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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Citation

Cuyvers, A. (2013, December 19). *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. Meijers-reeks*. Retrieved from https://hdl.handle.net/1887/22913

Cover Page

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Title: 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
Issue Date: 2013-12-19

9 | A tale of entanglement: The evolution and confusion of internal and external sovereignty

1   Introduction-A tale of entanglement

Having set out two prominent and opposing views on the EU and sovereignty, and the conflict between sovereignty and integration that seems to result, we now turn to sovereignty itself. The following chapter takes a closer look at the original concept of sovereignty behind the absolutist myth that now surrounds it, and obfuscates debates on sovereignty and integration. In doing so it demonstrates the conceptual fit and coherence of a confederal conception of sovereignty, and how such a confederal conception even forms a logical further step in the federal application of sovereignty.

To substantiate these claims this chapter traces two developments in the conceptual evolution of sovereignty.[1] First, it will be shown how internal and external sovereignty are at their root two separate concepts, which over time have become increasingly entangled and confused.[2] It will be argued that it is precisely this confusion between internal and external sovereignty, and the resulting tendency to approach the EU from ill-suited and absolutist

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1   Cf on the importance of the historical development for an understanding of sovereignty also Laski: 'Nothing today is more greatly needed than clarity upon ancient notions. Sovereignty, liberty, authority, personality – these are the words of which we want alike the history and definition; or rather, we want the history because its substance is in fact the definition.' H.J. Laski, *The Foundations of Sovereignty and Other Essays* (Harcourt, Brace and Company 1921), 314.

2   See for a powerful formulation of this distinction already Lauterpacht: '(…) it is only by dint of a gross inaccuracy of language that we give the same designation of sovereignty to the supreme authority of the State as determined by its constitutional law and to its legal position in international law.' Lauterpacht (1977), 9. A statement which could also form the motto of part II. For the customary blending of the two see for instance B. Fassbender, 'Sovereignty and Constitutionalism in International Law', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 116: 'According to a widely shared view, sovereignty has two complementary and mutually dependent dimensions: Within a state, a sovereign power makes law with the assertion that this law is supreme and ultimate, *i.e.* that its validity does not depend on the will of any other, or 'higher', authority. Externally, a sovereign power observes no other authority.' For another recent example see Thym (2009), 1796.

external conceptions of sovereignty, which underlies much of the presumed conflict between sovereignty and integration.[3]

Second, within the concept of internal sovereignty we will focus on the development of popular sovereignty, and specifically on its federal application in the US. Not incidentally these two developments coincide with the two definitional elements of internal and popular sovereignty part II aims to develop.

The outcome of this analysis will serve as a further basis for our discussion on a confederal conception of sovereignty and its potential to guide and support European integration. It will provide the conceptual tools required to further outline such a confederal conception, and to overcome the counterproductive and ultimately false juxtaposition between sovereignty and integration.

2   Five phases of historical development

To properly disentangle internal and external sovereignty, five different steps in the historical development of these concepts are suggested and analyzed. First, internal sovereignty is developed by Bodin as a solution for the internal organization of the polity (section 3). Second, the concept of sovereignty, as developed for internal purposes, is applied to create and structure an *external* order. Sovereign, territorial units become the building blocks of the now 'international' order (section 4). Third, modern constitutional theory increasingly introduces 'abstract' internal sovereigns. These abstractions require constitutional delegation of sovereign authority and therefore allow 'sovereignty' to be freely divided and shared within the state. Popular sovereignty forms one application of this development, and is combined with federalism in the US (section 5). Fourth, external sovereignty retains, and strengthens, the fiction of one absolute sovereign per territory. As long as all sovereign powers remain delegated *within* one state this remains a usable fiction (section 6). Fifth, and last, powers traditionally delegated within the state are delegated 'externally', that is outside the state. As a result, the logic of internal sovereignty enters the domain of external sovereignty. The result is a clash between two logics. Where internal and external sovereignty are not distinguished, or where an external conception of sovereignty is exclusively relied on, this clash cannot be explained, and sovereignty as such seems to loose its relevance (section 7).

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3   In this sense the aim of this chapter could also be described as a vindication of Althusius. An aim that is logically connected to an application of federalism, which has firm roots in the more contractual approach of Althusius. See J. Althusius, *Politica* (translated by F.S. Carney, Liberty Fund 1995).

It is this last development, and the resulting clash between internal and external sovereignty, which both requires and suggests a confederal evolution of sovereignty.

Obviously the proposed analysis triple jumps through vast, complex, and contested terrain. It does not intend to give a complete or final conceptual history of sovereignty. The five steps described above have also been chosen pragmatically and make no claim to exclusivity or historical necessity.[4] In addition the overview below provides a synopsis of a more elaborate conceptual analysis of sovereignty carried out elsewhere.[5] Here only those conclusions are presented which are necessary for the specific argument developed here.

3   Bodin and the origin of the absolute myth

The starting point of our second trip down historical memory lane lies with Bodin.[6] Firstly so because Bodin did lay the theoretical foundation of sovereignty as a distinct concept.[7] He has had a lasting influence on not just the content, but also the *structure* of the discourse on sovereignty.[8] A genuine understanding of his project, therefore, is a necessary condition for any real understanding of the nature and historical development of this concept. Second, the confusion of internal and external sovereignty partially stems from mistaken interpretations of Bodin. Especially to blame are too rigid and simplistic interpretations of his notions of 'absoluteness' and 'indivisibility'.

Appreciating Bodin's real views, therefore, helps to untangle internal and external sovereignty at their root. Four elements in Bodin's conception are especially relevant for this purpose: its complete *internal focus*, its *relative absolutism*, its exclusive use of a *personal sovereign*, and the *prescriptive nature* his sovereignty.

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4   This is not to say that the development of sovereignty forms one straight or necessary development since Bodin. Cf on this point also Schmitt (2005), 16-17.

5   Cuyvers (2011a), 49 et seq.

6   Clearly recognizing that the questions underlying sovereignty are as old as human society itself. See also Hinsley (1986), 27 and the overview by G. Buijs, '*Que les Latins appellent maiestatem*': An Exploration into the Theological Background of the Concept of Sovereignty', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 229 et seq.

7   Hinsley (1986), 121, J.H. Franklin, *Jean Bodin and the Rise of Absolutist Theory* (CUP 1973), 1 et seq.

8   Franklin (1973), P. King, *The Ideology of Order* (George Allen & Unwin 1974). Which is not the same as saying that Bodin is the Alpha en Omega of sovereignty (Onuf (1991), 427)

3.1   *The internal focus and relative absolutism of Bodin's sovereign*

Any appreciation of Bodin must start with the internal focus of his project: how to organize political authority *within* a polity. [9] This internal focus was not very surprising if one considers his primary concerns: enormous religious tensions,[10] civil wars,[11] renegade nobles, and the development of ever more sophisticated theories supporting a right to resist the monarch.[12] Bulwarking internal order and the authority of the monarch therefore formed the core objectives of the *Six Livres*. [13]

Bodin's famous definition of sovereignty as '*la puissance perpétuelle et absolue d'une république*'[14] formed a direct answer to this threat to internal order and security. It exclusively concerned the relation sovereign-subject *within* the polity.[15] The relation *between* sovereigns did not form part of Bodin's notion of sovereignty, and was not regulated by the concept.[16]

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9   A. Jakab, 'Neutralizing the Sovereignty Question: Compromise Strategies in Constitutional Argumentations before European Integration and since' 2 *European Constitutional Law Review* (2006), 375, and H. Lindahl, 'Sovereignty and Symbolization' 28 *Rechtstheorie* (1997), 353. Franklin (1973), 41.

10   Cf Hinsley (1986), 119-120.

11   Although ones count may differ, between 1562 and 1598 there were eight religious wars in France. The first version of the *Six Livres* was not accidentally published four years after the St. Bartholomew's Day massacre.

12   Two important examples: Brutus, *Vindiciae, Contra Tyrannos* (1570-1579, translated by G. Garnett, CUP 2003), and J. Boucher, *De Justa Henrici tertii Abdicatione* (Paris, around 1589).

