articles of Confederation.

149 Art. XI Articles of Confederation.

150 Art. IX Articles of Confederation.

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

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

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

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

153 Cf for instance Maduro (2006), 512.

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

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

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

3.1.2 *The supreme law of the Federation*

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

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

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

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

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

158 Wood (1969), 547.

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

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

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

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

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

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

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

3.1.3 Legal supremacy and direct effect of EU law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

188 De Witte (1999), 209 et seq.

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

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

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

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

3.2 Structure: Separate versus merged government

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

3.2.1 Merged government in the Confederation

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

3.2.2 Separate government in the Federation

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

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

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

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

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

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

3.2.3 Separate or merged government in the EU?

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3 Sub-conclusion structural modifications

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

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

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

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

4.1 The authority of the centre: Objectives

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

4.1.1 Objectives under the Confederation[204]

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

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

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

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

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

206 Jensen (1965), 154 et seq.

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

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

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

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

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

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

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209 Art. IV of the Articles of Confederation.

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

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

212 Art. VI of the Articles of Confederation.

213 Wood (1969), 403 et seq.

4.1.2 Objectives under the Federation

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

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

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

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

4.1.3 Objectives of the EU

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2 *The authority of the centre: Attribution*

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

4.2.1 *The narrow doctrine of attribution in the Confederation*

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

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

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

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

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

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

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

4.2.2 A broad doctrine of attribution in the Federation

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

Second, and with hindsight crucially, article 1, section 8, last paragraph of the Constitution explicitly incorporated an implied powers doctrine. It provided that Congress would have the power:

> 'to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.'[231]

Already at the time of drafting this addition was rightly considered to be vital for the success of the new constitution.[232] Only a normal legislative majority would be required both to decide on the existence of a competence, and to exercise it. Any decision could of course be subject to scrutiny by the newly created Supreme Court, yet the existence of implied powers as

228 Choper, Fallon, Kamisar and Shiffrin (2006), 55 et seq.

229 See on this important point amongst many others: B. Neuborne, 'The Myth of Parity' 90 *Harvard Law Review* (1977), 1105, P.M. Bator, 'The State Courts and Federal Constitutional Litigation' 22 *William and Mary Law Review* (1981), 605, S.D. O'Connor, 'Our Judicial Federalism' 35 *Case Western Reserve Law Review* (1984), 1, M. Shapiro, 'Jurisdiction and Discretion' *New York University Law Review* (1985), 543, and Tribe (1988).

230 Watts (1999), 39.

231 Nowak and Rotunda (2004), 138 et seq.

232 Something acutely perceived by opponents and proponents of the clause. Hamilton therefore vehemently defended this clause during the Convention, and in Federalist Paper No. 44 Madison declared that the Constitution would be a dead letter without it.

such could not be denied. What is more, such federate judicial scrutiny also meant that the ultimate decision on competence lay with the centre and not the states, and with a judicial instead of a political organ.[233]

In addition to any specific competences it received, therefore, the new federal government was above all allowed a broader interpretation of its competences, and access to an implied powers logic to boot.[234] As the later use of the commerce clause and the necessary and proper clause proves, this was a very significant change in the constitutional fabric, far outweighing most explicit additional powers granted.[235]

4.2.3 Attribution in the EU

Like the American Confederation the EU is based on the continuing authority of its individual members, and only has those powers attributed to it by them.[236] Articles 4(1) and 5 (1) and (2) TEU together provide the following formulation of the principle of attribution:

> '1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.
> (…)
> 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties *to attain the objectives set out therein*. Competences not conferred upon the Union in the Treaties remain with the Member States.'

Attributed powers are subdivided into three categories. They are either exclusive, shared, or complementary. Exclusive competences are the most far-reaching, and leave Member States with no residual competence. In areas of shared competence the Member States retain the right to act, albeit

233 Choper, Fallon, et al. (2006), 15 et seq., Tribe (1988), 195 Also, transferring decisions on the scope of federal powers to a judicial and federal organ only seems to increase powers, especially implied ones. This because it takes the decision out of the political arena and into a legal one, which seems more amenable to central powers, and usually *can only marginally check* the federal legislative judgment that an (implied) powers exists. Competences are thus boosted by the margin of appreciation left by the judiciary to the legislator. Lastly, legal logic is also unlikely, on its own, to withdraw a competence once given.

234 *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). Also see Tribe (1988), 298 et seq. and Federalist Paper No. 44.

235 Nowak and Rotunda (2004), 157 et seq. The crucial importance of implied powers was also described my Madison in 1800 'It must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers' (James Madison, Report on the Alien and Sedition act, January 7, 1800 in: J. Rakove (ed) *James Madison: Writings* (Library of America 1999), 643.

236 D. Chalmers, *European Union Law* (CUP 2007), 140. Also see chapter 9, section 7on the notion of delegation and sovereignty in the EU.

within the limits of pre-emption and Union loyalty. Complementary competences, on the other hand, only give the EU a limited capacity to act, and especially leave Member State competences largely intact.[237]

Interestingly the Treaties directly place conferral in the context of subsidiarity, proportionality and the objectives of the Treaties. The first two concepts, more typical for European than US federalism,[238] aim to limit the use of conferred powers.[239] At the same time, however, different from both the US Confederation and Federation, attribution is directly linked with the objectives of the EU. This link between objectives and competences is further developed through art. 352 TFEU:

> 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.'

Besides an interesting legal and ontological conundrum,[240] article 352 TFEU further links objectives with competences. It thereby creates a form of residual competence to ensure that objectives can be realized.[241] As such it displays a far greater concern for effectiveness than the very strict principle of attribution applied under the Confederation. The EU system thereby comes much closer to the federate approach to attribution with its necessary and proper clause, as is underlined by the requirement in article 352 TFEU that the EU may act where this is 'necessary' to achieve one of its objectives.[242]

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237 R. Schütze, 'The European Community's Federal Order of Competences A Retrospective Analysis', in: M. Dougan and S. Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009), 63.

238 Watts (1999), Elazar (2006).

239 Obviously these are in themselves complex an contested concepts, and notoriously complex to operationalise legally. Cf P.J.G. Kapteyn and P. VerLoren van Themaat, '*Introduction to the Law of the European Communities*' (3rd edition, Kluwer 1998), 233 et seq.

240 It can be defended that the provision both contains a certain logic of implied powers, and rejects it, for if there truly is an inherent doctrine of implied powers, 352 TFEU is not necessary. In that sense it straddles the Confederal – Federal divide by allowing the federate centre access to the instrument of implied powers, yet limiting this access by a confederal requirement of unanimity. Also, the provision claims to cover cases not provided for by the Treaty, yet is itself part of the Treaty.

241 A. Dashwood, 'Article 308 as the Outer Limit of Expressly Conferred Community Competence', in: C. Barnard and O. Odudu (eds) *The Outer Limits of European Union Law* (Hart Publishing 2009), 35 et seq.

242 See however also the attempt to at least somewhat limit the potential this opens up in Declaration No. 41 on art. 352 TFEU. For example art. 352 TFEU is not to be used in relation to such lofty aims as 'promoting peace'.

Art. 352 TEU in fact even goes one step further, as the text of the necessary and proper clause only refers to the *powers* of the federal government, not the objectives.

Perhaps even more importantly, as in the US Federation, in the EU the scope of the attributed powers is determined by a central court. Similar to the US Supreme Court, the Court of Justice has here played a vital role. Often applying a strong teleological approach, and linking a logic of effectiveness with the objectives of the Treaty, its case law has generally resulted in broad competences for the Union.[243]

The Courts approach to article 114 TFEU, the old article 95 EC, provides a clear example. Considering the objective of creating an effective internal market, competence to regulate this market is already accepted by the Court where there is an actual or potential obstacle, now or in the future to any of the fundamental freedoms. A threshold that is not difficult to reach.[244] Under a similar logic the Court has found that external competence exists where this is necessary for the effectiveness of an internal competence, albeit under strict conditions.[245] Further, in an area as sensitive as criminal law, the EU was allowed to demand criminal sanctions where this was 'essential' to ensure the effectiveness of EU rules, even where no explicit competences to do so existed at that time.[246] Perhaps the best illustration of just how attuned the case law of the Court is towards effectiveness and achieving EU objectives, however, is provided by the *Tobacco* saga: The *one* tobacco judgment where the Court 'drew a line', and not even a very strict one at that, became an instant classic. The eagerness with which this rather unimpressive limit to EU competences was anointed into the EU hall of fame only underscores the expansive approach normally followed in determining EU

243 Douglas-Scott (2002), 261.

244 Cf amongst many others Case C-491/01 *British American Tobacco* [2002] ECR I-11453, par. 60, case C-434/02 *Arnold André* [2004] ECR I-11825, par. 30, case C-210/03 *Swedish Match* [2004] ECR I-11893, par. 29, or joined cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451, par.28. Measures are not allowed, however, on a 'mere finding of disparity between national rules'.

245 See joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279 as well as Opinion 1/76.

246 Case C-176/03 *Commission v Council (Ship Source Pollution I)* [2005] ECR I-7879. The EU is not competent, however, to determine the 'type and level' of criminal sanction. See case C-440/05 *Ship Source Pollution II* [2007] ECR I-9097 par. 70. After Lisbon the EU has, however, received further, and more explicit, competences in the field of criminal law. See especially art. 82-86 TFEU.

competences.[247] A conclusion that does not involve a normative rejection of this approach, for it has probably been of vital importance for the effectiveness and survival of the EU, but that does question the portrayal of the Tobacco case law as a serious limit to EU competences.

Another clear example of the Courts approach, and of the use of objectives to determine competences, is provided by the Kadi-I saga.[248] Here the question was whether the EU, under the pre-Lisbon situation, had the competence to implement sanctions against individuals not in any way related to a state government.[249] The Advocate General supported a very broad interpretation of article 301 EC, reading into this provision a general competence to sanction individuals.[250] The General Court took a different approach, allowing such individual sanctions jointly under articles 60, 301 and 308 EC, whereby art 301 EC was used to 'import' an objective from the second pillar into the first pillar, which could then create a competence under article 308 EC (now article 352 TFEU).[251] The Court of Justice did not agree with such importation. Instead it invented the notion of an 'implicit underlying objective': although article 301 EC did not provide the *competence* to sanction individuals, it did provide the implicit *objective* to do so. Via article 308 EC, now article 352 TFEU, this 'implicit underlying objective could then become a competence.[252]

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247 Case C-376/98 *Tobacco Advertising I* [2000] ECR I-8419. The Court of justice annulled a directive on tobacco advertising, holding that it exceeded the competence of the EU under then art. 95 EC. The actual grounds for this finding, however, were quite specific. By removing some rather minor parts, such as the prohibition on ashtrays, the second tobacco advertising directive could be accepted in the second tobacco case (C-380/03 *Tobacco Advertising II* [2006] ECR I-11573). At the same time that the Court established this 'limit, furthermore, it also accepted the far more important and sweeping rule that an EU measure may be wholly based on art. 114 TFEU if it pursues a certain minimum (or threshold) of market harmonization. This also where a very significant, or even predominant, part of the measure concerns public health. A line of reasoning that clearly reflects a primary concern on effectiveness, and thereby significantly reduces the limiting effect of art. 165(5) TFEU).

248 For a further analysis of the legal basis discussion see A. Cuyvers, 'Tussen Scylii en Charybdii: terrorisme, rechtsbescherming en de verhouding tussen rechtsordes in Kadi', 58 *Ars Aequi* (2009), 155.

249 The old art. 301 EC only mentioned sanctions against third countries, which could include sanctions against individuals linked to the government of those countries, but in at least the view of the General Court and the Court of Justice could not directly support sanctions against individuals generally. Case C-376/10 P *Tay Za v. Council* nyr.

250 See par. 13 and 16 of his opinion, finding that art. 60 and 301 EC jointly provide a sufficient legal basis.

251 Especially see paras 120. 130 and 133 of the then Court of First Instance in case T-315/01 *Kadi I* [2005] ECR II-3649.

252 Joined cases C-402/05 P and C-415/05 P *Kadi I*, par. 226. It should also be noted that after Lisbon formally we no longer have separate first or second pillar objectives, widening the reach of art. 352 TFEU in a way that might not be wholly covered again by art. 352(4). See also Rosas and Armati (2010), 22.

