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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4 The costs of modification and the limits of the confederal form: Of new and exacerbated problems

1 Introduction

A free lunch is rare, even in constitutional theory. Besides their strengths, modified confederal systems obviously retain many flaws and inherent weaknesses. What is more, the same modifications that strengthen the constitutional framework of the EU may also bring new weaknesses and risks, or exacerbate existing ones. Some of these weaknesses and risks may be well known, but have perhaps not yet been traced back to their confederal root causes. Others are perhaps less visible or have not yet materialized, but logically flow from the nature and dynamic of a modified confederal scheme. All of these weaknesses and risks deserve to be explored as they may assist in better understanding the problems facing the EU and the limits that remain inherent in modified confederal forms. Limits that should ideally be understood and respected before they are overstepped and lead to a full crisis

Again it is necessary to limit our discussion to some of the most central problems, for which end we return to our three central propositions: what are the risks and downsides of the inverted market focus of the EU (section 2), its reliance on the rule by law (section 3) and the combination of a confederal basis and a federate superstructure (section 4)?

2 A market without borders or an EU without limits?

The inverted and economic focus of the EU energized integration. It partially did so by basing integration on a self-deepening conception of an internal market. As it turns out, however, this market focus might be too energetic, or at least too one-directional. Almost anything can be related to the market in some way, and therefore to an EU competence. As such this modification may help to better understand the increasing concern that the EU is usurping too much power, and is leaving too little space for national politics.[1]

1 A concern that amongst other things can be seen in the criticism of the Court of Justice, impossible but persistent calls for limitative lists of EU competences to be drawn up, or the virtual obsession with subsidiarity tangible in the Lisbon Treaty. Especially see the German *Lissabon Urteil*, BVerfGE, 2 BvE 2/08, and its attempt to establish some limits based on the German Constitution, see further chapter 8, section 4.4.

A market without borders might be desirable, an EU without limits is not.[2]

Several factors, related to the internal focus of the EU, contribute to this dynamic. To start with the self-deepening of the market brings ever more areas within the ambit of EU law. Once embarked on the project to create a genuine internal market, it turns out there are few areas that cannot at least in some way endanger this aim.[3] At least no logical or inherent limit in the concept of a market itself seems to exist. At the same time non-market aims have not been elevated to the same federate level as the market, and therefore struggle to provide such limits.

The increasingly distant link with the market required to establish an EU competence or trigger free movement prohibitions is the legal reflection of this dynamic. Under the almost federate doctrine of competences developed by the Court, for instance, only a relatively limited link with the internal market is required for the competence of art. 114 or 115 TFEU to become available.[4] One could, for instance, wonder what the real market risk is of not regulating the importation of thumbscrews (both serrated and regular) or electric chairs.[5] Similarly, the very broad definition of a restriction in the context of free movement law means even a rather remote connection with the market may bring into play the full arsenal of negative integration: any national measure, 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' forms a restriction which and in principle prohibited. [6] Staying below this threshold has almost become a challenge in itself. Examples of restrictions that stretch the imagination of at least those not-initiated in common market logic are not hard to find. In *AGM-COS.MET*, for instance, a televised interview given by one civil servant was enough to form a restriction, and could even lead to state

2 See in this regard the notorious claim by Lenaerts that in the EU there simply no longer is any: 'nucleus of protected state powers'. Lenaerts (1990), 222. Not surprisingly here the EU therefore shares in the same problems that many federations face: preserving any area of true state autonomy. As will be further discussed in the next parts the EU will also require more political solutions to counter this danger. Federal law, with its inherent central bias, cannot fulfil this role on its own.

3 On this point see already the analysis by Hamilton, who supported his proposal to abolish the states altogether with the argument that 'they are not necessary for the great purposes of commerce, revenue or agriculture.' McDonald (1968), 141.

4 Case C-376/98 *Tobacco Advertising I* [2000] ECR I-8419, case C-380/03 *Tobacco Advertising II* [2006] ECR I-11573, and case C-210/03 *Swedish Match* [2004] ECR I-11893.

5 See the truly fascinating Council Regulation 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment *OJ* (2005) L 200/1, annex III point 1.3, as well as the equally intriguing territorial *exceptions* to this prohibition.

6 Case 8/74 *Dassonville*. See for far-reaching applications of this test amongst many others case C-434/04 *Ahokkainen* [2006] ECR I-9171, case C-170/04 *Rosengren* [2007] ECR I-4071, case C-73/08 *Bressol*, [or case C-188/04 *Alfa Vita* [2006] ECR I-8135. Although of course all within the logic of the internal market, these cases do betray a certain measure of radicalism as well.

liability.[7] In Carpenter, though not the strongest of precedents one assumes, a spouse turned out to be necessary for interstate commercial activities,[8] as was a reduced rate on vignettes for disabled drivers.[9] The depillarization of EU law may further contribute to the further evolution and broadening of the internal market.

Naturally under the legal logic of the internal market a restriction does exist in these cases, and of course even minor restrictions can have a large effect or create loopholes for Member States to abuse. Equally the Court can, and has, compensated for this broad definition of a restriction through its case law on justification or by excluding certain domains from the internal market altogether.[10] Nevertheless these examples do illustrate the almost unlimited scope of the market, especially where there is a will to find a an actual or potential threat to its functioning.

Second, and in addition to this (legal) self-deepening, the *market itself* has expanded, and with it the competences and reach of the EU. With liberalization and privatization on the rise more and more formally public domains have been subsumed in the market place. These domains often concern important and sensitive goods and services such as healthcare, public transportation or energy. [11] As even the introduction of a small market component in an otherwise fully public service can trigger the full rigour of the internal market, furthermore, the transition from public to private, and therefore controlled by internal market law, can be a rapid process.[12]

As a result of these developments the EU has entered an increasing number of socially sensitive areas where it has limited competences for actual harmonisation.[13] This discrepancy between positive competences and negative reach is becoming increasingly contentious, and progressively taxes the

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7 Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749.