13   Jean Bodin, *Les Six Livres de la République* (Paris 1583). Unless indicated otherwise, this chapter refers to the English translation of J.H. Franklin, *Bodin: On Sovereignty* (CUP 2007), with book and chapter number, in addition to the page number. On these objectives see, for instance, Book I, chapter 8, 19, as well as Franklin (1973), xiv et seq. Further see Lindahl (2006), 88.

14   Bodin, Book I, chapter. 8.

15   A fact already borne out by his method of finding 'those properties not shared by subjects', but only possessed by the sovereign. Bodin, Book 1, chapter 10, 46.

16   Quite the opposite in fact: Sovereigns had the right, and in some situations perhaps even the duty, to intervene in another sovereigns territory, with force if need be. Bodin, Book II, chapter 5, 113-14, or Book II, chapter 5, 120. Note that this is equally true for Hobbes, a fellow founder of sovereignty, who 'made no attempt to extend the notion of sovereignty beyond state borders.' Carl Schmitt, *The Concept of the Political* (Translated by G. Schwab, University of Chicago Press 2007), xxiii.

In addition Bodin's sovereign was *not* as absolute as is customarily assumed.[17] Ironically, 'Bodin', 'absolute' and 'sovereign' have by now become almost synonymous.[18] Yet in reality absolutistic notions of sovereignty represent a caricature of his theory.[19] Obviously the *Six Livres* did aim to strengthen the position of the monarch, and contains no shortage of absolutist one-liners.[20] Yet in fact Bodin went to great lengths to *retain*[21] the many limitations on the powers of the monarch that existed in French legal practice.[22] On several points he stretched his conceptual framework to the extreme, and perhaps even beyond, to accommodate such limitations on power.

The first and most important of these limits lay in the subordination of the sovereign to the laws of God *and* nature.[23] Although only God was allowed to *enforce* these laws, this qualification was a very real one for Bodin.[24] On a careful reading of his work, furthermore, additional limits on the sovereign abound. The sovereign, for instance, was not *capable* of changing the basis, content, or scope of his own sovereignty,[25] nor was he allowed to levy taxes at his pleasure or confiscate private property.[26] In addition the sovereign was under an obligation to honour contracts with his subjects,[27] even though this obligation is interspersed with complex exceptions.[28]

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17 Franklin (1973), 102 et seq. Bodin himself, by the way, discusses several authors before him that, in his opinion, already wrote about the absolute power of the monarch. See, for instance, Book I, chapter. 8, 10.

18 See, amongst others, Schmitt (2005), 5, Walker (2002), 345, B. Yack, 'Popular Sovereignty and Nationalism', 29 *Political Theory* (2001), 527, R.O. Keohane, 'Ironies of Sovereignty: the European Union and the United States' 40 *JCMS* (2002), 746, A. James, 'The Practice of Sovereign Statehood in Contemporary International Society', (47) *Political Studies* (1999), 462, E. Barker, *Principles of Social and Political Theory* (OUP 1956), 60. Or see judicially: J. Holmes: 'The very meaning of sovereignty is that the decree of the sovereign makes law', *American Banana Co. v. United Fruit Co* (1909) 213 U.S., 347, 356, 358, 29 Sup. Ct. 511, 512, 513.

19 Cf. also Hinsley (1986), 122.

20 See already Book I, chapter 8, 3, and Book I, chapter 10, 50, 87.

21 Franklin (1973), 79 et seq. and Franklin (2007), xxv.

22 Hinsley (1986), 91, 105-7.

23 His own works on religion lead one to suspect that Bodin himself would value the *Ratio*, and the laws of nature derived by it, over any Divine law. See his interesting *Colloquium Heptaplomeres de Rerum Sublimium Arcanis Abditis* in: M. Leathers en D. Kuntz (trans); *Colloquium of the Seven about Secrets of the Sublime* (Hildesheim 1970), in which he constructs a dialogue between the different faiths.

24 'For if we say that to have absolute power is to not to be subject to any law at all, no prince of this world will be sovereign, since every earthy prince is subject to the laws of God and nature and to various human laws that are common to all peoples.' (Bodin Book I, chapter. 8,10) See for further examples also: Book I, chapter. 8, 8, 13, 32 or 34.

25 Bodin, Book I, chapter. 8, 18 and Book I, chapter. 10, 49.

26 For the discussion of confiscation and taxes see Bodin Book I, chapter 8, 21, 39-40.

27 See amongst others Book I chapter 8, 14, 35-36

28 Bodin, Book I, chapter 8, 42-45.

This obligation includes the duty of a sovereign to follow judicial rulings in a contractual dispute.[29] In combination with the prohibition on expropriation Bodin, therefore, *de facto* outlined a fundamental right to property which the sovereign needed to respect.

Of course these restrictions could not be enforced against the crown by force.[30] Yet it can only be concluded that the sovereign Bodin envisioned was not as absolute as an isolated reading of some of his statements might indicate.

3.2   *The personal sovereign and the impossibility of a constitution*

For Bodin sovereignty always rested with real individuals, be it with a single monarch or a group.[31] Two consequences of this personal conception of sovereignty are especially relevant here.

First, a personal sovereign makes delegation unavoidable because no single individual is capable of exercising all sovereign attributes without help. Bodin, therefore, accepts that the sovereign will delegate the daily exercise of his sovereign authority to others, as long as such attribution does not amount to a *de facto* relinquishing of his sovereign attributes.[32]

The second important consequence of a personal sovereign is that it does not allow for an *abstract* sovereign such as 'the state'.[33] The impossibility of abstract sovereigns in turn made it impossible for Bodin to subsume his sovereign under a supreme constitution, or even to differentiate between 'ordinary' legislation and a constitution. The sovereign had to be the highest legislator. He was also, therefore, the unrestricted constitutional legislator, meaning that his own powers could not be circumscribed by a constitution.

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29   Bodin, Book I, chapter 8, 42. On the other hand, the sovereign should also have the power to judge in final instance, although Bodin does imply that he should not do so in civil cases to which he is a party.
30   Bodin, Book II, chapter 5, 115.
31   For this reason perpetual sovereignty also simply meant 'for life' (Book I, chapter 8, 6). See for an example his discussion of the Venetian system in Book II, chapter 1, 98-99.
32   Bodin, Book I, chapter 10, 58.
33   Even though Bodin could have developed such a conception in multiple places in his work. His discussion of democracy and aristocracy, after all, lead him to situations in which a large group is jointly sovereign. Especially in a democracy where the population constantly changes and is amorphous the step to an abstraction as 'the people' or the nation' is nearby. Also, Bodin uses the maxim 'the king never dies' (Book 1, chapter. 8, 44), which implies some abstraction in the crown. On this old and established rule even in his own time see, E. Kantorowicz, *The Kings Two Bodies: A Study in Political Medieval Theology* (Princeton University Press 1957). Nevertheless Bodin does not follow these leads to a more refined, abstract conception of the sovereign. His notions of indivisibility and the focus on a personal sovereign apparently blocked such a step.

Combined with the fact that the sovereign could not bind his own future self, a proper constitution became impossible, both conceptually and pragmatically.[34] As will be seen below, such abstract sovereigns and constitutional layers were two of the major modifications introduced during the subsequent development of internal sovereignty.

3.3 *The prescriptive nature of sovereignty*

A fourth and last element that requires discussion here concerns the distinction between prescriptive and descriptive conceptions of sovereignty. This distinction traces the difference between (legal) *authority* and (factual) *power*: Is sovereignty concerned with or determined by 'absolute' factual power, or by supreme legal authority?