As these examples illustrate the principle of attribution in the EU, especially as developed by the Court of Justice, is far more conducive to central competences than the one used under the Articles. The combination of an effectiveness-driven interpretation of competences, an implied powers logic and general legal bases such as art. 114 or 352 TFEU bear a far higher resemblance to doctrine of attribution under the necessary and proper clause or the commerce clause, the engine behind so much federate development in the US.[253]

From our limited comparison, it results, therefore, that the EU has incorporated to a very high degree the federate modification of a more liberal theory of attribution. In any case it is far removed from the very strict doctrine of attribution that was applied under the Articles. One additionally interesting conclusion in that regard is that, especially in the EU, a more liberal theory of attribution can also bring objectives into play. As soon as a more teleological interpretation is followed, objectives start creating competence. This sometimes even to the *Kadi* extreme where it seems a certain objective, together with a desire for effectiveness, means a competence will be found somewhere. Clearly these underlying theories of attribution must also be kept in mind when comparing the specific competences set out next.

4.3 The authority of the centre: Specific objectives

For having compared the objectives and the general doctrine of attribution used, we can now turn to two of the specific competences that played a central role in the US transition from a Confederation to a Federation: the competences concerning war and the regulation of commerce.

4.3.1 The Confederation and the war focus

To reach its objectives, and under the strict principle of attribution described above, the Articles delegated several competences to the Confederation. The most far-reaching were the war-related competences. Congress received the exclusive power of deciding on war and peace, [254] to build a navy, to determine the size of land forces and to make binding requisitions on the States to supply their share of these forces.[255] In addition, the Confederation could

253 Choper, Fallon, Kamisar and Shiffrin (2006), 87 and 91. Further see T. W. Merril, 'Towards a Principled Interpretation of the Commerce Clause', 22 *Harvard Journal of Law and Public Policy* (1998), 31, and D. McGimsey, 'The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element loophole', 90, *California Law Review* (2002), 1675. Different from the US, however, the EU has less effective political counterbalances.

254 Except in the case of self-defence against attack or immanent threat of attack, see art. VI Articles of Confederation.

255 The states were obligated to raise, cloth and equip these forces, but the costs these actions were borne by the United States jointly.

regulate these forces, appoint all non-regimental officers in the army and the navy and all regimental officers over Colonel. Crucially Congress also directed the actual operations of these forces.[256]

Regarding the funding of the Confederation, the Articles determined that each of the states should carry a part of the confederal costs 'in proportion to the value of all land within each State.'[257] Congress was given the competence to set the mode of valuation of this land. As discussed above, however, Congress was *not* allowed to directly levy taxes or collect such moneys due. Determining the method of taxing, and collecting the revenue remained the exclusive competence of the states.[258] Congress was, however, allowed to borrow money and issue bonds on the credit of the United States.

Both the war competences and the capacity to borrow funds were complemented by significant exclusive competences in external relations more generally. Congress had the exclusive right of concluding treaties and of sending and receiving ambassadors. This right was supported by a complete prohibition for the states to enter into any international agreements, or any treaties amongst themselves for that matter, without the express permission of Congress.[259] Formally, therefore, the States did not even have a shared external competence left, [260] even though these obligations were violated as well.[261] Treaties concluded, at least those concerning the vital area of duties and imposts were binding on the states, and at least legally limited their internal competences.[262]

In line with their internal market objectives, the Articles gave Congress the exclusive power to regulate the 'alloy and value' of the *coin* struck by the Confederation or the States.[263] Crucially, however, this did not cover the right of the states to emit *paper money*, one of the most contentious political issues of the time.[264]

256 Art. IX of the Articles of Confederation.
257 Art. VIII of the Articles of Confederation. This was an important point of contention during the drafting of the Articles, the landed provinces preferred population or other sources of income to be included as well in the calculation, but eventually compromised on this point.
258 Art. VIII, s.2 of the Articles of Confederation.
259 Art. VI of the Articles of Confederation.
260 These extensive external competences did not lead to a kind of reversed *ERTA* logic: Congress did not receive internal powers where external powers had been exercised or where these powers were necessary for the effectiveness of the external competence. The strict attribution doctrine prevented any such inroads into state powers, and there was no central court to invent it.
261 Van Tyne (1970), 540.
262 Art. VI s. 3 Articles of Confederation. As indicated above, compliance was, however, low.
263 Art. IX Articles of Confederation.
264 See further below.

The Confederation, therefore, received sweeping military and external competences. Competences that match, and in some cases exceed, those given even too many modern-day federations. These competences were in line with the overriding need to win the war and establish the United States internationally. The *internal* competences of the Confederation, however, were very limited. They were not even really elaborated upon, even taking into account the concise writing of the time.[265] From the revolutionaries' perspective, however, even these limited internal competences of the Confederation were quite a leap already. Firstly, having just relieved themselves of one 'tyrant', there was little enthusiasm for creating a domestic one.[266] This sentiment was reinforced by the radical ideology of the revolution, which included a strong distrust of all central authority[267] and near total faith in democracy as direct and close to the citizen as possible.[268]

Second, as indicated above, most States had enjoyed large degrees of freedom and self-rule under the Empire, and had developed very strong identities. The Confederation was there to protect and assist the States, not to replace them.

Thirdly, the States were deeply divided on many important issues, and significant conflicts of interest existed. Slavery, trade versus agriculture, and claims to the vast stretches of 'empty' land to name but a few central ones.[269] Partially as a result, a deep distrust remained between several individual states. A strong central government either required settling these issues, or trusting the new centre to settle them. Neither proved possible directly after independence. As a result, the confederate period and the transition to the federate constitution can largely be described as a struggle over these issues between different groups, and their eventual settlement in Philadelphia.[270]

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265 To compare: The text of the US Constitution as adopted at Philadelphia has 4484 words. The *table of contents* of the consolidated EU Treaties already contains 2.439 words. After the Lisbon effort at simplification the Treaties themselves, including protocols and declarations an in the English language version, use 117.695 words.

266 Jensen (1970), 109 and 124. Linked to this general fear of centralized power, was also the fear that any central power would be dominated by Virginia, a.k.a. as the 'big knife' at that time, and by far the biggest state.

267 For a closer description of the roots and content of this ideology, as well as illustrative examples of it, see Wood (1969), for instance on. 18 et seq, as well Wood (1991). For a discussion of the ideas and ideologies in the states see Beeman (2006), especially ch. 6, 7 and 8.

268 This was at least the ideology of those describing themselves as 'patriots' or 'revolutionaries'. As will be discussed below, many powerful elite groups in society, not strong supporters of revolution to begin with, feared this ideology, and tried hard to temper it. The struggle between these camps is one of the central themes throughout the entire confederal period, Jensen (1970), 16, 117, 161.

269 Naturally, many of these issues eventually contributed to the outbreak of the Civil War.

270 See further below chapter 5 on the process of federation.

Fourth, it had been exactly the British regulation of commerce and the levying of taxes and imposts that lay at the heart of the Colonies' public defence of rebellion; no taxation without representation.[271] Giving the Confederation powers that had been deemed worthy of a revolt against Great Britain, so shortly after that very rebellion, was not a very popular option.

These limited competences of Congress did indeed safeguard the powers of the states. Yet they also severely limited the functioning of the Confederation, especially as there was no easy way to adapt or expand these powers where this proved necessary for effectiveness. Two key gaps in the competences of the Confederation primarily contributed to the 'deplorable' functioning of the Confederation: The inability to regulate trade, and the inability to secure an independent and sufficient income.

For even though the Articles did prohibit certain restrictions to the internal market, they did not grant any positive powers to regulate trade, or to achieve 'positive' integration, to use EU lingo. The Dickinson draft of the Articles had included greater trade competences, but these hade been removed by supporters of a weaker confederation.[272] Later on conservatives also tried to grant further competences to Congress but failed.[273]

Combined with the general compliance deficit, this lack of competence meant the Confederation could not prevent increasing protectionist behaviour, which blocked the internal market and spawned conflicts between the states. At one point, for instance, Connecticut taxed imports from Massachusetts at a higher rate than British products![274] In addition, the inability to regulate internally was seriously interfering with the capacity of the US to conclude and observe trade agreements *externally*. A problem that significantly harmed the standing of the new polity internationally. Serious as these problems were, however, the financial situation of the Confederation, as described above, was even more problematic. Not surprisingly these two weaknesses were in the front of the founding fathers' minds at Philadelphia.

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271 This section will not even attempt to settle the question what the 'real' causes of the revolution were, be they economic, ideological, class driven or a mix. Yet it is a fact that the *public defence* of the Colonies, as eventually formulated so powerfully in the Declaration of Independence, was based on inalienable rights, and the right of representation when taxed. See for different analyses or emphases on the 'real' causes: Beard (1969), R. Beeman, S. Botein and E. C. Carter II (eds), *Beyond Confederation* (University of North Carolina Press 1987), McDonald (1985), or Wood (2003).

272 Jensen (1970), 139 and 178.

273 Jensen (1970), 111. 128 and 174.

274 Madison (Sketch), 14.

4.3.2 The Federation: Combining the internal and the external

To create an efficient government, the power to regulate trade and to generate income were therefore deemed necessary for the federate government. The Virginia plan fully included these powers,[275] and they became the two central modifications in the field of specific competences. The increased powers to tax and generate revenue were already discussed above in light of their fundamental importance.[276] The power to regulate trade externally *and* internally was granted through the famous commerce clause:

> 'To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes'[277]

These powers proved to be especially broad when combined with their extensive interpretation under the necessary and proper clause discussed above.[278] The external and war competences of the Federation were extended as well, most importantly to maintain a standing army. The powers to declare war and to conclude treatises remained with the centre, and were vested in Congress, the President and the Senate respectively.

The central government, therefore, received a significant increase in specific competences, as well as more leeway to determine the ambit of these competences.[279] The greatest increase in competence, however, certainly with hindsight, concerned the power to regulate commerce internally. As a result the federation retained its dominant external powers, yet complemented these with more general internal powers.[280]

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275 In fact, the first draft of this plan went one significant step further and gave a general legislative competence to the central government.

276 The increased income of the federal government thereby also had a further, indirect effect on its powers: it acquired enough revenue to engage in non-regulatory activities, i.e. measures directly concerned with redistribution and public spending. Something the EU can only do to a far lesser degree due to its relatively minor income. Compare in this regard the distinction made by Majone in G. Majone, *Regulating Europe* (Routledge 1996) as well as Craig (1999), 42.

277 Compared to the Articles, several other powers were also added, such as the powers to establish uniform rules for naturalization and bankruptcies, to promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries, to constitute Tribunals inferior to the supreme Court, and to fully legislate for the newly created District of Washington.

278 Choper, Fallon, Kamisar and Shiffrin (2006), 55, 65 et seq. See for instance the Lottery case (*Champion v. AMES*) 188 U.S., 23 S.Ct. 321, 47 L.Ed. 492 (1903) and Hou*ston, East & West Texas RY, v. United States* (Shreveport Case) 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed 1341 (1914). Also see: R.L. Stern, 'The Commerce clause and the national economy', 1933-1946, 59 *Harvard Law Review* (1946), 645 for the boost during the New Deal.

279 A development that the 10th amendment could not stop, weakly formulated as it is.

280 Cf on this internal shift from the external confederal tradition also Forsyth (1981), 68.

4.3.3 The EU and the internal focus

How does the EU compare? To answer this question this section will not outline all of the competences of the EU in detail. This would require too much space and is not necessary for our comparative exercise. Rather the focus will be on comparing the EU against the overall picture concerning competences established above for the Confederation and the Federation. For this purpose it is especially useful to jointly consider the three key competence modifications underlying the transition from the confederate to the federate constitution: the control of trade, the external and war competences and the way these were affected by the concept of attribution used.

