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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10 The Confederal Potential of 'We the peoples'

1 Introduction: The uses of confederal sovereignty

Having set out the commonly assumed conflict between sovereignty and integration in chapter 8, and the conceptual feasibility of confederal sovereignty in chapter 9, this chapter further unpacks confederal sovereignty, and explores its explanatory and normative potential for the EU.[1] It first provides an introductory overview of confederal sovereignty (section 2), and establishes its fit with the EU Treaties and the case law of the European Court of Justice (section 3). Subsequently the idea of confederal sovereignty is further developed and tested by examining the potential advantages indicated in chapter 7. First to be discussed is the potential of confederal sovereignty to reduce some of the theoretical deadlocks that flow from the misconceived contradiction between sovereignty and integration, including some of the disagreement between statism and pluralism (sections 4 and 5). Second, and even more fundamentally, the capacity of confederal sovereignty to provide a more stable and potent confederal foundation for the EU will be explored. A vital task as this foundation must be able to support the increasing federate superstructure of the EU outlined in part I (section 6).

In addition to these two primary objectives, three further and mutually related benefits of confederal sovereignty will then be examined as well. To begin with it will be seen if confederal supremacy can help to explain why, and to what extent, constitutionalism seems to fit the EU (section 7). Subsequently we look at its potential to conceptualize a distinctly confederal form of supremacy for EU law. This would be a conception of supremacy that grants a certain type of broad operational primacy to EU law, without undermining a narrow but ultimate supremacy of national constitutions (section 8). Last, but certainly not least, we test the capacity of confederal sovereignty to create a normatively attractive narrative of and for the EU.

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1 See Walker (2006b), 3. The proposed analysis thereby also hopes to meet Walkers criticism that 'abstract debate' on sovereignty remains 'sterile and meaningless'. The conception developed in this chapter actually aims to connect a notion of sovereignty to the specific context of the EU, so that 'the particular conception of sovereignty within the particular intellectual scheme in question helps to produce significant knowledge claims on behalf of the scheme as a whole.'

One that builds on the potential of the EU to modify and improve the democratic process, rather than casting it as a necessary democratic evil (section 9).

2 Outlining a confederal conception of sovereignty

So what would confederal sovereignty look like? What conceptual outlines can be established based on the two definitional elements of internal and popular sovereignty suggested here as necessary elements of such a confederal conception?

The most basic shift concerns the identity of the sovereign. From the internal perspective it is no longer the state that forms the sovereign starting point.[2] Instead it is the sovereign entity that underlies public authority *within* the state. Under a popular conception of internal sovereignty this would be 'the people'. Already due to this basic fact all challenges lamenting that the Member States are loosing their sovereignty due to integration loose their comprehensibility. These challenges simply target the wrong sovereign.[3] Instead the question should be if the people, or any other internal sovereign, have lost their sovereignty due to European integration.[4] A question that must be approached from the internal perspective, including its extensive practice of delegation.[5]

For as we saw above, the development of (semi-)abstract sovereigns, such as 'the people', necessitated extensive delegation.[6] In turn, such delegation enabled the development of a *constitutional layer*, which structured the delegation and laid down some general rules and outer limits for the use of delegated powers. Within that constitutional layer authority could subsequently be divided without dividing the underlying sovereignty. The federate twist even allowed a division of authority over multiple distinct governments, though still only within one state.

2 On the way in which the concept of sovereignty used tends to lead to an unhelpful statist focus also see Schütze (2009), 1095.

3 Cf. also Börzel and Risse (2000), 7.

4 From here on the discussion will assume the people as the internal sovereign. Most arguments made here, however, will also fit wit other internal and abstract sovereigns. Yet, as will be further discussed below, it is believed that a popular conception of internal sovereignty might of special interest to the EU.

5 For a possible counterargument, focusing on the continued necessity of the state to represent the people, see Walker (2006b), 14, note 31. As clarified further below, however, this argument looses its force against a confederal conception, which has no qualms in acknowledging the relative normative primacy of the statal sub-units.

6 Cf Hinsley (1986), 222, 'the only remaining recourse was to locate sovereignty in the body-politic which the community and the state together composed, the community being regarded as wholly or partly the source of sovereignty and the state as the sole instrument which exercised it.'

From the confederal perspective the EU largely follows this system of constitutional delegation of sovereign powers, albeit with three major modifications. First, the internal sovereigns have now delegated part of their authority *outside* their own statal framework. Second, the recipient of the delegated power is a non-statal actor. Third, multiple internal sovereigns have *reciprocally* delegated sovereign prerogatives to one and the same external entity, the EU. What has changed, therefore, is the practice of solely delegating sovereign powers of this scope and nature *within* the own state, not the practice of splitting up and parcelling out sovereign powers itself.[7]

Clearly these are important modifications in the organization of public authority, whose effects will be further analysed below. They do not, however, alter the fundamental structure of internal and popular sovereignty. For neither of these require the sovereign to delegate solely to one recipient.[8] A fact already born out by the US federate system, as well as by the federate systems within the EU for that matter. All of these have multiple recipients of delegated authority.

Equally there is nothing in the concepts of internal and popular sovereignty that requires a sovereign to delegate powers within a *single* state only, or that the recipients of sovereign prerogatives could only be *statal* actors.[9] As shown in chapter 9, nothing in the concept of internal sovereignty prevents such extra-statal delegation, certainly not as it is the internal sovereign that underlies the state, and not the other way around.

Confederal sovereignty, therefore, does not start from federate sovereignty, but from the more basic assumption underlying the feder*al* use of sovereignty: The basic capacity of a sovereign people to delegate part of its sovereign powers to alternative centres of government. Different from the federate use of sovereignty, however, sovereign authority is directly delegated to an extra-statal actor.[10] This confederal application of sovereignty unravels the traditional understanding of sovereignty where the 'external' is the exclusive domain of sovereign states. Nonetheless it forms a perfectly

7 This, furthermore, is also an adaption of the federal model, which first creates different actors within a single state, to which one people then delegates powers.

8 See also chapter 10, section 4 on the case law of the German *Bundesverfassungsgericht*, which mistakenly relies on this implicit assumption.

9 The American States or German *Länder*, after all, are not sovereign states either. Cf also O. Beaud, 'Europa als Föderation? Relevanz und Bedeuting einer Bundeslehre für due Europäische Union', 5 *Forum Constitutiones Europea* (2008), 18 or Lindahl (2006), 89. Equally this approach also fits with Loughlins understanding of sovereignty as a tool to 'give expression to the distinctively political bond between a group of people and its mode of governance.' It is only that the group now includes multiple peoples, and that the mode of governance is confederal. Loughlin (2006), 56.

10 Note that the defining difference between federate and confederal use of sovereignty here list in the extra-statal delegation, and not in the fact that the EU is also a non-statal actor. The non-statal nature of the EU does, however, form an interesting further modification on its own, and equally fits fully with the confederal approach developed here.

logical application of federal popular sovereignty, only now in a confederal modus outside of statal boundaries.

Once this capacity for the external delegation of sovereignty authority is acknowledged, the EU can be understood as a logical application of this capacity. An application which forms an evolution of the federate system analysed in part I: instead of creating one state to encapsulate the delegation of sovereignty, the EU includes the 'external' in the 'internal' constitutional systems of its members.[11] The EU is grounded in each national constitutional system separately: it does not receive its power in one chunk from an overarching supreme entity, but in multiple parcels from the different member peoples. Vice versa the EU included in all national constitutional schemes for the delegation of sovereign authority.[12] Relying on the rule by law, the establishment of an overarching state is not deemed necessary, as the whole is held together by a confederal and not a federate bond.

Though not creating a European state, this evolution does end the virtual monopoly of the state in executing sovereign authority and representing the internal sovereign. An arrangement that carried several benefits, for instance in terms of coherence and legitimacy. The loss of these benefits must now be compensated for, as will be further discussed below and in part III.

The more fundamental point here, however, is that the new confederal arrangement in the EU fully fits with internal and popular sovereignty. The EU can be logically understood as a simultaneous delegation of sovereign authority by multiple sovereign member peoples to one and the same centre of government.[13] This delegation, furthermore, is reciprocal between the

11 See already on how the confederal constitution should be considered as part of the constitution of the individual Member States, Schmitt (2008), part IV. See also the French *Conseil constitutionnel*, Décision No. 2004-505 DC of 19 November 2004, on the Constitutional Treaty, par 11: the French constitution recognizes 'l'existence d'un ordre juridique communautaire *integrer à l'ordre juridique interne* et distinct de l'ordre juridique international.'

12 Cf. here the notion of a 'composite constitution', as suggested by Besselink (2007), inter alia on p 6, and 15. The confederal perspctive fits with such composite approach, although more than the concept of Besselink a confederal perspective stresses the primacy of the national, and hopes to explain and support the necessary hierarchy to deal with conflicts between the different components. As such it may provide part of the limits of the composite constitution Besselink himself predicts. See chapter 10 sections 6,7 and 8 for further discussion of thse points.

13 Cf in this regard also the views of Calhoun on how popular sovereignty may resolve the tension between the indivisibility of sovereignty itself, and the federal co-existence of multiple governments wielding sovereign powers. Views which can easily be transposed to a confederal system, or rather were developed to support the confederal reading of the US Constitution that Calhoun favoured: 'There is no difficulty in understanding how powers, appertaining to sovereignty, may be divided; and the exercise of one portion delegated to one set of agents, and another portion to another: or how sovereignty may be vested in one man, or in a few, or in many.' This insight into the potential of sovereignty may be supported and developed, however, without ascribing to Calhoun's confederal reading of the American Constitution. As cited in Forsyth (1981), 125.

member peoples. Each people delegates authority in return for EU influence, but also for the delegation of sovereign authority to the EU by the other member peoples.[14] Not incidentally this leads to the confederal mirror image of the sovereignty structure in a federate system. Instead of one people delegating authority to two levels of government, in the EU multiple sovereign peoples reciprocally delegate part of their sovereign prerogatives to one and the same extra-statal government.

In true confederal style the definition of a member people is thereby left to the national level.[15] Who belongs to the French or Estonian people, and how these express their will, is determined within the national legal orders. Equally, and as will be further shown below, confederal sovereignty leaves a certain primary, or existential, authority and legitimacy with the different Member States. Nonetheless confederal sovereignty can at the same time create a sufficiently strong link between the member peoples and the EU to support a federate superstructure, and to keep the Member States on their toes – an important objective of federalism more generally. For unlike under federate popular sovereignty the centre does not receive the normative authority of the whole people, whilst the Member States remain the principal bodies through which the member peoples have organized themselves.[16]

Obviously confederal sovereignty and its application to the EU face multiple challenges. In addition, the conception explored here wilfully contains an element of idealism, as it also aims to provide a guide for the future development of the EU. Nevertheless confederal sovereignty can already claim a strong fit with the EU and with EU law today. Before we explore the advantages of confederal sovereignty further, it is first useful to establish this fit in more detail.

3 The fit between confederal sovereignty and the legal and normative basis of the EU

Legally and normatively confederal sovereignty fits with the Treaties as interpreted by the Court of Justice, their normative foundations, and some key trends in their evolution. A fit which obviously relates to the confederal foundation of the EU established in part I, and which can be demonstrated

14 Excepting exceptional arrangements such as opt-outs, rebates or exemptions for specific members, furthermore, these reciprocal delegations are, in principle, also of equal size. In the case of enhanced cooperation this reciprocity is also visible in the limited rights of those members not participating.

15 Art. 9 TEU, art. 18-21 TFEU.

16 On the strong but 'secondary' claim to primacy this creates to the EU see chapter 10 section 8.

through three key elements: the basis of the EU in delegation, the values of democracy and popular government, and the increasing relation between the EU and the individual.

3.1 The legal fit: Delegation of sovereign powers

Article 4 and 5 TEU explicitly base the EU on the principle of conferral. The EU only has those powers that have been delegated to it. All powers that have not been delegated to the EU 'remain' with the state, unless delegated to another entity.

The EU, therefore, has been incorporated into in the national constitutional scheme whereby the sovereign member peoples delegate sovereign prerogatives between different centres of government. As such art. 4 and 5 TEU do not transfer any sort of original competence or sovereignty onto the EU. They only delegate the exercise of some sovereign *powers*. The case law of the Court of Justice on the principle of conferral, and its meaning for the status of the EU, confirms this confederal approach.

To begin with the Court has never claimed actual sovereignty for the EU. It only holds that EU institutions have been 'endowed with sovereign rights'. Similarly the Member States have not lost internal sovereignty either, which they never had. They only 'limited their sovereign rights',[17] or as it was phrased in *Costa v. E.N.E.L.*: 'the EU, having real powers stemming from a limitation of sovereignty *or a transfer of powers* from the states to the Community, the Member States have limited *their sovereign rights*.'[18]

The Member States, therefore, have *not* limited their *sovereignty*. Some of the sovereign rights previously delegated to the Member States are now delegated to the EU, and therefore outside the statal framework altogether.[19] This reasoning has been consistently followed by the Court.[20] Recently it

17 Case 26/62 *Van Gend en Loos*.

18 Notice how the limitation of sovereignty is equated to a transfer of powers, and how only the Member States have limited their sovereign powers, not the member people. In this regard the Court also find that: 'The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of *their* sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail'.

19 Equally see Ruling 1/78 [1978] ECR 2151 on the Euratom Treaty, where the ECJ held that: 'The Member States, whether acting individually or collectively, are no longer able to impose on the Community obligations which impose conditions on the exercise of prerogatives which thenceforth belong to the Community and which therefore no longer fall within the field of national sovereignty.'