8 Case C-60/00 *Carpenter*.

9 See case C-103/08 *Gottwald* [2009] ECR I-9117 Although here the restriction was found justified.

10 See recently case C-137/09 *Josemans* [2010] ECR I-13019.

11 See for instance case C-158/96 *Kohll* [1998] ECR I-1931, case C-157/99 *Peerbooms* [2001] ECR I-5473, case C-385/99 *Müller-Fauré* [2003] ECR I-4509, case C-372/04 *Watts v. Bedford Primary Care Trust* [2006] ECR I-4325, case C-381/05 *Commission v. Germany* [2007] ECR I-6957, case C-73/08 *Bressol*. Further see C. Newdick, 'Citizenship, Free Movement and Healthcare: Cementing Individual Rights by Corroding Social Solidarity' 43 *CMLRev* (2006), 1645 or E. Spaventa, 'Public Services and European Law: Looking for Boundaries' *Cambridge Yearbook of European Legal Studies* (2002), 271.

12 Slot, Park and Cuyvers (2007), 101 et seq. Of course art. 106 TFEU creates a balancing mechanism here, but it only does so within the scope of the internal market law, and under the strict criterion that the desired level of the public service cannot be guaranteed within the rules established for economic activities.

13 Already see Weiler (1991), 2477 and R. Dehousse, 'Integration v. Regulation? On the Dynamics of Regulation in the Community' 30 *Journal of Common Market Studies* (1992), 383.

legitimacy of the EU. In addition it may restrict political action: where the EU cannot legislate because it has no competences, and where the Member States can only legislate within the limits of the Treaty exceptions and the Rule of Reason, the space for political action becomes rather limited, and negative integration is all that remains.[14]

Third, once within its scope, the EU approaches these sectors with a market perspective backed up by near federate powers. As discussed above, after all, other public objectives did not receive the same federate competences, and are not enforced by federate means. Consequently, even though the centrality of fundamental rights is continuing to grow with the Charter, the market perspective remains the constitutional *primus inter pares*, which dominates non-market objectives. This carries the danger of elevating the market over other non-market interests. A risk even (or especially) where the EU does not have competences to legislate on a specific non-market value, yet where Member State competences are still subject to higher rules of EU internal market law.[15]

2.1 The challenge of an unlimited market: Collective action

The example of collective action provides an interesting example of this elevation of the internal market, and the risk for imbalance that accompanies it.[16] The tension between collective action and free movement came to a head in the *Viking* and *Laval* cases.[17] In *Laval* the Swedish unions took collective action against the refusal of certain foreign companies to sign on to Swedish collective agreements, especially for posted workers. The companies targeted argued these actions violated their free movement rights. In *Viking* Finnish trade unions undertook collective actions, together with the powerful International Transport Workers' Federation, against a Finnish company wanting to reflag a ship to a Latvian flag.

In both cases the Court of Justice held that the actions fell under the scope of respectively the freedom to provide services and the freedom of establishment.[18] Especially in *Viking* this in itself already formed an important extension of the horizontal direct effect of the market freedoms, and with that of the internal market itself. Instead of demanding some form of (semi-)public

14 See on this dynamic F. Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States', in: G. Marks et. al. *Governance in the European Union* (Sage 1996), 15 et seq.

15 Also see more fundamentally: K. Polyani, *The Great Transformation* (2nd edn, Beacon 2001) on the inversion between market and society that the EU might entail or stimulate.

16 N. Reich, 'Free Movement v. Social Rights in a Enlarged Union: The *Laval* and *Viking* Cases before the ECJ' 9 *German Law Journal* (2008), 125et seq.

17 Cases C-431/05 *Laval* and C-438/05 *Viking*.

18 Art. 49 and 56 TFEU, *Laval* par. 98, *Viking* par. 64-65.

authority for the freedoms to apply, the mere capacity to obstruct free movement was enough to trigger horizontal application.[19] This is a logical step where the aim is to protect the ultimate effectiveness of the market; why would powerful private entities be allowed to do what the state is not? Yet, already on the level of scope, this decision also illustrates the expansive logic of the internal market, and the tension this creates with other objectives.

Weighing the rights involved, furthermore, free movement won out in both cases. The claim here is agnostic as to whether the specific outcome in these cases was right or wrong.[20] Rather the point is that these judgments illustrate how the internal market logic elevates the right to establishment to the same level as an important social right as collective action, and in a specific case subsequently prioritizes free movement. Although the internal market rules are set at the EU level, furthermore, these social rights cannot be fully established at the EU level.[21] As a result, these rights are largely defined and protected at the national level, which then has to take into account the supranational rules on the internal market. Again the point here is not that social rights should not be weighed against other interest, as they also are at the national level, but the *prima facie* imbalance between the two rights created by the central and federate position of the internal market.

2.2 Fundamental rights

In this regard the explicit weighing that takes place between market freedoms and more classic fundamental rights is interesting in itself as well. In *Schmidberger*, for instance free movement of goods is weighed against the freedom of assembly.[22] In this case, as in *Viking* and *Laval*, both are placed at the same level and then weighed.[23] Now in *Schmidberger*, as in *Omega Spielhallen*, the fundamental right at stake is found to outweigh the restrictions on free movement. An outcome that illustrates how serious the ECJ takes these fundamental rights, and also how it manages to provide a certain counterbalance to the market within EU law itself.

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19 Also see A. Dashwood, '*Viking* and *Laval*: Issues of Horizontal Direct effect', 10 *Cambridge Yearbook of European Law Studies* (2008), 525.

20 For discussion see amongst many others: J. Malmberg and T. Sigeman, 'Industrial Actors and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' 43 *CMLRev* (2008), 1115, and S. Sciarra, '*Viking* and *Laval*: Collective Labour Rights and Market Freedoms in the Enlarged EU' 10 *Cambridge Yearbook of European Law Studies* (2008), 563.

21 See also the weaker formulation of such social rights in the Charter, as well as the various opt-outs to even these weaker formulations.

22 Case C-112/00 *Schmidberger* [2003] ECR I-5659. Note how, for instance in par. 51, free movement of goods is explicitly transformed into a principle, instead of a rule, to allow this balancing.

23 For similar exercises balancing free movement and fundamental rights also see case C-275/92 *Schindler* [1994] ECR I-1039, case C-36/02 *Omega Spielhallen* [2004] ECR I-9609 and case C-71/02 *Karner v. Troostwijk* [2004] ECR I-3025.

