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The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU

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Conclusion: The EU as a Confederal Union of Sovereign Member Peoples

The European Union is rearranging the rule of a continent. Increasing amounts of public authority are transferred from the Member States to the European level. Authority that is no longer under the exclusive control of national political systems, and further removed from their legitimacy creating mechanisms. Remaining national competences are more often than not affected by European norms, or become increasingly irrelevant due to globalization. The gravity pull and internal dynamics of integration, furthermore, are far from exhausted, as the increasing EU control over national budgets and economic policy illustrates. We are, in other words, in the middle of a major experiment in government.

Reorganizing government on such a grand scale offers great opportunities. Certainly at a time where the scope and structure of government needs to be realigned with the reality that needs governing. Tremendous challenges, however, accompany such change as well. Meeting these challenges is also becoming increasingly urgent. For the EU is not just a theoretical exercise. It is a life test, which carries immediate responsibilities. More than five hundred million people find themselves citizens of a still ongoing and ever-expanding experiment. They wonder how the EU will compensate for the national political and constitutional arrangements it has uprooted. And it appears they are becoming somewhat impatient. Not unreasonably so, one might add. After more than fifty years of relatively blind trust, the EU is still under construction; its nature and intended destination still unknown.

Meanwhile, existing constitutional and legal theory struggle to catch up. Considering the magnitude and speed of developments, furthermore, the ongoing pursuit of the EU is often guided by the understandable assumption that, to comprehend the EU, we need a completely new theory of political and constitutional organization. Brave new thinking beyond the statal framework and existing concepts seems called for.

This thesis, however, took a different approach in its attempt to help recapture the EU. Rather than burning our theoretical bridges behind us, it aimed to *reconnect* the EU to two classic and powerful, yet thoroughly unfashionable constructs: confederalism and sovereignty. Instead of forcing the EU to overcome history, these two constructs were used to connect the EU to existing theory, human experience, and the normative force they contain.

Two constructs, therefore, that could form part of a constructive confederal theory of the EU that builds on and improves existing structures, rather than spending most of its energy on demolishing them.

The findings above have demonstrated the *prima facie* potential of confederalism and sovereignty to contribute to such a constructive constitutional theory of the EU, and to a positive and democratic narrative for the EU more generally. The EU can indeed be usefully understood as a modified confederal system, and can be grounded on a confederal conception of popular sovereignty. Jointly, these constructs help to conceptualize a descriptively useful and normatively attractive confederal middle ground for the EU to rest on. A constitutional middle ground which can embrace a plural reality within the EU, yet without surrendering its necessary foundation in the sovereign member peoples and the national democratic process. One which actually shows how the EU can be conceived, and hence developed into, a necessary update of democratic government that protects the authority of the people from irrelevance in a global age. An update that empowers them to go beyond their nation state whilst retaining it as an existential safe haven, and to create a government of the peoples and for the peoples outside the state.

The confederal approach developed, furthermore, also helps to dissolve several theoretical deadlocks that currently obstruct our understanding of the EU and its peculiar strengths and weaknesses. Sovereignty and integration stop being an either/or, plurality and hierarchy stop being intrinsically incompatible, and the EU does not have to deny or erode the ultimate authority of the sovereign member people or the principal status of their Member States. Although much work remains, the path towards a more constructive and symbiotic understanding of the EU as a logical and attractive confederal evolution of public authority has thereby been demonstrated. A path that fits with the reality and necessity of a Neo-Westphalian world where states must surrender their near monopoly on public authority but nevertheless remain of central importance, and where increasing demands of democracy have to be reconciled with decreasing national power and factual interdependence.

2 CONFEDERALISM AND THE EU: THE MODIFIED CONFEDERATION AS A MODEL

To support these conclusions, part I first returned to the rich notion of confederation: The classic label for a *constitutional* union between entities that each retain their ultimate authority and independence.¹ A Union therefore,

1 For more detailed conclusions on part I see chapter 6.

that goes beyond the 'intergovernmental', certainly is 'supranational', but falls short of statehood or federation.

By comparing the EU against the concrete example of the US Confederation and its evolution into a federate state it was shown how the EU has retained a fully confederal foundation, yet reinforced and burdened this foundation with a federalized superstructure.