4.3.3.1 The regulation of trade: A federal centre of gravity

The internal market lies at the heart of the EU. Even if not normatively, although even that could be defended, it does so at least in terms of competences, both qualitatively and quantitatively.[281] It is the area where the EU has some of its most far-reaching powers. Many other fields, furthermore, come within the ambit of EU law via the link or logic of the internal market. As long as there is a potential effect on the internal market, after all, EU law kicks in either through negative integration or because legislative competences are triggered.[282] A process, for instance, via which many essential social services have been drawn into the internal market, such as energy, postal services, health care, social housing or public transport.[283] Another clear example of the snowball of a genuine internal market is the free movement of workers. Starting with the right to take up work, this eventually requires harmonization of diploma's, social benefits, rights for family and dependents, access to social services and even the grant of political rights.[284]

In legislative terms the EU has received a very broad competence to regulate the internal market after the introduction of article 95 EC, now article 114 TFEU by the Single European Act. As discussed above the threshold to trigger this competence is relatively low, and the Court is generally rather

281 See below chapter 3 section 2 for a more detailed discussion of this claim.

282 For the legislative competence to be triggered all further criteria as laid out in the Courts case law must clearly be met as well. See Case C-376/98 *Tobacco Advertising I*.

283 See, as typical examples for this dynamic case C-179/90 *Porto di Genova* [1991] ERC I-5889, case C-320/91 *Corbeau* [1993] ECR I-2533, case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, case C-280/00 *Altmark* [2003] ECR I-7747, case C-83/01 P *Chronopost* [2003] ECR I-6993, joined cases C 264/01, C 306/01, C 354/01 and C 355/01 *AOK-Bundesverband* [2004] ECR I 2493, case C-567/07 *Sint Servatius* [2009] ECR I-9021, or the so called Golden Share cases: C-367/98 *Commission v. Portugal* [2002] ECR I-4731, C-483/99 *Commission v. France* [2002] ECR I-4781 and C-503/99 *Commission v. Belgium* [2002] ECR I-4809. For a further discussion of the dynamic intended see P.J. Slot, M. Park and A. Cuyvers, 'Diensten van algemeen (economisch) belang nader beschouwd', *Markt en Mededinging* (2007), 101-112.

284 See for a more detailed discussion and the case law chapter 3, section 2.

willing to accept that a link with the internal market exists.[285] The EU possesses several other market related regulatory and legislative competences as well, for instance on competition law, customs, EMU, and in special fields such as fisheries, agriculture, transport, consumer protection and energy. As discussed above, furthermore, these legal bases have been given a very wide interpretation as well, with the Commission and the Court of Justice focussing on the need to effectively achieve their underlying objectives.

As a result, the internal market competences of the EU resemble those of the Federation far more than those of the Confederation, even though the Confederation also had the explicit *objective* of establishing an internal market.[286] Especially the resemblance between the expansive interpretation of the commerce clause under the necessary and proper clause, and the very broad interpretation of article 114 TFEU under the 'effectiveness' approach of the ECJ is striking in that regard.[287] Combined with the inherent broadness of concepts as trade or 'the market' – it is difficult to find something that will not potentially, now or in the future have an effect on trade – these competences have had a decisive effect on the overall competence of these entities. Both the structure of the competence, and the focus of this key EU competence, therefore strongly follow the federate modification on this point.

On the other hand, the internal market in the EU also relies heavily on negative integration, and thereby on the Court of Justice, as often no political consensus can be reached to support positive integration. This important role of negative integration forms an important confederal element, albeit one squarely within the field of the internal market. These strong and broad prohibitions maintain a certain minimal level of integration for which no political agreement is necessary, and which, more importantly, cannot be lowered via ordinary legislation. In that way, they show a lack of political trust, a need to fall back to a legal structure where no political agreement can be reached.[288] These confederal elements are strengthened by the requirement of qualified majority for legislation and unanimity for Treaty amendment, emphasizing the importance of the Member States, and causing the fall back option of negative integration to be relied upon more often. Different from the Articles, however, these prohibitions underlying negative

285 Case C-380/03 *Tobacco Advertising II*.

286 Von Bogdandy even went as far, already in 2000, to state that 'In the context of the aforementioned competencies, the Union can hardly be distinguished from the central level of a federal state.' Von Bogdandy (2000), 33.

287 Clearly many differences can be identified as well, yet the mechanism itself is very similar: the creation of an almost *pseudo-kompetenz-kompetenz* out of a trade power due to the fact that every subject matter can be made to relate to trade in some way or degree,

288 See below chapter 3, section 2.4.2. for a more detailed analysis of this function of negative integration in a confederal system.

integration have actually functioned in the EU, largely due to the Court of Justice and the reception of its case law in the Member States.

Despite these limited confederal elements, the market related competences of the EU are significant, and on the whole certainly come much closer to the federate modifications than to the far more limited powers of the Confederation in this field. Something that cannot be said about the more limited external and military competences of the EU.

4.3.3.2 The relative absence of war and defence competences

The external dimension of the EU is rapidly expanding, and forms a challenging new frontier for EU law. The establishment of a President of the European Council with external responsibilities, a High Representative and the European External Action Service provide clear illustrations, even if they also show the sensitivity of this field and the desire of the Member States to retain control. [289] The external clout and status that a functioning internal market provides externally, furthermore, should also not be underestimated. In this sense the role that the EU may play in preserving or enhancing the external status, especially for some of the larger Member States, certainly forms one of the elements in promoting and supporting EU integration.

Nevertheless, the centre of gravity for EU competences remains internal and market orientated, especially if compared with our US examples. This internal focus stands out even more clearly in the area of defence. The EU does not come close to the military objectives or competences of the either the Confederation or the Federation.[290] Be it due to the protective shield provided by that same US Federation and NATO, the different European attitude towards defence and the military, the method and path of European integration after two world wars, or to the many other reasons that might have contributed to its internal focus, the EU never did develop a strong military dimension.[291] The different attempts to increase the level of military and

289 See respectively art. 15(6), 18 and 27(3) TEU, as well as Council Decision 2010/427 of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJ* [2010] L 201 p. 30. For a detailed overview and analysis of the EEAS see: S. Blockmans and C. Hillion (eds), EEAS 2.0 *A legal commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service* (SIEPS and EUI 2013), available at: http://jura.ku.dk/pdf/nyheder/2013/eeas20/.

290 Furthermore, even though art. 42(7) TEU contains an obligation of mutual assistance in the case of attack, this does not require direct military engagement, but only the duty to provide aid and assistance. The EU, on other words, does not even form a defensive military alliance. See the House of Lords, European Union Committee, *The Treaty of Lisbon: an impact assessment* (London, HL, 10th Report, session 2007-08, 2008), points. 7.113-7.117.

291 Although, especially with today's eyes, the European Defense Community, which was one ratification away of becoming a reality, entailed an astonishing level of integration, including even European uniforms!

defence integration faltered. The European Defence Community proposed by Pléven failed when the French National Assembly did not ratify it.[292] The WEU, which went back to the 1948 Brussels Treaty, never truly developed either and formally seized to exist on 30 June 2011.[293]

More military cooperation, partially replacing the WEU, is of course developing, partially due to the necessity of cutting military spending.[294] Lisbon also increased the capacity of the EU in this field, and, more importantly, envisions more far-reaching cooperation in the future. Amongst other things it points to a future 'common Union defence policy', which 'will lead to a common defence, when the European Council, acting unanimously so decides.[295] The common security and defence policy further entails military cooperation whereby Member States make military capabilities available to the Union.[296] In addition a European Defence Agency is to be set up, coordinating the military capability and development of Member States.[297]

Despite these military competences, most of which depend on possible decisions in the future by the way, and the gradually increasing external competences of the Union, the EU does not come close to the total external and especially military competences of even the Confederation. Competences which included the power do declare war, raise an army and direct its operations. The Federation, as we saw, could even deploy these troops against unruly states. The EU does not have such powers, nor is it conceivable that it would develop such powers anywhere in the foreseeable future.

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292 See R. Dwan, 'Jean Monnet and the Failure of the European Defence Community' 1 *Cold War History* (2001), 141.

293 See the Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, signed in Brussels on 17 March 1948 by Belgium, France, Luxembourg, the Netherlands and the United Kingdom, as well as the statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty, Brussels, 31 March 2010.

294 In a letter of 2 September 2011, for instance, the foreign ministers of France, Germany, Italy, Poland and Spain asked High Representative Ashton to: 'Examine all institutional and legal options available to Member States, including permanent structured co-operation, to develop critical CSDP capabilities, notably a permanent planning and conduct capability.' The UK position is, however, diametrically opposed. UK foreign Minister Hague said, for instance: 'I have made very clear that the United Kingdom will not agree to a permanent operational HQ. We will not agree to it now and we will not agree to it in the future. That is a red line.' See http://euobserver.com/13/113569.

295 Art. 42(2) TEU. In that case the Council shall 'recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.'

296 Art. 42(3) TEU. See art. 43 and 44 TEU for further details on what type of missions are envisioned.

297 Art. 45 TEU.

4.4 Sub-conclusion: An interesting mix of central authority

Assembling the larger picture on objectives, attribution and competences an interesting blend appears. At the structural level the EU has incorporated several important federate modifications. Most importantly its doctrine of attribution and the purposeful interpretation of competences by the ECJ come much closer to the Federation than to the Confederation. The EU utilizes an implied powers doctrine, combined with the extra possibilities that Article 352 TFEU offers. Through these channels its many objectives amplify its competences in a way that would have been completely unacceptable in the Confederation. Not surprisingly, these modifications played an important role in the development of the EU. Just as in the US Federation, they allowed it to develop, achieve its objectives, and adapt far better than the Confederation.

The EU also comes much closer to the Federation as far as internal powers to regulate commerce are concerned. Even though the Confederation also had the explicit *objective* to create an internal market, and even contained some prohibitions that resemble the four freedoms, it did not have any *competences* to achieve its internal economic objectives, nor an effective system to enforce them.

In its turn, however, the EU clearly does not come close to the external competences of the Confederation, let alone to those of the Federation. The EU thereby emerges as something like a *mirror-image of the Confederation*: both cover one side of the competences awarded to the Federation. This is interesting as confederal systems historically were generally more concerned with the external than with the internal dimension of government. This does not mean that the EU necessarily has more or less far-reaching powers than the US Confederation. After all the power to wage war is highly significant. Yet it is so in a very different and less day-to-day manner than the competence to create and regulate an internal market.

In any event the EU has not been given the *combination* of internal and external powers that were granted to the US Federation. Interestingly this also means that the *development* of the EU is to a certain extent the mirror-image of that of the Confederation as well. Supporters of the Confederation tried to expand the powers of Congress to regulate the economy, seeing how these internal powers were important to effectuate the external objectives and competences of the Confederation. The EU, on the other hand, is gradually seeking its way to more and more coherent powers externally, as these also relate to its internal objectives, and become increasingly important once a far-reaching internal cooperation has been established. As in the Confederation, however, also granting the 'other half' of competences increasingly threatens the confederal nature of the polity, and the constitutional counterweight offered by the fact that Member States so far retained the 'other half' of competences.

The consequences of this reversed focus of the EU as compared to the Confederation will be discussed further in the analysis below. Before we try to establish such consequences, however, it is important to also compare the institutional system within which these competences are to be exercised, and the degree to which the EU has incorporated federate modifications in the institutional dimension as well.

5 Institutional modifications

Having compared the key foundational, structural, and competence modifications underlying American federation, this section will look at three key institutional modifications. First, the modifications concerning the representational scheme, and how these were translated into the structure and functioning of the legislature. Second, the federate introduction of a powerful central executive. Third and lastly, the creation of a supreme central court.[298] Jointly these three modifications were instrumental in strengthening the institutional system of the American Federation. They addressed several vital weaknesses of the Confederation, and brought the institutional structure of the Federation in line with its new and strengthened foundation.

5.1 Institutional modifications: Representation and the legislature

The first institutional modification concerns the representative scheme as institutionalized in the legislature. This was one of the main battlegrounds in Philadelphia. Any modification on this point was understandably seen as vital for the functioning and nature of the Union to be established.

5.1.1 Representation and the Confederal legislature

The institutional structure of the Confederation was limited. It reflected the revolutionary belief that centralized power, non-elected elites and especially executives were sources of tyranny.[299] For these reasons the legislature should be predominant, and even that body should be kept on as short a popular leash as possible. In addition true republicanism required government as close to the citizen as possible, meaning as much power as possible should remain with the states. Reflecting these views, the institutional structure of the Confederation was dominated by Congress, which in turn was dominated by the states.

298 As the Confederation did not have a central bank, and the Federation only established a central bank in 1791, the European Central Bank falls outside the scope of our comparison. This increasingly central institution will, however, be included in our overall assessment, and especially in our discussion of the EMU crisis, and obviously forms an interesting federate element in the EU.