20 See also case 294/83 *Les Verts*. Cf also the comparable statement by the BVG in BVerfGE 2 BvR 2661/06 (2010) *Honeywell* par. 53: 'The primacy application also corresponds to the constitutional empowerment od art. 23.1. of the Basic Law, in accordance with which sovereign powers can be transferred to the European Union.' or BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*, par. 100.

has been reconfirmed in Opinion 1/09. Reiterating the autonomy of the EU legal order the Court holds:

> 'It is apparent from the Court's settled case-law that the *founding treaties* of the European Union, *unlike ordinary international treaties*, established a new legal order, possessing its own institutions, for the benefit of which *the States* have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (…) The essential characteristics of the European Union legal order thus constituted are in particular its *primacy* over the laws of the Member States and the *direct effect* of a whole series of provisions which are applicable to their nationals and to the Member States themselves'[21]

Following this internal, confederal logic the supremacy and potential direct effect of EU law should also not come as a surprise, just as the supremacy or direct effect of national law does not.[22] In any event the internal perspective of a sovereign people delegating power to both their state and the EU fully squares with the notion of conferral, and the fact that the EU lays claim to certain 'sovereign prerogatives' without claiming sovereignty as such.

3.2 The normative fit: The value of democracy, popular rule and identity

Normatively a confederal conception of sovereignty fits with the respect for national identity and the democratic values and principles which underlie the EU.

The EU is 'founded' on the value of democracy.[23] This foundational value requires the EU to recognise not just the national democratic systems, but also the sovereign position and ultimate authority of the member peoples that underlies these national democracies.[24] This duty is confirmed by the 'strict observance and the development of international law, including respect for the principles of the United Nations Charter' required by Article 3(5) TEU. These principles include the right to self-determination, and with

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21 In addition: 'In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the *constitutional charter* of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the *States have limited their sovereign rights* and the subjects of which comprise not only Member States but also their nationals.'

22 See further chapter 10, section 8.

23 Art. 2 and 10 TEU. The functioning of the EU is even *founded* on representative democracy. Already see as well the 1973 Copenhagen Declaration on European Identity, which in par. 2 defines as central to that identity: 'the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights.'

24 For the fundamental and superior status of such principles in the legal order see the forceful language of the ECJ in C402/05 P en C415/05 P *Kadi I*, par. 283-285, and especially 303.

that the ultimate authority of a people.[25] As stated, for instance, in Article 21(3) of the Universal Declaration of Human Rights (1948): 'The will of the people shall be the basis of the authority of government (…).'

In line with this respect for the member peoples, the consecutive Treaties have consistently aimed to create an ever closer union *among the peoples* of Europe.[26] The peoples are to remain the ultimate – and separate – building blocks. The new Article 4(2) TEU cements this recognition by requiring the EU to respect the different *national* identities.[27] A clear attempt to safeguard the ultimately confederal authority and sovereignty structure of the EU.

Basing the EU on a confederal conception of sovereignty equally provides a normative fit with the *national* political and legal systems. All Member States ascribe to democracy as a fundamental value. In fact they have reaffirmed so by ratifying the EU Treaties.[28] Article 7 TEU even creates an EU mechanism, political as it may be, for the EU to monitor and *enforce* these values of democracy and self-rule against a Member State. Embryonic as it is, this allows the EU to protect a sovereign people against their *own* state.

More fundamentally, however, democracy, and the related assumption of popular sovereignty, are already of foundational importance to the Member State legal systems.[29] Sixteen Member State constitutions and the Croatian Constitution explicitly acknowledge the sovereignty of the people and

25 See also Petersmann (2006), 146: 'The universal recognition of inalienable human rights to self-government legally limits state sovereignty by requiring respect (…) for popular sovereignty including rights to individual and democratic participation in the exercise of government powers.'

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

27 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government (…).'

28 Art. 2 and 6 TEU, as well as art. 49 TEU.

29 Heringa and Kiiver (2012), 15.

the fact that all public authority derives from these people.[30] Six other Member State constitutions nominate 'the Nation' as sovereign. Without denying the conceptual and historical significance of such 'Nations', they can largely be equated with accepting the sovereignty of the People which make up the Nation, certainly for the normative dimension discussed here.[31] Similarly, even the famed 'Sovereignty of Parliament' in the UK has become increasingly linked to the notion of representation of the Community, and hence with representing the people.[32] The Dutch Constitution does not mention sovereignty at all, yet if a notion of sovereignty were to be included it is difficult to imagine any other candidate than the people.

The Cypriot and Danish Constitutions provide a slightly different picture. For obvious reasons the Cypriot Constitution does not declare 'the people' sovereign. Instead it declares a sovereign republic, which respects both the Greek and the Turkish 'Communities'. Section 12 of the Danish Constitution places 'supreme authority' in the King, who is nevertheless bound by the Constitution. Twenty-four out of twenty-seven Member State constitutions, therefore, either directly or indirectly acknowledge the ultimate authority of the people. The three exceptions, furthermore, also fully acknowledge the value of democracy and popular representation, which in itself creates a strong link between public authority and the people.

Two remarks on the proposed use of *popular* sovereignty for an EU conception of confederal sovereignty, however, must be stressed at this point. First, it is a conception intended for the EU legal order. As such it remains compatible with Member State systems that rely on a non-popular internal sovereign. The proposed conception of confederal sovereignty, however, is at its strongest and most appealing where the national and EU conception of the internal sovereign are aligned along the lines of popular sovereignty.

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30 See art. 1 of the Austrian Constitution, art. 1(2) and 1(3) of the Bulgarian Constitution (but also see art. 9 and 44(2)), art. 1 of the Croatian Constitution, art. 2 of the Czech Constitution, art. 1 of the Estonian Constitution, Section 2(1) of the Finnish Constitution, Art. 20(2) of the German Basic Law, art. 1(2) of the Greek Constitution, art. 2(2), 5 and 68(1) of the Hungarian Constitution, art. 1 of the Italian Constitution, art. 1(2) of the Latvian Constitution, Art. 1 and 3 of the Portuguese Constitution, art. 2 of the Romanian Constitution, Art. 2(1) of the Slovak Constitution (but also see art 43(3) and 106), art. 3(2) of the Slovenian Constitution, art. 1(2) of the Spanish Constitution, and art. 1 of the Swedish Instrument of Government.

31 See art. 33 of the Belgian Federal Constitution, art. 3 of the 1958 French Constitution and art. 3 of the Declaration of Human and Citizen's rights of 1789, which still forms part of that Constitution, art. 1 of the Irish Constitution, which also refers to the 'Most Holy Trinity, from Whom is all authority', art. 2 of the Lithuanian Constitution, art. 32 of the Luxemburg Constitution, and art. 2(1) of the 1989 Polish Constitution and art. 4(1) of the 1997 Polish Constitution. De Witte notes for instance that, '(…) the sovereign 'Nation' in Belgium '(…) would now, if the article had to be rewritten, be called the 'people'. (B. de Witte, 'Do not Mention the Word: Sovereignty in Two Europhile Countries: Belgium and the Netherlands', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 353.

32 J. Goldsworthy, *The Sovereignty of Parliament* (Clarendon Press 1999), 231.

Second, and related, a popular conception of confederal sovereignty purposefully contains an element of idealism. Where a national system does not recognize popular sovereignty, the EU may be a source of inspiration. In this way as well the EU can positively contribute to democratisation, instead of threatening it.[33]

3.3 The evolutionary fit: The increasing relation between the EU and the individual

Having established the respect of the EU for the sovereign peoples in their *collective* capacities, a last element of fit concerns the increasing relation between the EU and the individual. This increasing relation forms a clear trend throughout the evolution of the EU. The famous direct effect of EU law already created an unmediated link between individuals and the EU legal order. Contrary to the norm in 'international' law, the individual became a subject, and not just an object of EU law.[34] A link that broadened and deepened with the expansion of EU law itself.

Already under the ECSC, furthermore, the peoples were directly involved politically as well. The Assembly was composed of 'representatives of the peoples of the Member States'.[35] Art. 10 TEU continues this line with a more individual twist, declaring that 'Citizens are directly represented at Union level in the European Parliament.' Several other innovations under Lisbon have deepened this political link. The inclusion of national parliaments into the constitutional structure of the EU directly involves the national representatives of the member peoples.[36] Article 10(3) TEU gives each citizen the right (or perhaps implores him) to 'participate in the democratic life of the Union.' Article 11 TEU obliges EU institutions to 'give citizens and representative associations' an opportunity to make known their views.

The new citizens' initiative forms another clear attempt to more directly involve individuals at the European level.[37] Though weak, the initiative creates a direct channel between the peoples and the EU level. In a sense it forms a confederal check where the peoples feel that either the EU institutions, or their own statal representatives, are not doing their job properly. Now the required number of one million citizens must represent 'a significant number of Member States'. In other words, even in a citizens' initiative,

33 For this potential see in more detail below chapter 10 section 9 and chapter 12.
34 See for a relativization of this 'uniqueness' De Witte (2011) and De Witte (2012).
35 Art. 20 ECSC.
36 Art. 12 TEU and Protocol No. 1 on the role of national parliaments in the EU.
37 Art. 11 TEU. Also see now Regulation 211/2011 on the citizens' initiative *OJ* (2001) L 65/1, and for discussion of its uses and (many) weaknesses M. Dougan, 'What are We to Make of the Citizens' Initiative? 6 *CMLRev* (2011), 1807, and J. Mendes, 'Participation and the role of law after Lisbon: A legal view on Article 11 TEU', 6 *CMLRev* (2011), 1849.

as in the election of the EP, individuals are still acting as representatives of their sovereign member peoples, not just as EU individuals. At the same time this direct involvement of the peoples at the EU level, nascent as it may be, does underscore that the EU is not based on the sovereign states alone, but more confederally on the sovereign peoples that underlie these states as well.

The strongest direct relation between the EU and the individual is obviously formed by EU citizenship. The derived status of EU citizenship captures the secondary, but direct, relation between the EU and the individual: 'Citizenship of the Union shall be additional to and not replace national citizenship.'[38]

For on the one hand EU citizenship is hereby structured as a secondary citizenship. The EU does not have the power to create an own citizenry independent from the Member States. Nor can it refuse anyone citizenship that has been granted that status nationally. The EU has to build on the existing citizenship relations. Limits that underscore the confederal respect for the sovereign peoples described above, and for the existential relation between the member peoples and their own states.

On the other hand, and notwithstanding its derived status, EU citizenship does establish a direct link between the EU and the individual. Furthermore, largely in the hands of the ECJ, EU citizenship is gradually evolving towards a stronger and more meaningful status, which even provides increasing rights against the own Member State.[39] One example of this development can be found in the gradual pressure on the scope of EU law exerted by EU citizenship. Especially the developments in *Rottman* and *Zambrano* and are telling in this regard.[40] They underscore the increasing importance of the direct link between the EU and the citizens, and the believe that this link should not be curtailed too easily.[41]

A confederal conception of sovereignty fully accords with this direct though secondary link between the EU and the citizen. As the sovereign peoples have directly delegated part of their sovereign authority to the EU, it only makes sense that the EU enjoys a direct – and two directional– link with these peoples. At the same time it is equally logical in a confederal system that this link remains secondary to the one enjoyed by the Member States and their peoples. As discussed in part I it is the essence of a confederal

38 Art. 9 TEU. Also see art. 20 TFEU. Even though 'destined to be the fundamental status' it remains subordinated to citizenship of a Member State (See cases C-85/96 *Martinez Sala* and C-184/99 *Grzelczyk*).

39 C-184/99 *Grzelczyk*.

40 See C-34/09 *Zambrano*, C-434/09 *McCarthy*, C-256/11 *Dereci and others*, C-40/11 *Iida* [2012] nyr, and C-356/11 and C-357/11 *O.E.A* [2012] nyr.

41 For a (willingly) rather extreme extrapolation of EU citizenship in this regard see Von Bogdandy *et al*, (2012) 489 et seq.

system that the constituent parts remain primary and are not subsumed in a single superior authority.[42] It are these constituent parts that, as pre-existing and self-referential entities, join in a confederal bond with other such entities.

Consequently the confederal perspective both fits with and explains the direct link that exists between the EU and the member peoples, and places logical limits on this link. As will be further explored below and in part III, however, it is becoming increasingly urgent that, in true confederal style, this link is better conceptualized and organized at the *national constitutional* level.

Despite the remaining challenges of properly organizing confederal sovereignty, however, it can be concluded that this concept, and the confederal approach that underlies it, show a sufficient fit with the EU and its legal order. Combined with the conceptual fit already established, this provides a sufficient basis to further engage with the potential advantages of confederal sovereignty set out above. Advantages to which we now turn in more detail, beginning with the capacity to dissolve some of the theoretical deadlocks that flow from the apparent contradiction between sovereignty and integration, including the related clash between statism and pluralism.

4 Dissolving the clash between statist sovereignty and plural integration

Chapter 8 discussed the apparent deadlock between sovereignty and integration: you cannot have your sovereign cake and let it be eaten by others. It further showed how this juxtaposition of sovereignty and integration leads to a deadlock in the theory of European Union, and for example forced both statism and pluralism to either defend the sovereign state and limit integration, or to embrace integration and reject sovereignty.

Chapter 9 subsequently demonstrated how integration does not inherently conflict with the concept of internal sovereignty, but how the real conflict is between integration and external sovereignty, and even between external sovereignty and internal sovereignty as such.

To build on these findings, and to further test and illustrate the capacity of confederal sovereignty to dissolve the conflict between sovereignty and integration, we return to the schools of statism and pluralism. Below it will be shown how both rely on unsuited external concepts of sovereignty, and how this forces statism and pluralism into positions that are untenable and counterproductive. Positions furthermore, that are also unnecessary. For as will subsequently be suggested, both schools can successfully switch to a

42 See chapter 1, section 5.1.2.

confederal conception of sovereignty. This would help them overcome the false choice between sovereignty and integration they now force themselves to make, and would actually allow them to better achieve their respective core objectives. What is more, it would also reduce the contradiction between statism and pluralism as such. An outcome that is especially valuable because both camps defend important values and field convincing arguments, certainly so for a confederal understanding of the EU that seeks to combine respect for the Member States and peoples with a plural organization of public authority.