Bodin clearly recognizes the importance of actual power, including the capacity of the sovereign to use force.[35] Yet fundamentally his conception concerns legal authority, not actual power.[36] His primary attribute of sovereignty, for instance, is the capacity to legislate, and not some factual power or force.[37] Equally Bodin rejects the possibility of usurping sovereignty by force, even where a subject might have accumulated far more actual power than the sovereign. Considering the entire purpose of sovereignty for Bodin – ensuring order through well constituted authority – distinguishing sovereignty from actual power is also the only logical possibility. Were sovereignty to depend on the actual distribution of power it would, for instance, fluctuate and lead to factual power *contests*. The net result would be struggle and chaos, and an open invitation to usurpers.[38]

With his conception of sovereignty the jurist Bodin was, therefore, not describing actual power. Quite the opposite: it was the threatened power of the monarchy that led him to his conception of sovereignty in the first place. In that regard his concept aimed to *change* reality, or at least counter some developments in the balance of power. Describing the reality on the ground would, therefore, not have brought Bodin closer to this objective. Instead he

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34   See on this point also Grimm (1995), 286.
35   See, for instance, Bodin, Book II, chapter 1, 108: '(…) and in matters of state, the master of brute force is the master of men, of the laws, and of the entire commonwealth.' This doses of *Realpolitik*, however, is also immediately relativized: 'from a *legal standpoint*, says Papinian, we must look not to what they do at Rome, but what they ought to do.' Whereby Bodin eventually chooses for legal authority over power again.
36   See also Fassbender (2006), 116.
37   Bodin, Book I, chapter 8, 23. Bodin's analysis of different historical examples is also revealing on this point, always declaring the legal authority to be sovereign instead of usurpers holding *de facto* power (Book II, chapter 5, 114-115, 117, Book II, chapter 5, 110).
38   The importance Bodin attaches to respecting the sovereign also shows in the period of a *hundred years* it takes for an usurper to become the legitimate sovereign: No usurper, in other words, will ever live to see that day. Book II, chapter 5, 112.

was searching for a *normative* concept to structure and guide the reality of actual power in a suitable manner. Consequently, his conception contained a large prescriptive element. It described how authority *should* be organized, hoping the reality of power would then follow suit.[39]

3.4   *The descriptive fallacy*

The distinction between prescriptive and descriptive conceptions of sovereignty is an important one, especially when assessing the potential of a constructive conception of sovereignty for the EU. Many of the arguments claiming that the growing interdependence in the world undermines sovereignty implicitly confuse the descriptive with the prescriptive,[40] and fail for that reason.[41] Typically such approaches are linked to rather radical conceptions of sovereignty as an absolute, undivided and unlimited power. After checking such absolutist conceptions against the confused reality of political power, sovereignty is then usually declared officially deceased, as to our surprise no such supreme centre of power is found.[42]

With Werner and De Wilde I will term this approach the *descriptive fallacy*.[43] For of course actual power is not organized and exercised in a neat hierarchical and linear process. In any real decision, be it judicial, bureaucratic or political, a multitude of actors may exert influence. And these actors do not stand in a one-dimensional, fixed hierarchical relation to one another.[44] Understanding and describing this actual power reality is highly important, yet falls squarely within the realm of the empirical sciences. Prescriptive

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39   J.H. Franklin, 'Sovereignty and the Mixed Constitution: Bodin and his Critics', in: J.H. Burns and M. Goldie (eds), *The Cambridge History of Political Thought 1450-1700* (CUP, 1991), 298.

40   Cf also M. Kumm, 'The Moral Point of Constitutional Pluralism. Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection' In: J. Dickson and P. Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (OUP 2012), 216.

41   A nice example is K. Jayasuriya, 'Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism', 8 *Constellations* (2001), 442.

42   Cf G. Marks, L. Hooghe, and K. Blank, 'European Integration from the 1980s: State-Centric v. Multiple-Level Governance' 34 *JCMS* (1996), 346-7, describing how (the presumed sovereign state) does not have ultimate control.

43   W.G. Werner and J.H. De Wilde, 'The Endurance of Sovereignty' 7 *European Journal of International Relations* (2001), 283, 285. Also see the four misunderstandings identified by Van Roermund (2006), 35 et seq.

44   Something already clearly described by precisely a descriptive approach as neo-functionalism. See for instance George (1996), 36. Additionally, if a descriptive conception of sovereignty is applied it is not the complexity of today's world that would undermine it. Even in Bodin's time his concept made no descriptive sense: There never has been a real leviathan.

concepts such as sovereignty, however, should not be denaturized into such a descriptive exercise.[45]

Sovereignty, it is suggested, should therefore be understood as a *prescriptive* concept, and not as a descriptive one.[46] It was also developed as such by Bodin. It is a theoretical concept that abstracts from reality, aiming to create order and hierarchy in a complex reality which obeys no single or stable hierarchy.[47] As the historical and conceptual analysis below will show, sovereignty has been developed and used to *mould* reality and *justify* certain power set-ups, not to describe it.[48] A role it may again be able to perform for the EU, and other forms of regional integration.

This does not make sovereignty an excuse to ignore reality. To be able to exert any normative influence any conception of sovereignty must stay sufficiently close to the reality it aims to guide.[49] It is therefore suggested sovereignty should be understood as sharing in that same double relationship that law has with reality (and therefore politics). On the one hand it is there to guide and shape reality, which means it cannot be simply falsified by finding a single example where reality does not conform to the sovereign ideal.[50] On the other hand it cannot deviate too far from reality, as this simply means it has lost its normative status and influence.[51]

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45   Law, as an inherently normative system, stands in a special relation to such factual description. Law, after all, contains norms as how things should be, instead of just describing how they are. In addition law has institutions who get to decide on what the social reality will be, as society is in need of ending conflicts. Sovereignty to an extent is the self-reflexive exercise of this task. For it is exactly the aim of sovereignty to structure and normatively order this power reality, girding it with legitimacy where it sufficiently approaches the ideal-type.

46   Cf Walker (2006b), 31-2 and 6: '(…) sovereignty involves a 'speech act' – a *claim* to ordering power.'

47   R. Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape' 67 *Political Studies* (1999), 439. At the same time, of course, legal authority can then be used as a platform to acquire the necessary factual power, that is, the normative system becomes part of the dynamics of actual power.

48   Hinsley (1986), 68: 'it is in the realm of theory that the concept of sovereignty must be sought'. See also Burgess (2009), 227. This also fits with the position of sovereignty 'at the boundary between politics and law.' (Walker (2006b), 20).

49   Forcefully Schmitt (2005), 17-18: (…) it utilizes the superlative "the highest power" to characterize a true quantity, even though from the standpoint of reality, which is governed by the law of causality, no single factor can be picked out and accorded such a superlative. In political reality, there is no irresistible highest or greatest power that operates according to the certainty of natural law.' And; 'the connection of actual power with the legally highest power is the fundamental problem of sovereignty'.

50   Cf also for a very sharp analysis of this, admittedly faith, of lawyers in 'the creative force of the rule' Van Middelaar (2009), 22: 'only the legal rule can transform a conceptual castle in the air into an institutional fact.' (my translation).

51   See especially how even Kelsen (1925), who goes to extreme lengths to keep his theory of law 'pure', has to introduce some notion of effectiveness in his definition of law, again binding the definition and status of law to reality, and not just a legal norm

In line with this prescriptive nature of sovereignty, some of the potential of a confederal conception of sovereignty precisely lies in envisioning a more convincing and legitimate understanding of EU authority.[52] In doing so, the suggested definitional elements proposed must of course stay within the relevant conceptual and factual limits,. But in line with the historical role of sovereignty, they intentionally contain an element of idealism as well: an image of what the EU can and should become.[53] A potential that requires action, and not just passive discovery.[54]

3.5   *Sub-conclusion: Dismantling the absolutist myth of Bodin*

Instead of an absolute monarch with unlimited worldly power, Bodin's sovereign was an internally focused and prescriptive ideal with impressive but far from absolute legal authority. The crude notion of an absolute, omnipotent Leviathan as the only possible sovereign simply cannot be ascribed to Bodin. In fact Bodin himself was 'amazed' by the criticism of a contemporary that he was *de facto* propagating tyranny.[55]

In any event Bodin's prescriptive idea proved to be a phenomenally powerful, and flexible, conceptual tool for the future organization of political authority.[56] It was so useful that it inspired the development of both our modern concepts of internal *and* external sovereignty, although internal sovereignty developed further Bodin's actual concept within the state, whereas external sovereignty only used a simplified version as a starting assumption.[57]

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52   In that manner it also hopes to address the normative weakness underlying (constitutional) pluralist accounts, contributing to the challenge set by Kumm: 'In other words, what is the constitutional theory that can provide an account of the normative point, structure and limits of constitutional pluralism?' Kumm (2012).