299 Wood, (1991), Beeman (2006).

The single chamber of Congress was made up of *annually* appointed 'delegates' from the states. Congress convened for several months per year starting the first Monday of each year, and elected its own president.[300] As 'sovereign equals' each State had one vote in Congress. The vote was cast by the majority of its delegates present. States could send between two and seven delegates, and each determined the way in which its own delegates were selected. No person, however, could serve as a delegate for more than three years in any period of six years, so as to prevent a tyrannical oligarchy from developing. Legislative proposals could be made by any delegate, only requiring one other delegate to second it.

Consequently, delegates really were representatives of their state, and not holders of a personal mandate. A position reaffirmed by the right of each state to replace any of its delegates whenever it so desired, and the practice of providing delegates with written instructions.[301] John Adams described Congress as 'not a legislative assembly, nor a representative assembly, but only a diplomatic assembly.' Randolph for his part even stated that: 'They have therefore no will of their own, they are a mere diplomatic body, and are always obsequious to the views of the states.'[302]

It should be noted, however, that despite their status as representatives, it could matter greatly which individuals sat in Congress. The limited means for transportation and communication of the time, combined with the inherently limited hold of written instructions over a determined mind, meant that delegates did have considerable discretion.[303] Also, the parliamentary *modus operandi* of Congress – for instance the tradition of breaking up in smaller subcommittees to prepare proposals, which were then debated and amended in a plenary session – allowed for persuasion and the winning over other delegates. *A fortiori* one strong delegate could have a decisive influence *within* his own delegation.

300 Art. V Articles of Confederation.

301 A practise, however, that must also be appreciated against the quite general practise in the state assemblies of constituents providing their representatives with written instructions, which were generally considered binding. The North Carolina, Pennsylvania, and Vermont Constitutions, for instance, even explicitly allowed such binding instructions for their own members. Wood (1969), 190.

302 Van Tyne (1907), 542.

303 Especially where the delegate was a major figure in his home state, and where the instructions themselves sometimes left important decision up to the discretion of the representative to get the best result possible. See for example the crucial debates on the settlement of western lands, as described by Onuf (1987).

One effective individual could therefore have a significant influence.[304] In this way, Congress was an interesting blend of a meeting of state representatives and a parliamentary assembly. Structurally it was more like the Council of Ministers or COREPER, yet it often operated more as a Parliament.

Congress held the full legislative power vested in the Confederation. Despite the emphasis on sovereign equality, and contrary to common assumptions about confederations, *most issues in Congress were decided either by normal majority or by a qualified majority of nine States*.[305] Even fundamental decisions such as engaging in war, concluding alliances, coining or borrowing money, raising land and naval forces, appointing the Commander in Chief or appropriating money from the states could be taken by a majority of nine out of thirteen. The decision to admit new states only required a normal majority.[306]

Roughly 70% of the votes was, therefore, required to legislate on most core issues, whilst a blocking minority required at least five States. Consequently the confederate system in itself did not require too obstructive a majority for decision-making.[307] Yet in practice it turned out that blocking minorities were (too) easily formed along different political lines such as North versus South, or landed versus unlanded factions.

5.1.2 The federate modifications to the legislature and the system of representation

In contrast to the Articles, the institutional framework of the Federation was more geared towards ensuring energy and effectiveness in the centre. Fear of tyranny and loss of State sovereignty were still influential forces at Philadelphia, but they were no longer as pervasive and all determining.[308] In addition, as discussed above, the federate government became a separate government, meaning it could no longer incorporate state institutions in its design. As a result the institutional framework of the Federation was much

304 Burke, for instance, singlehandedly ensured the defeat of several proposals, and ensured that the second article of the Dickinson draft was altered to emphasize the sovereignty of the states.

305 Art. IX Articles of Confederation.

306 Art. XI Articles of Confederation.

307 Note that, for instance, the Swiss Diet under the Restored Swiss Confederation of 1815 could also act via qualified majority on multiple issues. The Inner Council of the Diet in the German Bund, a body which utilized a weighted voting system, could even decide on many issues by a simple majority. Decision making by majority can, therefore, not be seen as a federate element in itself. A conclusion which also further illustrates how confederalism is often supranational in character, and should not be mistaken for or confounded with Intergovernmentalism.

308 For the interesting mix of reasons underlying this shift, see chapter 5 below on the procedural aspects underlying the US transition towards a federation.

more elaborate and powerful.[309] A choice that, in turn, shifted attention to the creation of controlling mechanisms at the federate level: checks and balances became necessary to prevent these powerful institutions from abusing their newfound powers, and to provide some kind of safeguards for the states.

The institutional arrangements that were designed to achieve these aims, and their actual development over time, form a fascinating study by themselves. They have been analysed extensively, and unlike those of the Confederation, are very well known. As indicated earlier, the discussion here focuses on those elements most relevant for our comparison: the modifications to the representational scheme and the organization of the legislature. Both of these were seen as essential in remedying the weaknesses of the Confederation. At the same time these modifications had to safeguard a sufficient degree of autonomy for the states. The inherent tension between these aims formed one of the main bottlenecks at Philadelphia, and could well have sunk the entire undertaking. A Compromise was reached, however, incorporating some of the key balancing exercises underlying the federate legislative structure.

First, a bicameral Congress was established. Following one of the central compromises in Philadelphia, the lower house, called the House of Representatives, was based on proportional representation: one man one vote. A system that greatly favoured the more populous states. Representatives were directly elected per congressional district for a term of two years. The purposely brief term would keep Representatives on a short popular leash to their district. A measure that was designed to safeguard a certain level of republicanism even in such a centralised government. At the same time the representation per district also undermined the capacity to make a coherent stand in the House *as a state*. Each state was effectively divided in multiple factions per district whose interests would not always overlap.[310]

In return, the smaller States,[311] received recognition in the upper house, the Senate. Each state was guaranteed two senators regardless of population.[312] The compromise was more subtle than that however. The lower

309 Tribe (1988), 209 et seq, as well as Federalist Papers, no. 48, and Works of Alexander Hamilton 76, 80-81 (Hamilton 1851).

310 Federalist Papers No. 10.

311 In coalition with proponents of a more aristocratic constitution: senates had been one of the central bulwarks in the states against radical democracy See below chapter 5, section 3 on the 'anti-democratic' forces in Philadelphia, as well as McDonald, (1968).

312 This of course became one of the standard solutions to the inherent tension in federations between regional equality and individual equality. See generally P. King, 'Federation and Representation', in: M. Burgess and A-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993), 94 et. seq. The two senators per state not coincidentally is the one truly entrenched state right in the constitution.

house, for instance, received more powers regarding the purse, re-tilting the balance of power somewhat again towards the more populous States. In turn the Senate was given important powers in the field of external relations. Senators, however, would not cast one vote per state as first proposed. Instead they would cast their vote individually and independently of each other, altering the state-focussed representational nature of this chamber, and of the senators. States were not to be indivisible entities that spoke with one voice.[313]

Senators, furthermore, were not to be direct representatives of the State administrations. They became elected officials with an independent mandate, forming part of the separate federate government.[314] To that end Senators were elected by their State legislatures for a period of *six* years. Besides their role of safeguarding the federate autonomy of the States, this long period of office also reflects a second function of the Senate. It was to serve as a more stable buffer against the politics of the day. As a more aristocratic chamber, with older, more experienced members, who by their longer term were more isolated from daily politics, the Senate would balance the perceived democratic excesses of the confederal period.[315]

At the same time their long immersion in Washington, especially if they served more than one term, also meant that senators had time to become part of a truly federate elite. They could develop a certain loyalty to the central government, also because their own powers and fortune were bound to it.

Congress became the central legislative organ. Except for budgetary issues both chambers received the right of initiative and amendment, and both needed to give their consent before any proposal could become law. Importantly, ordinary majority became the rule for most legislative decisions. With a separate direct government the requirement of a qualified majority was no longer seen as required or justified.

One further important modification was made by the inclusion of the executive in the legislative process. Congress was to be legislatively checked by the new institution of the President, who was given the power to veto any piece of legislation. A veto that could again be overturned by a two-thirds

313 As well as – inadvertently – opening up the way for party politics in the senate. This further affected the nature of the Senate by making it less of a state-representative organ, and more of a party political one with a strong state-focus. Imagine for instance two, or more, representatives in the Council of Ministers, where voting rights would be determined by national political weight multiplied by EU voting weight. A thought experiment that also clearly highlights the difference between representing states and peoples.

314 Cf in this regard, however, also the *Bundesrat* system, which comes much closer to the EU system.

315 For a more detailed analysis of this aristocratic counter-coup in Philadelphia see chapter 5, section 3 on the anti-democratic revolution.

majority of Congress.[316] A legislative modification related to the objective of creating a sufficiently effective executive that would not be completely dominated by the legislature.[317]

5.1.3 The EU legislature and system of representation

As with the institutional framework of the Federation, the rather special system of the EU has been the subject of much research.[318] Again, our discussion here will be limited to those parts most relevant for the specific comparison made here.[319]

The EU does not have an institution comparable to the Confederal Congress, nor does it have any institution approaching its dominant position. The legislative functions and powers of this organ have been spread over the Council of Ministers, the European Parliament and the European Commission. Since Lisbon, furthermore, the European Council has, both formally and more dominantly, entered the legislative field in the broad sense.[320] The result might appear as rather clear parallel with the bicameral solution of the Federation, even including a legislative role for the executive. This parallel is, however, deceptive.[321] Due to the way in which this split has been designed and has developed, the end result conforms much stronger to the confederal system.

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316 In addition Congress was of course checked by the new Supreme Court, which could enforce the constitutional limits on the federal government. An innovation that reflects another major shift away from the paradigm of the legislature as the unlimited source and holder of authority to that of a legally limited government.

317 Rakove (1996): 'Having stripped executives of power during the Revolution and Confederation period, the Constitution's drafters struggled to reconstruct a sufficiently energetic executive through painful steps, against opponents who continued to express suspicion of over powerful executives. As Rakove sees it, the only unifying 'first Principle' was 'the desire to enable the executive to resist legislative encroachments.'

318 Generally see Kapteyn and VerLoren van Themaat (2008), 181-311, Chalmers (2007), 86-130, D. Curtin and T. Heukels (eds), *The Institutional Dynamics of European Integration. Liber Amicorum Henry G. Schermers* (Martinus Nijhoff 1994), J.H.H. Weiler, 'European Models: Polity, People and System', in: P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (Kluwer 1998), ch. 1, M. Westlake, '"The Style and the Machinery": The Role of the European Parliament in the EU's Legislative Process', in: P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (Kluwer 1998), ch. 5, F. Scharpf, P. Schmitter, and W. Streeck, *Governance in the European Union* (Sage 1996), P. Pierson, 'The Path to European Integration: A Historical Institutionalist Analysis' 29 *Comparative Political Studies* (1996), 123, R. Keohane and S. Hoffmann (eds), *The New European Community: Decision-making and Institutional Change* (Boulder1991).

319 This chapter will, therefore, also not set out the familiar system of the EU separately.

320 See for a clear assessment Editorial Comments 'An ever Mighty European Council' 46 *CMLRev* (2009), 1383. Also see the detailed discussion of the EMU crisis in this regard below in chapter 13.

321 Although potentially instructive, this observation also does not intend to make any normative statement on whether the EU *should* copy the bicameral American solution.

5.1.3.1 The Council of Ministers

To start with the Council of Ministers, the institution that might resemble the Senate in the sense that it represents the Member State interest, and counterbalances the more 'European' worldview of the European Parliament and the Commission.[322] Although the Council shares these functions with the Senate, its composition and nature are more confederal in nature.[323] Very different from Senators, who – very intentionally – were made independent and integral parts of the *national* government for six years, ministers remain truly embedded in their national system.[324] Clearly their national position differs, but all of them *derive their power solely from their national office*. In addition they tend to be firmly embedded in their national structures. For instance, ministers usually operate in some form of cabinet in their home state, depend on a national political party for re-election or re-appointment, and are controlled by their national parliament, provided it manages the apparently difficult technique of controlling their executives' Brussels operations.[325] It will largely be their national media, furthermore, that shapes their image in these primary national arenas. Not only do they, therefore, have a professional obligation to represent the interests and viewpoints of their Member State,[326] they also have strong political incentives to do so. The ties that bind overwhelmingly lie at the national level.[327]

In fact, ministers are even more closely bound to their Member State than the confederal delegates to Congress were, even taking smart pones out of the equation. Although delegates also sat in their state assemblies, received instructions, and could always be recalled from their part-time confederal function, they were elected for a year and often served consecutive terms. As such, during sessions of Congress their primary status was

322 Cf art. 16(2) TEU stating that the Council consists of one 'representative' per Member State, holding that the minister must be authorized to 'commit the government' and 'cast *its* vote'. Also see Rosas and Armati (2010), 80.