4.1 Statism and confederal sovereignty

Chapter 8 demonstrated how the BVG, applying the key tenets of statism, postulated the sovereign state as a *conditio sine qua non* for democracy. Only a sovereign state, which controls a critical mass of competences, can provide and guarantee a democratic process. EU integration, therefore, is only compatible with the German constitution as long as the German state retains a controlling say in certain key competences.

The BVG thereby raised a legitimate and necessary question: how much power can be outsourced before the state, and the democratic process that controls it, loose their relevance?[43] Its statist stance also contains many other valuable points, certainly for a confederal thinking of the EU. The attempt of the BVG to protect the state, and with it the German people, against ever expanding EU powers fits with the fact that in a confederation primary authority and legitimacy should remain with the sub-units.[44] As a result it is highly important to counterbalance the risk of centralization that seems inherent in federal systems.[45] The choice for sovereignty as a regulating concept in this regard also seems sensible.

From the great responsibility it carries for the German people and their constitution, its critical and conservative approach can also be more than understood: why change a system that works and replace it with a still emerging system of which even the proponents cannot agree on its *finalité* or nature, let alone guarantee its stability. After all we are not playing for

43 See for a factual relativiztion of the Courts fears for the relevance of Germany: Moravscik (2005), 349, and Moravscik (2001).

44 The Member States have also spent significant time and energy in creating this primary link with the people, for instance through the creation of national identities and social securities. Not only is the EU incapable of matching this link, the Member States will not want to give up this primacy, and are certainly capable of defending it precisely because of their primary legitimacy. Cf. also on this point Van Middelaar (2009), 314, 359.

45 Note that the argument here is not that the EU must necessarily remain confederal, and should therefore respect the status of the member states. The more limited point is that, as long as the EU remains a confederation or desires to remin one, it should respect this status. Obviously the sovereign member peoples retain the option of joining a federate EU, and relinquishing their sovereign status.

nickels. On the table are fundamental questions on democracy, identity, and the rule over more than 500 million people. The position of the BVG within the German legal order, furthermore, also leads to a necessary bias. The BVG has been established to protect and uphold the German constitution, not to surrender it. All in all, the reluctance of the German Constitutional Court to erode the foundations of the current statal system appears responsible. It rightly places the burden of proof on those hailing a new order of things.

At the same time the *Lissabon Urteil* contains several weaknesses.[46] Its reasoning, for instance, rests on a number of rather general, undeveloped and opportunistic definitions of core notions as democracy or the state. Notions which are nevertheless asked to carry quite some weight. The most relevant weakness for the present discussion, however, is the BVG's unhelpful and unnecessary reliance on an external and statal notion of sovereignty.[47] For as shown earlier, it is the state that ultimately forms the sovereign in the framework developed by the BVG.[48]

Its choice for a statal sovereign traps the BVG in an unfruitful external paradigm. One unsuited to conceptualize European integration, or to lay down realistic and effective limits to that integration. As will be illustrated below, in the longer run this unfortunate choice of sovereign even threatens some of the very values the BVG tries to safeguard, such as democracy and national identity.

In this regard two specific problems that result from the BVG's application of external sovereignty to the EU must be discussed in more detail. To begin with the static and defensive position the Court locks itself into. Second, and most fundamentally, the way the BVG locks up both the people and the democratic process in the state. A form of conceptual protective custody that only blocks their necessary evolution, and removes any opportunity for the EU to be founded on a stronger democratic basis.

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46 The judgment was also criticized right from the start. Very critical see: W.T.E. Eijsbouts, 'Ein Land, ein Volk, ein Richter', *Het Financieele Dagblad* (3 juli 2009), 7 and further refined, W.T.E. Eijsbouts, 'Wir Sind das Volk: Notes About the Notion of 'The People' as Occasioned by the *Lissabon-Urteil*' 6 *European Constitutional Law Review* (2010), 199. Further see Schönberger (2009), 1202. Bieber (2009), 391, Grimm, (2009), 353, Thym (2009), 1796.

47 For the importance of external sovereignty generally for the German debate on sovereignty see Aziz (2006), 279-280, emphasizing the fact that Germany had just reacquired 'full' sovereignty in 1990 only.

48 Or at least is provided with an automatic monopoly on sovereignty. See chapter 8 section 4.4.3.

4.2 The statist Maginot line against integration

By opting to preserve the sovereignty of the German state in order to protect the German democracy and identity the BVG opts for an inherently defensive strategy. Although European integration can play an (important) role, the core of political and democratic life must remain within the state. A position that results from the far from evident claim, common to statism, that democracy is only possible within the sovereign state.[49]

Even more problematic is that this approach forces the BVG into an herculean, counterproductive and not really judicial task of defining these core competences, and with them the essence of democracy and the political process. A substantive exercise that sits uncomfortably with the more procedural and self-determining essence of democracy. Not surprisingly the parts of the *Lissabon Urteil* outlining these core competences are amongst the least convincing. To begin with the selection of the 'essential areas of democratic formative action'[50] is almost not supported by arguments. Why are these enumerated competences so essential, and why are other viable candidates not? [51] As most areas mentioned by the BVG happen to coincide with those powers still largely remaining under the competence of the Member States at the time of the judgment, it is difficult to suppress the suspicion of theoretical opportunism.

Furthermore, the idea of a fixed list of competences that together form the essence of democracy, and the German identity, does not seem very promising in itself. And as it is static, it will inevitably run into difficulty in the future, certainly considering the current pace of integration. The constitutional *Maginot* line of sovereignty and democracy can be outflanked all too easily. A fact already illustrated by the difficulties of the BVG in actually holding the fort in the *Lissabon Urteil*. A clear gap, for example, exists between the logic of and rhetoric of boundaries, and the eventual conclusion that the Lisbon treaty stays neatly within the limits prescribed.[52] It is very difficult to see how the current level of integration has not removed several competences from the German State that are not at least as important for the democratic process as those mentioned by the BVG. The *Honeywell* judgment and the EMU judgments have made it even more obvious

49 This chapter will not discuss the second leg of the BVG test for democracy, being if the EU itself is democratic enough, and which democratic standard should be applied to a non-statal entity as the EU.

50 Lissabon, 248.

51 Schönberger (2009), 1209.

52 Idem, 'there is probably no other judgment in het history of the court in which the argument is so much at odds with the actual result.'

that the BVG will only police these boundaries in highly grievous cases, or frontal attacks.[53]

Naturally the tactic of formulating a hard limit and then virtually nuancing it away in application should also be seen as a wise and pragmatic solution, and as part of a dialogue with the ECJ.[54] At the same time it underscores the weakness of the limiting strategy chosen by the BVG.[55] Where the aim is to actually limit integration, the defence chosen should be able to do so. To that end the limit itself should be flexible enough to adapt to changing circumstances. For as static defences have proven throughout history: once breached they loose much of their value.

4.3 Trapping the people and the democratic process in the state

Second, and partially due to this static and defensive strategy, the external and statist approach of BVG traps the people, and the democratic process, in the state. As a result the BVG again endangers what it seeks to protect.

The reproach that the BVG is locking up the people in the state is perhaps unexpected. The *Lissabon Urteil* explicitly refers to the sovereign people that, as the sole *pouvoir constituant*, are the source of all public authority.[56] The people are even given the power to dissolve the German state, despite the eternity clause in the Constitution.[57] The actual authority of the people, however, is clipped significantly by the way in which the BVG welds democracy and sovereignty to the state. The people have no choice but to delegate 'their' authority to a state. Within this statal paradigm, furthermore, the only two choices the German people are given are between the German state or a European federation.[58] The second alternative of dissolving Germany into a European federate state is so far-reaching, that *de facto* the current German state remains as the sole alternative. This severely restricts the peoples' freedom of delegation. Politically speaking the people can be compared to consumers in a communist regime: free to spend their political capital with the sole supplier available, being the German State.

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53 BVerfGE 2 BvR 2661/06 (2010) *Honeywell*, BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package* par. 200 and 206, BverGE 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 be 6/12 (2012) *ESM Treaty*. Also see in this regard the rather flexible acceptance of art. 8(2) TESM and the possible loss of German voting rights in par. 237. Further see Payandeh (2011), 10.

54 Compare in this regard also the equally open and cooperative approaches to the ESM by the Estonian *Riigikohus* (Constitutional Judgment 3-4-1-6-12 of 12 July 2012, *ESM Treaty*), and to the Fiscal Compact by the French *Conseil constitionell* (decision No. 2012-653 DC 9 August 2012).

55 BVerfGE 2 BvR 2661/06 (2010) *Honeywell* par. 66.

56 Lissabon, 231 and 234.

57 Lissabon, 228.

58 Lissabon, 228.

Yet why should the people themselves not be allowed to decide on the delegation of powers? And why should the limits of such delegation not be determined by the democratic process itself, instead of by some judicially determined limits?[59] Is the desire to centralize such core competences not an outdated notion of democracy, originating in a time that the myth of autarky was at least somewhat plausible? For in today's world, increasingly defined by interdependence, the question which authority should lie at what level seems like a particularly crucial question for the democratic process to engage with.[60]

Moreover, even after a power has been delegated to the EU the question remains for national politics how to *use* the influence that has been acquired in return for the delegated powers. What the BVG does not substantiate, and probably also cannot substantiate, is why the application of national competences is the sole possible substance of national democracy: Why can the use of voting rights in regional organisations not make democracy worthwhile? The national discussion on, for instance, the services directive, the Lisbon Treaty itself, or the financial crisis for that matter, seem to suggest otherwise.[61]

The limitation on national democratic decision-making regarding delegation is additionally problematic considering its weak basis. The rather opportunistic selection of 'essential' competences was already commented upon. Even more problematic, however, is the entire idea of a substantive core of competences itself. An idea that implies that there can only be *one core per democratic entity*, and consequently also only one truly democratic entity per geographic unit. There can, after all, only be one centre of authority that exclusively holds the required preponderance of essential competences.[62]

This statal swaddling of democracy is so restrictive that it would not even be compatible with the democratic reality in existing federate systems, including the German one. [63] It is, after all, the essence of the federate form that essential competences, such as social security, criminal law or family law, are divided over multiple governments. Under the logic of the BVG, this would mean that there is either no full democratic process in a federate system, or that only one of the levels of government in a federation could be really democratic. Yet in democratic federations, such as the US or Germany

59 See for a further discussion of this point below chapter 10 section 6 and chapter 12.

60 Habermas (1996), and Habermas (2001), 58. As will be discussed below such questions can thereby provide extra substance to the national process, partially replacing control over outsourced competences.

61 See Barnard (1998), 323 et seq.

62 Logic that in a sense follows Bodin's argument from indivisibility. See Bodin, Book I, chapter 10.

63 See above chapter 2 section 2.1.2. and chapter 9 section 5 for the sovereignty arguments leveled against the US federation as well.

the states and the central government do have autonomous democratic processes.[64] Fully appreciating the difficult position of the BVG, which simultaneously needs to protect a German unity externally and a federate diversity internally, this seems an ultimately indefensible position.

The external conception of sovereignty relied on by the BVG, therefore, traps both the people and the democratic process within the – declining – state. It does so at a time where it is becoming obvious that the relatively random scope of the state no longer forms the sole level at which influence needs to be exercised to be effective. In other words, the net effect of the BVG's approach is to safeguard democratic control at a level that may often guarantee little real world power or actual influence.[65] Yet what is the value of a German vote that determines the national political outcome on, say, social security, but cannot determine, or even affect, reality? Though with the best of intentions, the external conception applied by the BVG thus undermines its own central aims and only threatens democracy in the long run. For as a result of its protective stance neither the role of the people or the democratic process can evolve and adapt to the changing circumstances that necessitate integration in the first place.[66]

4.4 The potential benefits of confederal sovereignty for statism

A transition towards a confederal conception of sovereignty may help statism in better achieving several key aims, whilst reducing some of its weaker spots. That is, even the statist aims and objectives may be better served by applying an internal, and 'softer' confederal conception of sovereignty than by sticking to seemingly more forceful and absolute external conceptions.

First of all the confederal perspective may not recognize the ultimate authority of the Member States, but it does recognize the ultimate authority of the member peoples. It thereby empowers the people, who are also the intended beneficiaries of statism, directly. In addition, it also accepts that the Member States form the primary, if not exclusive, embodiment and representatives of these sovereign people. As such it not only provides protection to the people, but also to the Member States, as should be done in a

64 Elazar (2006), 33.

65 This forms the opposite of the descriptive fallacy: It assumes that sovereignty can be fully separated from actual power.

66 The warning of Grimm, himself a former judge in the BVG, on the need for law to respect the political becomes of even greater interest here: 'Total legislation is neither desirable nor possible. The task of politics consists in the production of a just social order in changing circumstances. With complete legal binding this task could not be carried out. That would instead confine politics to the implementation of norms and thus ultimately reduce it to administration. A society so organized would render itself incapable of adaptation or even survival. (Grimm (1995), 287).

confederal system. Protection that includes the national (judicial) power of safeguarding the ultimate authority of the people where truly threatened.[67]

Contrary to the statist perspective, however, confederal sovereignty can actually empower the people instead of trapping them in the state. It offers them more choices in delegating their power, and allows them to extend their influence, and legitimacy, beyond the state.[68] It thereby creates at least a starting point for the further evolution of the democratic process itself, and does so in a way that includes European integration in the democratic process instead of excluding it. A potential further explored in part III. This is of vital importance as democracy will have to keep pace with global developments, and cannot be protected by locking it into the state for safe keeping.[69]

Internal sovereignty also allows more flexibility than the BVG's approach of setting fixed limits to integration. The level and limits of integration may become part of the democratic process, preventing courts from having to define and defend democracy. Simultaneously it opens up a path for the EU to ground its authority in the people directly without dismantling the states, and for the people to exert democratic control on the EU. In fact the concept of a *Staatenverbund* could form a useful starting point here, especially when coupled to the BVG's idea that power in the EU should derive from 'the peoples of Europe with their democratic constitutions in their states.'[70] Of course, as will be seen below, many problems attach to such flexibility and inclusion as well, but at least it seems to offer more perspective than a retreat within the state.