Again, therefore, the claim here is not that the Court, or EU law more generally, is deaf to all but internal market interests. Only two more limited claims are made. First, as with collective action, the elevation of the internal market as a near federate element within the EU leads to a confrontation between market interests and other interests that have not been elevated in the same manner. The fact that free movement rules are actually balances against fundamental rights only illustrates this elevation of the market. Second, without automatically overruling other social or public aims, this federate elevation of the internal market does give an advantage to the market within confrontation, seeing how the internal market has the structural benefit of its federate position and authority.

A central focus on market and economy becomes particularly problematic where one ascribes to thick or existential notions of the political. For either the EU then threatens this political core, wrongly replacing politics with economics. Or alternatively the internal and economic focus of the EU can never be strong enough to support a real polity, and must therefore lead to the downfall of the EU. This because a polity can only be based on more political notions than economic interest. See in this regard, for as thick a notion of the political as one can get, the discussion of a customs union by Carl Schmitt:

> (…) unions such as postal association contracts, customs and trade unions, etc. This type of contractual relation or connection is characterized by the fact that it establishes obligatory commitments with a definable content, which are often very important, but it does not entail the political existence of the state as such in its totality. It is never a connection that is a matter of life and death.
> It can be that economic or other connections become significant, but they are first decisive when they involve the political existence of the state. (…) If an economic connection like that of a customs union would result in a political community, the political element would simply become decisive and an additional connection involving the existence of the state would occur in lieu of the contractually regulated individual relations.'[24]

Obviously the claim in this thesis, as will be further developed in part II, is that the confederal form does form such a stronger political bond that can be partially driven by economics but should indeed be based on more. Nevertheless the risk of too one-sided a market approach should be recognized.

2.3 In search of confederal limits?

Somewhat surprisingly for a confederation, therefore, the question arises how to curb the authority, actions and impact of the confederal centre and the rules it enacts. How to delimit the market in a way that does not undermine the project altogether? Recent case law of the Court of Justice can be

24 Schmitt (2008), 382-383.

seen as an attempt in this direction. In some sensitive and contested areas, such as gambling, soft-drugs, or particularly sensitive rules on transcription of names, for instance, it seems the Court works hard to create more space for national decision making. It even seems to be setting some moral limits to the market.[25] As the struggles of the Court show, however, this is not an easy task, especially not within the legal framework currently in place.

The objective here is only to flag up this danger, and to show how it fits with the confederal prism proposed. From that prism, however, one could envision different means of addressing this imbalance. For instance some other EU objectives could be upgraded to a more federate level as well.[26] Conversely, the market objective itself, or parts of it, could be toned down. Taking a leaf from competition law, to give but one idea, one could strive for a *workable market* only, and not for a perfect one. In addition one could imagine that a more established, 'adult' internal market could be less puritanical and more pragmatic in choosing its battles. All such actions, however, do run the risk of undermining precisely the legal focus and mechanisms supporting integration. At the same time it is important that the internal market does not start writing cheques the rest of the constitutional structure cannot cash.[27] Although this problem cannot be solved here, part II of this thesis will return to it, further building on the insights developed there regarding sovereignty.

3 Limits and risks of the rule by law

The second and third proposition pointed out how the EU relies on the rule by law. An approach that allowed it to reduce the confederal weaknesses concerning inaction and compliance. Several other weaknesses, however, remain, have been exacerbated, or have even been newly created by this reliance on a rule by law. Five of these, which are especially relevant to a theory of the EU as a modified confederal system, will be focused on here. First, how the range of a rule by law is limited to areas amenable to legal control. Second, its tendency to unbalance the relation within the *trias*, and between law and politics more generally. A problem which feeds into the

25 See especially case C-387/96 *Sjöberg* [1998] ECR I-1225, and case C-137/09 *Josemans*. For a further analysis also see Van den Bogaert and Cuyvers (2011), 1175.

26 See in this regard the attempt made with the protocol on services of general economic interest.

27 The current situation hereby leaves Member States in a difficult catch 22. They can counter the market focus by elevating some other, more social objectives to an equally federal level within the EU. Yet this would further strengthen the EU and reduce their national say in these per definition sensitive fields. If they choose not to do so, however, these non-market objectives continue to be subjugated to the internal market focus. Either way control is lost, and it should be decided in each case which is the lesser evil.

further issues concerning the amendment trap created and the inherent but vulnerable reliance on the stability of Member States and their legal infrastructure. Lastly, the risk of political free riding on the rule by law must be acknowledged.

3.1 Areas not amenable to legal control

First, relying on law restricts EU control to *those areas covered by law*. Areas where law holds no sway, for instance because they do not fall under the jurisdiction of courts or administrations, or because they are inherently not rule bound, escape effective control by the EU. Vice versa, the problem exists that the EU needs to 'juridify' an issue to exercise control. Luckily for EU effectiveness few areas seem to escape juridification these days, yet this limitation does help to explain why the EU is having such difficulties in more purely political areas. Foreign affairs, defence, or the budget, for instance, are generally left to the discretion of democratically elected politicians.[28] Not only do they generally fall outside the competence of courts and bureaucrats, these areas often involve truly political decisions that are difficult to capture legally. As a consequence they fall within only the most marginal of legal limits, even where judicial review is provided for at all.

As a result, the EU cannot effectively control such non-legal fields via national courts or bureaucracies. An analysis that also explains why it is not so much the political 'sensitivity' of a field that limits EU involvement, but the level of national legal control over this field . The internal market inroads into criminal law, social law and immigration have shown as much. Rather than political or social sensitivity, it is the level of juridification and of rule based control in a certain area that determines the potential for EU involvement.

If correct, this conclusion points to two potential problems or limits for integration. First, it limits EU control in 'high politics' dimensions such as foreign affairs or military cooperation. Conversely, however, it points to another risk for the long-term legitimacy of the EU. There might be a temptation to increasingly juridify core political domains so as to increase the capacity for EU control and prevent national political actions from undermining EU effectiveness. Juridifaction of these domains, however, would further empower courts and bureaucracies over politics, and could undermine both EU and national legitimacy in the longer run. A political system cannot live by law alone.