323 Also in light of the heavy involvement of national bureaucracies in the sub-levels of the Council. For an overview of these groups see the list annexed to Council document 5869/10 REV 1, of 11 February 2010, POLGEN 11, leading up to COREPER. See art. 16(7) TEU, and M. Westlake and D. Galloway, *The Council of the European Union* (3rd edn, Harper Publishing, 2004), 201, stating that 'COREPER is 'one of the most powerful organs within the European Union's institutional structure.'

324 In this sense the EU system comes much closer to the German federal solution in the *Bundesrat*. Also see chapter 12 on the necessary adaption of national constitutional roles to participation in the EU.

325 See however the House of Lords Select Committee as a noteworthy exception, providing scrutiny and analysis at a very high level. See for instance their thorough analysis of the Lisbon Treaty *'The Treaty of Lisbon: An Impact Assessment* (London, HL, 10th Report, session 2007-08, 2008).

326 Schütze (2009), 1084.

327 In this regard COREPER provides an interesting, though relatively small, counterweight of individuals who, though depending on national mandates, are Brussels-based.

that of a delegate.[328] They were, for this period, *part of a confederal institution*.[329] For ministers, their functioning in the Council is of a more secondary status, though increasing in terms of time and impact. Also the parliamentary process of Congress differed strongly from the functioning of the Council, which procedurally comes closer to a traditional negotiation between states, albeit within the framework of a supranational organization.[330] An effect that is strengthened by the fact that there is only one representative per state, instead of the potential seven in Congress.[331] Winning over the majority of a delegation is not a possible tactic in the Council. The *form* of Congress, therefore, to a certain degree controlled the *functioning* of the delegates, in a way that the Council does not.

The use of qualified majority voting (QMV) and weighted voting are two further institutional components that significantly impact on the nature of the Council, and thereby the EU. There has been a gradual increase in the use of QMV, up to the point where, with some important caveats, it could now be described as the default option.[332] A development often cited as prove for the uniqueness of Europe, and the move away from intergovernmentalism and confederalism. As we saw, however, QMV also was the norm in the Confederation, even for some extremely far-reaching decisions. Decisions that, if entrusted to the European level at all, would certainly carry a requirement of unanimity in the EU. The QMV requirement in the Council, furthermore, is far removed from the ordinary majority, which is the rule in both the House and the Senate, and even applied to sever-

328 For the significant impact that this can have, also compare the development of Commissioners, who even if Eurosceptic at arrival, tend to become more pro-integration during their term, if only already because their position and responsibilities requires them to. Not only where one sits, but also where one lives, listens and lunches determines where one stands.

329 COREPER forms an interesting exception to this rule, and the significant power of this group can be seen as an important modification to the confederal scheme. This body of permanently Brussels based representatives forms a powerful EU institution capable of making many decisions. On the bond that can develop between members, even representatives of national interests as in COREPER, from extended cooperation and the EU perspective, consider the parting speech of French Ambassador Boegner in 1972. A fierce Gaullist, after 11 years in COREPER he stated 'J'ai aimé ce Comité, M. le Président, comme nous l'aimons tous. Je dirai comme un marin aime son bateau, comme un paysan aime son champ ou sa vigne, comme quelque chose à laquelle nous sommes attachés de toutes nos fibres et je dirai par notre nature même.'J-M. Boegner, 3 February 1972, accessible via www.ena.lu. [last accessed April 1 2012].

330 Despite the formal requirement of QMV, for instance, the Council usually strives for consensus. Dann (2010), 247.

331 This also is a very significant difference with the US Senate. Having two 'representatives' per State, especially if these are elected by the people, opens the way for much more politics Also it should not be forgotten that in the US political parties were developed first, and only then was the mode of election for Senators altered.

332 See art. 294 TFEU, now aptly called the 'ordinary legislative procedure', which requires QMV.

al decisions under the Articles. Adding the requirement of unanimity on some points, the QMV element of the institutional framework more closely resembles the Confederation than the Federation. That is, one of the hallmarks of supranationalism in fact corresponds more to a confederal, than a federal set-up.

The asymmetric voting weight in the Council, on the other hand, complicates the picture and is one point where the EU deviates from the Articles and incorporates at least part of a federate modification.[333] The Confederation clung to sovereign equality despite significant differences between its members. The federate compromise allowed for proportional representation in the House, but maintained parity between the States in the Senate. The EU, on the other hand, has introduced forms of proportional representation in both the Council and the European Parliament.[334] This can be seen as both a federate and a confederal element: on the one hand it shows a larger degree of political surrender, so to speak, by the smaller states, somewhat resembling a federate bond. On the other hand, it shows a very high concern for the status and relative power of each state, more resembling a confederal logic. In a sense, one could say that the weighing makes the EU more federate for smaller states, and less federate for larger ones. An effect that is offset in part, by other institutional elements such as the requirement of unanimity for some decisions, and the more federate surrender by large states to the Commission and especially the European Court of Justice.

Except for the mixed effect of the asymmetrical voting, therefore, the Council rather strongly resembles the Confederate model. A finding that is especially interesting in light of the rather strong position of the Council, and its subsequent effect on the EU as a whole. For the relative dominance of the state-oriented Council itself is another clear confederal element, one that only has been strengthened by the increased role of the European Council.[335] The new role for the European Council, and the strong way in which this role has been taken up so far, sometimes even seeming to reduce the Council of Ministers, the Commission and the European Parliament into mere executing authorities, has clearly increased the confederal element

333 Art. 16 TEU.

334 Historically this also made sense: for a long time the Council of Ministers was clearly the dominant institution, so that more power in the European Parliament would never have compensated the larger states for the relative loss of power in the Council. The very powerful position of the House, in other words, made the compromise possible in the US. This would imply that only where the European Parliament would become much stronger, could a more Senate-like organization of the Council become acceptable to the Member States.

335 Within the EU this dominance need hardly be explained. For a more detailed discussion of the power of the European Council see Werts (2008).

in the EU institutional framework.[336] More even than through its formal powers,[337] the European Council can be seen as part of the EU legislator by the indirect control it has over the Council of Ministers,[338] which is composed of individuals that are generally under the control of the head of state, or at least the cabinet, nationally, and over the Commission through its agenda setting capabilities.[339]

5.1.3.2 The European Parliament

The European Parliament more resembles Congress in working methods and parliamentary nature.[340] Though the primary status of MEP's is linked to the centre, even stronger so than was the case for confederal delegates, clearly many differences exist as well.[341] MEP's, for instance, represent the people of their Member States,[342] and not their governments.[343] They are elected directly by the people, hold a personal mandate, cannot be recalled, and have one vote each.[344] Most of all, the European Parliament is far from

336 One could see this development as a conferral correction: the increased power of the European Parliament, once combined with the power of the European Commission and the increased scope and impact of European law itself, caused the Member States to introduce a more powerful confederal institution, directly imbued with the political power of Heads of States. In the longer run, however, such a move may end up only increasing the federalization / central authority of the EU. For it also means that the Heads of State have themselves become *parts of the EU framework*. Especially where national parliaments are increasingly incorporated as well, and national courts already are, this means the EU is slowly incorporating more and more of the national institutional framework. The responsibility shouldered by Merkel in the Euro crisis could be seen as an example of such a development. See also Dann (2010), 264-65, and Werts (2008), 197 et seq. The fact that the European Council now even has Rules of Procedure governing its operation further illustrates this development or assimilation, See European Council Decision 2009/882 of 1 December 2009, *OJ* (2009) L 315/51.

337 See for instance art. 82(3) and 88(3) TEU directly involving the European Council in the legislative procedure.

338 Dann (2010), 263. See further below the detailed discussion of the EMU crisis in chapter 13.

339 Rosas and Armati (2010), 76, who regard it as 'neither a legislative body' which at the same time has become '(…) the pinnacle of the framework it once eschewed.'

340 As Congress, for instance, the European Parliament also conducts much of its work in smaller committees. See R. Corbett, F. Jacobs and M. Shackleton (eds), *The European Parliament* (7th edn, John Harper Publishing 2007), 126 et seq.

341 Westlake (1998) and P. Craig, 'Democracy and Rule-Making within the EC: An Empirical and Normative Assessment' 3 *European Law Journal* (1997), 105.

342 Different see Schütze (2009), 1086, who does claim that the EP represents a European people as a whole.

343 Also see art. 2 and 3 of Decision 2005/684 on the single statute or MEP's *OJ* (2005) L 262/1, holding that MEP's 'shall not be bound by any instructions.'

344 Art. 14 TEU. Granting each national group of MEPs a weighted vote for their nation would be one option: that would, however politicize the EU on a national level, and block the development of parties. Also it would lead to a winner takes it all system in the European Parliament, with the minority doing little, except perhaps campaign in their Member States for the next chance. This clearly is les ambitious politically and more confederal as a model, but comes closer the perception of representing the people.

the dominant institution that Congress was, both due to limits in its own power and its encapsulation by powerful other institutions.[345]

As the House, the European Parliament is to a certain extent based on proportional representation. Crucially, however, the European Parliament is degressively proportional, granting a minimum of six representatives to the smallest states and a maximum of ninety-six to even the largest.[346] As a result inhabitants of smaller states are significantly overrepresented when compared to inhabitants of the largest states. A lack of one-man-one vote that has attracted significant criticism, most notably from the German *Bundesverfassungsgericht*.[347] In any event the proportional representation in the European Parliament does not go as far as in the House, but retains a certain confederal, statal focus.

The European Parliament ordinarily votes by regular majority, giving one vote to each MEP and not to each state. The election of MEP's is determined by the Member States, some following a district system, some using national lists. The House, however, is fully based on a district system, which has a significant impact on the nature and functioning of this institution. It further weakens the statal focus, which is still far more prominent in the European Parliament. In addition, due to the two-year term its members are up for virtually constant re-election and are bound closely to their local interests.

The House, furthermore, has certain key institutional powers that the European Parliament lacks, such as the right of initiative, including in budgetary matters.[348] Most importantly, however, Congress as a whole forms the whole legislative power only subject to a reversible veto by the executive. The legislative power in the EU is far more bound up with the other branches. The European Parliament therefore does not compare with the House. And although there was no clear counterpart in the Confederation, this *relatively* weaker role of the European Parliament in the EU also adds to an overall confederal element in the legislature.

345 This is not to deny its significant influence, especially compared to its days as a mere Assembly. Influence which might well exceed that of some national parliaments (Dann (2010), 255).

346 Art. 14 TEU.

347 For a detailed analysis of the BVG decisions on this point see below chapter 8, section 4.4.

348 Except on budgetary issues the Senate also has a right of initiative. Budget proposals may only come from the House, a deliberate limitation on the Senate that was a part of the Philadelphia Compromise. For the strengthened powers of the European Parliament on the budget, see art. 314 TFEU, especially 314(7)(d).

5.1.3.3 The European Commission

The third institution in the legislative process is the Commission. At least in most fields of EU competence this institution is armed with an exclusive right of initiative.[349] The Commission also holds some very limited direct legislative competence,[350] and, in practice much more importantly, may be delegated (quasi-)legislative powers by the Council.[351] It has also been given a role in the process for Treaty amendment.[352]

In its legislative capacity the European Commission has no confederal counterpart, since Congress had a full right of initiative.[353] Under the federate set-up, however, the executive was also given a role in the legislative process, especially with the presidential veto. The Comparison does not go very far however, and it cannot be said that the EU incorporated this modification as such. The American executive was very differently composed with the one elected President who, with no right of initiative only received a limited veto.[354] The Commission on the other hand received the exclusive right of initiative, which also removed this core legislative power from the Council and the European Parliament.[355] The Commission was, therefore, largely given a role at the beginning of the legislative process. Although it can withdraw its proposal, it received no veto power at the end of the EU legislative process.[356]

The innovative nature of the Commission, at least in its legislative capacity, is therefore also born out by our current comparison.[357] In addition, however, the confederal prism might explain and put into context that innovation. With the rather strong confederal nature of the Council noted above, something of a counterpart was needed to control the Member States. Especially in the beginning with a very weak European Parliament which could

349 Art. 17(2) TEU and 294(2) TFEU. The Commission may withdraw or amend its proposals during the legislative procedure, and the Council may only deviate from the text of the Commission proposal by unanimity. (art. 293 TFEU).