For on the one hand, the EU has not incorporated any of the foundational modifications that together grounded the American transition to a federation. The EU does not create a single European people, is not allowed to tax directly or use force, the Treaties cannot be amended by majority and secession is allowed. On this foundational level, therefore, the EU remains wholly confederal.

On the other hand, the EU does claim supremacy and direct effect, utilizes a federate doctrine of attributed powers, wields significant powers to regulate commerce, and incorporates a supreme federate court with a final say on the interpretation of the Treaties. Jointly these federate modifications form an innovative and crucial federate superstructure. They help to understand how the EU remains confederal at its heart, yet is also federate in some sense. In addition, this federate superstructure modifies the classic confederal system in several important ways, which helps to better understand the evolution and functioning of the particular EU system. Jointly, the comparative findings of part I thereby supported three key findings on the EU constitutional framework.

2.1 *Three comparative key findings*

First, the EU can best be understood as an *inverted confederation*. Contrary to the US confederation, it has an internal and economic focus, not an external and military one. This provides the EU with a far more continuous and stable basis for confederal cooperation than the traditional external focus: In the marketplace there are no times of peace. What is more, the impetus for continued cooperation provided by an internal market also has the crucial capacity to keep pace with integration. The deeper economic integration becomes, the higher the benefits of cooperation and the costs of a breakdown become as well. A finding that helps to explain the remarkable stability of the EU for a confederal system, and its capacity so far to overcome significant crises. The sheer limitlessness of the economy and the market, however, also explain the complexities in circumscribing the scope of EU integration. An unlimited market should not result in an unlimited EU.

Second, the EU rests on a confederal basis, but has both reinforced and burdened this basis with a federate superstructure. It has included several of the federate constitutional elements which made the US federation more effective, yet without incorporating the foundational elements which sup-

ported these elements in the US, such as a single people or a separate federate government.

This federate superstructure further explains the remarkable stability and effectiveness of the EU. It protects the EU against several of the classic confederal weaknesses. At the same time it also explains some of its main weaknesses, including the EU's continuous quest for legitimacy. After all, a clear gap exists between the authority capacity of the confederal foundation and the authority demand of the federate superstructure. A constitutional imbalance that, as discussed, resembles armouring a car without increasing its engine capacity.

Third, the EU has used these federate modifications to develop a truly *confederal rule by law*. Not incidentally almost all of the federate modifications identified concern law and the legal system. This method of governing builds on the capacity of the administrative and legal systems of the modern welfare state to self-police. A vital mechanism, as it reduces the need for the EU to enforce, and thus reduces stress on several classic Achilles heels of confederal systems: Money, conflict and enforcement. A conclusion, therefore, that also helps to further understand the vital role of law for European integration, as well as why the EU has achieved a level of stability and effectiveness that most classic confederal systems could only dream of. Here modified confederalism really does form an *empire of law*. At the same time, it also exposes some major weaknesses of the modified confederal form, including its reliance on stable Member States and national legal systems, its limited capacity to control non-legal domains, or to engage in direct political conflict where a conflict escalates from the legal to the political domain.

Jointly, these confederal findings provide a high explanatory power for many of the well-known strengths and weaknesses of the EU system. Additionally, they identify some less obvious ones, which might be better exploited or will provide future problems if not attended to. The primary risk identified, however, is the growing schism between the confederal basis and the gradually expanding federate superstructure of the EU. A schism that increasingly taxes the confederal foundation of the EU, and should be addressed before it threatens the viability of the entire system.

2.2 Three confederal key conclusions

Based on these confederal findings, three central conclusions were drawn. First, the confederal prism provides a suitable and instructive prism to approach the EU with. It can explain and accommodate its pluralist characteristics, as well as the ultimate hierarchy of its member peoples in their states. It also contributes to understanding the continuous expansion of EU integration, which can partially be explained as a process whereby the federate superstructure, not sufficiently contained by the confederal basis, self-

expanded. At the same time the federate superstructure also allowed the EU to survive several deep crises where traditional confederations would likely have failed.