These risks of juridification thereby also point to another risk in the rule by law, and one that is already occurring: a relative empowerment of law over politics.

28 On budget and EMU see further below chapter 13.

3.2 Unbalancing the Trias

Even in areas amenable to legal control, law may at points have become too dominant. Here we see the same challenge as with the internal market: where only one element in a confederal system receives near federate backing, be it the market or the national judiciary, its relative power is dramatically increased over elements that do not. In the end this alters the overall balance in ways that might not be desirable.

By introducing federate legal and judicial elements such as supremacy and direct effect, the EU has empowered national bureaucracies, but especially national courts *vis-à-vis* their executives and legislators.[29] They now speak, if they choose to do so, with the supremacy of EU law. As is well known these federate modifications enabled even the lowest national court to review all national norms, up to constitutional norms, against any norm of EU law.[30] A body of law that that contains an expansive set of rules, principles and interpretative tools that further empower a national court where it wishes to be so empowered.

In this way the EU has reversed the relation between politics and law, or has at least affected the balance between the two in the benefit of law and courts. As a result the relation between the courts and the other branches of government has changed, as has the relation between law and political decision-making itself. This especially because at the same time the national executives have been empowered *vis-à-vis* their own legislatures as well, further affecting the *Trias* and the balance of power within the national systems.

At the EU level a similar empowerment of law over politics took place. A federate style court was placed amongst confederal political institutions. This court now has the authority to interpret a corpus of supreme primary law, with which all secondary law must comply.[31] In fact the first *Kadi* judgment of the Court of Justice seems to suggest that even primary law might not be exempt from review against the principles that – according to the Court – form the very foundations of the EU legal order.[32]

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29 At the same time the national executives have also been empowered *vis-à-vis* their own legislatures, further affecting the Trias. This shift in power between the executives and legislatures will be further discussed in chapter 10 section 6.2 and chapter 12 section 3.

30 Cases 106/77 *Simmenthal* [1978] ECR 629 and C-213/89 *Factortame* [1990] ECR I-2433.

31 See recently Opinion 1/09 on the potential establishment of a Patent Court.

32 Joined cases C-402/05 P & C-415/05 P *Kadi I*. For discussion see Cuyvers (2009) and A. Cuyvers, 'The Kadi II judgment of the General Court: the ECJ's predicament and the consequences for Member States' 7 *European Constitutional Law Review* (2011), 481.

Now it is normal for modern government to be controlled by the courts, and the general difficulties this creates are well known. Yet these difficulties become especially acute for the EU where the political counterparts are based on a far more confederal footing than the ECJ. An imbalance which further enhances the relative power of the Court, even beyond the high level of judicial authority normally found in a federal system.

The relatively limited power of the political institutions also forms a further risk of the rule by law in itself. One that provides an interesting example of the unintended consequences of mixing a confederal basis with a federate superstructure, and might be labelled as the amendment trap.

3.3 Setting an amendment trap

Considering the complexities of EU legislation it is already difficult to respond politically to the European courts via secondary law.[33] On the level of Treaty change, the only way to formally counteract an interpretation of primary law by the Court, the difficulties are even more daunting. Only where Member States unanimously agree on an alternative to the interpretation of the Court of Justice can they use the instrument of Treaty change to overrule the Court.[34]

Clearly the Court does take into account the views and sensitivities of the Member States.[35] Views which the Member States may express as intervening parties or via other routes with different degrees of formality. Furthermore, the Court has often proven sensitive to changes in tone reflected by Treaty amendments. After Maastricht, for instance, a certain restraint was generally perceived in the Court's case law. Similarly the clear emphasis on subsidiarity and the limits of EU competences in Lisbon, including the repeated warnings that the Charter is not intended to extend the scope of EU law nor EU competences, [36] gave give a clear signal to the Court which

33 For one example see the development from *Bidar*, via Directive 2004/38 to *Förster* concerning the maximum residence period that Member States may require to become eligible for study grants.

34 Also see on the limiting effect of the stringent requirements for amendment A. von Bogdandy and J. Bast, 'The European Union's vertical order of competences: The current law and proposals for its reform', 39 *CMLRev* (2002), 237.

35 See for instance case 72/83 *Campus Oil* [1984] ECR 2727, joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, C-36/02 *Omega Spielhallen*, C-440/05 *Ship Source Pollution II*, C-203/08 *Sporting Exchange* [2010] ECR I-4695, C-137/09 *Josemans*, C-434/09 *McCarthy* [2011] nyr., C-256/11 *Dereci and others* [2012] nyr., or C-370/12 *Pringle* [2012] nyr.

36 See for example art. 4, 5, 6, 12(b), and 48(2) TEU, art. 69 and 352(2) TFEU, Protocol 1 on the role of national parliaments in the European union, art. 3, and Protocol 2 on the application of the principles of subsidiarity and proportionality or art. 51 of the Charter.

it appears to take into account.[37] These alternative means of communicating with the Court, however, do not alter the fundamental fact that actual amendment, and therefore directly correcting an interpretation of primary law by the Court, requires unanimity.[38]

By establishing a federate court, yet maintaining a requirement of unanimity for Treaty change, the Member States have in fact created a confederal amendment trap. Since each Member State can veto a Treaty change, amendment will only succeed when the proposed change is better than the status-quo for all parties.[39] Clearly this will not readily be the case.[40] As a result the status quo, being the current Treaties as interpreted by the Court of Justice, is deeply entrenched.

Instead of protecting members from radical change, as the unanimity requirement does in a standard confederation, their own veto's trap the Member States into the autonomous development of the Treaty.[41] In a sense they have locked themselves up with a (robed) tiger and thrown away the key. The fact that none of the *Acquis* on the internal market was really touched in Lisbon, despite its many contested elements, illustrates the strength of this mechanism.

One often ignored consequence of this trap is that it becomes more difficult to claim that the current interpretations of the Court, including those on supremacy, rest on tacit agreement of the Member States. A claim often made based on the reasoning that Member States have repeatedly chosen not to challenge those interpretations in later Treaty amendments.[42] That fact alone, however, only proves their inability to unanimously agree on an alternative. It cannot prove their consent, not even tacitly.