53   Cf in this regard also Walker (2006b), 3, on the need to define the explanatory and normative purpose of an assessment of sovereignty: 'This is not to say that sovereignty can mean whatever we want it to mean (…). it is also crucial that the knowledge claims that emerge from that scheme are more generally persuasive.' Part of the persuasiveness of the proposed conception of sovereignty here precisely derives from such a normative attraction, and aims to enhance 'the explanatory and/or normative value of that overall scheme.' In this sense it forms a return to the more 'confident' use of sovereignty in the 'Westphalian phase' (p. 10). On the need / capacity of ideas to make alternative realities 'conceivable' also see Lindseth (2001), 145, 163. Further see the interesting argument on sovereignty as a 'social psychology' that Schütze (2012), 57 draws from Kelsen.

54   See further below chapter 12 on the national adaptations required. Also see Lindahl (2006), 111.

55   Jean Bodin, *République* 1961, Epistola in its introduction, cited in Franklin (2007), xxvi.

56   Loughlin (2006), 61, S. Lee, 'A Puzzle of Sovereignty', 27 *California Western International Law Journal* (1997), 244, Bartelson (1995), 83 and 98.

57   Cf Hinsley (1986), 125: 'But it was not for nothing that subsequent theorists would be unable to ignore the notion of sovereignty or to alter Bodin's statement of it to any significant extent – that the further history of the concept will be a history of its use and misuse in varying political conditions and not of restatements of it in different or in novel terms.'

4   THE PRIMITIVES AND THE CREATION OF THE EXTERNAL

The second step in our conceptual detective on the development and con-
fusion on internal and external sovereignty concerns the externalization of
sovereignty. The assumption of one exclusive, highest authority per delin-
eated territory, after all, has tremendous organizing potential. Suddenly
the world can be divided into territorial units with one representative each.
A stark contrast with the complex and pluriform organization of author-
ity in Medieval Europe, where authority was divided along overlapping
functional, territorial, personal and sectoral lines, including the conflicting
authority claims of the church and even more worldly rulers.[58]

4.1   Discovering the external via the internal

In this second step early internationalists[59] such as Vitoria,[60] Suárez,[61]
Gentili,[62] and Grotius[63] seize this potential to *create* the external itself.[64] For
only after the creation of the 'internal' by Bodin could an 'external' space
be conceived as well.[65] In this 'external' space territorial sovereigns could

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58   Franklin (1973), 4 et seq. Koskenniemi (2005), 116, and Jackson (2007), 25, 'They conceived
      of themselves as belonging to one, unified Christian World – Christendom – however
      loose and wobbly its unity might be in practice.' Other actors could only become external
      after their was a realization of the internal. Also see G. Mattingly, *Renaissance Diplomacy*
      (Dover Publications 1988), 16.
59   A group also known as 'primitive scholarship', D. Kennedy, 'Primitive Legal Scholar-
      ship', 27 *Harvard. International Law Journal* (1986), 1 et seq.
60   F. de Vittoria (1480-1546), central work *Reflectiones Theologicae,* of which especially *De
      Indis Noviter Inventis* (on the recently discovered Indians) and *De Iure Belli Hispanorum in
      Barbaros* (On the right of war waged by Spain against the Barbarians) would now be con-
      sidered 'international'. See: E. Nys (ed), J. Pawley Bate (trans), *Classics of International Law
      No. 7* (Carnegie Foundation 1917).
61   F. Suarez (1584-1617), of which the most relevant 'international' work is *De Legibus, ac Deo
      Legislatore* (On the Law, and God the legislator). See: J.B. Scott (ed), G. Williams, A Brown
      & J. Waldron (trans), *Selections from Three Works of Francisco Suárez*, *Classics of International
      Law No. 20* (Clarendon Press 1944).
62   A. Gentili (1552-1608), See especially his *De Iure Belli Libri Tres* (Three book on the right to
      war), in: J.B. Scott ed., J. Rolfe (trans), *Classics of International law No. 16* (Clarendon Press
      1933) and *De Legationibus Libri tres* (On Envoys), in: J.B. Scott (ed), G. Laing (trans), *Clas-
      sics of International Law No. 12* (OUP 1924).
63   H. Grotius (1583-1645), with of course as the central work for this chapter *De Iure Belli ac
      Pacis Libris Tres* (On the right of war and peace), in: J.B Scott (ed), F. Kelsey (trans), *Classics
      of International Law No. 3* (Clarendon Press 1925).
64   Shaw (2003), 20; Jackson (1999), 432, Hinsley (1986), 185, who talks about a 'refashioning'
      of internal sovereignty that is required.
65   Hinsley (1987), 159.

in turn become the exclusive actors.[66] Instead of the linchpin in the internal organization of a polity, sovereigns become the building blocks of what we by now have learned to see as the *international legal order*.[67] The major consequence of this conceptual innovation was revealed and illustrated by Westphalia:[68] Sectoral, functional and overlapping authority was to be replaced by a system of territorial, sovereign units, with one supreme authority each.[69]

4.2   A new concept is born: External sovereignty

In this way external sovereignty transplanted Bodin's concept of internal sovereignty into the external arena.[70] As a result, external sovereignty has many similarities with internal sovereignty. It naturally shares some structural elements and underlying logic with its conceptual parent.[71] The early internationalists also remained *in sync* with Bodin on several other important points. For instance, they generally retained personal sovereigns.[72] Equally their external sovereigns were not absolute but remained bound by the rules of God and nature.[73]

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66 Obviously historical and gradual developments are concerned here, and territory has always played an important ordering role. This role, however, was not yet as conceptually fundamental or developed as it became. No concept or understanding of an international system, existing of specific territorially organized external actors, yet existed (Shaw (2003), 15). In addition, this was a first, conceptual step. It would take a long time before the world indeed consisted, or was generally perceived to consist, exclusively of territorial sovereigns. Important here is especially that such a world became *imaginable*. See also Bartelson (1995).

67 Grotius, for instance, held that the law between nations derived its binding force of from the will of all or many nations. See also L. Strauss and J. Cropsey (eds), *History of Political Philosophy* (3d edn, University of Chicago Press 1987), 390 and Hinsley (1986), 90 as well as his differentiation between internal and external sovereignty in chapters IV and V.

68 Of course the conceptual development was, in its turn, influenced by the already changing political reality in the period before Westphalia.

69 At a time where many of these 'sovereigns' had long lost true internal sovereignty as understood by Bodin, a fact that further underscores the complete abstraction from the real internal sovereign in the external discourse.

70 Also see Shaw (2003), 21: 'the idea of the sovereign as supreme legislator was in the course of time *transmuted* into the principle which gave the state supreme power vis-à-vis other states.'

71 The argument by Van Roermund that both internal and external sovereignty 'flow from an idea of sovereignty being 'supreme power'.' Is recognized. A relation between the two concepts is also not denied, nor is it claimed that this distinction is a sufficient answer in itself to the 'Argument from Incoherence'. Merely that it provides a better sovereignty narrative for the EU. Van Roermund (2006), 40-41.

72 Koskenniemi (2005), 98-99, Bartelson (1995), 98.

73 See for example Vittoria, *De Indis* sect. I, 120-122 or Vitoria (Quoting the Bible, Romans 13) in '*De Potestate Civili*' lxx., Suárez, *De Legibus*, Book I, Chapter I, sect. 6, or *De Legibus*, Book II, Chapter 19, sect. 9, 348-349, Gentili, *De Iure*, p. 10, and Grotius *De Iure Belli*, Prolegomena par. 16. Further see Kennedy (1986), 4 et seq., Koskenniemi (2005), 95 et seq., and H. Bull, *The Anarchical Society* (3rd ed. Palgrave 2002), 29. Hinsley (1986), 181.