Second, many of the familiar EU weaknesses are so hard to address because they are linked to the very modifications that protect the EU against the traditional confederal weaknesses. A catch-22 results, for by weakening the federate modifications underlying some of the EU woes, such as the ever-expanding internal market, even worse systemic risks may return in their place. Instead of removing these federate modifications, therefore, further modifications within the confederal system as a whole are required. These need to take into account, however, all the outer limits inherent in the confederal form. Confederal overstretch, that is burdening the confederal foundation of the EU beyond its carrying capacity, will only deepen the problems of the EU in the longer run, and therefore harm its long-term viability.

Third, and related to this second conclusion, the EU is in fact approaching, or perhaps already overstepping, the limits of its current framework. The gap between the federate superstructure and the confederal foundation has become dangerously large. This puts a high level of strain on the legitimacy of the EU, but also on the national institutions that carry integration at the statal level. As legitimacy and trust are already in short supply in the political arena today, bridging this gap must become a priority for politics and theory alike. An exercise to which a confederal approach to the EU can again contribute, both by providing a better understanding of the risks, and by identifying different means to address them.

2.3 *The lack of federate driving forces*

To complement this substantive comparison, part I also considered the process of American federation. Though based on a selective sample, this analysis showed how several of the key procedural components that drove and enabled federation in the US are lacking in the EU. Most important in this regard is the reversed elite structure in the EU. In the US several pre-independence elites saw federation as their way back to political power. In the EU the national elites depend on their national power bases, and therefore will not weaken these in favour of EU integration: Not enough actors would gain more power from federation than from maintaining the status quo. The national democratic and elite structure in the EU, therefore, prevents rather than propels a federate shift in political authority, and cements the confederal authority structure of the EU.

In addition, it was shown how the primary normative argument generally used to defend federation – making the EU more democratic – is largely based on confusion between *having* a central normative authority and *how* this authority is represented. For federation simply does not equate with

democracy. In several important respects, American federation should be seen as a check on democracy, or even as an anti-democratic coup intended to reign in the overly democratic states, and return authority to an ordered central system.

Consequently, these process elements only confirmed both the improbability of European federation, at least in the foreseeable future, and the normative risks that federation would entail. As such, they confirm the necessity of finding confederal solutions to the woes and weaknesses of the EU.

A conclusion which also leads to the second key challenge of this thesis: How to create a confederal basis strong enough to carry a significant federate superstructure? A challenge that, as shown in part II, should build on the specific strengths of the EU's confederal foundation, yet avoid its inherent weaknesses. A worthwhile challenge, however. If found, such modifications would open up the confederal form as a highly interesting model for a globalizing reality, one where the federal capacity to combine unity and diversity should be taken to the next (confederal) level. It was to address this challenge that part II engaged with the second central concept in this thesis: sovereignty and the potential evolution towards a confederal conception of sovereignty. An evolution that should emulate the federate evolution of sovereignty in the US, and enable the sovereign member peoples to reassert their position both at the national and at the EU level.

3 A CONFEDERAL EVOLUTION OF SOVEREIGNTY

Inspired by the federate evolution of sovereignty in the US, part II subsequently established the potential of such a confederal conception of sovereignty. A conception that enables a direct and popular foundation for the EU in the sovereign member peoples, and thereby prevents the need for the EU to choose between federating or taking a step back into the unstable waters of traditional confederation. Sovereignty, in other words, is part of the solution for creating a stable and democratic EU, not part of the problem.

To support these findings, part II developed two necessary, though not sufficient, definitional elements of a confederal conception of sovereignty, being *internal* and *popular* sovereignty. It subsequently illustrated their capacity to overcome the apparent contradiction between sovereignty and integration suggested by the current theoretical framework, and the statist-pluralist divide that shapes it.

3.1 *The conceptual fit of confederal sovereignty*

First, it was shown how a confederal conception logically fits with the concept of sovereignty and its evolution over time. A fit that became apparent

once the increasingly confused concepts of internal and external sovereignty were separated, and the EU was approached from the conceptually and normatively more fundamental concept of internal sovereignty alone.

For, as was demonstrated, internal sovereignty does not conflict with the division of sovereign authority that integration entails. Within the logic of internal sovereignty, sovereign prerogatives are perfectly capable of being divided over multiple levels and governments. This even more so after the popular and federate innovations to internal sovereignty, as developed in the US, are taken into account.