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37 Dougan (2008), 617. Also see, for instance, the careful way in which the ECJ acts in *Dereci*, not expanding the scope of the charter itself, though giving a nudge to national courts in the direction of fundamental rights and the ECHR.

38 Compare the very different reality in the now re-emerging East African Union. There, after the first case in which the East African Court of Justice ruled on its own competence, the Treaty was immediately amended by the Member States. See EACJ [2007] *Prof. Peter Anyang' Nyong'o & 10 others v. The Attorney General of Kenya & 5 others*, Reference No. 1 of 2006 and H. Onoria, 'Botched-Up Elections, Treaty Amendments and Judicial Independence in the East African Community, Journal of African Law (2010), 78.

39 Trade offs between the Member States are of course possible, but complex with close to thirty parties.

40 Two examples may suffice to illustrate the point. First, the inability to really reform the agricultural policy. Second, the ongoing traveling circus between Brussels and Strasbourg. A practice that cannot be defended, but only explained by the requirement of unanimous Treaty change, and has become an increasingly damaging symbol for EU wastefulness. On the 'sticking power' of agriculture at the EU level see A. Milward, *The European Rescue of the Nation State* (Routledge 1992), 317.

41 Cf also Tushnet (2006), 1240 on this general dynamic between the ease of amendment and the need for constitutional adjudication.

42 See for an example De Búrca (2006), 450.

So far this confederal lock-in has certainly helped to protect and promote integration: The crucial backbone provided by entrenched negative integration, for instance, has already been discussed.[43] Unfortunately, it also means that their might be a (widening) gap between the content of EU law as interpreted by the Court of Justice, and the political will supposedly underlying it. A fact that would provide an additional explanation for the extreme difficulties that recent attempts to substantial Treaty amendment unavoidably seem to run in to.[44] A gap also, that might create a search for more radical solutions by threatened, or opportunistic, Member States in the future.[45]

3.4 Reliance on stable Member States and member courts

The rule by law depends on stable states and effective legal systems. Anything that reduces these preconditions threatens this type of confederal rule. The accession of less well-developed Member States forms one such potential threat. Another threat, which bears an interesting resemblance with our US comparator, is the apparent rise of populist, anti-establishment parties. When such parties come to power, they may introduce a less stable form of politics, and one less concerned with loyal external cooperation, especially in light of the nationalist streak that often energizes them. Even when such parties do not participate in government, they may destabilize national politics, either because their support is required to govern, or because they scare more centrist parties into a nationalistic mode as well. The Dutch PVV provides a clear example of both, but examples are not hard to find within the EU as a whole.[46]

Equally the rule by law would run into difficulties where national courts were to cease their cooperation. Of course a certain level of resistance already exists, and has existed from the beginning.[47] Not asking preliminary questions is one common form.[48] Equally, most supreme courts openly challenge the basis of supremacy in EU law itself, and with that its absoluteness. It is suggested here, and developed in detail in the next part of this thesis, that a confederal system cannot but accept these claims of national

43 See chapter 3, section 3.1.

44 Cf also the tangible fear and reluctance of the Member States when Treaty amendment proved necessary in the EMU crisis.

45 When this gap gets to big, Member States might start agreeing on radical amendments to reduce EU influence. The significant strengthening of the European Council perhaps shows one example of this process already.

46 The Greek 'Golden Dawn' party forming a particularly worrying example.

47 See for an overview of the early case law the more detailed discussion of supremacy below in chapter 2, section 3.1.3.

48 It is furthermore very difficult to find out how well EU law is applied in the day-to-day reality of lower courts, already as many judgments are not even published. A significant blind spot in our understanding of the EU system, and of course a limitation that limits the certainty of the rule of law claim made here.

supreme courts. Such heterarchy, at least between the EU and the Member States, is inherent in a confederate basis, and should be accommodated and managed as well as possible. What is essential, however, is that in 'ordinary' cases, supremacy of EU law seems by and large respected, again as it also should be in a confederal system. As long as supremacy is granted where the core of national constitutions is not threatened or national supreme courts are not forced to prove their own supreme status, the rule by law is not undermined too much. Only where rejecting supremacy would become the default position of national courts would the rule by law, on which a confederal system must partially rely, be made impossible.

Even where national courts do generally respect EU law, however, another opposite risk attaches to a rule by law: it places significant stress on the legitimacy of law and national courts, the primary instruments of a rule by law. Yet not just a national revolt *by* the courts would undermine the EU system, so would revolts *against* the national judiciary, or law in general. Courts enjoy a certain level of legitimacy as independent, professional institutions that apply 'the law'. Institutionally they derive legitimacy from their specific task, and from their position in the national constitutional framework. This national framework, however, was not developed with their EU role in mind. Instead, to put it boldly, the EU has 'commandeered' these institutions through the medium of law, upsetting the national balance in the process.

As discussed above, this focus on law and the judiciary has so far proven a very effective one for the confederal rule of the EU. Not only did it prevent the need for more federate intrusion into the executive or the legislature, it also allowed the EU to tap into the legitimacy that courts enjoyed in their national systems. In the longer run, however, this EU role of courts might diminish their legitimacy, certainly where no national rebalancing takes place. Yet where the authority and legitimacy of national courts is threatened, so is the very rule of law on which the EU depends. For that reason any future conception of the EU constitutional system must also consider just how to fortify and legitimate these national foundations of the EU system.[49]

3.5 Absolving political responsibility

Where too large a burden may be placed on the courts, a rule by law may require to little from national political actors. For a last risk of too one-sided a reliance on the rule by law is that it reduces the need for political actors to explain, justify and improve the process of integration. Instead, they can

49 Further see chapter 10 section 6 and chapter 12 on the need for national constitutional systems to be better adjusted to their participation in a confederal constitutional system.

score political points by criticizing courts and Brussels: the legal machinery will take care of itself and 'force' them to cooperate whilst they defend the nation.

One of the long term risks of this dynamic is that no *positive political discourse* is developed to explain, positively conceptualize, or sell the EU. The often clumsy campaigns and lack of a convincing message in 'yes' campaigns for referenda provide painful examples. Where there is no shortage of punchy one-liners on the 'no' side – factual correctness aside –, a positive message on the EU has not yet evolved through practise and repetition.