350 Art. 106(3) TFEU and art. 45(3)(d) TFEU.

351 Art. 290-291 TFEU. These power can be very broad, but may not concern the 'essential elements of an area.'

352 Art. 48 TEU.

353 Even though the Committee of the States, as the European Commission, could be delegated powers, including some legislative powers.

354 In practice the President can of course suggest legislation, or even have it introduced on the floor via through allied Members of Congress.

355 Although both the veto and the right of initiative can be seen as blocking powers: both can prevent any legislation from being adopted, but cannot ensure their adoption.

356 An interesting exception now exists to this general rule under Article 27(3) TEU, where the consent of the Commission is required for the Council to adopt its decision on the organisation and functioning of the European External Action Service.

357 Also see J. Temple Lang, 'How Much do the Smaller Member States Need the European Commission/ The Role of the Commission in a Changing Europe' 39 *CMLRev* (2002), 315.

not play the role of the House, and without knowing how the Court would assert itself. Since there could be no strong central executive either,[358] a more federate element in the legislative process was needed to stabilize the constitutional structure.[359] At the same time, this central element should not become too powerful. In a more confederal style it, therefore, only received a negative power, to withhold a proposal.[360] Additionally it was to be composed in a very confederal manner, with Commissioners being appointed by each state, and larger states even receiving more than one Commissioner in the beginning. Even though these Commissioners have to be 'objective' and independent this set-up is there for a reason.[361]

The Commission can, therefore, be usefully understood as an attempt to infuse a certain controlled amount of federate power into the overall structure, thereby counteracting the confederal elements. With the empowerment of the European Parliament, the European Court of Justice, the European bureaucracy and the European Central Bank, the Commission may by now, however, seem one of many federalizing elements. This evolution within the institutional structure and balance of power within the EU, and how it relates to the confederal – federate spectrum, will be further discussed below. For from the confederal perspective the simultaneous ascendancy of the European Council, the increasing powers of the EU, the strengthening of the European Parliament and the apparent squeeze on the role of the Commission might all be logically related.

On the whole, however, especially looking at the post-Lisbon situation, the EU forms a blend of confederal elements and federate modifications. The representational scheme remains largely in the confederal spectrum. Not just because there is no central people to represent at the EU level, but also because the representation of the Member States has not been incorporated into a separate, central institution as the Senate, and because the European Parliament, despite its direct election, still represents citizens per Member State. The requirement of QMV, furthermore, is no proof of federalization either. In fact it more resembles the situation under the Articles. At the same time, the legislative institutional framework far exceeds that under the Articles, and both the Commission and the European Parliament are permanent

358 See section 5.2. below.

359 Kapteyn and VerLoren van Themaat (1998), 195 et seq.

360 With of course an additional steering power: it decides how the proposal will first be formulated and framed, all later amendments requiring political agreement between multiple parties.

361 All attempts to reduce the Commission so far have therefore stumbled on the importance that Member States apparently place on 'their' Commissioner. An importance that, for that reason alone, should be taken seriously. See in this regard the attempts, from Nice to Lisbon, to reduce this to a more manageable number. Lastly, the reduction envisioned by art. 17 (5) TFEU was postponed by the European Council (Presidency Conclusions of 11 and 12 December 2008, par. 2, EU Council 17271/08).

Brussels-based institutions, providing a truly central input in the legislative process, with the Commission even *representing* the central interest.

5.2 Institutional modifications: The executive

Before we draw more general conclusions on the institutional qualification of the EU between our confederate and federate poles, however, we must also take into account the other two modifications concerning the executive and the judiciary. The next sections will compare the EU with the impressive executive modifications that took place: From virtually no central executive the United States introduced what, to many contemporaries, must have resembled a republican king.

5.2.1 The weak executive under the Articles

The Articles intentionally did not create a strong, separate executive. The executive branch was still too strongly associated with monarchy and tyranny. Reliance was placed on the states as the primary executive.[362] Some form of administration had to take place, however, and, since Congress only convened for several months per year, the periods in between sessions needed to be covered as well.[363]

For these reasons, the Articles allowed Congress to set up a 'Committee of the States' (the Committee).[364] Initially it would only sit during recess, but the Committee soon became permanent.[365] It consisted of one delegate from each state, its president to be appointed by Congress. Congress could, and did, delegate far-reaching powers to the Committee, including making binding requisitions from the states in terms of money, troops and naval forces.[366]

Importantly, the Articles also allowed Congress to establish 'such other committees and *civil officers*' as it deemed necessary. Congress could then delegate part of its powers to these Committees and officers. Under this procedure a form of administration was created. The central offices were the

362 As discussed above many of the states did not have separate executives either, or certainly not very strong ones.

363 Jensen (1970), 361-362.

364 The position of the executive had been better under the Dickinson draft, which had envisioned a stronger and permanent Committee, more akin to the European Commission now.

365 Jensen (1970), 135-139.

366 See art. X of the Articles of Confederation. Those powers of Congress requiring a majority of 9 in Congress could not be delegated.

Treasury, the State department and the War department.[367] The Confederation did, therefore, have some form of an administration, and at least in law had the powers to develop it further. The administration created during the Confederation even formed the basis for that of the later Federation, which simply took over the existing people and structures.[368]

Clearly this administration was not nearly as elaborate as modern day bureaucracies – Treasury had 15 civil servants – but this should also be seen against the general background of government in those days.[369] Compliance was very limited however, and the weak executive power of the Confederation was seen as one of its core weaknesses.

5.2.2 The powerful executive in the Federation

The impressive arsenal of powers combined in the presidency more than illustrates the determination with which the executive flaws of the Confederation were addressed.[370] As pointed out by opponents of the Constitution, and internally admitted by its proponents, the presidency certainly approached some monarchs in power, if not in nature. The President received an impressive array of competences indeed.[371] Powers enhanced by the fact that the President became the head of a full-blown, and entirely separate federate government. The historical coincidence that the first president to-be was already a given in the figure of Washington undoubtedly helped in establishing such a strong executive.

As a result of this executive upgrade, the federate government no longer had to rely solely on the States for execution. This not only isolated the federate government from any ill will, but also from incompetence in the states. For most state governments lacked efficient executives of their own, generally having been designed from forceful yet untested revolutionary first principles. It actually was the federate bureaucracy that would later form

367 A development that is similar to that in the United Provinces, where the States-General could delegate powers to committees made up of one representative per Province, together with the *Greffier* and the Counsellor Pensionary (*Raadspensionaris*). The primary committees established in this manner concerned foreign affairs, finance and the navy. In the United Provinces, however, the *Council of State* and the *Stadtholder* formed additional executive and governing bodies.

368 Jensen (1970), 348.

369 It may also be related to the experience under the British Empire, which had a tradition of governing its colonies with a remarkably low number of, usually very highly educated, elite civil servants.

370 Privately even strong nationalists/federalists admitted that there existed 'a preposterous combination of powers in the President and the Senate' (Edward Carrington to Jefferson, Oct. 23, 1787, Boyd (ed) *Jefferson Papers* XII, 255). At the same time the creation of a strong, personal, presidency was one of the major victories of the federalist during the convention.

371 See art. IV US Const.

the model for improving the executive organization of many states. Besides circumventing national executives, the federate government therefore also played a part in creating an effective bureaucracy at the statal level, further improving the effectiveness of the overall system.

In the original design, the President was to be elected by an electoral college. A deliberate attempt to make him responsive to the people yet at the same time somewhat isolate him from too direct a democratic influence. Also, it was assumed that the general public would simply not know the relevant candidates. It would consequently be best for them to elect a middleman who did, and who could choose for them.[372]

His popular election also meant that the President did not depend on the states for legitimacy. His authority derives directly from the whole of the American People. In fact he is the only single elected official who is elected by the people as a whole, and therefore boasts a legitimacy that trumps that of any other elected official individually. The Federate institutional scheme thereby not only went from uni-polar to multi-polar, it also based the different poles on different, yet fully representative footings.

Combining the separate federate government with the array of powers vested in the executive, the scene was also set for a large, permanent bureaucracy to be developed at the central level. As everywhere, with the advent of the modern state, this bureaucracy and the executive expanded significantly.

5.2.3 The executive in the EU

The executive branch is the one where the EU has remained most visibly confederal.[373] The structural similarities with the Confederation are especially strong and interesting here.

Firstly, and most importantly, as the Confederation, the EU has a relatively weak executive. Its own executive capacity, except in the case of the CFSP, is largely located in the European Commission.[374] As a watchdog

372 Currently the delegates commonly pledge to follow the results of the general election, and in 30 states they are obliged by law to do so. The directness of the election is further tempered by the 'winner takes all' system applied in most States, which means that the majority of the voters in one State get to award all the electoral votes, in one way leaving the minority unrepresented.

373 For an analysis tracing the American and the German model of Executive Federalism in the EU, see R. Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' 47 *CMLRev* (2010), 1385.

374 Some executive powers may be conferred on the Council. See art. 291 TFEU, as well as artt. 24 and 26 TEU. The Council also has the task of overseeing the Stability and Growth Pact, see art. 126 TFEU. In addition, special agencies and specialized bodies may be established. In the area of the CFSP furthermore, one can see a certain 'brussalization' of the national executives, which can be seen as a sort of federal capacity building at the national level.

of the *acquis*, the Commission acts as a first line enforcer, especially in the field of anti-trust.[375] It also controls Member State compliance, assisted by complaints from concerned parties, and can start infringement procedures, potentially ending in a fine being imposed by the ECJ.[376] In addition the Commission executes and oversees many EU programs, including important subsidy schemes.

The Commission, however, has a very limited institutional capacity, certainly considering the vast area that needs to be covered. In addition, the Commission does not have a police, an army, or other means to actually enforce. It either acts through another legal act (be it a decision or a court case), or must rely on a Member State.[377] Even this limited capacity, of course, far exceeds the extremely inadequate capacity of the Confederation, which approached zero. Yet overall the EU largely depends on the Member States for execution.[378] The Member States have to execute and enforce the overwhelming part of EU law. [379]

Second, the composition of this main executive organ shows clear similarities with the Confederation. As the Committee, the Commission consists of one member per state, and acts collectively as the executive to which further powers can be delegated.[380] The Committee as found in the Articles, furthermore, was a deliberately weakened version of the one envisioned by the original draft of the Articles. The Committee Dickinson originally envisioned was stronger and even more comparable to the European Commission. His draft proposed a permanent Committee consisting of one delegate per state, which would decide by normal majority of seven. It would foremost be a type of war-department coordinating the war against Britain, but would also oversee regular execution and coordinate with the States.[381]

375 Art. 17(1) TEU, art. 101-107 TFEU.

376 art. 258-260 TFEU. Also see art. 7 TEU, where the Commission plays a role.

377 An interesting exception to this is the financial power the Commission has gathered through managing large financial schemes. Although still dependent on Member States to reclaim any sums paid, the Commission can have the power not to grant or pay out any more sums. This financial power is an interesting addition to institutional power, one that is also used by the US federate government to gain influence where competences might fall short. The Confederation did not have this option because it lacked sufficient resources.

378 Lenaerts (1990), 232, 237, and K. Lenaerts, 'Regulating the Regulatory Process: 'Delegation of Powers' in the European Community', 18 *European Law Review* (1993), 27.

379 Chalmers, (2007), 348 et seq., D. Curtin, *Executive Power of the European Union* (OUP 2009), esp. chapters 2, 4, 5 and 6.

380 Art. 17(3) TFEU and art. 290 TFEU. These power can be very broad, but may not concern the 'essential elements of an area.'