As was then further demonstrated, it is only the concept of external sovereignty that conflicts with integration. For where internal sovereignty became increasingly flexible, external sovereignty evolved towards an absolute, indivisible and statal sovereign. A powerful construct, which over time has wrongly come to dominate our understanding of sovereignty, eclipsing the concept of internal sovereignty. Yet external sovereignty is intrinsically unsuited to understanding an entity like the EU, and ultimately remains secondary to internal sovereignty, which it must assume.

Consequently, it was shown that European integration, with its dividing and sharing of far-reaching public authority outside the Member States, does not conflict with sovereignty as such. Rather it forms a logical and necessary confederal evolution of internal and popular sovereignty. One that reasserts the control of the normatively primary internal sovereign over the external sovereign, or more plainly put, of the people over their states. A conclusion that can also be normatively welcomed, as the external sovereign had become increasingly dominant, in theory and in fact, even though it is inherently less democratic and certainly less suited to order an interdependent and interconnected reality.

3.2 *De-complicating reality*

Based on this conceptual analysis, it was then demonstrated how the EU can indeed be understood as a further confederal evolution of internal sovereignty. Instead of delegating all their sovereign powers to a single state, the member peoples now delegate part of their sovereign authority directly to an external, non-statal entity. Moreover, they do so reciprocally in a confederal union with other sovereign member peoples. This development forms an important modification of the traditional Westphalian arrangement, but it does not deviate from the basic structure or logic of internal sovereignty. As such, it also presents a far more logical, if less spectacular, picture of the EU: Instead of seeing the EU as a radical break from all that came before it, the EU can be understood as a gradual evolution of sovereignty and confederal organization. It becomes a logical, if not necessary or inevitable, development in the exercise of public authority.

The analysis from internal sovereignty also provides an important legal, normative and evolutionary fit with the realities within the EU. Legally it fits with the basis of the EU in attribution, and the case law of the Court of Justice on this point. Normatively it provides a crucial fit with the national authority structures in the Member States, almost all of which explicitly recognize the sovereign authority of the people. Evolutionarily it fits with the direct but secondary bond that is being increasingly established between the EU and its citizens. In addition to this overall fit, a confederal conception of sovereignty was also shown to provide several further distinct advantages for a constitutional theory of the EU.

3.3 *Advantages of confederal sovereignty: From technocratic frog to democratic prince*

First of all, building on the conceptual analysis above, it has been shown how a confederal conception of sovereignty can dissolve the commonly assumed incompatibility between sovereignty and integration, and thereby the clash between statism and pluralism that largely derives from this contradiction. What is more, once approached from an internal and confederal conception of sovereignty, both statism and pluralism can actually be strengthened, relieved of some of their less convincing purist streaks, and made more compatible with each other.

For example, the member peoples can retain ultimate sovereignty, and they can hence intervene in the case of fundamental conflict between the EU and a Member State. Yet this does not reduce the daily reality in the EU to a linear hierarchy. For *neither* the EU, nor the Member States turn out to be ultimate authorities, but the member peoples. So in the relation between the EU and the Member States a high level of fundamental heterarchy can remain. With sovereign hierarchy in place as the necessary hierarchical exception (statism), heterarchy can remain the daily reality between the Member States and the EU (pluralism).

Second, and as a result of this reconciliation between sovereignty and integration, sovereignty stops being one of the obstacles that the EU needs to overcome. Instead, sovereignty, with all its potential to legitimize and structure authority, becomes available as a building block for a constructive constitutional theory of the EU. A conclusion that leads to the second key advantage of confederal sovereignty: Its capacity to provide the sufficient confederal foundation required to support the federate superstructure of the EU.

For as was shown, with the help of confederal sovereignty the EU is enabled to establish a direct, if subsidiary, link between itself and the sovereign member peoples. A link which explains and substantiates the increasingly direct connection between the individual and the EU. Even though it needs to be further developed and institutionalized, this link opens up a path to a sufficiently stable, yet still confederal basis for the EU in the sover-

eign member peoples, and with it the potential for direct, though secondary, popular legitimacy.