Despite these similarities, however, external sovereignty formed a separate and distinct concept from internal sovereignty, already at its inception. External sovereignty completely abstracts from Bodin's core question, namely the internal position of a sovereign in his own polity. This core question is turned into the *assumption*: an absolute sovereign exists in each territory, and represents this territory externally.[74] All the complexities with which Bodin was concerned, therefore, become irrelevant. Instead they are simplified into a simple assumption and applied to the relation between sovereigns that did not concern Bodin. As internal and external sovereignty still attached to the same entity (the monarch), this fundamental difference between internal and external sovereignty, however, was not yet very conspicuous, although it would lead both concepts to develop very differently.

5   THE CONSTITUTIONALIZATION OF THE INTERNAL SOVEREIGN

The third step in our analysis describes the taming of the internal sovereign. For where sovereigns increasingly became a reality instead of an ideal, the need quickly arose to effectively control their authority. A desire, however, that proved a challenge, both practically and conceptually.

The modern history of taming sovereign and governmental power is so well known that one could almost suffice with naming a series of icons: Locke, Montesquieu, Hume, Rousseau, Hamilton, Madison, Mill, Tocqueville, and so on.[75]

Within this history our analysis focuses on three developments that are of special interest to a confederal conception: the shift from personal to abstract sovereigns, the creation of a constitutional layer between the sovereign and the exercise of sovereign prerogatives, and the invention of the people as the semi-abstract sovereign underlying that constitution. Developments that lead us to the second definitional element of confederal sovereignty explored in this thesis, that of popular sovereignty and its potential appeal for EU integration.

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74   As shown below, within the concept of external sovereignty this internal question will increasingly be abstracted from. See also Hinsley (1986), 225.
75   More recent additions to this canon of course exist.

5.1   The abstract sovereign: Abstractions don't shoot

Although abstraction often form an escape where true understanding is
lacking,[76] for sovereignty abstraction proved part of the solution.[77] One of
the central strategies to reconcile 'absolute and effective power' with 'lim-
ited and controlled power'[78] turned out to be the use of abstract sovereigns.
[79] Abstractions as 'the state' or 'the nation' made it possible to make the
internal sovereign more absolute, and less threatening for liberty at the
same time.

To begin with an abstract sovereign avoids many of the problems of a
human sovereign.[80] An abstraction will never have delusions of grandeur
or put his individual interest over the common good. Even more fundamen-
tally, an abstraction cannot decide, act, or exercise power itself. In this sense
an abstraction resembles the Eunuch in a Harem, the classical solutions to
the *quis custodiet*.
    The impotence of an abstraction to act necessitates an elaborate sys-
tem of delegation, as eventually a competence will have to be applied by a
person.[81] It is this need to delegate *all* public power from the abstraction to
institutions and individuals that creates the crucial room required to accom-
modate a separation of powers and checks and balances, without removing
the sovereign as the theoretical and conceptual basis under the legal order.[82]
Under an abstract sovereign, therefore, conceptual space becomes available
to freely cut, separate, limit and divide public authority.[83] Although Bodin
accepted the possibility of delegation, such pervasive and all-encompass-
ing delegation is an important modification to his conception, and enables

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76   Cf the discussion of rationality and knowledge by Hayek (1960), ch. 2 and 3.
77   As it did already in the early Thomist attempt to reconcile absolute multiple claims to
      power (Community, Church, Empire) which could only be accommodated by assuming
      a higher yet more abstract notion of divine sovereignty. Also see Hinsley (1986), 99. Alter-
      natively, abstraction could be seen as a logical recognition of the fact that the unity pre-
      supposed by sovereignty is only the (fictive) agent to whom the joint (or popular) inten-
      tion is ascribed; there need not be a physical, concrete 'we' for individual agents to
      ascribe an action to it. Cf. Van Roermund (2006), 47.
78   Also see *Federalist Paper* No. 37.
79   Jakab (2006), 375 et seq. On this point I therefore disagree with Hinsley: only after Bodin
      was a more coherent way found to create both an unrestricted power yet escape simple
      absolutism. (Hinsley 1986), 125).
80   Cf Hinsley (1986), 221.
81   Hinsley (1986), 146.
82   Cf in this regard also Dworkins comments on the notion of discretion. R.M. Dworkin,
      Taking Rights Seriously (Duckworth 1978), 31.
83   Here any Critical Legal Studies approach would of course point out that in reality a fic-
      tion is deployed to mask the real holders of power, and this power needs to be traced
      back to the actual people behind such fictions to find out what they had for breakfasts.
      Compare also Schmitt's *auctoritatis interposito* (Schmitt (2005), 31). Acknowledging this
      risk, see nevertheless the discussion above on the fact that abstract sovereigns, as a legal
      fiction, are exactly used not to force a regression into actual power analysis.

the use of a modern constitution to structure and control internal sovereign authority.

5.2 The constitutional layer

With an abstract sovereign a constitution becomes a logical, and even necessary step, even from the perspective of the sovereign. After all the constitution is not a way in which the sovereign restricts himself, but a way in which the sovereign restricts his servants, thereby safeguarding his own sovereignty.[84]

The constitution, or any layer of rules between the actual wielders of public authority and the sovereign, thereby offers a practical means to reduce the classical tension between the 'absoluteness' of sovereignty and the obvious desire to safeguard some 'higher norms' such as the right to life or property. For within a constitutional layer these higher norms can be positivized, which makes them clear, cognizable and legally enforceable. Formally, furthermore, such constitutional rights do not form a restriction of the sovereign, yet a restriction the sovereign has placed on his own servants. Factually however, as the sovereign power can only be wielded via intermediaries who are bound by the constitution, such constitutional safeguards tend to cover all exercise of public authority. The constitutional order in this way *absorbs* the higher norm, and internalizes it.[85]

The shift to abstract sovereigns and constitutions also enabled a further development within internal sovereignty: the discovery of the people as a semi-abstract sovereign. Here we are of course especially interested in the evolution of internal and popular sovereignty that supported American federation, and lead to the famous 'We, the people'.

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84 Although the problem remains to what degree the constitution can limit the sovereign in the future, for instance by entrenching clauses. On the other hand, no legal contraption is truly capable of blocking the will of an activated people, or other energy peaks in reality, if these truly want to alter the constitution.

85 See especially variants of 'Soft Positivism' such as that of H.L.A. Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994), in which the Rule of Recognition may also *refer* to 'soft' sources of law such as morality. Obviously this strategy does not solve the fundamental theoretical problem what to do when the constitution itself conflicts with a higher norm. The practical significance of this question, however, is greatly reduced where the constitution usually matches the 'higher' norm. It is no coincidence that most 'universal, 'higher' norms are nowhere protected more effectively than as part of a constitutional framework, latched directly to public power itself. As long as we do not agree on the content and status of fundamental norms, especially not once we leave the safety of abstraction, the best option might indeed be to prevent the need for asking these questions by positivizing them in constitutions or treaties in a form of pre-emptive practicality.