Before further exploring such applications of a confederal conception of sovereignty, however, it is useful to first return to the opposing school of pluralism. As with statism, it would appear that several of its weaknesses relate to a reliance on external sovereignty, whereas its valuable insights could be strengthened by incorporating an internal notion of sovereignty.

5 Pluralism and the confederal perspective

As discussed, pluralism, to the extent that it has a shared core, stresses the lack of an ultimate authority or hierarchy. Our current reality is one of multiple levels of interacting legal orders and actors. A point of view that direct-

67 See on the secondary primacy of EU law chapter 10 section 8.

68 See also on this 'augmenting' potential Loughlin (2006), 81.

69 For a prime example of such an approach which ostentatively protects democracy and national identity but in reality only guarantees their demise by welding them to the state, see T.H.P. Baudet, *The significance of borders: why representative government and the rule of law require nation states* (Doctoral thesis Leiden University 2012).

70 BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil* par. 231.

ly clashes with the sovereign claims of the BVG, and seemingly leaves little space for any form of sovereignty at all.

Pluralism thereby makes some very convincing points, and fits with several facts that appear beyond denial. We are seeing a plural reality where multiple centres of authority are engaged in a dialogue, where different public authorities maintain public views that are clearly incompatible with each other, and where no single actor seems capable of imposing its view on all others. States are losing power and influence as events force them to cooperate and compromise.[71] In that light the EU does seem a credible crown witness against any statist view, and sovereignty with it.

Just as statism this pluralist perspective also has much to offer to a confederal model. For a confederation logically knows multiple centres of authority. And because all these rely on separate authority bases they do not stand in a clear hierarchy to one another, nor do they need to. In the confederal model developed here, for example, both the Member States and the EU receive sovereign authority directly from the member people. They do not depend on each other for this authority in any hierarchical way. As a result, in a confederation the constitutional value and importance of procedural principles such as loyal cooperation, subsidiarity or mutual respect increases, as does the value of dialogue in general.

Yet despite its useful insights and accurate description several problems surround this popular school of thought as well. As with statism, some of these problems can be traced back to the (implicit) use of an external notion of sovereignty. In the case of pluralism, however, this concerns the resistance against such an external notion. Resistance that leads to an overreaction, and to an overstatement of the tension between sovereignty and integration. As a result pluralism might reject far more of what is valuable in sovereignty than is necessary to sustain its key values and insights.

Two problematic points in pluralism are especially relevant in this regard. First, it removes instead of provides a proper foundation for political authority, even though its search for alternative foundations for EU authority through notions of citizenship contains interesting leads. Second, some of the key descriptive truths it draws on are not as antithetical to sovereignty as it claims, but rather require a basis in internal sovereignty.

71 This is a fact even acknowledged by those who argue that the state remains as the central actor, and that, for instance, organisations as the EU only 'rescue' the nation state. Even in such arguments, after all, the state is in need of some saving or support to retain its central position in a globalizing reality. Cf. for example A. Milward, *The European Rescue of the Nation State* (Routledge 1992).

5.1 Free floating authority

As a post-modern logic pluralism seems better suited to deconstructing our existing foundations than creating sufficiently powerful new ones. After traditional notions such as sovereignty have been debunked, we are generally left with a daunting conceptual, political, and legal hole.[72]

By denying ultimate hierarchy, for instance, pluralism must also deny the ultimate sovereignty of the people. A denial that directly attacks the basis for *national* democracy. It also removes any chance of grounding the EU, including its federate superstructure, in these member peoples. As discussed above, however, these sovereign peoples seem one of the few foundations strong enough to carry that burden. Equally no final authority is left to settle conflicts, no matter how fundamental their challenge may be to the polity as a whole.[73]

Once traditional foundations for political authority have been rejected, furthermore, legitimacy must be derived from other and much weaker sources such as output, procedural concepts, or abstract shared values.[74] The denial of ultimate popular authority, therefore, explains the tendency of pluralists to revert to more technocratic or procedural sources of authority.[75] Yet there is a realistic concern that these alternative sources are too thin, at least for a fairly large majority of the population. In any event this is what the recent rise of populism and, to say the least, less than enlightened politics, so far seems to indicate. Rational citizenship and enlightened values seem to hold a limited attraction, certainly in times of crisis. Furthermore, basing the EU on a different legitimacy structure than its Member State systems could create a conflict, and could undermine the legitimacy of those Member States as well.

The request to the European peoples to commit themselves to such an alienating, post-modern Europe that continues to defy qualification understandably lacks appeal. Where integration nevertheless continues, without providing more convincing answers as to the foundation of its authority, legitimacy naturally remains a problem.[76] Instead of finding a stronger foundation to carry the federate superstructure of the EU, the Union becomes a free floating entity. In this regard the somewhat clinical basis of

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72 Cf Loughlin (2006), 76. Especially so where sovereignty is seen as the answer to the constitutive act / challenge of creating unity in a plural chaos. That is: Without sovereignty, or another conceptual answer to the same question, we do not even have unified entities that can interact, dialogue or interpenetrate. We just have, ultimately, individuals. See to this end especially Van Roermund (2006), Lindahl (2006), and Huysmans (2006).

73 Lindahl (2006), 105, Baquero Cruz (2008), 398.

74 Habermas (1995), Habermas (2001), Kumm (2009), 258.

75 Habermas (2001), Maduro (2006), Kumm (2005), 262, MacCormick (1999).

76 See for instance: Habermas (1996), 126 et seq., Douglas-Scott (2002), 255 et seq.

postmodernism in epistemology perhaps remains too dominant in pluralism; how to base trust in a political system on a fundamental distrust of all knowledge remains difficult to see.

5.2 *The descriptive basis and prescriptive weakness of pluralism*

The strength of pluralism lies in its accurate description of the heterarchy in the legal reality of the EU. As we saw, however, sovereignty is a prescriptive concept not a descriptive one. It contains a normative claim of how power should be organized and who should have the ultimate say. As a result the descriptive claims of pluralism do not directly affect sovereignty.

Even where the descriptive basis of pluralism is turned into a normative command – thou shall not desire hierarchy– the descriptive foundation of this command eventually undermines it. For the command cannot offer a *solution* where a fundamental conflict does arise. If we take, for instance, the not fully imaginary situation of an open conflict between a national constitutional court and the ECJ. Even though pluralism might celebrate the capacity for such a conflict to arise, it provides no solution once the conflict is there. Yet it is part of the *function* of a constitutional and legal system to solve such conflicts, and to prevent extra-legal escalation. In this sense pluralism reflects the Kantian dream of civilized republics that will never go to war: although highly desirable it fails to be *political* theory as it assumes that those factors of the human condition making a political system necessary will disappear.[77]

Similarly pluralism does not solve the need for hierarchy, and therefore sovereignty, in law. It simply assumes hierarchy will not be necessary as no dispute will arise or escalate, and that not providing an answer will remain a viable option.[78] Consequently pluralism is not a prescriptive or a *legal* theory. It is a description of the current reality in the EU, based on the hope that this reality will remain stable.

Where the EU is in clear need of a stronger legitimacy for and foundation of its authority, pluralism is, therefore, incapable of providing these. Instead it removes what foundations we thought we had. The thinner, rational and rather optimistic alternative foundations it offers, be they procedural, value based or advanced forms of multiple citizenship, also seem incapable of providing the legitimacy required. At least they are not doing so at the moment, even though there is no shortage of EU values. Conversely, pluralist accounts of European integration may even contribute to an anti-EU sentiment. The enlightened picture pluralism paints can all too easily be perceived as, or turned into, an attack on national foundations. Some of the optimism underlying these alternatives, furthermore, especially where reli-

77 Cf Keating (2006), 201.

78 See the bridging attempts by Kumm and Maduro discussed in chapter 8, section 6.

ance is based on overarching values, may even conflict with the epistemological scepticism underlying the pluralist approach itself: Where does the substantive supremacy of these values come from, where hierarchy itself is anathema?

At the same time the fact that we might not like some of its outcomes does not in itself prove that pluralism is wrong. For if hierarchy has indeed become factually impossible in our new global order, undermining the intelligibility of sovereignty as a prescriptive concept, we would need to accept that reality. The weak alternatives suggested by pluralism would not, in themselves, undermine the problem identified, but would only deepen our predicament.

Fortunately, the pluralist approach may be far more compatible with sovereignty than generally thought. Several of its key aims and values may even be better achieved by combining it with a confederal notion of sovereignty. A conclusion that, if correct, also means that pluralism might be more compatible than it seems with accepting some ultimate foundation, as long as it does not undermine factual plurality and the valuable processes this plurality allows in daily reality.[79]

5.3 The plural reality of confederal sovereignty

Just as statism, pluralism implicitly engages with an external notion of sovereignty. It derives part of its strength from the way it deconstructs this prominent concept. Yet as set out above external sovereignty is the wrong concept to challenge. The process of European integration can best be understood from an internal conception of sovereignty. The pluralist critique on external sovereignty only reaffirms this suggestion. Illustrating how the EU undermines external sovereignty does not, therefore, proof that sovereignty should be scrapped from EU discourse altogether.

Once approached from a confederal perspective, furthermore, it becomes apparent that the core phenomena pluralism aims to describe and explain – multiple related, yet not hierarchically organized centres of political authority and the occurrence of authority conflicts between them for which the system offers no solution – do not intrinsically conflict with internal sovereignty. The plural reality *within* most states clearly illustrates this point.

79 Note in this regard also that it is in such daily practice that habits are formed (in the Aristotelian sense). In that regard the moral strand of pluralism, hoping to educate people and build tolerance through dialogue and interaction, is served by *daily* dialogue, but is not undermined by the existence of an ultimate hierarchy in *exceptional* cases.

From the internal perspective, after all, the possibility of a conflict *within* a constitutional or legal system – that is the fact that there is no definitive solution for such a conflict within the system– does not prove that there is no sovereign. Rather it is a logical and expected consequence where human intelligence tries to device any system, let alone a complex one for dividing and checking public authority.

Prior to joining the EU, Member States did not have flawless hierarchies either.[80] To give only some examples: Before the judicature act of 1873, England had two parallel court systems, the Common Law Courts and the Courts of Equity, with no common court of last instance. Until 1783 there was no mechanism within the legal system to solve a conflict between these two courts. In the Netherlands we see something comparable, albeit less dramatic, where the Supreme Court (*Hoge Raad*) and the Council of State (*De Raad van State*) may come to conflicting outcomes, without any judicial mechanism to resolve the conflict. The Spanish, French and Belgian systems provide further examples of different courts, supreme within their respective jurisdictions, who *inter alia* disagree on the status of EU law in their national legal system.[81] Federate systems are another case in point where uncertainty and political struggle over the delineation of powers is even purposely built in to the system.

A more fundamental example, however, can be found in such common and fundamental constitutional doctrines as the separation of powers or checks and balances. The entire logic of these doctrines is *premised* on the hope that powers will control and block each other. They purposely create the possibility of a stalemate that cannot be solved within the system, and thereby protect the internal sovereign. Were a system really to deadlock, after all, the only remaining option would be to go back to the people, the ultimate source of authority. [82]

80 This follows a more general pattern of sometimes applying demands and requirement to the EU that are not even met by the most well developed Member State.

81 France does have the institution of the'Tribunal des conflits', which consists of members of the *Conseil d'État* and the *Cour de cassation* and aims to resolve conflicts of competence between both high Courts. This body does not, however, remove the plurality in the French judicial system, as the diverging French case law on the effect of European Law in the French legal order has aptly demonstrated.

82 One example that has become acutely relevant with the war against terror(ism), is the tension between the executive power to declare war, declare an emergency and secure security with the obligation of the judiciary and the legislator to safeguard rights and procedures. On the one hand a level of comity is required, yet the executive cannot be limitless.

The sole existence of multiple centres of authority that may irreconcilably conflict, therefore, does not mean that there is no more sovereign, but only that the system of delegation is not flawless, or that such conflict was deemed desirable.[83]

In the case of the EU the system for the delegation of sovereign authority now includes an external, non-statal entity.[84] No ready blueprint exists for such a constitutional structure.[85] Much of the structure, furthermore, has been made up along the way, often in response to crises. Even more often decisions were based on a compromise between conflicting, or confused, preferences for the *finalité* of the EU. What coherent theory, after all, would model a constitution after an asymmetrical temple, or use a 'hidden' pillar, only somewhat understandable to experts if they manage to simultaneously keep in mind all earlier Treaties?[86] It should not come as a surprise, therefore, that the EU system contains many gaps, overlaps and uncertainties, especially when compared to the tried and tested schemes of delegation found within national systems.

Rather than making it obsolete, therefore, the EU, and the experiment in delegation it comprises, *increases* the role and need for sovereignty. The new found appeal of referenda only confirms this, as the need is increasingly felt to consult with the people directly where the system itself no longer provides an answer, or must be redesigned in some part.[87]

Even if factually and descriptively correct, therefore, pluralism does not lead to a necessary rejection of internal sovereignty. It only raises the question what level of pluralism is still bearable within internal sovereignty, and

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83 In addition, post-modernism cannot just begin at the border: Either sovereignty has never been plausible, also not within the state, meaning the EU cannot have brought any fundamental changes in this respect. In this sense the debate mirrors that of internal sovereignty against internal pluralism such as the type developed by Laski. See in this respect also the criticism of Schmitt, which can today also be scaled up to the EU level: 'That is the pluralism of his theory of state (…) its entire ingenuity is directed against earlier exaggerations of the state, against its majesty and its personality, against its claim to posses the monopoly of the highest unity, (…). Schmitt (2007), 44.