In addition, it was shown how confederal sovereignty dovetails with the contested issues of EU constitutionalism and the conflicts surrounding primacy. From a confederal perspective, the EU Treaties can logically be understood as secondary constitutions. They partake in the constitutional structures of the Member States, fulfil the constitutional task of dividing and controlling sovereign authority, and derive additional and uniquely confederal authority from the multitude of sovereign mandates simultaneously held. At the same time, the Treaties lack the existential dimension and intensity of national constitutions, which form the principal political shells of the sovereign member peoples.

This conclusion also allows us to distinguish between the ultimate normative primacy of national constitutions, and the secondary, though broad, primacy of EU law. The confederal primacy of EU law is based on several mutually reinforcing bases, such as its constitutional nature, the principle of *pacta sunt servanda*, and the possession of multiple reciprocal delegations of authority. National systems can generally accept these arguments, and hence the supremacy of EU law in daily operational practice. They can just not accept an EU claim to ultimate normative authority, which the EU fortunately does not have to make.

The distinction between the different types of supremacy enabled by confederal sovereignty, therefore, explains the seemingly conflicting supremacy claims at the national and the EU level. It further demonstrates how both claims are based on different, and largely compatible grounds, which allow a broad and powerful operational primacy to the EU, but retain an ultimate primacy for the national constitution. In the case of a conflict, furthermore, the risk of which cannot be completely eliminated, the sovereign people now provide a sovereign back stop.

Lastly, and also crucially in light of the challenges raised by part I, it was demonstrated how a confederal conception assists in developing a positive normative and democratic narrative for the EU. It conceptualizes the EU as an evolution in internal and popular sovereignty necessary to safeguard democracy in a globalizing world. Member peoples are empowered to escape the confines of their states. Even though their states remain, in confederal style, their principal habitats, extra-statal delegation should be seen as a democratic imperative and popular empowerment. Its rejection would be a refusal to evolve, historically a path to extinction only.

Consequently the EU can be construed as the 'saviour' of popular sovereignty and democratic control over globalisation. Confederal organization can thereby be seen as the current optimum between self-rule and the cooperation necessary to remain relevant.

4 CONFEDERAL TESTS AND APPLICATION: DEMOCRACY AND THE EMU CRISIS

Parts I and II therefore established the *prima facie* feasibility and attractiveness of confederalism and a confederal conception of sovereignty for the EU. Constructs, furthermore, that could clearly be of value for the EU in some of its most problematic dimensions. At the same time the potential held by the confederal form must, to a large extent, still be translated, operationalized and institutionalized. The confederal link between the member peoples and the EU needs to become a democratic reality and a political actuality. A democratic reality, however, that in keeping with its confederal basis must retain its principal existence at the national level. To further test and illustrate this potential of confederalism, part III subsequently applied the confederal approach to two major challenges: Reconciling integration with national democracy, and the sovereign debt and EMU crises.

4.1 *A confederal evolution of the national democratic process*

Concerning the potential for a confederal evolution of the democratic process, chapter 12 first illustrated the confederal root causes of the current democratic deficit. Root causes which were found not to lie in the decline of the state or limited representation at the EU level, but in the failure to institutionalize the reality of confederal integration at the national constitutional level. Three guiding principles were then formulated that could guide a better national embedding of European integration, and to allow a national democratic process to develop and exert control over a confederal application of public authority. To illustrate these principles and their underlying confederal logic they were combined into one concrete suggestion: the creation of EU senates within the Member States. These senates which would be directly elected at the national level, would not incidentally form the mirror image of a central federate senate. These bodies could be developed into the required political and institutional nexus to which a national political process on EU matters could attach itself. An aim for which they need to fit within the national system, receive a critical mass of EU powers but also remain necessary to the exercise of national political authority. In this manner, EU senates could provide both the prize and the arena required for a much needed national political fight over the EU at the national level, and hence the chance for the member peoples to pick their political champions and democratically engage with European integration. The EU could then revert to a confederal role of supporting and guiding the national institutionalization of confederal democracy, for instance by creating guidelines and minimum requirements. A role which it should in any event claim with more vigour in the future, both to protect its own confederal foundation in the member peoples, but especially to guarantee its citizens the democratic control, also at the national level, they are entitled to under the Treaties.