381 Art. XIX of the Dickinson draft.

Obviously many important differences exist as well. The Committee, for instance, consisted of delegates, and not of individuals specifically selected as independent Commissioners. No requirement of independence existed for Committee-members. The Committee also did not have the general 'watchdog' function in the way the Commission does, nor were the powers delegated to it as extensive. Furthermore, the Committee, being formed out of delegates, was not designed as clearly as a distinct institution, balancing out Congress, the way that the Commission does with the Council of Ministers and the European Parliament.

Most of all, however, the Committee was not given the opportunity to really establish or proof itself.[382] What is especially interesting, however, is that the Confederation had the internal *capacity* for institutional development to support a more active confederal executive, and that his capacity was envisioned along the same structural lines as in the EU. Legally, nothing prevented the Committee, with its subcommittees, to develop into a prototype of the European Commission. It lacked, however, certain key resources, such as supremacy and direct effect backed by a court, a stronger institutional position such as the exclusive right of initiative, an independent term of 5 years, clearly pre-defined legal powers, and above all stronger political support.

As a result, the European system, though similar in some regards, is far more effective and stable than the confederal one. One interesting, and largely confederal, innovation that should not be overlooked in this regard, furthermore, is the extensive use of committees and agencies.[383] The executive capacity, and reality, of the EU is strongly determined by such forms of cooperation. In a sense these intermediate forms of executive powers could be seen as a confederal means of increasing executive power without needing to create a separate or fully central executive authority. Rather the executive capacity if the Member States is coordinated and somewhat controlled. Despite the risks and weaknesses, this use of intermediate executive forms is very interesting, and could form one further tool in stabilizing the confederal form more generally. As such an analysis of these forms from the confederal perspective could be highly interesting, even though it can only be highlighted here.

At the same time the EU also strongly differs from the federate modifications. The EU executive simply cannot compare to the vast powers and separate government controlled by the executive in the US. No institutions equivalent to the US President exists in the EU. The newly created 'President'

382 H.A. Johnson, 'Towards a reappraisal of the Federal Government 1783-1789' 8 *American Journal of Legal History* (1964), 316.

383 Curtin (2009), 105 et seq., Chalmers (2010), 117 et seq.

of the European Council, for instance, does not even begin to compare to the powers of the US presidency,[384] nor does the President of the Commission.[385]

The EU, therefore, has not incorporated the federate executive modifications. Structurally and institutionally the executive organization of the EU remains in the confederal spectrum. At the same time the EU is clearly more effective, also as far as enforcement is concerned, than the Confederation. Rather than incorporating a federate modification, it seems the EU has managed to increase the effectiveness of a confederal set-up, partially through intermediate executive forms, of course acknowledging the many limits and weaknesses that remain. The EU has created mechanisms to coordinate and utilize the national systems in existence, rather than creating its own executive capacity, and ultimately supporting it with the right to use force. A system that obviously relies heavily on the effectiveness and compliance of national executive infrastructure, yet for a confederal system operates rather effectively.[386] At the same time the effectiveness of EU law has obviously been greatly enhanced by one of the key federate modifications that was taken over: a central court.

5.3 Institutional modifications: The judiciary

The third and last key institutional modification compared here concerns the central judiciary. A modification again shows a radical shift from the confederate to the federate system, and one that has had a major impact on the functioning of the federate system. A modification also that is of obvious interest to the EU.

5.3.1 The (absent) judiciary in the Confederation

The Confederation all but lacked a judicial power. Congress did hold some limited judicial competences.[387] It was the court of last resort in 'all disputes and differences now subsisting or that hereafter may arise *between two or more States* concerning boundary, jurisdiction or any other causes whatever.'[388] Importantly, this jurisdiction explicitly included disputes about land granted by two or more states to different individuals, a major

384 Art. 15(6) TEU. Note in this regard that the Dutch version uses the term '*voorzitter*' (chairmen), which is useful as aversion had arisen to the idea the there would be an 'EU President'.

385 Art. 17(6) TEU.

386 See in more detail below the analysis on the EU and rule by law in chapter 3 section 4.

387 This was in line with the radical ideology of the time, where more and more state legislatures, as highest authorities and 'voice of the people', were taking over judicial tasks. Faith in direct republican rule and distrust of elites was outweighing fear of the legislature, and the need to control power via separation and checks.

388 Art. IX Articles of Confederation.

source of disputes at the time.[389] No separate confederal court, however, was established to oversee the interpretation of, or compliance with, confederal law.

The procedure for the judicial function of Congress, furthermore, was very construed, and rather resembled international arbitration. Each state could bring a case before Congress, which would then order the states to appoint 'commissioners or judges (…) by joint consent.' Where parties could not agree Congress would select three candidates from *each* of the states. Parties were then allowed to alternately strike out one name until thirteen names were left.[390] Out of these thirteen, seven were then selected by lot. The tribunal thus constituted could then 'finally determine' the dispute by a majority of at least five.[391] A final and binding ruling could also be given *in absentia*. Judgements became part of Congress' proceedings. This procedure was used, albeit not frequently, and was useful in preventing escalation in some very contentious cases.[392]

The absence of any further judicial institutions not only meant that there was no court to ensure compliance, but that there also was no organ outside of Congress to authoritatively interpret the Articles. This for instance where Congress itself disagreed over the scope of its own powers or the content of certain obligations. As a result there also was no authoritative guidance for state courts, or state political institutions on their obligations under the Articles. As is well known this situation was about to change quite dramatically under the federate constitution.

5.3.2 The essential judiciary in the Federation

The creation of a Supreme Court was a crucial federate modification, certainly with hindsight. Obviously it is also one of particular interest for the EU. The lack of any supervision, as well as the lack of an institution that could authoritatively interpret the Articles, was seen as another major flaw of the Confederation. Together with the shift towards the notion of a government *under* the law, and the conception of a constitution as a legal bond on all public power, a Court was seen as a logical and necessary part of the federate government. Some proposals, especially Hamilton's, had gone further and had wanted to give the centre and with it the Supreme Court, a negative on all State laws, but this was seen as unnecessary and as going to far.[393]

389 See Johnson (1964), 323 et seq.

390 Where one of the parties would not cooperate, the secretary of Congress would strike out the names for them, so the case could move forward.

391 N.B. the Articles say nothing about the law applicable to the dispute.

392 Jensen (1965), 327 et seq.

393 Proposals that were more in line with the British tradition of the House of Lords.

The Supreme Court was the only federal court established directly by the Constitution. It derived its power and legitimacy directly from that constitution. Going against republican practice in the States, the justices were to sit 'during good behaviour', and not to be re-elected at regular intervals. A significant step, especially when considered together with the enormous increase in authority of these justices. The justices, furthermore, were to be selected by the President. They were therefore selected by the central government and not by the States.[394] The only State check was to require the consent of the Senate.[395]

That the Supreme Court, and the lower federal courts that were to be established, would supervise the States and nullify any state laws that conflicted with the supreme federal law seems to have been intended. At least from the federate logic of a government under law exercising powers delegated by the people, the possibility of constitutional review seems to follow quite logically.[396] Originally 'intended' or not, it hardly needs to be said that in the 1803 judgment in *Marbury v. Madison* constitutional review was adopted, and has played an important role in the American constitutional model ever since.[397] Many significant changes and adaptations to the constitutional model, for example, occurred via constitutional interpretation. The Court has also played an important part in the constantly shifting balance between state and federate powers. As such the Supreme Court has fulfilled a crucial role in providing, developing, ad guarding the legal framework so important for federate systems.[398]

5.3.3 The judiciary in the EU

The Judicial branch is clearly the branch where the EU has gone furthest in incorporating federate modifications. [399] A development that has been vital for the nature and functioning of the EU, and forms one of its key innova-

394 Tribe (1988), 244. A system that still, therefore, allowed for significant political influence. An effect that only increased with the way the Court developed, and the introduction of the two party system, as the hearings of Bork and more recently justice Sotomayor attest.

395 Art. II, sec. 2 US Const.

396 Note, however, that the US Supreme Court did not have access to the debates in the Convention until after the 1820's when the notes by Yates were published. Only in 1840, furthermore, were the reliable, notes by Madison published. All early cases were, therefore, necessarily decided on a very limited access to the 'original understanding' of the constitution.

397 Nowak and Rotunda (2004), 6 et seq., Choper, Fallon, Kamisar, and Shiffrin (2006), 1 et seq.

398 Elazar (2006), Watts (1999).

399 'The Change in the status of the Court has been enormous, so that today it more closely resembles the equivalent institution of a fully fledged federation (for example the United States Supreme Court or the German BundesVerfassungsGericht) than any other institution of the Community' T.C. Hartley *Constitutional Problems of the European Union* (Hart Publishing 1999), 12. Cf also J. Rinze, 'The Role of the European Court of Justice as a Federal Constitutional Court', *Public Law* (1993), 426.

tions compared to the standard confederal model.[400] Historically confederal systems relied on forms more akin to arbitration and structured negotiation than adjudication: The old Swiss Confederation, the United Provinces and the early German confederation, for instance, all primarily relied on forms of arbitration rather than real adjudication.[401]

The European Court of Justice might not be a Supreme Court in the strict sense.[402] It only has a very limited direct jurisdiction, and formally stands in a cooperative relation with the Member State courts. At the same time it is a very powerful central court, generally obeyed by national courts, controlling a body of law that, at least from its own perspective, trumps all national law.[403]

As we saw the Confederation completely lacked this judicial element, as well as an effective executive. This meant that the political process alone was responsible for compliance and interpretation. The flip side of this was that all conflicts or disagreements over the Articles *became political*. The question, for instance, whether Rhode Island had met its financial requirements was to be decided by Congress. A process that allowed for political bargaining, and brought the self-interest of other states who had failed to pay in full into play. This reliance on self-policing failed, and created free-rider and prisoners-dilemma like incentives to violate obligations. The fate of the Stability and Growth Pact, or the application of article 7 TEU, form EU examples of this problematic confederal dynamic where no stronger mechanisms for compliance and interpretation exist. [404]

400 Cf amongst many others, K.J. Alter, *The European Court's Political Power* (OUP 2009), J. Komarek 'Federal Elements in the Community Judicial System – Building Coherence in the Community Legal Order' 42 *CMLRev* (2005), 9, J.H.H. Weiler, 'The Least Dangerous Branch: a retrospective and prospective of the European Court of Justice in the arena of political integration', in: J.H.H. Weiler, *The Constitution of Europe: Do the new clothes have an emperor?*, (CUP 1999), 188, A. Barav, 'Omnipotent Courts' in: D. Curtin and T. Heukels (eds), *The Institutional Dynamics of European Integration. Liber Amicorum Henry G. Schermers* (Martinus Nijhoff 1994), 265, or J.H.H. Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' 26 *Comparative Political Studies* (1994), 510.

401 Forsyth (1981), 44. The later courts that developed in the German Bund, furthermore, were rather ineffective as courts, as also noted by Madison in his analysis of confederal government.

402 Art. 19 TEU.

403 See in this regard also the more confident qualification in A.M. Donner, 'The Constitutional Powers of the Court of Justice of the European Communities', 11 *CMLRev* (1974),127.

404 See art. 126 TFEU, as well as further below chapter 13 for an application of the confederal approach to the EMU crisis.

The ECJ therefore strongly resembles the federate modification, with the Member States not only legally binding themselves through a legal document, but also granting a *central* institution the *judicial kompetenz-kompetenz*, so to speak, to authoritatively interpret that document. [405] Some confederal qualifications, however, need to be made.

First the Court does not have the same direct inherent jurisdiction as the US Supreme Court. The EU Treaties place specific limits on the jurisdiction of the Court. [406] Second, the composition of the Court shows some confederal undertones. The right of each Member State to select its judges for the ECJ and the General Court, as well as the relatively short term for judges as opposed to their appointment for life in the US are clear confederal elements. Even if these elements are cancelled out by the professionalism of the judges and the micro-cosmos of the Court, they remain a clear reminder of the status of the Member States, and the importance of nationality.[407] A fact the new selection committee cannot alter, although it can at least impose a quality threshold on national choices.[408]

Third, there is the privileged standing for Member States, including the right to intervene or request a grand chamber.[409] Fourth, and lastly, the growing challenge, at least theoretically, to the supremacy of EU law by national supreme courts, and the resulting 'dialogue' between the ECJ and national courts, is a further confederal judicial element. As was discussed above, the supremacy claim of the EU does not have the same federate basis as the one of the US. The role of the ECJ, therefore also differs, and to an extent includes the assignment to convince the national courts to accept its lead, and to keep them on board so to speak. The dialogue that now exists between the ECJ and the national courts, after all, is difficult to imagine between a federate Supreme Court and state courts. Something that again reflects the fundamental confederal elements retained by the EU.[410]

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405 Lenaerts (1990), 263 who sees giving a Court the power to umpire between federal units as a constituent part of federalism, just as Watts (1998). Further see P.R. Dubinsky, 'The Essential Function of Federal Courts: The European Union and the United States Compared' 42 *American Journal of Comparative Law* (1994), 295.