5.3   The Federalists and the sovereign 'We'

As discussed in part I the American Constitution leaves little doubt as to where sovereignty lies: the people. The people are the 'fountain of authority' for all public power.[86] This 'people' however, form an abstract, almost mythical figure. One that disappeared into the background, certainly after the Constitution had been ratified.[87]

Obviously the US has an actual population, consisting of very real people. These people are, however, not constantly present as the sovereign. Normally these citizens form one part of the democratic system of governance as established by the sovereign 'People'[88]

This separation between the 'People' as sovereign and the people as the normal electorate also becomes apparent after one realizes that the 'sovereign' was deliberately left without any means to act once it had enacted the Constitution.[89] Outside the Constitution and the system of government it creates 'the People' have no more means to execute their wishes. Even amending the Constitution has to take place within the framework of the Constitution itself.[90]

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86   *Federalist Paper* No. 51.
87   See chapter 2, section 2.1.2. One could, furthermore, go one step further and state that even during the 'founding' moment 'the people' were a purely symbolic construct allowing the presupposition of unity. Cf Lindahl (2006), 98: 'The sovereign people is not a real entity but a symbolic pole lying 'outside' the community of individuals , and by reference to which these individuals can recognize themselves as the members of a polity.' Such a fully abstract understanding of the people fully fits with the (normative) aims of this thesis, and does not prevent relating the EU to these different abstractions.
88   On the act whereby the people as the *pouvoir constituent* create the constitution and attribute political power to themselves and public institutions also see Grimm (1995), 290.
89   Compare in the framework of a Schmittian analysis the people with the 'unmoved mover', the watchmaker that after activating the mechanism withdraws. The people here are both *Pouvoir Constituant*, and *Pouvoir Constitueé*. See, also pointing out this incapacity of the people, H.P. Monaghan, 'We the People[s], 'Original Understanding, and Constitutional Amendment', 96 *Columbia Law Review* (1996), 121-122, 168. Monaghan, however, ignores the normative claim and prescriptive nature of sovereignty, and the capacity of the people to become a reality. On the other extreme, reminding us of the risk (or benefits) of direct action by the sovereign people see the work of Amar, for instance A.R. Amar, 'The Consent of the Governed: Constitutional Amendment Outside Art. V', 94 *Columbia Law Review* (1994), 457.
90   See article V of the US Constitution. Clearly the option of revolution remains, but this would bring us back to an analysis of real power, and not legal authority. Also see *Federalist Papers* No. 51.

Exorcising the direct use, and abuse, of the people's sovereign power actually formed one of the explicit aims of the Federalists.[91] For the biggest danger in 'popular government' was tyrannical rule by a faction.[92] Publius is painfully clear:

'whilst all authority will be derived from and dependant on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority will be in little danger from interested combinations of the majority.'[93]

Put more plainly, although the people as a whole are the sole legitimate source of power, we would rather not see them wield that power directly.[94] The original and ultimate sovereign authority is therefore placed in a (semi-) abstraction, the People.[95] This abstraction can then be used as a legitimate source and tool to delegate parts of this public authority over the different parts of government. At the same time, however, this approach creates a strong, and important, normative link between the people and the different levels of government. The people, furthermore, may be an abstraction in daily practice, yet certainly have the *potential* to become far less abstract in times of crisis or fundamental conflict. Especially so when the constitutional layer does not provide a substantive or procedural solution and one or more factions are able to appeal directly to the authority of the people.[96]

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91   See also chapter 5, section 2 and 3 on the abuse and excesses of democracy after the revolution.

92   See especially *Federalist Papers* No. 10 for the classic formulation of this point.

93   *Federalist Papers* No. 51.

94   Cf in this regard also the, somewhat contradictory, limited grant of sovereignty to the people in art. 1 of the Italian constitution: 'Sovereignty belongs to the people, who exercise it in the manner, and within the limits, laid down by the Constitution.' A limit that also fits with the remaining position of the state and the inviolable core of some constitutional values (not provisions), such as embodied in art. 139, which cannot be amended. Here one could say that ultimate sovereignty even lies in these values. Cf Cartabia (2006), 317. Art. 33 of the Belgian constitution equally limits the sovereign powers of the nation.

95   As an abstraction, one can also disagree on when this pre-political people was established. It can for instance be asked if the American people were created by, or with, the federate Constitution, or whether they predated it. Clearly this question is also one of self-creation and therefore politics. Lincoln, for instance, and other anti-secessionists during the Civil War, would hold that the American People had even predated the Confederation and had created the states. In the words of Lincoln: 'The Union is older than any of the States; and in fact created them as States.' The only thing relevant here is *that* the US Constitution presupposes the existence of a sovereign American people. Whether created before, during, or after the ratification of the Constitution is not even that relevant. The quote is from M.E. Brandon, *Free in the World, American Slavery and Constitutional Failure* (Princeton University Press 1998), 174.

96   A referendum may be an (intermediate) solution allowing a controlled appeal to the people (if not quite the pre-political *constituant*). Cf in this regard the qualification of a constitutional referendum by the French *Conseil constitutionnel* in *Maastricht II* as 'adoptées par le Peuple français'(…) 'constituent l'expression directe de la souveraineté nationale.'

As will be discussed further below, this might be the situation in the EU at the moment where increasing appeals to the authority of the people in the form of referenda are felt to be necessary.

5.4   *Combining federalism, sovereignty, and democracy*

The American use of popular sovereignty already formed an interesting development in internal sovereignty in itself.[97] So interesting that the concept of popular sovereignty could of course easily fill several volumes by itself. Here we can only make two limited and selective points regarding the potential of popular sovereignty for a confederal notion of sovereignty.

Firstly, the use of a semi-abstract people as the sovereign allowed a reconciliation between sovereignty and federation.[98] Ultimate authority was located in the non-statal and largely abstract entity of 'the People'. Through the constitution, the People then delegated sovereign prerogatives directly to both governments. As a result, both government hold original power, independent from one another.[99] By creating a semi-abstract sovereign over and above the multiple governments the federalists transformed sovereignty into a foundation for the federate structure that it appeared to resist. [100]

To grasp the importance of this reconciliation it is important to realize that, as in the EU today, sovereignty was initially used as a key argument *against* the proposed federate system.[101] The federalists countered this argument precisely by basing these multiple and separate governments on a single sovereign people.[102] Instead of anathema, the plurality of governments reflected and safeguarded the sovereignty of the people.[103]

Second, and of special interest to the EU, popular sovereignty dovetailed with democratic theory. By choosing the people as the ultimate locus of sovereignty, the American system linked sovereignty and federation to democracy, greatly contributing to the normative appeal of both. Though, as we saw, the constitution did also aim to reduce what were seen as the excesses of direct popular government, it at the same time provided a powerful

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97   Elazar (1976), 9 et seq., Elazar (2006), 41.
98   See below chapter 2, section 2.1.2.
99   See also Grimm (1995), 287: 'The splitting of the legal order is thus preceded by a splitting of the public power into a *pouvoir constituant*, formed by the people as sovereign, and various *pouvoirs constitutes* deriving their power from it.'
100   In this regard I disagree with Schütze (2009), 1077, that the US did not focus on sovereignty. Sovereignty was very much considered, and then a pragmatic and novel approach was taken. Also see Elazar (2006), 41: 'Rather than accepting the sixteenth-century European view of the sovereign state, Americans understood sovereignty to be vested in the People'.
101   Wood, (1969), 527-529, and Bailyn (1993).
102   This line of argument even became 'the basis of all Federalist thinking' (Wood, (1969), 530), not accidentally merging sovereignty with democratic theory at the same time.
103   Cf also Elazar (2006), 39 and 41.

foundation for democratization in the long run. For in addition to the democratic mechanisms within the Constitution, the people were postulated as the ultimate source of authority and legitimacy. Even though one can, and probably should, question the extent to which this assumption reflects reality, this is an important normative statement. It expresses a key constitutional value, which has surely impacted on the development of actual politics in the US. In any event it forms an important source of legitimacy for the American government in general, as its authority can be founded on the People directly. The lasting appeal and power of the 'We the People' is a testimony to the potency of this linkage.[104]

As will be discussed further below, both the capacity of popular sovereignty to ground multiple governments, as well as its normative linkage with democracy may be of use to an EU needing to bridge a gap between its confederal foundation and a necessary but weighty federate superstructure.[105] First however, we return to the development of external sovereignty. The fourth and penultimate step in our analysis will show how external sovereignty became increasingly absolute, and further removed from its historical roots in internal sovereignty.

6   Fulfilling the myth: External sovereignty and the creation
     of the absolute

In step two of our analysis we saw how the concept of internal sovereignty was used as a basic assumption to create, found and structure an external order.

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104   Clearly this linkage also comes at the price of some conceptual confusion, including the charge of incoherency, generally based on Foucault, that sovereignty aims to 'express both the (political) power that enacts law and the law that restrains (political) power.' Equally it injects some clearly whish full thinking or 'In one fell swoop it turns both rule of law and democracy into a romantic dream of universal participation.' (Van Roermund (2006), 34, 40). At the same time this transition, which precisely allows the move from pre-legal to a legal, constitutionalized, and self-restraining order, also forms the power of sovereignty. See also for a positive evaluation of this sovereign 'paradox' Walker (2006b). Equally the proposals in this thesis would also fit with a 'reflexive' understanding of popular sovereignty, which leaves the self-definition of their unity to the different member peoples.