84 Cf John P. McCormick, 'Fear, Technology, and the State: Carl Schmitt, Leo Strauss, and the Revival of Hobbes in Weimar and National Socialist Germany' 22 *Political Theory* (1994), 641. This is also not so much of a problem once one accepts that the state was only a tool, an instrument to certain objectives, and not the goal itself.

85 Cf the warning by Van Roermund. The delegation that takes place outside the state can also not refer to, or rely on, the (more) strongly perceived objectives of 'shared co-operative activity' within the national polities. As a result the shared discourse authorizing authority claims is much more fragile: 'I would call this *deferred* (rather than late) *sovereignty*, because such shared co-operative activity is a precarious equilibrium that continues to exist only by virtue of meeting the Bratman parameters when push comes to shove.' Van Roermund (2006), 53. The resulting danger that the system will break down in times of crisis must be taken seriously, but are hopefully addressed by the modifications and proposals discussed in part I and III.

86 Dougan (2008), 617 et seq.

87 See the proposals in chapter 12, section 4 and 5 below.

how we could manage the pros and contras of pluralism using the tools that have been developed within national constitutional systems.

This deprives pluralism of one of its main claims, as it is the obvious descriptive truth of pluralism that underlies much of it credibility. At the same time an internal conception may also strengthen the pluralist cause. It may allow for a stronger foundation than the thin and perhaps overly civilized alternatives for sovereignty it has come up with so far, yet without having to accept some form of overall *linear* hierarchy: the plural reality it values normatively may perhaps be combined with some form of ultimate foundation. And in line with the pluralist intuition this basis is then not found in the state, but in the citizens, albeit not as rational and detached global citizens, but as sovereign member peoples acting through their states. As will be further developed below and in part III, the declining role of the state that pluralism rightly points out, can then also be fully accommodated under an internal conception of sovereignty.

5.4 Sub-conclusion: Where statism and pluralism meet?

Both statism and pluralism engage with an external conception of sovereignty. The apparent juxtaposition that these views land us in – sovereignty or integration– is linked to this external conception. Only where sovereignty is perceived as indivisible and absolute in the external sense are we required with statism to 'defend' the sovereign state, or with pluralism to exorcise sovereignty altogether. Both schools, therefore, lock our understanding of the EU into an unsuitable external paradigm. An external paradigm developed to abstract from the complexities of the internal constitutional system, and therefore incapable of accommodating the demands of democracy and legitimacy posed by the constitutional and confederal nature of the EU.

In a certain way this is good news. The conflict between statism and pluralism, and between integration and sovereignty, is not inherent and unavoidable. Once external sovereignty is replaced with a more suitable notion of confederal sovereignty this conflict is significantly softened, as are some of the unconvincing extremes in both approaches.

Most importantly for statism a confederal notion of sovereignty provides a sufficient level of protection for the member peoples and their states as primary entities within the constitutional system. These entities, therefore, also remain as foundations for public authority. The safeguarding of these entities, however, can now be based directly on the peoples, making it far more flexible and convincing than the external defence of the state. A more flexible basis that enables statism to accept a more plural reality in the EU, no longer tied to an absolute state, and enables the people to escape their conceptual entrapment in that state.

For pluralism confederal sovereignty may retain the plural reality, and the spirit of cooperation and dialogue it requires, yet at the same time provide it with a much needed but not too restrictive foundation. The delega-

tion of sovereign powers necessary within confederal sovereignty allows more than enough space to divide and share authority and create a plural reality in the daily exercise of authority. As the system for delegation improves, furthermore, less direct appeals to the authority of the people, and to direct hierarchy, will be necessary. This confederal plural reality, however, does not have to challenge the ultimate authority of the people, and with it one of central tenets of democratic theory. Unlike external pluralism, it can respect the limits laid down by internal statism, and rely on the sovereign foundation of the peoples where a conflict cannot be solved by dialogue alone.

These conclusion free the way to further develop our notion of confederal sovereignty. It also brings us to the second central aim of this thesis. Can confederal sovereignty assist in creating a more stable yet still confederal basis for the EU?

6 Grounding the Union: A sufficient popular foundation for the EU

Part I outlined the growing gap between the authority demands of the EU's federate superstructure and the authority capacity of the EU's confederal foundation. A problem that did not arise in the US, where the federate superstructure was based on the federate basis of a single American people. Yet, as also discussed in part I, this federate solution to close the gap is currently not available to the EU. A purely statist approach cannot provide a sufficient foundation either, as it must contain the authority of the EU within the too narrow boundaries of an international organization. Pluralism cannot even accept the idea of a foundation itself, let alone provide one to the EU.

Confederal sovereignty may offer a way out of this conundrum. It can provide a subsidiary but sufficient popular foundation to the EU. A foundation that is capable of carrying the EU's federate superstructure, but can also respect the autonomy and elemental status the Member States need to retain in a confederal system. As a consequence, such a confederal foundation can also combine a high level of operational heterarchy within an overarching confederal hierarchy.

Confederal sovereignty does so by establishing a direct but subsidiary link between the member peoples and the EU. The link is direct because the EU is directly incorporated into the national constitutional schemes via which the people delegate their sovereign authority. The explicit clauses in many Member State constitutions allowing delegation of sovereign powers to the EU underscore this fact. This link between the EU and the member peoples, therefore, is *as direct* as that between the member peoples and their respec-

tive states, which also receive their authority from the people through the constitution.[88] On this point, therefore, the EU and the Member States stand on an equal level, both receiving a certain amount of sovereignty authority directly from the people.

Yet, in true confederal style, the direct link between the EU and the member peoples remains subsidiary to, or conditional on, the relation between the member peoples and their respective states. As a result, the Member States also retain a certain principal, or primary, status themselves, as should be the case in a confederal system.

It is important to stress, however, that the terms subsidiary and principal are used here in a specific and confederal meaning. To begin with, these terms certainly do not indicate that the Member States hold some form of higher or more real sovereign authority than the EU. As indicated above, both the EU and the Member States directly receive sovereign authority from the member peoples, and both do so at the constitutional level. Equally, as will be further discussed below, this principal link between the member peoples and their states does not mean that the states always trump the EU, or enjoy some form of inherent supremacy.[89] Where the EU receives sovereign authority from the people, it equally receives the claim to final authority that comes with it. Lastly, it is also not claimed that this primary link between the member peoples and their states is a necessity or a constitutional constant for the EU. If they so desire, the member peoples could transfer their primary loyalty and political existence to the EU, for example by jointly creating a federate European state. The principal status of the Member States, therefore, is contingent, and derives from the will of the sovereign member peoples to remain sovereign.

What is claimed, however, is that in the current confederal reality in the EU, and for as long as the member peoples desire to keep the EU confederal at its core, the Member States retain a principal relationship to the member peoples, and through that relation a certain primary and protected status. Several factors combine to establish this relation and status. These factors relate to the nature of the EU confederal system set out in part I, and together shape the direct but subsidiary popular foundation that confederal sovereignty can provide to the EU.

Firstly, there is what can be termed the existential, or home-base, factor. The Member States are intimately involved in the political existence, identity and self-government of the member peoples. The member peoples, at least for an important part, exist and act through their state and its institutions.

88 Except for Cyprus, The Netherlands and Denmark that do not have an (explicit) popular internal sovereign.

89 See below section 8 on confederal primacy.

As such the member peoples have their principal political existence at the national level, and not at the EU level.

This argument does not claim that a people can only exist in, or be created by, a state. It also recognizes that some states contain more than one people, or that some people are spread out over multiple states. It is only claimed that, within the established states in the EU, a principal or existential relation between the member peoples and their states does generally exist.[90] Even in those Member States that do not fully qualify as a nation-state, a close relation exists between the existence and identity of the people and their state. A claim that is supported at the national level by the common reliance on popular sovereignty as the foundation of the state set out above, as well as by the many constitutional courts that recognize and protect such an existential relation between their people and their states.[91]

At the EU level, the existential importance of the national is, *inter alia*, evident in the derivative nature of EU citizenship, and in the explicit recognition and protection of national identity in Article 4(2) TEU. Similarly the preambles of the TEU and TFEU speak of the Member States and 'their peoples', and vice versa of the member peoples and 'their states', capturing the close relation between both. The requirement of unanimity for amendment,[92] and the right of a people to secede under Article 50 TEU further underscore the existential primacy of the national level.[93] Within a state, after all, constitutional change generally does not require unanimity, and secession is far more problematic as well.[94]

In addition, the existential primacy of the national is borne out by a simple thought experiment. Were one to abolish the EU tomorrow, the different member peoples would continue to exist and act within their own states. The collapse of the EU would rob them of a substantial, but ultimately subsidiary and complementary status and identity. Were one to abolish the Member States tomorrow, however, political life would be far more disrupted, and it seems unlikely that the EU could step in as the new primary habitat of all member peoples. It seems more likely that new sub-units would be established, and that these would once again house the principal political existence of the different member peoples, even if these might not

90 Here Belgium might form the exception that confirms the rule, as there the EU might actually play a role in keeping the different 'peoples' within a single state.

91 See the discussion of judicial statism above in chapter 8, section 4.4, as well as the case law mentioned there. For particularly strong examples of this existential relation see the Polish Constitutional Tribunal in judgment K18/04 of 11 May 2005, *EU Accession* and K32/09 of 24 November 2010, *Lisbon*.

92 Art. 48 TEU. For a detailed overview of all procedures for amendment see chapter 2, section 2.4.3.

93 Art. 50 TEU further stipulates that this right is to be exercised under the *own constitutional requirements*. Also see Art. 46(5), where the withdrawal from any permanent structured military cooperation is also foreseen.

94 Maduro (2005), 348.

be identical to the current ones in all cases. So where the EU depends on the existence of the Member States, the Member States do not depend on the EU in the same manner.

This existential link between the member peoples and their states, and the principal status of the Member States that flows from it, conforms to the nature of a confederal system as set out in part I. It is part of the essence of a confederal system that the sub-units remain the principal hubs of legitimacy, political organization and identity, and the foundational political building blocks on which the central system is built. Again this does not mean that the EU must necessarily remain confederal, or that the EU could never establish a primary or existential link with the member peoples itself. It only means that, as long as the member peoples remain separate sovereign entities, their principal statal shells also retain a certain elemental status.

A second factor that underlies the principal status of the Member States is closely related to the existential factor. It could be labelled the default factor. The Member States remain the default option for delegation: all sovereign authority not delegated to the EU, or other entities, remains with the states.[95] This arrangement further indicates that these states remain the principal political shells of their member peoples and their authority. It further relates to the fact that the member peoples only retain a certain level of unilateral control over the exercise of their sovereign authority within their states. As soon as authority is delegated to the EU, after all, it will be exercised jointly, with no single member people controlling the way in which the EU will exercise the authority. Where a people considers a certain competence as vital, for instance for its identity, it will generally prefer to keep that competence under unilateral control. This will, of course, not always be feasible, but nevertheless increases the chance that the national level will retain certain competences that are considered existential, further increasing its principal status.[96]

Thirdly, and again related to the existential factor, there is the fact that the Member States play a vital role in the functioning of the EU. The merged system of EU government was already discussed in part I.[97] This merged system means that the EU would not be able to function without the primary institutions, legitimacy and political processes of the Member States. Equally, the member peoples would have no, or very limited means to act on the European level without their statal exoskeleton. Conversely, and

95 Art. 5(2) TEU.

96 Note that this factor does not require one to establish a quantative or qualitative list of competences that must remain at the national level. Rather, as will be further explored in chapter 13, it calls for a rigorous national democratic process on which competences a member people itself wants to delegate.

97 See chapter 2, section 3.2.

again in line with the confederal nature of the EU, the Member States are not dependent on the EU for the exercise of the sovereign authority delegated to them.

It in this sense, therefore, that under a confederal approach the Member States retain a principal and existential link with the member peoples.[98] And it is in this specific sense as well that the link between the people and the EU is qualified as subsidiary, since it does not equal, nor needs to equal, the more existential connection between the peoples and their respective states.

As stated, however, the subsidiary nature of this link in no way diminishes the direct link between the people and the EU, or the importance and potency of this link. Quite to the contrary, it is the subsidiary nature of this direct popular link that makes confederal sovereignty such an interesting construct. For through its direct connection, confederal sovereignty provides the EU access to probably the only foundation strong enough to democratically support its federate superstructure: the sovereign member peoples. At the same time, the subsidiary nature of this connection means that it does not aspire to the supreme and principal status of a federate foundation, nor has to challenge the principal status of the Member States.

Equally, confederal sovereignty does not threaten the sovereignty or identity of the member peoples either. Rather it respects and reinforces it. The people are confirmed as the foundation of public authority both nationally *and* at the European level. Contrary to statism, they are not trapped in their states. Contrary to pluralism, no alternative source of authority than the people has to be developed. Popular sovereignty, a core construct of democratic theory and the peoples national status, does not have to be deconstructed to legitimize the EU. As a consequence, confederal sovereignty would really allow the EU to be 'an ever closer union among the peoples of Europe'[99] A Union based on the sovereign peoples directly, who reciprocally share part of their sovereign authority in the EU.[100]

98 Cf. Weiler (2000), 57, where he states that, although there formally is a hierarchy of norms with EC law on top, 'this is not rooted in a hierarchy of normative authority or in a hierarchy of power'.

99 Art. 1 TEU.

100 For the risk, and to a certain degree reality, that the Member States will usurp the central position of the people, as they wield power nationally, and for a discussion of how to avoid this risk, see the discussion on confederal democracy in part III.