Consequently, instead of having the support of politics, courts are increasingly forced to go against it. And that in a time where their legitimacy is already under pressure in some Member States where courts, as other public institutions, are increasingly stripped from the almost automatic authority they used to enjoy. Considering the importance of national courts for the modified confederal system of the EU it will be a crucial challenge to find ways to ensure their legitimacy. Equally national politics must be enlisted, and political free riding on the rule by law must be prevented. This will require, it is suggested, creating constitutional incentives that align political interest with that of EU integration. A challenge that will be further addressed in part II and III of this thesis.[50]

As will be clear from the overview so far the inversion of the EU's focus, and its reliance on a rule by law not just strengthened the constitutional system. They also introduced certain weaknesses of their own, or amplified existing ones. It is suggested, however, that the most central problem of the modified confederal system of the EU lies in the *growing imbalance between its confederal basis and its federate superstructure*. A schism that directly relates to the legitimacy challenge the EU is facing, and points to some of the real limits that a confederal basis imposes.

4 The increasing schism between foundation and superstructure

As shown the EU has incorporated several federate modifications yet has consistently not incorporated the foundational modifications that underpin them in the US. Most crucially, the EU is not based on one sovereign people, but on a mixture of states and the sovereign peoples these represent. As a result, there is a gap between the federate superstructure of the EU and the

50 See especially chapter 12 on the ways in which the EU could assist in restructuring, and enriching, the national democratic process itself.

confederal legitimacy structure it rests on.[51] The supremacy of EU law, for instance, is not supported by the normative superiority of a single people, as it is in the US.[52] Similarly primary citizenship allegiance, in law and in social fact, generally lies with the Member State or sub-national units.[53] The national courts derive their institutional power from the Member State constitutions, not the Treaties, yet are asked to overrule those very same constitutions.

It is this gap between superstructure and foundation, it is suggested, that forms one of the root causes of the infamous legitimacy problems of the EU, as well as its perceived democratic deficit.[54] In this regard the confederal perspective fits with, and may contribute to, the impressive amount of work already done on the legitimacy of transnational governance.[55] This growing schism also points to another inherent weakness in confederal systems: their limited capacity for direct conflict.

4.1 An increasing schism: A problem of normative capacity

From the confederal perspective the key problem underlying the democratic deficit is that the EU has federate powers but no federate authority to base them on. Consequently its problems go deeper than just the institutional set-up or the system of representation. They are directly related to limits inherent in the confederal basis of the EU. As long as the centre does not have the normative capacity to legitimize centralized federate powers, after all, no solutions *at the EU* level exist to bridge the gap between basis and superstructure; the problem is one of normative authority, not representation.

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51 The entire human rights turn in EU law can be understood as one attempt to fill this gap with another form of, substantive normative authority. Yet from a constitutional point human rights are not suitable as a basis for such normative hierarchy: they are heterarchichal in nature, as is natural law itself. The normative superiority of fundamental rights can be claimed by all, including by Member States or national courts *against* the EU. See for a further discussion of this dynamic Cuyvers (2011), 481.

52 See chapter 2, section 3.1.3.above and chapter 10, section 8 below on the effects this has on the nature of supremacy in the EU legal order.

53 For example the Language Communities in Belgium, the regions in Spain or the polities with devolved authority in the UK.

54 Clearly this analysis, as the entire democratic problem itself, dissipates where the EU is deemed already sufficiently legitimated by its 'output' or other technocratic standards. Even the Commission, perhaps out of desperation or resignation concerning deeper and stronger sources of legitimacy, seems to have embraced this language of results. Cf the 2006 Commission paper 'A Citizens' agenda: delivering results for Europe'. (COM/2006/0211) final. Without being too cynical, however, it should at least be wondered if you are taking the European citizens seriously if the fundamental transformation in public authority that the EU entails is to be justified by lowered cell-phone costs.

55 J.H.H. Weiler, U.R. Haltern and F.C. Mayer, 'European Democracy and its Critique', in: J. Hayward (ed), *The Crisis of Representation in Europe* (Frank Cass & Co 1995), 24.

The development of the European Parliament illustrates the point. The powers of the Parliament have steadily increased since its inception as an Assembly with supervisory powers in 1951.[56] After Lisbon it can truly claim to have become a serious co-legislator, also in comparison to many national parliaments. In many ways this has been a welcome development. Yet it has to be acknowledged that the consecutive upgrades of the European Parliament have not closed 'the gap'.[57] A thought experiment might drive the point home: would the legitimacy problem of the EU, and the perception of a democratic deficit, really go away if we made the European Parliament sole legislator tomorrow? Quite to the contrary. It seems more likely that most citizens would strongly object to such a move. Most likely they would see it as a decrease in legitimacy, as they feel more represented by their government than by 'their' MEP's.[58]

The underlying issue, after all, is not so much that the Member States, or their citizens, are not represented democratically enough. Both the members of the European Parliament and the members of government that act in Brussels have clear democratic mandates. It is useful in this regard to keep in mind the example of the German *Bundesrat*. Just as the Council of Ministers, the *Bundesrat* consists of members of the state governments, yet no one challenges its democratic credentials as such.

The real issue, therefore, is not the system of EU representation. It is that there is no central normative authority to represent, be it democratically or not. For unlike the *Bundesrat*, the Council does not act on behalf of a larger and normatively primary central entity. It is for the same reason that it would be highly problematic to grant the EU the power to tax directly, let alone to allow it to use force against Member States, or to allow the institutions to amend the Treaties without Member State consent. Even if all of the above would be done perfectly democratically the EU would still lack the normative authority to wield these powers.

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56 See art. 20-25 of the ECSC Treaty of 1951.

57 Cf also Van Middelaar (2009), 378-379, 389, and especially 391: Het [Europese Parlement] is geen volkstribuun die met de steun van de straat de machthebbers uitdaagt. Het lijkt eerder een hofmusicus, op zoek naar de aandacht van de prins – omdat achter de prins het publiek zit.' ([The European Parliament] is not a tribune of the people who, with the support of the street challenges those in power. It rather comes across as a court musician, seeking the attention of the Prince – because it is behind the Prince where the audience sits. My translation).