406 Its jurisdiction is furthermore limited in some regards, such as by Art. 24(1) TEU, art. 269 TFEU, art. 275 TFEU, 276 TFEU, as well as by the limited rights of standing for individuals.

407 Art. 19(2) TEU. See on the other hand relativizing the effect of this method of appointment F. Jacobs, 'Advocates General and Judges in the European Court of Justice: Some Personal Reflections', in: D. O'Keeffe and A. Bavasso (eds), *Judicial Review in European Union Law, Liber Amicorum Lord Slynn, vol. I* (Kluwer Law International 2000).

408 Art. 255 TFEU. See also P. Kapteyn, 'Reflections on the Future of the Judicial System of the European Union after Nice', 20 *YBEL* (2001), 188-189.

409 Art. 263 TFEU.

410 See further below chapter 10, section 8 for a more detailed analysis of supremacy from the perspective of confederalism and confederal popular sovereignty.

In any event and despite these confederal elements, it is beyond doubt that the EU has almost fully incorporated the federate modification of a central, supreme judiciary. A modification that has had a major impact on its functioning, and is generally seen as having been vital for its survival and development.

5.4 Sub-conclusion institutional modifications

Even from the necessarily brief and selective overview provided above, it is obvious that the EU institutional scheme far exceeds that of the Confederation.[411] At least in complexity and elaborateness it more resembles the federate constitution, having multiple distinct institutions dividing and connecting branches and mutually checking each other. A conclusion is only strengthened when the increasingly central European Central bank and the federate Monetary Union it presides over is added to the equation.[412]

A closer comparison, however, shows that as far as the nature and focus of the institutions discussed are concerned, strong confederal elements still exist in between these significant federate elements.

The executive has remained most clearly confederal, though it has been empowered compared to the virtually absent executive of the Confederation. Despite retaining a fundamentally confederal nature, furthermore, the EU executive has managed to achieve a relatively high level of effectiveness. It was partly enabled to do so by the most federate branch of the EU institutional framework, the judiciary. With the European Court of Justice the EU has almost fully incorporated the federate judicial modification that also proved so crucial in the US itself.

411 See for instance G. de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis', in: P. Craig and G. de Búrca (eds), *The Evolution of EU law* (OUP1999), 55 et seq. In fact historically confederations seem to have been generally underdeveloped institutionally. Both the Swiss Confederation and the German Bund, for instance, only had one formal institution in the form of the Diet (general assembly). The high level of institutionalization of the EU may, therefore, also be seen as a separate modification in itself. Cf also Forsyth (1981) p. 32.

412 See on the federal nature of the monetary union already the language of the Werner rapport in 1969, para 30, explicitly calling the ECB federal 'Considering the political structure of Community and the advantages of making existing central banks part of a new system, the domestic and international monetary policy-making of the Community should be organized in a federal form, in what might be called a European System of Central Banks (ESCB).'

The modifications to the legislature discussed here show more of a blended system, which combines confederal and federate elements, especially in the European Parliament.[413] Elements often quoted in support of the 'federal' nature of the EU, such as the use of QMV or the Council as an 'EU Senate', however, are not that federate at all. Rather these elements match the confederal scheme under the Articles.

Overall the legislative structure of the EU, and the representational scheme it contains, remains predominantly in the confederal sphere, also because there simply is no central people to federally represent at the EU level.

6 The Confederal Comparison: Overview and conclusions

Before further analyzing the results of our comparison it is useful to briefly combine and summarize our findings above. What is the combined conclusion on the constitutional DNA of the EU when compared against our sixteen (con)federate markers?

To begin with, none of the five fundamental modifications discussed were taken over. The EU is not based on a single people, and it may not use force or levy taxes. Amendment by majority it not possible, but secession is. Some other modifications have partially taken over the constitutional *function* of these foundational modifications, such as pseudo-amendment of the Treaty via judicial interpretation, or the effective levying of money from the Member States. Nevertheless, as far as its foundation is concerned, the EU has remained fully in the confederal camp.

The structural modifications compared provide an almost reverse picture: supremacy and direct effect have been taken over, even if the character of supremacy is different in the EU than it is in the US Federation. These two elements form pillars of the EU legal order. They have also allowed the EU to embrace the rule of law as a key instrument just as in the US Federation. The more fundamental federate foundation of a fully separate European government based directly on the people, was however not adopted. Rather the EU relies on a merged system, and, therefore, on the Member States' internal institutions to a very large degree.[414] As a result the system operates directly on the people but is not directly based on them, nor backed by its own separate level of government. This is not a novel point of course, but an important one for understanding the structural limitations and problems

413 Burgess (2009), 41: '(…) the existing institutional channels of the EU that represent the Member State governments, such as the Council of Ministers and the European Council that constitute the confederal dimension of the European project. The EU, we are reminded, is a political, economic, social and legal hybrid that is characterized by a combination of federal, confederal, supranational and intergovernmental features.'

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

of the EU. After all, tension between foundation and structure can only be expected in such a situation, as will be further explored below.

The third cluster concerned the objectives and competences of the polities compared. Assembling the larger picture within this cluster, an interesting blend appears. First we saw that, as far as objectives were concerned, the EU differs from both the Articles and the US Federation through its dominant focus on internal objectives, and its relative lack of external and military ones. As it were especially these external and military competences that dominated the objectives of the Confederation, this leaves the EU, on balance, more on the federate side.

Second, and crucially the EU doctrine of attribution and the purposeful interpretation of competences come much closer to the Federation than to the Confederation.[415] The EU utilizes an implied powers doctrine, combined with the extra possibilities that art 352 TFEU offers.[416] Through these channels its many objectives amplify its competences in a way that would have been completely unacceptable in the Confederation. The important role this grants to the objectives, in addition to the actual power conferring clauses, can almost be seen as another federate modification in itself. Not surprisingly these modifications played an important role in the development of the EU. Just as in the US federation, they allowed it to develop, achieve its objectives, and adapt far better than the Confederation.

Thirdly, regarding specific competences, the EU also comes much closer to the US Federation as far as its internal powers to regulate commerce are concerned. Even though the Confederation had the explicit *objective* to create an internal market, and even contained some prohibitions that resemble the four freedoms, it did not have any *competences* to achieve its internal economic objectives, nor an effective system to enforce them. The EU does wield these competences, and does so in a way that strongly resembles the commerce clause and the necessary and proper clauses.

At the same time, however, the EU clearly does not come close to the external competences of the Confederation or the Federation. Despite the increasing relevance of the external for the EU, its centre of gravity remains internal. Interestingly the EU thereby emerges as something like a *mirror-image* of the Confederation: both cover one side of the competences awarded to the Federation. This is additionally interesting as confederal systems historically were generally more concerned with the external than with the internal dimension of government. Crucially this means that the EU does not necessarily have more or less far-reaching powers than the US Confederation. After all the power to declare and wage war is a rather significant one. Yet it is so in a very different and less day-to-day manner than the competence to create and regulate an internal market.

415 Douglas-Scott (2002), 261.
416 Dashwood (2009), 35 et seq.

At the institutional level three major modifications were highlighted in the legislature, the executive and the judiciary. The judiciary thereby formed the most clear and most far-reaching federate modification in the institutional structure of the EU. A completely separate court has been established, which has developed into a central and influential actor within the EU. The establishment of a Court is intimately related to many of the other federate modifications, and in fact largely responsible for several rather important ones.[417] Different from the US, however, this central court was not supported by its own branch of 'federal' courts.

The Executive, on the other hand, remained predominantly confederal. Although more developed than under the Confederation, it does not even approach the federate executive created under the President. In addition it largely remains dependent on the executive capacity of the Member States.[418]

The legislature presented a more mixed picture. As far as the decisional system is concerned the increased use of QMV in fact fully remains within the confederal prism, whereas the central role of state representatives in the decision-making process does so even more. The introduction and gradual empowerment of the European Parliament, especially after the introduction of direct elections, in turn forms an important modification. Even if degressively proportional, it creates a direct link between Member Peoples and the EU. In general, however, the decision-making is still dominated by the Council, Commission, and now increasingly the European Council.

This also brings us to the *representational scheme*, which was one of the key bones of contention in Philadelphia. Here the overall result seems more confederal. The European Parliament again forms a major innovation from the Confederation. Even leaving the confederal elements of the European Parliament aside, however, the overall balance of representation far more rests on statal representation than the more 'national' scheme developed in Philadelphia. Especially the strong influence of the Council of Ministers, and increasingly the European Council, are relevant in this regard. Where in the US Federation even the State vote was given to a federate institution with independent individuals, these EU institutions consist of direct state representatives whose European powers depend on their national roles. Different from the European Parliament, furthermore, their consent is always required for any act to become law. The representational scheme thereby directly reflects the lack of a single European people. This is a fundamental difference with the national scheme developed in Philadelphia, where not only one man one vote was introduced for the House, representing full political equality of all American citizens, but even the statal representation

417 See further below chapter 3, section 4 on the rule by law and the role of the ECJ in this regard.

418 Aided by direct effect and supremacy, that enlisted individuals and national courts to ensure the proper application of EU law. See also P. Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC law' 12 *Oxford Journal of Legal Studies* (1992), 453.

was subsumed in a federate institution. Especially nothing like the European Council, now gaining prominence, was created in the US. Instead, a powerful central executive was included in the federate legislative process. Overall therefore, the legislative structure, and certainly the representative scheme of the EU fall more in the confederal than in the federate camp.

Of the sixteen modifications discussed, the EU therefore remains on the confederal side of the equation for eight. (No single people, no force, no direct taxation, no amendment by majority, secession, merged government, the executive and the representational scheme). Five scored as federate, or at least predominantly so (Supremacy, direct effect, broad attribution and implied powers, internal commerce competences, and a central judiciary. Three are here qualified as mixed (objectives, external powers, and the institutional setup of the legislature). These are either blended, the EU conforms to neither, or equally to both.

On the *truly foundational modifications* therefore, the EU remains overwhelmingly confederal. It equally remains firmly in the confederal camp for several other rather fundamental points such as the use of a merged government, and the lack of a strong and independent executive.

Most of the federate modifications that have been taken over, on the other hand, concern the *legal infrastructure and competences*. These include the – mutually reinforcing – federate modifications of supremacy, direct effect, attribution, and the internal market competences. Many of these modifications were made possible by the *institutional* modification of a central court with the competence to rule on the interpretation of the Treaty. These findings have been summarized in the table below:

Category		Modification	US CF	Blended	US Fed.
Institutional	16	Judiciary			
	15	Executive			
	14	Legislature			
	13	Representation			
Competences	12	Internal / commerce comps			
	11	War and external comps			
	10	Doctrine of attribution			
	9	Specific objectives			
Structural	8	Direct effect			
	7	Supremacy			
	6	Separate or merged gov			
Fundamentals	5	Enlargement / secession			
	4	Amendment by majority			
	3	Taxation			
	2	Use of force			
	1	Single people			
			8	3	5
			US CF	Blended	US Fed.

Of course these comparative points only form one selection and their binary qualification as either confederate or federate does not do justice to the complexities involved. Nevertheless it is suggested that the overall outcome does have some value for better understanding where and how the EU can be placed on the spectrum between the American confederate and federate systems. Again taking the limitations of these comparative conclusions into account, the next chapter uses these comparative outcomes to develop some more general conclusions on the nature and functioning of the EU constitutional order. Conclusions which aim to test the value of the comparison made, and at the same time explore what this comparison can provide us with in terms of understanding, inspiration and perhaps even solutions to some of the problems facing the interesting constitutional creature known as the EU.