4.2 *A confederal answer to the sovereign debt and EMU crises*

Lastly, the confederal approach was applied to the sovereign debt and EMU crises. It was first shown how, from the confederal perspective, these crises can be logically understood as a perfect confederal storm. First of all, these crises logically flow from the fault lines between the confederal foundation and the federate superstructure of the EU. They clearly illustrate the risk that a gradually expanding federate superstructure poses for the EU, as well as just how powerful an incentive for continued cooperation is generated by the inverted focus of the EU. For equally remarkable as the development of these crises is the confederal determination to overcome them so far.

In addition, it was shown how these crises simultaneously hit several of the EU's confederal Achilles heels, including money, politics, enforcement and direct conflict. The crises are thereby forcing the EU beyond a rule by law and onto the stage of high politics and direct conflict. A stage for which it is poorly suited.

Appreciating these confederal root causes, and placing the crises in their confederal context, also revealed two major pitfalls that should be taken into account when responding to the crises. First of all, the EU should guard against a federate overreaction to the EMU crises. An overreaction, for instance, in the form of creating a fully federate economic union with far-reaching authority over the budgets of its members, and therefore over the political will of its member peoples. Such a move could enlarge the federate superstructure far beyond the carrying capacity of the confederal foundation. Equally, the EU should refrain from trying to establish the primary democratic legitimacy that would be required for any such far-reaching powers at the EU level. An attempt that would not only be likely to fail, but would also threaten the very national democratic authority on which the EU largely depends. An attempt, therefore, that would also be likely to evoke a confederal countermove that could re-confederalize the federate superstructure, which would equally threaten the modified confederal system developed in the EU so far.

Instead, it was argued that the EU should consider a more balanced confederal response to the crises. Such a confederal response logically focuses on the national constitutional level, and leaves it up to the national democratic process to establish the necessary safeguards for a responsible economic policy that meets the confederal obligations of the member peoples. One option would be to establish national debt brakes, but part of the power of a confederal response would be its capacity to allow for measures that are tailored to the different national systems. The energy and leverage of the crises should, therefore, be utilized to establish such national mechanisms, and to improve the national democratic systems along the confederal lines set out in chapter 12 more generally.

5 STRENGTHS AND WEAKNESSES OF CONFEDERALISM

Overall, therefore, the confederal perspective developed in this thesis holds much of value for a constitutional theory of the EU. It provides a logical fit with the EU, placed as it is between a 'normal' international organization and a federation. As a result it also holds a strong explanatory power, both for the strengths and the weaknesses of the EU. Especially the dynamic between the confederal foundation and the federate superstructure is instrumental in this regard.

The explanatory fit and value of the confederal approach also provides a concrete framework when considering future developments in the EU. It not just sheds light on the weak points that must be addressed, but also on the strengths and opportunities within the confederal form that should be relied upon to do so. Instead of entering conceptual and constitutional no man's land whenever we engage the EU, we can rely on past experiments, albeit with all the caveats that come with such comparative exercises. Suggesting modifications to the EU may start to feel less like operating on E.T, where one would have no idea if our understanding of human medicine has any use, or might only pose a tremendous risk when applied. Instead, the EU can be brought closer to earth by identifying those parts that can usefully be described and understood from existing knowledge and categories. As a flexible approach, furthermore, confederal insights can be readily applied to other more general theories of the EU, for instance those defending a hybrid understanding of the EU, or notions of composite constitutionalism.

At the same time, a confederal understanding of the EU also brings several weaknesses and threats to the fore. To start with, it points to the growing schism between the authority capacity of the EU's confederal foundation and the increasing authority demands of the federate superstructure. This superstructure is largely linked to the internal market, which is itself expanding and knows little inherent limits. The federate force of this superstructure, furthermore, means it cannot easily be contained by the confederal foundation. Consequently, there is a real risk of the superstructure exceeding a critical size, the precise boundary or threshold of which is hard to predict. Both controlling this superstructure, and strengthening the confederal foundation along the lines set out above are, therefore, necessary.