58 Cf Dann (2010), 271: 'Institutionally the EP has to be regarded as a strong parliament. Sociologically, however, it barely exists in the European Political mindset.' For an even starker analysis of the legitimizing power of the European Parliament, even under the – now – ordinary legislative procedure, see D. Grimm, 'Does Europe Need a Constitution?' 1 *European Law Journal* (1995), 283-4 and 296.

4.2 The no-demos challenge...or not

Because the confederal basis of the EU does not represent a single highest authority, the normative authority of each member remains primary and more intense.[59] As a result the EU cannot rely on the same normative superiority that the US federate government has. Instead, it has to recognize the primary normative superiority of its many masters.[60] Changing how each of these masters is represented at the EU level, therefore, does not alter the fact that there is no joint European body politic that normatively trumps, or equals, the individual Member Peoples.[61]

On the one hand this conclusion fits with the well-known 'no-demos' position. This holds that there can be no real democracy, and therefore no real legitimacy, at the EU level because there is no EU people.[62] Indeed the current analysis also points to the fact that there is no such central and superior entity to ground EU authority in. Of course this point would be solved if the EU manages to fully federate. Something that might be a possible outcome in the (much) longer run, but does not form a realistic shorter term solution to this schism between foundation and superstructure. [63] In any event it is also not the solution explored here, given our exploration of the confederal form and its potential.

Different from the 'no-demos' position, however, the confederal analysis does not reduce the legitimacy issues of the EU to an insurmountable *demos*-based limit inherent in democracy. Instead, it points to a mismatch between a confederal basis and a federate superstructure. A mismatch that would indeed have been solved if the EU had one '*demos*'. Yet a single *demos* only

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59 See for a further analysis on this point chapter 9 sections 5 and 7.

60 A fact which does not undermine the unique claim of the EU that it alone holds the *combined* delegated authority from all members. A claim that will be explored in chapter 10, section 8.

61 From that perspective the European Parliament only provides a *different mode* of national representation. Why this representation is any more 'direct' than the representation by governments, as is implied by art. 10(2) TFEU, is not exactly clear. This especially for states where the governments are directly elected, or consist of MP's. As the division of EMP's per Member State shows the EP does directly represent the citizens, but only the citizens in their own Member State. In that sense the language in art. 189 EC that proclaimed that the EP consisted of 'representatives of the peoples of the States brought together in the Community' was more accurate than the current art. 14(2) TEU. Note in this regard especially he second sentence of art 14(2) TEU, which states that: 'Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State.' Not only is the predicate 'European' left out, representation clearly takes place per Member State.

62 See for a discussion of the key tenets of statism chapter 8, section 4.3. below.

63 Von Bogdandy (2000), 51. See also the political judgment in the Intergovernmental Conference of 1996: Report of the Reflection Group, Brussels (1996) p. 21 et seq. Also see below chapter 5 on the process of American federation.

forms one of the potential solutions. Focussing on the lack of a *demos* alone, therefore, mistakes one potential solution for the problem itself.

The absence of a European demos does, therefore, *not* automatically mean that there are no alternatives to democratically organize the EU in a way that legitimizes its federate superstructure. What needs to be explored is if, and to what extent, a stronger yet still confederal basis for the EU can be conceived. A confederal basis that provides an *alternative* to creating one European people, but that is nevertheless robust enough to carry a number of federate elements.

Logically such a confederal solution should not start at the central level. It must start from the primary building blocks of a confederal system: the members.[64] For only once a sufficient confederal normative authority has been established at the national level can one consider how to democratically represent it at the confederal level.

To this end Part II will investigate a *confederal notion of sovereignty*. It will be examined if such a conception, which incorporates the EU into the constitutional power conferring arrangements of its different Member Peoples, can assist in establishing a sufficiently stable but still confederal basis. A confederal approach, which, if possible, might also allow us to recast the EU from a threat to democracy to an opportunity to protect democratic government. For a properly constituted confederation could take the Member peoples seriously, both nationally and supranationally, and allow them to escape the confines of the state. A solution, furthermore, that is necessary where one wants to truly and lastingly combine three crucial elements: democracy, the reality of increasing integration, and the enduring role of the state. A combination for which the – modified – confederal form might provide a suitable model if it can be properly grounded. For at the moment such a confederal conception and foundation for the EU's superstructure is missing, even though integration is progressing. The consequence is an increasingly hefty toll on democratic legitimacy.

Even if such confederal solutions can be found, however, its confederal foundation, and the gap between foundation and superstructure will continue to impose limitations on the EU. Limitations that must therefore be taken into account in the future development of the EU. One such inherent limitation must be discussed here in more detail before we engage the quest

64 In that sense the increased focus on the national parliaments under Lisbon, which hopes to draft them into the constitutional framework of the EU goes in the right direction. Mistakenly, however, the measures focus on the EU level once more, and not enough on the national process. See art. 12 TEU, and Lisbon Protocol no. 9 on the role of national parliament in the European Union. Also see on the tendency to include national organs already Rosas (2003), 7 et seq. and further O. Tans et. al (eds), *National Parliaments and European Democracy: A Bottom-Up Approach to European Constitutionalism* (Europa Law Publishing 2007).

for a stronger confederal foundation. A limitation that appears to become increasingly relevant and also should be taken into account when exploring a more stable confederal basis: the limited capacity of the confederal centre to actively and for a continued period of time pit itself against one or more Member States who willingly violate their obligations or in some other way obstruct cooperation.

4.3 The limited capacity of a confederal system for direct conflict

The fact that under a confederal system the members retain their ultimate and primary normative power also means that it is difficult for the confederal centre to directly confront a member. Certainly where this member directly relies on its normative primacy and is willing to violate binding legal obligations. Who, after all, is the EU to tell the French, the Greek, the British, the Danish or the Italian people what to do on their own territory? The EU also lacks the *means* to win such a direct conflict. It does not have an army or a police. More importantly, the EU also does not have the ear or the heart of the citizens to appeal to.[65] Not incidentally, all these instruments of power remain with the Member States.

