

**The London School of Economics and Political Science**

*The European Union as a Federation: A Constitutional Analysis*

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## **Abstract**

What type of political association is the European Union? From the start of the European integration process, this question has puzzled scholars. Many different answers have been offered, but in the absence of an agreed response, most scholars implicitly avoid the issue by suggesting that the European Union is ‘sui generis’. In contrast, this thesis maintains that the European Union is a federation (Bund): a political union of states founded on a federal treaty-constitution that does not constitute a new federal state. The thesis maintains, further, that the federation is a discrete form of political association on a par with, though differentiated from, the empire and the state. The thesis aims to make three contributions. First, to contribute to the constitutional theory of the European Union by solving the mystery of its political form. Second, to contribute to the constitutional theory of the federation through an in-depth case study of the European Union as a federal union of states. Third, to contribute to both European Union studies and federalism studies by showing, first, how some of the most profound constitutional questions of the contemporary European Union raised by the rise of authoritarianism in Poland and Hungary and the Eurozone crisis can be properly understood on the basis of the constitutional theory of the federation. Second, by demonstrating how these contemporary issues shed light on the most difficult question for the constitutional theory of the federation: whether, to what extent and under what circumstances the Union has authority to intervene in the internal constitutional affairs of its Member States.

## **Acknowledgements**

I would not have been able to write this dissertation without the conversations, debates, critique, help, support and, most of all, friendship of several people. I would like to thank a number of my peers at the LSE Law Department—Bernard, Irene, Jake, Rebecca, Samuel and Sarah—whose friendship, encouragement and support have been a source of joy and comfort throughout my doctoral studies. I would also like to thank my supervisors Martin Loughlin and Mike Wilkinson for their invaluable critique, insightful comments and lively debates. I have learned so much from both of them. Most of all, I would like to thank my husband, Hjalte, to whom I dedicate my dissertation. The idea of this thesis was born from one of our conversations on a winter’s walk in Central Park in New York years ago.

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Poster by Melantrich (Prague, 1990) from the V&A poster collection, page 114.

*“Classical political theory, (...) the kind that begins with Machiavelli and Hobbes and ends somewhere in the nineteenth century, seemed to be of little direct help in comprehending the process by which states unite with one another after the fashion of the Rome Treaty. Classical political theory performs the invaluable service of revealing the leading characteristics of the state (...) However, classical theory does not positively indicate why or how states join together voluntarily to create a body capable of legislating for their own citizens—indeed, precisely because of the emphasis on state sovereignty, it tends to make one deeply sceptical of the possibility of such a development, and to deny in the name of theory the reality that exists before one’s eyes”*

— Murray Forsyth, *Union of States: The Theory and Practice of Confederations* (New York, Leicester University Press, 1981), ix-x.

# Introduction

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The legal and political nature of the European Union (EU) remains an enigma for academics and the general public alike. For many years, the latter could happily ignore the question of what the EU really is, yet the multiple crises characterising the last decade of European history—the Eurozone crisis, the refugee crisis, the rise of authoritarianism in Poland and Hungary, and Brexit—have prompted a new interest in the EU. For example, one of the most googled questions in the UK after the result of the Brexit referendum was announced in the early hours of 24<sup>th</sup> June 2016 was: “What is the EU?”<sup>1</sup>. Within academia, the constitutional nature of the EU has been debated for decades without ever solving the mystery, and for some time, the tacit consensus was to avoid the issue altogether by declaring the EU to be unique or ‘sui generis’. While the ‘sui generis’ thesis might have been a viable position in times of relative stability, the government of the Eurozone crisis—significantly extending the powers of the executive branch of government at both Union and Member State level and relying on governmental instruments of dubious legality—forces us to confront the question: With what right are the citizens and states of Europe governed? To answer these questions of European politics, it is necessary to address the question of the constitutional nature of the EU.

This thesis takes up the challenge of developing a constitutional theory for the EU. The point of departure is that, contrary to what is maintained by the ‘sui generis’ thesis, the EU, from the perspective of constitutional theory, is neither unique nor unprecedented. The EU, this thesis maintains, is a union of states of a special kind: a *federal union* or a *federation*. That is, a *political union of states founded on a federal treaty-constitution that does not absorb the Member States into a new federal state*. The thesis argues, further, that the federation is a discrete form of political association on a par with though distinct from the other political forms of modernity, i.e., the empire and the state. As such, the EU is not unique in world history. Multiple manifestations of this political form predate the EU, most importantly the antebellum United States, the 19<sup>th</sup> century German Federation and the Swiss Confederation before the constitution of a federal state in 1848.

To be sure, it is not submitted that there are no unique aspects of the EU’s constitution or its law and politics—all actual political associations are unique in one way or another—but these singular features do not make the EU any less a federation.

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<sup>1</sup> B Fung, “Britons are frantically Googling what the EU is after voting to leave it” (The Washington Post, 24 June 2016).

Germany, Poland and the UK all have unique constitutional attributes and are constitutionally very different from one another, but they are no less states because of that. The same applies to federations, including the EU. A study of the constitutional nature of the EU must abandon the imaginary of ‘sui generis’ and start to think of the EU in the context of what in constitutional terms it is comparable to, namely, federal unions of states.

This thesis is not the first study of the EU in light of federalism. Several volumes have been dedicated to the subject<sup>2</sup>, however, most of the literature in the field is of limited relevance to this thesis. The reason is that these studies are generally not concerned with questions of constitutional theory. Besides, in the few cases where they are, they almost invariably set about with a flawed understanding of the federation as a federal state. Nearly all available studies, in other words, do not begin with an understanding of the federation as a discrete form of political association differentiated from that of the state and therefore tend to understand the EU as an ‘incomplete federation’<sup>3</sup>.