A necessity which, unfortunately, leads to a second central weakness. The continuing failure up till now to realize the democratic and constructive potential of the confederal form. For whilst the federate superstructure was increasing, the necessary confederal foundations have not been sufficiently strengthened at the national level. Neither the national constitutional or institutional structure, nor the national democratic process were sufficiently adapted. With the passing of time, however, several of the traditional normative foundations of the EU, such as fear (and German guilt) of war, desire for peace, hopes of prosperity or fear of the Russians, which carried part of

the federate superstructure so far, have decreased in force. In its place, and unopposed by strong confederal foundations, a certain resentment against the EU has been gradually building. Resentment which is now being effectively cultivated politically to acquire national political power.

In other words, the rather unique constitutional grace period following world war II, further supported by the enormous economic growth the EU experienced over the past decades, has not been used to set in place a more lasting national foundation for the EU. Unfortunately this means that this more lasting foundation must now be erected, and urgently so, under far less ideal circumstances, including a severe economic crisis. A major challenge and risk for the confederal model.

The risk of increasingly unstable and uncooperative Member States, and the resulting threat of a breakdown in the rule by law, can amplify another inherent risk for a confederal system, such as the imbalance in actual power between the members and the potential for unregulated power play.

In a federation, after all, the differences between the constituent parts are taken into account in an institutional compromise. In the US the more populous states, for instance, were awarded more votes in the House of Representatives, whereas equality between states was respected in the Senate. Differences in size, population or power are further neutralized by the creation of one overarching federate people, which possesses greater authority than even the largest Member State. In the EU this last safeguard is absent. There is no overarching authority, so smaller Member States are protected by the rules of the Treaty, and therefore (the rule of) law, alone.

Consequently, if large Member States such as France, Spain, Poland, or especially Germany were to become unstable, or for other reasons would start to ignore EU rules and predominantly rely on (political) force, the confederal system of the EU would be seriously challenged as well. This is not to ignore the reality of political power, which of course has always played a role within the EU, but only to indicate the risks for a confederal system where the rule of law would be undermined. Besides strengthening the confederal basis and respect for the rule of law within each Member State, however, such power imbalances are hard to address for a confederal system. One alternative would be to take another leave from the US federalists, and to allow different factions within each Member State to cooperate with factions in other states, for instance via the confederal senates proposed. This to break up the political power of larger states into several, sometimes opposing, factions. Although such a scheme would require far more study, it could be seen as a next step in confederal democracy as well, allowing the sovereign peoples to interact and form mutual coalitions. Even so, however, the imbalance of power between Member States will remain a risk factor from the confederal perspective.

6 TOWARDS A DEMOCRATIC CONFEDERAL UNION OF SOVEREIGN MEMBER PEOPLES, OR THE CONFEDERAL COME BACK!

Several challenges, therefore, face the confederal experiment of the EU. At the same time, the strengths and opportunities offered by the modified confederal form may well be capable of meeting these challenges, especially once combined with a more developed conception of confederal sovereignty. What is more, the normative and democratic potential of the modified confederal form certainly makes it worth our while to try.

As such a confederal theory of the EU deserves to be developed further, either separately or as part of a broader and more encompassing theory. Now that proof of principle has been provided, the EU could, for instance, be compared against further (con)federal systems, and specific means of strengthening the national basis of the EU confederal system can be explored based on experiences in different con(federal) systems.

An improved understanding of the modified confederal form is also of interest for the organization of extra-statal authority more generally. For the EU is only one polity in which the organization of public authority must be realigned with reality. The modified confederal form, as developed within the EU, provides a powerful tool for such exercises. What is more, it has the unique advantage over federate or statist approaches that it allows sovereign member peoples to simultaneously participate in multiple forms of extra-statal cooperation: As long as the centre of sovereign gravity remains with the member peoples, nothing stands in the way of delegating authority to multiple external entities at different levels and with different objectives, as long as the national constitutional system is kept up to date with these different delegations.

For now, however, it suffices to conclude that confederalism does allow a constructive and attractive understanding of the EU. Although it needs to be further developed, the EU can be usefully understood as a confederal union of sovereign member peoples, both as a reality and as an aspiration. As a result, our neo-Westphalian reality may indeed be the perfect time for a veritable confederal comeback. A time when this ugly duckling of constitutional theory can finally come into its own, and provide a constitutional model for effective and democratic government in a globalizing world.