As indicated, such a confederal conception of sovereignty also fits with the explicit basis of the EU in delegation, and with the increasingly direct relation between the EU and the individual.[101] Confederal sovereignty explains and justifies this link: as direct recipients of sovereign authority the EU should have a direct link with the member peoples. Yet it also shows why his link remains subsidiary to the one between the member peoples and their states, and why the EU should not even strive to change that fact by seeking a stronger foundation that would undermine either the Member States or the ultimate sovereignty of the member peoples.

6.1 Counter arguments: The people, really?

The direct link between the EU and the member peoples logically raises two objections. One relates to the initial delegation by the people, and the other to the situation after delegation. Both need to be addressed.

6.1.1 Statal instead of popular delegation

First, can one really claim that the people delegated authority to the EU? Is it not closer to reality to say that national governments, or even courts, have done so, and often without knowledge of the people or even against their wishes? Sadly, especially the first part of this claim may hold a painful truth, the consequences of which the EU is increasingly confronted with.[102] Indeed, important steps in the development of the EU were based on statal consent alone, or were driven by the internal (legal) dynamic of integration itself.[103] At the same time this historical reality should not be *overstated*, and for the other part should be *overcome*.

6.1.2 Overstating the exclusion of the people

The exclusion of the people should firstly not be overstated in the sense that the actions of the Member States cannot be so easily disassociated from their peoples. The Member States, and their elected governments, represent the people and exercise their sovereign authority. As we saw, furthermore,

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101 Obviously this direct link to the people also allowed the Court to grant them benefits and 'create a pro-Community constituency of private individuals'. See A-M Burley and W. Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', 47 *International Organization* (1993), 41.

102 See for example the German decision to join the EMU, and to admit Italy in the Eurozone. The German government did so without publicly acknowledging the serious risks this enterprise involved, even though the government had received clear warnings from different sides, and this clearly concerned a momentous decision. See S. Böll, C. Reiermann, M. Sauga and K. Wiegrefe, 'Operation Self-Deceit: New Documents Shine Light on Euro Birth Defects', in *Der Spiegel Online*, May 8, 2012, available via: http://www.spiegel.de/international/europe/euro-struggles-can-be-traced-to-origins-of-common-currency-a-831842.html.

103 Also see the discussion on the self-expanding effects of the federate superstructure in chapter 3, section 3.4.

several Member States have accepted constitutional clauses allowing delegation of sovereign powers to the EU. More importantly, the perceived lack of direct popular consent almost completely derives from the situation in the six original Member States, and ignores the increasing practice of direct popular consent since.

Germany, France,[104] Italy and the Benelux countries[105] started the EU without a referendum.[106] They did so, however, at a time where the, then ECSC and EEC, were far less developed, and fitted more logically within the boundaries of an international organization. In line with the evolution of the EU, however, a clear trend has since then developed to acquire direct popular support before accession. In 1973 Denmark[107] and Ireland[108] held referenda on their accession to the EU. The UK did not hold a referendum immediately, but continued membership was supported in a 1975 referendum by 67.2% of the votes.[109] Greece, Spain and Portugal did not hold referenda on accession, yet as these countries had recently emerged from dictatorial regimes, membership of the EU was seen as an important step to achieve and secure democratic rule.[110] In 1994 Austria and Finland did hold referenda on their 1995 accessions,[111] as did Sweden.[112] With the

104 Since then France has, however, held three referenda. In 1972 68.32% of voters supported accession by the United Kingdom, Denmark and Ireland with a turnout of 60.24%. In 1992 51.05% said yes to Maastricht, with a 69.7% turnout. The Constitutional Treaty was rejected by 54.68% of the vote in 2005, with 69.34% voting.

105 Luxemburg did hold a compulsory referendum in 2005 on the Constitutional Treaty, whereby 56,52% voted in favour of ratification.

106 On 17 December 1952, however, the Netherlands did hold a pilot-referendum in the two municipalities of Delft and Bolsward. Based on the last elections, these were deemed representative for the Netherlands as a whole. The people were asked to vote on the following question 'Do you think that the Peoples of Europe should henceforth jointly serve certain shared interests, and do you support to that end: a UNITED EUROPE under a UNITED GOVERNMENT and with a DEMOCRATIC REPRESENTATION to be laid down in a EUROPEAN CONSTITUTION?' (My translation, capitals in original). Though voluntary and non-binding, turnout was high: 88,2% in Bolsward, and 74,8% in Delft. The outcome was a resounding yes: In Delft 93.1% voted in favour, in Bolsward it was 96.6%. The 2005 Dutch referendum on the Constitutional Treaty, of course, showed a markedly different outcome, with 61.54% voting No.

107 63.4% of voters supported accession, with a turnout of 90.1%. Since then Denmark has held five further referenda on EU issues, with varying results.

108 83.1% voted for accession, with a turnout of 70.9%. Since then Ireland has held six referenda on subsequent treaties, four voting yes (including one overturning a previous 'no' to Nice) and two no to ratification.

109 Turnout was 64%.

110 Spain did hold a referendum in 2005 on the Constitutional Treaty. 76,73% voted yes, turnout was 42,32%.

111 In Finland 56.9% voted for accession with a turnout of 74% (respectively 73.6% and 49.1% for the Aland Islands). A probably not symbolic 66.6% of Austrian voters supported accession, turnout being 81.3%.

112 52,8% supported accession. Turnout was 83,3%. In 2003 Sweden held another referendum in which 55,9% voted against the introduction of the Euro, turnout being 82,6%.

eastern enlargements referenda became the norm. The Czech Republic,[113] Estonia,[114] Latvia,[115] Lithuania,[116] Hungary,[117] Malta,[118] Poland,[119] Slovakia[120] and Slovenia[121] all asked and received direct popular support for accession. Cyprus was the only exception, relying on parliamentary ratification alone. In 2007 Romania and Bulgaria did not organize referenda, yet this was largely because public support was so overwhelming it was not felt necessary. In a 2003 referendum in Romania, furthermore, 91.1% of voters supported the changes to the Romanian constitution required to accede to the EU. This was generally also seen as a referendum on accession itself. In 2012 Croatia also held a referendum on accession, in which 66.27% of voters supported accession.[122]

All in all, strictly counting pre-accession referenda only, 14 out of 27 member people directly voted in favour of accession. More realistically including Great Britain, Bulgaria and Romania in this list, the total comes to 17 out of 27, or 63% of member peoples. Counting the ex-dictatorial regimes of Spain, Portugal and Greece, and the future member Croatia, one would come to 21 out of 28, or 75%. In these cases (though with decreasing force) one could say that the delegation of sovereign powers to the EU can even be based on a direct delegation by the people, and not just by the states as representatives.[123] Most crucial in this overview, however, is the clear trend towards a direct consultation of the people. A trend that follows and supports the evolution of the EU into a constitutional confederal organization.

Overall, therefore, the so called exclusion of the people should not be overstated, and cannot be relied upon to reject the confederal perspective. At the same time there remain clear weaknesses and gaps in the direct delegation of authority from the member peoples to the EU, also because often the EU has developed significantly after popular consent to membership was given. As in all constitutional systems, however, part of the function of a constitutional theory is to overcome such gaps.

113 77,33% voted in favour of accession, turnout was 55,21%.
114 66,83% in favour of accession, turnout was 64,06%.
115 67% in favour, turnout was 72,53%.
116 91,07% in favour, turnout was 63,37%.
117 83,76% in favour, turnout was 45,62%.
118 53,65% in favour, turnout was 91%.
119 77,45% in favour, turnout was 58,85%.
120 92,46% in favour, turnout was 52,15%.
121 89,61% in favour, turnout was 60,29%.
122 Turnout was, however, low at 44%.
123 It should be noted, however, that in many of these referenda no (super-)qualified majority was reached, as is often required for constitutional changes.

6.1.3 Overcoming past shortfalls in popular consultation

A confederal perspective can also be of value in *overcoming* these past shortfalls in popular consultation. Especially so in the six founding members that joined when referenda did not seem necessary. These shortfalls can be lamented, begrudged, and probably have been counterproductively ignored. At some point, however, a constitutional system must overcome such original sins. It must replace them with a positive narrative – and reality – which justify them with retroactive effect.

The US again provides a prime example. The federate Constitution flatly violated the Articles of Confederation. Its ratification was fraught with bitter disputes and involved quite some political handiwork above and below the belt. It was ultimately affirmed only by a civil war.[124] Yet its normative, almost mythical status, as well as the democratic system it eventually produced,[125] retroactively compensated for these points, at least for most US citizens.

Similarly the democratic shortfalls that have marred the establishment of the EU in the past can, per definition, never be undone. Yet they might be overcome by proving the ultimate attractiveness and usefulness of their outcomes. And this usefulness is not meant in a narrow output sense, as in lowering cell phone costs. The confederal perspective may provide a normatively attractive understanding at a more fundamental level. An understanding in which member peoples are not robbed of their influence, but empowered to engage with a globalizing reality. That is, the original sins of the EU will have been worth it because they will increase the democratic control and influence of the people in the longer run.

This normative appeal of a confederal approach will be further developed below and in part III, but also leads us to the second objection against the direct link between the member peoples and the EU claimed by a confederal approach: what remains of this direct link *after* power has been delegated to the EU?

6.2 Institutionalizing confederal sovereignty

In the US federate system the people delegated their sovereignty to the different governments. In turn they received back certain rights and a certain level of popular control as the electorate and *pouvoir constituant*. In this non-sovereign capacity the people retained a level of control over the exercise of the sovereign authority they had delegated. As a result the direct link established between the people and their governments by the delegation of authority was further substantiated and translated in daily political reality.

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124 See on the process of American federation below chapter 5.

125 Current malfunctions left aside for the moment.

One must equally ask how the direct link that has been established between the EU and the member peoples has been translated and substantiated into daily reality. For if this direct delegation is not counterbalanced by political control in some way, the EU remains open to the challenge that it is a one-way relation. One that takes sovereign authority from the people, perhaps even with their consent, yet subsequently exercises this authority without their further control or assent. Here the challenge shifts from the undemocratic transfer of authority to the undemocratic exercise of delegated authority. Additionally, if we do require effective and ongoing political control by the member peoples, does this not require an overarching statal system? A question that brings us back to the statist challenge to the EU?[126]

If the direct link between the EU and the member peoples would only amount to such one-sided surrenders of authority, confederal sovereignty would indeed be no more than a conceptual fig leave. A confederal conception of sovereignty, however, can precisely assist in structuring and institutionalizing this political link between the member peoples and the EU. Though a major challenge that can only be tentatively discussed in part III of this thesis, confederal sovereignty does so by directing our attention to the national constitutional level. There it points to ways in which the control of national electorates over the EU activities of their statal representatives can be improved, and ways in which the delegation of competences to the EU can be made an integral part of national democracy. Confederal sovereignty, therefore, is not just one way traffic where the member people lose competences and are brought under direct EU control in return for some free movement rights. As federate sovereignty, it can also support a political model where the member people receive active political influence in return for their sovereign authority.

6.3 Sub-conclusion: A direct and subsidiary link

A confederal conception of sovereignty can establish, justify and structure a direct but subsidiary link between the EU and the member peoples. The EU is directly endowed, at the constitutional level, with sovereign authority by the people. Although it might not always have been established in an ideal manner, and though the system for political control must be improved, a direct connection is thereby established between the EU and the member peoples. A connection that can form a stable and sufficient basis for EU authority, whilst respecting the principal and even existential status of the national level.

To further test and illustrate the potential of this confederal basis, and before further developing it in part III, three further advantages that flow from this

126 See the statist views of Kirchof and Grimm set in chapter 8, section 4.1.

direct link must first be discussed here as well: its explanatory value for the simultaneous fit and conflict between the EU and constitutionalism, its suggestion of a confederal-style primacy for the EU, and its normative appeal for the evolution of democracy.

7 To constitute or not to constitute: Why does constitutionalism fit the EU?

Though it is based on treaties, is not a state, does not hold original *kompetenz-kompetenz*, nor has a population of its own, constitutional language and concepts are increasingly applied to the EU.[127] What is more, these have proven suitable and fruitful. [128] They are useful, for instance, in analyzing the entire institutional apparatus that is set up at the EU level, or to conceptualize the relation between the Member States and the EU. [129] At the same time, this constitutionalization has proven highly contentious. It arouses fears, for instance, of the EU claiming a normative foundation that is equal or even superior to that of the Member States. For statists as Kirchhof or Grimm, therefore, claiming the EU has a constitution in the true meaning of the word necessarily entails an attack on the sovereign state and national democracy.[130]

This tension between the treaty basis and the constitutional functioning of the EU came to a head with the Constitutional treaty.[131] As the name itself already indicates, this document tried to straddle both elements, igniting a

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127 Weiler and De Búrca (2012), Von Bogdandy and Bast (2010), Von Bogdandy (2010b), 95, R. Barents, 'The Precedence of EU Law from the perspective of Constitutional Pluralism', *5 European Constitutional Law Review* (2009), 421, Maduro (2005), Walker (2002), 317, Timmermans (2002), 1, Weiler (1999), or Pernice (1999), 703. This does of course not mean that approaching the EU from a constitutional perspective is new. See, for instance, already Stein (1981), 1, or F. Mancini, 'The Making of a Constitution for Europe' 26 *CMLRev* (1989), 595, or the ECJ itself recognizing / proclaiming the constitutional nature of the Treaties in Case 294/83 *Les Verts*.

128 Cf. also Maduro (2006), 504, expounding the vision of the Court of Justice: 'The Court of Justice grounded the direct effect and supremacy of Community law in a direct relation between Community norms and the peoples of Europe. (…) *Van Gend en Loos* is, in effect, the declaration of independence of EU law with regard to he authority of the Member States. The Treaty is presented as much more than an agreement between States; it is an agreement between the peoples of Europe that established a direct relationship between EC law and those peoples.'

129 L. Besselink. *Een samengestelde Europese constitutie/A composite European constitution* (Europa Law Publishing 2007).