105   At the same time the conceptual problems inherent in popular sovereignty must be recognized as well, especially its (unfounded) presumption of a unity at the moment of constitution, and the related danger of according 'primacy of presence over representation.' (Cf Lindahl (2006), 95-97, and 111). Besides pragmatically pointing to the *de facto* usefulness of popular sovereignty, one could also point to the role of *time* here, seeing how the claim of unity has to be sustained and approved in the future. To the theoretical objection that 'unity cannot be generated from plurality' the perhaps low brow but effective answer of, for instance, the federalists would be that they have managed to do precisely that. Lindahl also accepts this where he speaks of 'the core of irreducible groundlessness at the heart of every political community (…).' (p. 113).

This fourth step looks at two subsequent developments in external sovereignty. First, how externally the 'state' became the exclusive carrier of sovereignty. Second, how this external sovereignty became increasingly absolute and dominant.[106]

6.1   *From Monarch to State: Disconnecting the external from the internal*

Gradually, the state has become the model-T of external sovereignty: external sovereigns may come in all forms and shapes, as long as they are states.[107] In this way territorial sovereigns became the exclusive, and conceptually standardized, building blocks of the 'external'.[108] An approach that has been of great practical value in conceptualizing the international legal order, providing it with subject, object and foundation at the same time.[109] Such an exclusive role for the state, however, also had significant consequences
       for external sovereignty, and its relation to internal sovereignty.

To begin with this development required the definition of a state to become so general that it could encompass all possible types of internal organization. From people's-republic to democracy and theocracy, all can be a state as long as they have effective control over people and territory.[110] In turn, however, this meant that the external sovereign had to be fully detached from the reality and complexities of the internal sovereign. No longer united in the person of the monarch, the internal and the external sovereign become two different entities.[111]
       A second consequence of the state becoming the sole possible external sovereign was that – by necessity – the state also became the *exclusive* external representative of the *whole* internal sovereignty. The internal sov-

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106   See also Fassbender (2006), 118 et seq.
107   When Henry Ford was asked in what colours his famous Model-T could be ordered he famously answered (so goes at least the story) 'People can get the Model-T in any colour they want, as long as it is black'. He had discovered that black paint dried the fastest, and therefore sped up the production process.
108   In the words of Lauterpacht: 'The orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law.' E. Lauterpacht (ed), *International Law: Collected Papers, Being the Collected Papers of Hersch Lauterpacht, vol. II* (CUP 1975), 489, Shaw (2003), 177.
109   Shaw (2003), 189 et seq. Of course this foundation still contains many a problem as well. See Koskenniemi (2005), 246 et seq.
110   Or where other, powerful, sovereigns decide they are, or should be, sovereign. See Krasner (1999).
111   Kennedy (1986), 8. One result of the recent weakening of absolute external sovereignty, therefore, also might be that doubt arises as to the right of external representation where another, normatively more authoritative, internal sovereign claims sovereign rights, such as a popular resistant movement or a suppressed people claiming the right of self-determination. Here the internal sovereign also shimmers through, upsetting the external system.

ereign simply did not have another route to manifest itself externally. As a result internal sovereigns were, in a sense, *locked in to their external shells*. Where internally the state is (formally) subordinate to the sovereign People, externally this subordination is reversed, as it is assumed that the state has full internal control and say over its 'population'. The only remaining link between internal and external sovereignty here is the *assumption* underlying external sovereignty that somewhere within the national order a supreme authority exists, and that this sovereignty is represented by the state.

6.2   *The absolute external sovereign*

In addition to this divergence between the identity of the internal and the external sovereign, the external sovereign also became increasingly absolute. To start with, the exclusive position of the state logically makes it a far more absolute and powerful actor than the divided, checked, and circumscribed internal recipients of delegated sovereign prerogatives. The absolute nature of the externally sovereign state was further reinforced by the theoretical victory of positivism in international law.[112] Positivism freed the external sovereigns from the normative limits that the early internationalists had still firmly believed in. Unlike the internal sovereign, however, they were not, or at least not to the same level, encapsulated under a constitutional structure.

The modern external sovereign, therefore, emerged as an absolute and unlimited state, exclusively representing the national sovereignty on the international plane. The state had turned into the absolute and mythical entity the internal sovereign never was.

6.3   *The conceptual dominance of external sovereignty*

The external statal sovereign did not just eclipse the internal sovereign in absoluteness. External sovereignty also eclipsed internal sovereignty in visibility and conceptual dominance. The archetypical example of a sovereign changed from the sovereign monarch to the sovereign state. The rise of the *nation*-state only supported this image.

The conceptual dominance of the external sovereign was further enhanced by the fact that all the bearers of delegated internal sovereignty formed part of the state. Though divided functionally and geographically, all public authority was in the hands of different emanations of the state. Consequently, the state became the exclusive nexus between internal and external sovereignty; it *exercised* all internal public authority and *was* the exclusive, absolute external sovereign. Even though internal and external sovereignty were no longer united in the crown, the difference between the internal and the external sovereign was still masked by the state.

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112   Koskenniemi (2005), 226 et seq., Shaw (2003), 25.

At the same time the internal sovereign became less visible. It was increasingly embedded in, and hidden behind, the ever more developed legal and constitutional system.[113] The more seamless these systems became, and the more the exercise of public authority was guided by detailed rules, established conventions and effective procedural mechanisms to prevent or solve conflicts, the more the sovereign People could fade into the background. The very success of the constitutionalist project to encapsulate the sovereign within a constitutional framework, therefore, decreased the visibility and daily relevance of the sovereign. Sovereignty became more of a postulate for the state, and became less and less relevant in daily practice.

Combining these developments, it is not surprising that the state was increasingly seen as *the* sovereign, overshadowing more fundamental, and ultimately more authoritative, internal conceptions of sovereignty. Completing the eclipse of internal sovereignty it even became common to assume that internal and external sovereignty are two elements of the same concept.[114] In a form of conceptual patricide, external sovereignty thereby swallowed the notion of internal sovereignty, out of which it had itself developed.

6.4   *Sub-conclusion: Towards a fifth step in sovereignty?*

The previous sections outlined how internal and external sovereignty form two distinct concepts, both of which developed along completely opposing lines. Internal sovereignty became characterized by increasing delegation and diffusion of public authority. Using abstract sovereigns, and through increasingly complex systems for constitutional delegation, the exercise of sovereign authority was increasingly divided. Popular sovereignty linked internal sovereignty with democratic theory, and allowed a 'federal twist', further dividing power over multiple separate governments.

External sovereignty, in contrast, became increasingly typified by concentration and absoluteness. States became the sole and absolute sovereigns in the 'external' order. To enable this development external sovereignty was decoupled from internal sovereignty. The internal locus of sovereignty became irrelevant, and was replaced by the assumption of effective control over population and territory.

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113   Cf the conception of sovereignty as a borderline construct developed by Carl Schmitt (Schmitt (2005), 1 et seq.)

114   Cf Thym (2009), 1795, 1798, as well as A. Bleckmann and B. Fassbender, in: B. Simma (ed), *The Charter of the United Nations, vol I* (2nd edn. OUP 2002), Art. 2(1) paras. 3 et seq.

With the internal sovereign benignly receding behind the national constitutional order, the absolute and highly visible external sovereign, furthermore, became the dominant image of the sovereign. Due to the states' monopoly over delegated internal sovereign prerogatives, internal sovereignty increasingly became seen as one side of (the states) overall sovereignty.

More recently, however, the exclusive, and absolute, position of the state has come under pressure.[115] Both internally and externally the state appears to have lost its place at the pinnacle of public authority. Multiple related factors contribute to this development, amongst which 'globalization', increased interdependence, advancements in technology, and the decline of strict legal positivism.[116] We are, of course, especially, interested in one specific phenomenon in this regard: regional integration, of which the EU is the most prominent example.