Again the fate of the US Confederation provides a useful example. The unstable American states often did not have the capacity to self-police their obligations under the Articles. Consequently the Confederation was required to enforce these obligations. In addition, Congress was asked to intervene directly in several states where the rights of certain groups and individuals were increasingly being violated. Where such violations concerned (former) British individuals, furthermore, they also entailed breaches of the peace treaty that had been concluded with Great Britain. The Confederation, however, failed to reign in delinquent states, and could not put a halt to persistent and blatant violations.[66] It simply lacked the means and the authority to do so.

Such requests to become a counter-force to its members, therefore, forces a confederate system exactly into the role for which it is most ill suited: enforcement and conflict. A lose-lose situation occurs: either the confederal centre does not confront the delinquent state, and loses face. Alternatively it may choose confrontation, but suffer even greater loss of face where it loses this confrontation. In the case of the US Confederation, the consequence of its repeated failure to intervene or protect significantly harmed its legitimacy and credibility.

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65 Arguably where Member State governments are failing, trust in the EU may on the other hand exceed that in the national institutions. Italy and Greece illustrate this, up to a certain point.

66 See chapter 1, section 5.

Clearly this limited capacity for direct conflict forms a serious limit on confederal systems. One could even wonder what use a constitutional system is that only works where it pleases the members, yet cannot enforce even the fundamental rules of its own system where challenged. One can, after all, not base a serious constitution on the hope that no crisis will occur, or that the self-interests of the members will never come into conflict with the rules of the confederation. An argument that is often used to disqualify confederal rule as transitional arrangement at most.[67] Once the constitutional dating period is over one either moves to a stable federate marriage or separates, at most remaining friends with institutional benefits such as a free trade zone.

Obviously this limit to confederal systems is a serious one. It forms a major challenge to their usability and viability. It certainly means that great care must be taken not to bring a confederation in a position of prolonged confrontation, and to relieve it as much as possible from the need to pit itself against Member States directly.

As we saw above the modifications in the EU already go quite some way in this regard. The internal market provides increasing incentives to continue loyal cooperation even where other national interests might point in the other direction. The rule by law and the capacity for self-control have helped by entrenching confederal obligations *within* the national systems themselves, relieving pressure on the EU. Similarly states are already restrained by their own constitutions and by other international obligations from violating individual rights, although recent events such as the deportation of Roma, the treatment of asylum seekers in Greece, and the constitutional amendments in Hungary give cause for concern, and potential conflicts.[68]

So far these mechanisms have at least helped the EU survive several crises. The EU has generally even managed to strengthen and deepen integration via such crises. At the same time this track record does not guarantee this will always be the case. Further strengthening the system of the EU, especially by reducing or managing the schism between superstructure and foundation, therefore, remains of crucial importance.

67 See Kinneging (2007), or Watts (1998), 126.

68 Indeed one also sees that the Greek situation immediately put pressure on the Dublin system, built as it is around a typically confederal notion of mutual recognition. It therefore depends on proper minimum standards being observed in each Member State. See the ECJ judgment in C-411/10 *N. S. and others* [2011] nyr., as preceded by its ECtHR counterpart in *M.S.S. v Belgium and Greece*, [2011] Application no. 30696/09. On Hungary now see case C-286/12 *Commission v. Hungary* [2012] nyr.

As indicated, furthermore, part III of this thesis will analyse exactly one such crisis: the EMU crisis, which has shaken the EU to its core, and is interestingly heralded both as the end of the EU and the harbinger of even more far-reaching integration. As such it is an ideal, if daunting, candidate to help us test and develop the confederal insights developed above, as well as the further suggestions on strengthening the confederal basis that will be developed in part II.

5 Conclusion: The weaknesses of a modified confederation

The previous two chapters refined the semi-crudes of our sixteen-point confederal comparison into three more general propositions on the modified confederal nature of the EU. It was illustrated how these propositions, and the more general confederal approach they represent, can assist in better determining and understanding the specific strengths and weaknesses of the EU constitutional system.

The overarching image that arises from this exercise is a significantly strengthened system that nevertheless contains some serious risks and weaknesses. For the different modifications to the classic confederal model have indeed managed to reduce several of the most classic and existential flaws of the confederal form. An inverted focus, for instance, provided more 'energy' to the centre and ensured that the self-interest of Member States in cooperating kept pace with the demands of deepening integration. This increased will to act could be more effectively channelled and translated into action through the federate elements in the superstructure of the EU, which also guard against inaction. These federate elements, together with the stable and developed legal systems of the Member States, further enabled an EU rule by law, which reduced pressure on the confederal Achilles heals of executive capacity and compliance. The cumulative increases in effectiveness and stability these modifications have brought may well have impressed a Madison, and perhaps even surpass the expectations that some founding fathers had of the federate system at Philadelphia.

At the same time each proposition also pinpoints several serious flaws. The self-deepening of the inverted focus, for example, might lead the EU to unsustainable levels, just as the tendency of the federate elements in the EU system to increase in relative weight and importance vis-à-vis their confederal counterparts. Two elements that also help to better understand the evolution of the EU constitutional system more generally. A rule by law may be no match for direct political challenges, may actually undermine the political dimension needed to sustain EU integration, and in any event depends on several preconditions that may not hold. Most fundamentally, however, the growing schism between the federate superstructure and the confederal foundation of the EU puts an increasing strain on the overall constitutional structure and its legitimacy.

All in all these are serious challenges that need to be addressed or at least taken into account. Before further drawing these findings together in a general conclusion, and exploring some potential suggestions and solutions in part II and III, it is, however, useful to first turn to a second and so far unexplored dimension of our confederal comparison: the process of American federation.

As will be seen, several of the key procedural elements driving and enabling the federal transition in the US seem to be lacking in the EU. Even if the economic crisis provides a certain push factor towards federation, therefore, this is not supported, or even counteracted, by some other relevant procedural factors brought to the fore by the process of federation in the US. If correct this is directly relevant to our further research, as it increases the stakes of finding a confederal solution, simply because it becomes more unlikely that a federate one will be available any time soon. Equally, some of the procedural findings are directly relevant for the solutions explored in part II and III. For this purpose the next chapter will first address the fascinating process underlying the US transition into a federation, before chapter 7 provides a general conclusion to part I.