130 See supra chapter 8, section 4.1. Interestingly, on the other end of the spectrum the pluralist use of the term constitution often risks denaturizing it, as they cannot ground or accept the hierarchical claim that attaches to the concept of constitution.

131 For a much earlier discussion, however, see already E. Stein, 'Towards Supremacy of Treaty-Constitution by judicial Fiat: On the margin of the Costa case' 63 *Michigan Law Review* (1964-65), 491.

heated debate. Was the Treaty actually a constitution, should the EU have a constitution, or did the EU perhaps already have a constitution, no matter what the Treaties called themselves?[132]

Obviously much of this debate centred around the different conceptions of constitution that exist. Some of these are ultra-thin, qualifying anything that establishes something, be it a golf club or a nation-state, as a constitution.[133] Others are padded to the hilt with contested conceptions like nation, identity or *Volk*.[134] Much of the tension underlying this debate, however, turned on the assumption that having a constitution implied statehood or ultimate sovereignty, and consequently involved cannibalizing the Member States.

Those in favour of a European constitution tended to decouple the idea of a constitution from a state. The fact that the Treaties function as a constitution for the EU, does not mean they overrule or degrade national constitutions. Often such reasoning leads to the conclusion that the Treaties of Rome should already be considered a constitution.[135] A line of reasoning supported by the definition of the Treaties as the 'basic constitutional charter' by the ECJ. A legal fact providing an authority argument for any one looking for an easy exit in the big 'C' or small 'c' debate .[136]

These thinner notions have the advantage that they recognize the constitutional *functioning* of the Treaties. They also square with the significant authority granted and controlled by the Treaties. Yet they tend to be so thin that they cannot resolve the underlying questions on, for instance, the ultimate relation between national constitutions and the EU constitution. Neither do they engage with the legitimacy aspect of constitutions. For constitutions do often play a foundational role in justifying and grounding public authority, precisely because they rely on thicker normative notions. As a result such thinner notions may preserve the term constitution for EU use, but loose much of the terms usefulness.

A confederal perspective contributes to this discussion by showing how the Treaties may be of a constitutional nature without embodying or claiming

132 Cf N. Walker, 'Big 'C' or small 'c'' 12 *European Law Journal* (2006), 12, M. Andenas and J. Gardner, 'Introduction: Can Europe have a Constitution?' 12 *King's College Law Journal* (2001), 1, P. Craig, 'Constitutions, Constitutionalism, and the European Union' 7 *European Law Journal* (2001), 125, or already J. Shaw 'The Emergence of Postnational Constitutionalism in the European Union, 6 *Journal of European Public Policy* (1999), 579.

133 For the golf club example see the contribution by former British foreign secretary Jack Straw, 'A constitution for Europe' in the *Economist*, 12 October 2002, who notably does not use a capital 'C'.

134 See, for instance, Kirchof (2010), and Kirchof (1993).

135 Note the difference in Opinion 1/2009 made between treaties and *founding* treaties.

136 Case 294/83 *Les Verts*, par. 23, as confirmed in *inter alia* joined cases C-402/05 P & C-415/05P *Kadi I*. Also see N. Walker, 'Big 'C' or small 'c'' 12 *European Law Journal* (2006), 12.

the original and ultimate power ascribed to constitutions by thicker conceptions. From the perspective of confederal sovereignty, after all, what happens is that sovereign powers are relegated from the Member States to the EU. As a result, the EU is *incorporated* into the internal scheme of delegation that traditionally took place within the Member States alone.[137] Instead of superimposing a new and higher constitutional order, the EU treaties became an *integral part of multiple national constitutions*, whilst also linking those constitutional systems to each other in an overarching confederal framework.[138]

Consequently the EU Treaties are not *principal* constitutions in the meaning just described. They lack the existential dimension, as they do not constitute the member peoples, and do not form their principal political habitat. Rather the Treaties build on the existential basis of the principal national constitutions. They do, however, form an integral part of multiple national constitutions, and as such share in their constitutional nature and function. In that sense they are derived, or secondary, constitutions.[139] A secondary nature that again becomes obvious when one considers that a dissolution of the EU constitution would not undermine the national constitutions, whereas the EU constitution could not survive without the national ones.[140]

Based on this derived constitutional status, the Treaties do perform several *functions* of a constitution. They distributes public authority and provide procedures and safeguards for its use.[141] The EU Treaties are, therefore, are constitutional in that important sense of the words that they form part of

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137 Cf also Schmitt (2008), 385: 'The federation agreement is a contract of a particular type, a constitutional contract specifically. Its conclusion is an act of the constitution-making power. Its content is simultaneously the content of the federation constitution and a component of the constitution of each Member State.'

138 In this regard already see Case 6/64 *Costa v E.N.E.L.*: 'By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became *an integral part of the legal systems of the Member States* and which their courts are bound to apply.'

139 Cf also Chalmers: 'Real power' in the Union remains firmly with the national administrations.' Chalmers, Davies and Monti (2010), 187.

140 Cf Weiler noting that, different from national law, EU law is 'not rooted in a hierarchy of normative authority or in a hierarchy of real power.'(Weiler (2000), 57 or Von Bogdandy (2010a), 39: 'The dependence of the Union's constitution on the Member States' constitutions is greater in law and in fact than that of a federal state in its constituent states. In terms of positive law, this results from, for instance, Article 6(2) and (3) EU or Article 48 EU, and conceptually from the principle of dual legitimacy, which implies that the Union's legitimacy depends on the legitimacy organised by the national constitutions.' On the power and authority of the national systems also see Loughlin (2006), 83 and Kumm (2012). Strongly emphasizing the secondary authority of a Member States, albeit from a very different approach, see P.L. Lindseth 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community.' 99 *Columbia Law Review* (1999), 628, and Lindseth (2010), for instance 21 et seq.

141 Cf also Burgess (2009), 39.

the network of legal rules established to delegate and control public authority. To perform this function, however, they do not *need* to make the same normative claims as a national constitution. The subsidiary but direct link with the people set out above, together with the related incorporation of the Treaties in national constitutions, are sufficient to explain why constitutional discourse is so suitable, and at least one of the necessary ones, in understanding and analyzing the EU and its founding Treaties.

The direct inclusion of the EU at the national constitutional level also helps to explain and circumscribe EU primacy. Especially so once it is combined with a further characteristic of the EU highlighted by the confederal perspective: the *reciprocal* nature of the extra-statal delegation by the sovereign member peoples of the EU.

8 The confederal primacy of EU law

The contested issue of primacy was already touched upon above. The ultimate primacy of their respective constitutional charters is claimed by both the ECJ and most national courts.[142] The resulting supremacy conundrum forms one of the beloved battlegrounds of EU law. At the same time the supremacy of EU law is generally accepted by these same national courts for day to day affairs.[143] A daily reality which sharply contrasts with the intensity of the clash at the level of theory and principle.[144]

142 Case 6/64 *Costa v E.N.E.L.*, Case 11/70 *Internationale Handelsgesellschaft*, Case 106/77 *Simmenthal*, and for the national dimension Oppenheimer (1994) and (2003), and De Witte (2011).

143 See supra chapter 8 section 1, as well as Besselink (2007), 9. The degree to which national lower courts really respect primacy, consciously or not, remains one of the intriguing blank spots, and perhaps safely so for the overall image of EU law. For recent high level judgments clearly signaling respect for EU law see the Constitutional Chamber of the Supreme Court of Estonia, Opinion No. 3-4-1-3-06 of 11 May 2006 *Euro Decision*, *Conseil d'Etat* (France), 30 October 2009, *Mme Perreux*, (2009) Revue française de droit administratif, 1125, overruling the notorious line adopted in *Conseil d'Etat* (France), 22 December 1978, *Cohn-Bendit* 1 CML Rev (1980), 543, *Conseil constitutionnel* (France), Decision 2012-653 DC of 9 August 2012, *Fiscal Compact*, or German *Bundesverfassungsgericht* BVerfGE 2 BvR 2661/06 (2010) *Honeywell*.

144 See again also the difference between the reasoning and the outcome in BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil* or a similar gap in the case law of the Polish Constitutional Court, for instance in its judgment of 11 May 2005, K18/04 on *Polish membership of the EU* or its judgment of 24 November 2010, K32/09 on *The Treaty of Lisbon*, and the Hungarian Constitutional Court, for instance in its Decision 143/2010 (VII. 14.) AB of 12 July 2010 *Lisbon Treaty*. For an example where high flying principle did lead to a very real conflict see the Czech Constitutional Court judgment of 31 January 2012, *Landtova* Pl. ÚS 5/12, whereas in its earlier judgments the Czech court had followed the same line of sharp and firm principles and supple application. See, for instance, its Decisions of 26 November 2008 *Lisbon I* Pl. ÚS 19/08 and 3 November 2009, *Lisbon II* Pl. ÚS 29/09.

A confederal perspective can at least reduce this supremacy conundrum. It allows us to distinguish the different bases, and therefore nature, of the national and EU supremacy claims. Once distinguished in this manner, furthermore, these claims are not as conflicting or mutually exclusive as might be expected.

8.1 The narrow but ultimate normative primacy of the national constitution

National constitutional supremacy is based on the supreme normative authority attributed to the national constitution. In turn, this authority is based on the principal and existential link between a national constitution and a member people set out above. An existential link that endures as long as the member peoples desire to remain independent sovereign entities, and therefore to keep the EU confederal at its core. National constitutions are, therefore, intertwined with the people in a way that the EU constitution cannot be, and represent the full and ultimate sovereign authority of the people. Not incidentally, national constitutional courts point to the *original* authority (or *kompetenz-kompetenz*) of the national constitution, as contrasted to the derived authority of the EU.

This primacy claim on behalf of the national constitution quite simply makes sense. It is only fitting and logical that it is defended by national constitutional courts charged with upholding their national constitutions. It is also fully compatible with a confederal understanding of the EU, which expressly leaves ultimate authority with the members. But what is especially interesting is that such an ultimate primacy claim at the national level does not inherently conflict with the sort of confederal, or secondary, primacy claimed by, and necessary for, the EU either. A confederal primacy that can be accommodated within the ultimate primacy that the national constitution must retain.

8.2 The weaker but broader claim of EU supremacy

As shown above the EU does not have a principal constitution, but does form part of multiple national constitutions. It receives sovereign prerogatives directly at the constitutional level. Already based on this constitutional level of delegation, the EU could claim some form of primacy over 'ordinary' national legislation. Just as constitutional norms trump lower national legislation, so do EU norms that derive from a constitutional level delegation to the EU. Such normal, or operational, primacy has also proven relatively uncontroversial.

Yet a certain primacy for EU law is supported by two additional grounds as well. First, unlike Member States, the EU receives reciprocal grants of sovereign authority from *multiple* member peoples. As a result where Member States only speak for one sovereign, the EU represents – one part of– many

sovereigns. This grants it another claim to a less intense but broader kind of primacy.

Second, these multiple grants are *reciprocal*. Each member people has delegated its parcel of authority in exchange for the delegation of similar authority to the EU by the other member peoples. These reciprocal delegations, therefore, form part of a contract (or compact) between these sovereigns, and thus are reinforced by the principle of *pacta sunt servanda*.[145] Interestingly, it was already accepted by Bodin that in principle even sovereigns should honour their contracts. Or in other words, the contract has a certain kind of primacy over the sovereign.[146] What is more, as Bodin also accepted, sovereigns can be bound by judicial interpretations and enforcement of their contracts. Interpretation that will require the relevant Court to assess the scope of the obligation undertaken by the sovereign, and hence the scope of the contractual limitation of his sovereignty.

Interestingly, these different and mutually reinforcing bases for EU supremacy – reciprocal, and contractual delegation of sovereign powers at the constitutional level– can all be found in the case law of the Court of Justice. The Court, furthermore, has gladly used the opportunity this composite basis offers to combine two different canons for judicial interpretation. On the one hand the Court can rely on the canon for constitutional interpretation. On the other hand it can also revert to the international law canon for the interpretation of treaties or contracts more generally. A combination which offers the ECJ an impressive array of options, and the ability to pick and choose from either the international or the constitutional depending on which fits or suits best. For instance the ECJ can combine principles as *pacta sunt servanda* and effectiveness.[147] Nevertheless the Court's defence of EU supremacy always remains within the confederal bandwidth, as the confederal inherently combines and merges the international and the constitutional.

To begin with, the Court's defence of EU primacy does not rest on any EU claim to ultimate normative authority. Rather in *Costa v. E.N.E.L.* the Court begins by stating that the EU legal order 'became an integral part of the legal systems of the Member States'. A finding that supports the confederal picture of the EU being included in the national constitutional systems.[148]

145 Cf the BVG in BVerfGE 2 BvR 2661/06 (2010) *Honeywell*, par. 53: 'Article 23.1 of the Basic Law permits with the transfer of sovereign powers – if provided for and demanded by treaty – at the same time their direct exercise within the Member States' legal systems. It hence contains a *promise* of effectiveness and implementation *corresponding* to the primacy of application of Union law.' (my emphases).

146 See chapter 9, section 3.1.

147 In a sense the rule of *pacta sunt servanda* can perhaps itself be understood as a rule of effectiveness, being a *condition sine qua non* for effective social behavior.

148 Case 6/64 *Costa v E.N.E.L.*

In line with this approach the Court then stresses the transfer of sovereign authority from the Member States to the EU. The EU (EEC) holds 'Real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community.' A defence of EU primacy which follows the first limb of constitutional delegation and interpretation.

The ECJ then continues its defence of primacy with the second limb: the reciprocal and contractual nature of the Community:

> 'The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over *a legal system accepted by them on a basis of reciprocity*. Such a measure cannot therefore be inconsistent with that legal system . The executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without *jeopardizing the attainment of the objectives* of the treaty (…).'