These developments propel us from the relative safe haven of the past to the still unfolding present in the EU. They bring us to what, in the categorization developed in this thesis, would be a fifth phase in the conceptual development of sovereignty. As will be shown below, grasping this phase requires a sharp distinction between internal and external conceptions of sovereignty. For the developments spearheaded by the EU can best be understood as a further development of internal sovereignty at the expense of external sovereignty, and therefore as a clash between these two conceptions.

7   The EU: Where internal and external sovereignty meet?

Considering the confusion of internal and external sovereignty, and the relative dominance of external sovereignty, it can come as no surprise that the EU is generally approached from external conceptions of sovereignty, and that this is often unwittingly so. Moreover external conceptions of sovereignty might also be consciously considered the most appropriate. After all the EU is based on an international treaty signed by states. The domain of external sovereignty *par excellence* one would say.[117]

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115   See also Fassbender (2006), 124 et seq.

116   C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Courts* (1999), for instance p. 63 et seq., or P-M Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', 1 *Max Planck Yearbook on United Nations Law* (1997), 1.

117   For a good example of this statist assumption, as well as its dogmatic strength, see also the contribution by former British foreign secretary Jack Straw, 'A constitution for Europe' in the *Economist*, 12 October 2002. He states, without any hesitation, that: 'The constitution should start with just a few lines, setting out what the EU is—a union of sovereign states who have decided to pool some of that sovereignty, better to secure peace and prosperity in Europe and the wider world.'

Yet from the absolutist perspective of external sovereignty the EU offers a rather spectacular and confusing sight indeed. Significant competences, clearly linked to the exercise of sovereign authority, are taken from the state and delegated to an external and non-statal entity. Sovereignty, once absolute and indivisible, becomes a flexible substance. It appears capable of amazing feats such as being pooled, shared, cut up, temporarily given away, or simple being left in the middle.[118] Feats that are fully at odds with the absolute conceptions of external sovereignty that were outlined above. As a result we indeed appear forced to choose between sovereignty or the desire for integration.[119]

Once the EU is approached from the perspective of internal sovereignty a more logical and appealing, if far from perfect, picture emerges. EU characteristics that appear so baffling from the external perspective, such as far-reaching delegation and division of sovereign authority, become far less revolutionary. Internal sovereignty, after all, has already evolved to embrace total delegation and division of sovereign prerogatives over multiple actors. The federate twist even allowed the internal delegation of sovereign authority over multiple separate governments.

The perspective from internal sovereignty will be further developed in the following chapters. Three main conclusions, however, can already be drawn here based on the conceptual analysis carried out above, and the resulting distinction between internal and external sovereignty.

7.1   *The conceptual fit of integration and confederal sovereignty*

The first main conclusion is that European integration does not conflict with sovereignty as such, but only with external concepts of sovereignty. The EU does fit with the concept of internal sovereignty and its tradition of constitutionally dividing powers. Internal sovereignty, furthermore, forms the more fundamental concept of sovereignty, as it is both conceptually and normatively trumps external sovereignty. The assumption of internal sovereignty, for instance, underlies external sovereignty. And where external sovereignty abstracts from democratic theory, internal sovereignty has managed to dovetail with it through the notion of popular sovereignty. The EU,

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118   A development primarily initiated judicially. See, famously, E Case 26/62 *Van Gend en Loos*, Case 6/64 *Costa v E.N.E.L.*, and for the next steps case 294/83 *Les Verts* [1986] ECR 1339 and Joined cases C-402/05 P & C-415/05 P *Kadi I*, but is now also making theoretical furore. See amongst many others: L.J. Brinkhorst, *Europese Unie en Nationale Soevereiniteit* (Oratie Leiden 2008), Jackson (2007), Walker, (2006b), 5 especially note 7, J. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept', 97 *American Journal of International Law* (2003), 782, 801, 145 et seq., Habermas (1996), 125 et seq., MacCormick (2003), 1 et seq., De Witte (1995).

119   See the juxtaposition set out in chapter 9 above. Also see M. Keating, 'Sovereignty and Plurinational Democracy: Problems in Political Science', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 192, 198.

therefore, fits with what is ultimately the most important concept of sovereignty, even if it is not the most conspicuous one.

The second conclusion is that a confederal notion of sovereignty forms a logical next step in the evolution of internal sovereignty. As illustrated the evolution of internal sovereignty is one of increasing abstraction and delegation, with the federate twist even allowing the division of sovereign powers over multiple governments. Confederal sovereignty takes this evolution one step further. It incorporates extra-statal, and even non-statal, entities into the framework for the delegation of sovereign powers. Instead of delegating the exercise of sovereign powers to the state alone, the sovereign delegates some of his power outside the state, and thereby partially emancipates itself from the state.[120] The conceptual evolution of internal sovereignty, including its federate twist, here provides us with a wealth of conceptual substance and space to support this further evolution along confederal lines.

Furthermore, a confederal evolution also fits with the prescriptive nature of internal sovereignty. Just as under Bodin or in the US, it can be used to indicate how public authority *should* be organized and legitimated, and to subsequently help create that desired reality. An admittedly normative use of sovereignty that will be further explored and defended below. It nevertheless deserves to be stressed here already, as it explains why a conception of sovereignty for the EU is not directly falsified by any descriptive inaccuracy.

Jointly these two conclusions also lead to a third general conclusion: We are not so much witnessing a clash between integration and sovereignty, but one between internal and external sovereignty.

7.2   *The clash between internal and external sovereignty*

If regional integration can indeed be seen as a logical confederal development within internal sovereignty, where does the tension between sovereignty and integration come from? Why is the EU not simply embraced as an application of internal sovereignty?

The analysis above suggests that this is because, instead of a clash between sovereignty and integration as such, we are witnessing a clash between internal and external sovereignty. In the confederal system of European integration the organizing principles of internal sovereignty are being

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120   In this sense the confederal form fulfills exactly the need identified by Fisher in his famous 2000 speech: 'The completion of European Integration can only be successfully conceived if it is done on the basis of a division of sovereignty between Europe and the nation-state.' Fisher (2000).

applied in the 'external' domain: substantial sovereign powers are constitutionally delegated to entities outside the state.[121] Internal sovereignty, therefore, is conquering ground previously held by external sovereignty.

As a result, the long separate domains of internal and external sovereignty are increasingly colliding. The state no longer forms a complete barrier and controlling nexus between the two. Where internal and external sovereignty were first united in the crown, and where the difference between both was later masked by the state, the internal sovereign is now openly challenging the external sovereign. The existing conceptual framework, which sees both as part of the same concept, cannot explain this collision. Instead it remains committed to the dominant but unsuitable notion of external sovereignty. As a result this standard framework leads one to either reject integration or the concept of sovereignty as a whole. An outcome that fully follows the juxtaposition between statist defenders of sovereignty and pluralist defenders of integration outlined earlier. Not incidentally, as will be further shown below, both schools rely on unsuited external notions of sovereignty. Both can, therefore, be strengthened and even partially reconciled when infused with a confederal notion of sovereignty.

The tension between sovereignty and integration, therefore, should be exposed as a clash between internal and external sovereignty. Consequently we are also not witnessing the decline of sovereignty. Rather we are witnessing a relative decline of external sovereignty, and a relative ascendance of internal sovereignty. A development which cannot be comprehended as long as internal and external sovereignty are not separated, and the conceptual and normative primacy of internal sovereignty is not recognized.

This renewed ascent of internal sovereignty, in a confederal form, holds great opportunity for supporting and organizing far-reaching cooperation and integration between states. At the same time it also creates many challenges as it upsets part of the established and deeply rooted system for the exercise of public authority in place. Advantages and challenges that will be set out in more detail in the next chapter, now that the fit and coherence of a confederal conception of sovereignty has been established.

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121   Cf in this regard the intuition of W. Friedmann in 1964, referring to the Community: 'If mankind is to achieve a more effective international organization (…) the development must be from international towards constitutional law.' Note also the reliance on 'effectiveness', a key principle for the EU Court of Justice in justifying EU authority. W. Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964), 113.