Supremacy is needed to safeguard the 'obligations undertaken under the Treaty'. Effectiveness, which most national constitutions simply assume, still had to be created in the EU using such teleological treaty interpretation.

The primacy of EU law, therefore, does not derive from a claim that the EU has a higher normative force, or a more fundamental power than the Member States. It derives from the constitutional nature of the powers delegated to the EU, the fact that the EU receives constitutional authority from multiple member peoples on a basis of reciprocity, and the related notion of *pacta sunt servanda*.[149] EU primacy, therefore, rest on a different basis than national supremacy. A basis which is subsidiary to national supreme authority, but nevertheless justifies an independent claim of supremacy over national law in most cases.

8.3 Confederal primacy: The peaceful coexistence of EU and national primacy

Starting from a confederal perspective, both the national and the EU claims to supremacy can be explained and supported. A conclusion that fits with the choice of most highest national courts to respect the supremacy of EU law over 'ordinary' national law but not over (core) constitutional law, and the intuition that this is not such an awkward idea. The different claims, furthermore, do not have to conflict, and if they do the outcome should generally be rather clear.

149 De Witte (1999), 183.

As indicated national constitutional primacy is based on the ultimate and supreme authority of the sovereign people.[150] Though more fundamental, it is therefore also more narrow, and largely concerned with preserving this ultimate authority and autonomy. It is consequently relatively untouched by EU supremacy at the operational level over non-existential issues.

The supremacy claimed by EU law is based on very different grounds, which provide the EU with a viable if not absolute claim to primacy. This confederal primacy of EU law, therefore, does not have to deny the ultimate supremacy of Member State constitutions and the sovereign people behind them. After all, part of the supremacy that the EU can claim is based on the same ultimate primacy of the sovereign people. Equally, the supremacy EU law does claim is not contrary to the confederal nature of the EU. Confederal sovereignty, after all, entails the delegation of sovereign powers outside the state, and, therefore, such primacy claims at the confederal level. Again, both at the national and the EU level it is the same sovereignty of the people that ultimately is at work, and that demands recognition in the form of primacy.

For most concrete cases this confederal distinction between forms and grounds of supremacy will provide an evident result. This is exemplified by the practical approach of national courts, including the BVG, to accept primacy of EU law over non-constitutional law, or even non-essential constitutional law, in all cases except grievous examples of ultra vires action.[151] Conversely, the common sense that the EU should not violate (the core of) its members' constitutions is now supported by art. 4(2) TEU.

The confederal approach does mean, however, that in the case of an ultimate conflict the ultimate authority of the national constitution should prevail over the less fundamental confederal primacy of the EU. The existence of such a fundamental conflict, furthermore, will logically have to be ultimately determined and resolved by national highest courts. Here confederalism, therefore, ends up in the statist camp, as it does accept an ultimate hierarchy, even though this hierarchy will more often than not remain latent. Fortunately this also means, however, that the confederal approach also remains in line with the current power and legitimacy reality as well.[152]

150 A distinction could be made here between the national constitutions which hold the sovereign command of the Member People, and the states, which are also created by these constitutions or at least derive their competences from the constitution. In that sense states have attributed powers only as well. In relation to the concept of a 'Verbund', which also hinges on the continued normative independence and primacy of the members, see Von Bogdandy (2000), 29.

151 See especially BVerfGE 2 BvR 2661/06 (2010) *Honeywell* par. 52-53.

152 A reality further underlined by the possibility of succession under art. 50 TEU, the use of which might perhaps even be demanded by a national supreme court.

Obviously this ultimate national authority, and the power of national courts to wield it, creates the possibility of conflict and abuse. As an inherent effect of their judicial *kompetenz-kompetenz*, for instance, national courts could declare any part of EU law in violation of constitutional core values. But more importantly, honest disagreements could also arise. This risk, and one can debate its magnitude and acuteness, partially comes with the confederal nature of the EU, which requires cooperation between multiple sovereigns. In part such conflicts should be buffered by the political process and made unappealing by the substantive benefits of confederation. The law can only be there to support and accommodate integration, and cannot be its *raison d'être*.

At the same time, however, law itself may be of assistance in further pre-empting any risk of such primacy disputes arising. To this end, for instance, it could be suggested to formulate EU primacy as a principle and not as a rule. Within this principle conceptual space would then be freed to allow a balancing between EU primacy, which after all is a means and not an end, and national constitutional values.[153] A suggestion that should not be mistaken, however, for a rejection of either the ultimate primacy of national constitutions or the secondary primacy of EU law in operational matters, both of which can be logically traced and supported from the confederal structure of ultimate authority in the EU. Two constructs, furthermore, that in many cases do not conflict, but do leave the eventual decision on the existence of conflict and on what to do in case of conflict at the national level.[154]

9 The normative appeal of confederal sovereignty

Potentially the most far-reaching advantage of confederal sovereignty is the positive normative understanding, or even ideal vision, of the EU it allows. An understanding where the EU is not an enemy of democracy, but an imperative for its survival in today's world. An understanding where the EU can become a vehicle which allows the member peoples to escape the confines of their states and to project their authority outside its borders,

153 See for an exploration of this option, and its fit with the case law of the ECJ, Cuyvers (2011), 49 et seq.

154 Again see BVerfGE 2 BvR 2661/06 (2010) *Honeywell*, par. 57: 'That in the *borderline cases* of possible transgression of competences on the part of the Union bodies – which are infrequent, as should be expected according to the institutional and procedural precautions of Union law – the constitutional and the Union law perspective do *not completely harmonise*, is due to the circumstance that the Member States of the European Union also remain the masters of the Treaties subsequent to the entry into force of the Treaty of Lisbon, and that the *threshold to the federal state was not crossed* .The tensions, which are basically *unavoidable* according to this construction, are to be harmonised cooperatively in accordance with the European integration idea and relaxed through mutual consideration.' (my italics).

thereby reinforcing their ultimate authority and making it 'globalization-proof'.

The normative and democratic potential of confederal sovereignty derives from the direct link it establishes between the EU and the member peoples combined with two further insights. First, the federal insight that a people can be empowered by having multiple governments. Second, the confederal insight that these governments do not have to be part of a single state.

As in the US federation, the EU could be understood, and developed, as a rival champion for the people, and as a second venue for them to exercise their authority. A rival champion that can check the existing statal one, which not incidentally is facing legitimacy problems itself, as the EU competes with the Member States for the favour of the people.[155] From such a perspective, the choice to delegate sovereign authority directly to the state and the EU can be seen as a safeguard for democracy, and a means of empowering the people. Unlike the US federation, furthermore, this second government of the peoples does not have the be part of a federate state. Confederalism, therefore, allows the federate benefit of multiple competing governments, but without the need for the member peoples to subsume themselves into a single sovereign people or a federate state. The member peoples are given a means to extend their reach beyond the state, and to check their own state, without having to sacrifice their ultimate independence or authority.[156]

Under such a confederal, and admittedly normative, understanding the EU could make the vital shift from an external threat to national democracy to an internal solution for the democratic challenges of today's world. A shift that would not just be rhetoric, but would form an actual part of the EU's constitutional theory, as it pertains to the self-understanding and ultimate aim of the EU project. Again the prescriptive nature of sovereignty must be stressed here: Such vistas of confederal democracy purposefully contain prescriptive elements that still need to be realized, yet this does not make them any less real or relevant for current EU theory.

Of course here the problem occurs that, under a perfect application of popular sovereignty, the people must also be the *original actors* underlying the constitution. As in the US we prefer a (mythical) moment where the people, as an actuality, constitute public authority. In such cases the timeline of authority overlaps with its conceptual foundation.

155 Elazar (2006), 29.

156 Although some restriction of ones own freedom (understood as liberty to do as one wants) will always be necessary for any form of effective cooperation.

Yet in EU this has not happened.[157] And considering the enduring irrevocability of time it cannot happen: We can never go back and create a (confederal) founding moment à la US. As discussed, however, it is essential to accept the prescriptive power of sovereignty to *restore* this lacuna.[158] What can be seen as a hypocritical myth, twisting history to mask an elite coup, can also be welcomed as the necessary capacity of social constructs such as sovereignty to go back in time, and to provide a normative foundation for a historical fact. A necessary solution for the chicken and egg problem of self-constitution.[159]

9.1 The importance of self-understanding for democratic legitimacy

A more appealing normative self-understanding of the EU is important for legitimacy in itself. For currently integration is often primarily justified as factually inevitable. Resisting it, therefore, betrays a form of naivety and other-worldliness automatically disqualifying one's opinion for serious consideration.

Yet even if integration is indeed factually inevitable, this does not automatically make it normatively or emotionally acceptable for the member peoples. Finding the narrative that transforms the necessary into the desirable is a vital part of constitutional mythology and politics. It is an important ingredient for generating legitimacy, as once again shown by the US experience. In the US the need to establish a more effective system for governance needed to be translated into a more appealing and normatively convincing narrative as well. A narrative of democracy and federalism which, in its turn, ended up significantly influencing the political reality and eventual constitutional nature of the US.

The confederal approach, including its focus on internal and popular sovereignty, can provide such an attractive democratic narrative of the EU. One that might convince the people that they, as the internal sovereigns, are empowered by integration, and by convincing them in fact contributes to achieving that end.[160]

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157 See, however, the overview of the significant direct popular support for accession described in chapter 10, section 6.1.2.

158 See also chapter 9, section 3.3. and 3.4. for this prescriptive potential and essence.

159 See in this regard also the analysis of this temporal trick in the 'judicial' constitution of the EU in *Van Gend & Loos* in H. Lindahl, 'Acquiring a Community: The Acquis and the institution of European legal order', 9 *European Law Journal* (2003), 433, 439 et seq.

160 Cf also Van Middelaar (2009), 294, 301 on the importance, and creative potential, of perception for social and institutional facts, and admitting that any claim to represent the *pouvoir constituant* requires an element, or episode, of bluff.

Creating such a convincing narrative is also important for the legitimacy of the *national* systems comprising the EU. For the longer national self-understanding and political discourse cling to the notion, or desire, of an absolutely sovereign and omnipotent state, the bigger the discrepancy with reality will become. For though the inevitability of globalizing forces does not in itself create legitimacy for integration, it cannot be ignored either. The state is no longer able to singlehandedly determine outcomes on many issues that its citizens do wish to influence. Continued national promises that the state is able to determine these outcomes can, therefore, only lead to an increased disillusionment of the people in national politics: It can never deliver what it promises, nor can it 'protect' them from the outside world. By clinging to a myth of statal autarky, in other words, national systems are undermining their own long term legitimacy. Instead they need to embrace new venues and methods for serving the interests of their people, an they must endow these new venues with the legitimacy required to make them work.

A last benefit of a positive confederal narrative of the EU is that it bases the Member States and the EU on *compatible normative foundations*. Both will be based on internal and popular sovereignty. The EU can then link to the normative structure of the Member States, without needing a people of its own, or developing a competing basis for authority that might undermine the ultimate claim of the member peoples at the national level. Instead both the national and the EU level can be conceptualized as two complementary servants serving the same popular masters.

The direct link with the member peoples, therefore, opens a channel for the EU to ground its authority in these peoples. To actually connect itself with these fountains of popular authority, however, the EU should embrace a confederal narrative. A narrative that includes internal and popular sovereignty, and the democratic self-understanding that comes with it. A narrative which allows the EU to be envisioned, developed, – and sold –, as a development to safeguard the sovereignty of the people and their democratic influence in a globalizing reality.

9.2 A confederal fairytale?

It can be objected that this picture from confederal sovereignty appears a very theoretical, normative, and abstract construct. And it is. It can equally be objected that this analysis requires a rather hopeful disposition, and some wishful thinking to boot. And in a sense it does. The confederal perspective purposefully includes an element of idealism, and is further based on the normative assumptions that authority should be based on the people, and that it is valuable in itself to preserve the distinct member peoples in the EU.

Against such understandable objections, however, it must first be replied that the idea of a sovereign people, or that of sovereignty in general, is highly abstract and theoretical.[161] Qualities that have not prevented these constructs from playing vital roles nationally over the past centuries. Second, to fully appreciate the potential of confederal sovereignty it is necessary to bear in mind its prescriptive nature. Sovereignty does not aim to simply describe a power reality. It prescribes the authority structure as it should be.[162] Although it cannot deviate from reality too much, it does aim to steer reality, and to provide a normative framework to justify it.[163] Confederal sovereignty can play such a prescriptive and legitimizing role for European integration. Besides justifying the current reality in the EU, it should act as a rudder and compass in developing or correcting the EU system to better conform to the confederal democratic ideal.

In that regard it is important that moving in the right direction, or even striving for the right goal, can already provide a certain level of legitimacy. Certainly for an ongoing project as the 'ever closer' Union, which is in need of a goal and positive dynamic. Even the US federate system was, and is, partially legitimized by a continued strive towards a future aim, towards an ever 'more perfect Union'.[164]

At the same time these defences obviously remain rather theoretical as well, just as most of the advantages of confederal sovereignty set out above. Although at this point one can conclude that confederal sovereignty at least offers the possibility of a more normatively appealing understanding of the EU, namely as a democratic imperative to liberate democracy and the member peoples from the increasingly inadequate confines of the state, the question remains how to operationalize confederal sovereignty, and how to realize these benefits of a confederal approach.

Fully acknowledging the tendency of reality to spoil perfectly good theory, part III of this thesis will therefore apply the confederal approach outlined so far to two challenges of reality: how to implement confederal sovereignty constitutionally and institutionally, and how to respond to the EMU crisis from a confederal approach. Before engaging these challenges, however, let us first provide a concluding overview of part II.

161 Hinsley (1986), 156 et seq.
162 See chapter 9, section 3.3 and 3.4.
163 CF also Börzel and Risse (2000), 5.
164 See the preamble to the US Constitution, as well as the 2008 inauguration speech by Obama still hailing 'A More Perfect Union'.