Only a few scholars defy this general trend by comparing the EU not with contemporary federal states but with federations. Robert Schütze is one of the few scholars on federalism who identifies the federation as an autonomous form of political association irreducible to that of the state. Schütze has written extensively on the legal transformation of the EU in comparison to the early history of the United States<sup>4</sup>, with a special focus on the development of the internal market as a federal market<sup>5</sup>, and explicated EU constitutional law as a concrete manifestation of a federation<sup>6</sup>. His interest in the subject, however, is more practical than theoretical, and he does not develop a constitutional theory of the federation. Similarly, Sergio Fabbrinni also starts out from the understanding that the EU is a federal union of states which he juxtaposes to a federal

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<sup>2</sup> K Nicolaïdis and R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford, OUP, 2001); DR Kelemen, *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond* (Cambridge MA, Harvard University Press, 2004); F Laursen (ed), *The EU and Federalism: Politics and Policies Compared* (Farnham, Ashgate, 2011); A Menon and MA Schain (eds), *Comparative Federalism: The European Union and the United States in Comparative Perspective* (Oxford, OUP, 2006); M Cappelletti, M Seccombe and JHH Weiler (eds), *Integration Through Law: Methods, Tools and Institutions: Vol. 1 Book 1: A Political, Legal and Economic Overview* (Berlin, De Gruyter, 1986); A Trechsel, *Towards a Federal Europe?* (Abingdon, Routledge, 2006).

<sup>3</sup> JE Fossum and M Jachtenfuchs, “Federal Challenges and Challenges to Federalism. Insights from the EU and Federal States” (2017) *Journal of European Public Policy* 24(4), 470.

<sup>4</sup> R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford, OUP, 2015).

<sup>5</sup> R Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford, OUP, 2017).

<sup>6</sup> R Schütze, *European Constitutional Law* (Cambridge, CUP, 2015).

state<sup>7</sup>. His interest in the theory of the federation, however, is not that of constitutional theory, but comparative politics and political sociology—questions relating to division of competences, institutional dynamics and legitimacy and accountability. Fabbrini simply assumes the EU to be a federal union<sup>8</sup>.

An important reason for the general lack of studies of the EU based on the federation as an autonomous political form, and hence as distinct from studies of contemporary federal states, is that the constitutional theory of the federation is underdeveloped. The great bulk of contemporary writings on federalism has to do with the government and structure of the federal state<sup>9</sup> and it is therefore of limited relevance to the development of a constitutional theory of a federal union like the EU. The main exception is Olivier Beaud, who undoubtedly is the most important contemporary scholar of the constitutional theory of the federation. His *Théorie de la Fédération*<sup>10</sup> [*Theory of the Federation*] is the first monograph dedicated exclusively to the development of a constitutional theory of the federation as an autonomous legal and political form. Though *Théorie* is inspired by the problem of the constitutional nature of the EU<sup>11</sup>, Beaud does not endeavour to apply his theory to the EU in any systematic manner<sup>12</sup> and the book ends on the following note: “We see that there is still ample material for another book, just as there is a need for another to answer the inaugural question of this work: is the European Union a federation?”<sup>13</sup>.

This thesis takes on the challenge of answering the question posed by Beaud. While no study has yet attempted to do that, both Murray Forsyth and Christoph Schönberger have developed legal and political theories for the EU in light of a genuine theory of the federation and their works have provided invaluable material for this thesis. With his pioneering, *Union of States: The Theory and Practice of Confederations*<sup>14</sup>, Forsyth

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<sup>7</sup> S Fabbrini, *Which European Union: Europe after the Eurozone Crisis* (Cambridge, CUP, 2015), xxii; S Fabbrini, “Intergovernmentalism in the European Union. A Comparative Federalism Perspective” (2017) *Journal of European Public Policy* 24(4), 582.

<sup>8</sup> Fabbrini, *Which European Union*, xx.

<sup>9</sup> M Burgess, *In Search of the Federal Spirit: New Theoretical and Empirical Perspectives in Comparative Federalism* (Oxford, OUP, 2012); M Filippov, PC Ordeshook and O Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge, CUP, 2004); J Bednar, *The Robust Federation: Principles of Design* (Cambridge, CUP, 2009); TO Hueglin and A Fenna, *Comparative Federalism: A Systematic Inquiry* (Toronto, University of Toronto Press, 2006); Arthur Benz and Jörg Broschek, *Federal Dynamics Continuity, Change, and the Varieties of Federalism* (Oxford, OUP, 2013); M Burgess and AG Gagnon (eds), *Comparative Federalism and Federation* (New York, Harvester Wheatsheaf, 1993).

<sup>10</sup> O Beaud, *Théorie de la Fédération* (Paris, PUF, 2007).

<sup>11</sup> Beaud, *Théorie*, 1.

<sup>12</sup> See, however, O Beaud, “Histoire. Fédération, l'Europe écrit ton nom” (*Libération*, 25 January 1995).

<sup>13</sup> Beaud, *Théorie*, 425, my translation.

<sup>14</sup> M Forsyth, *Union of States: The Theory and Practice of Confederations* (New York, Leicester University Press, 1981).

presents a comprehensive overview of the history of federal political thought, develops the idea of the economic confederation<sup>15</sup> as a federal ‘subspecies’ and demonstrates how the political theory of the federation applies to the then European Economic Community (EEC). Notwithstanding the impressive contributions made by *Union of States*, the discussion of the EEC is limited to one chapter, and as such it does not provide a comprehensive account of the EEC as a federation. Furthermore, almost four decades have passed since the publication of *Union of States*, and a new study is long overdue.

Christoph Schönberger responded to that need both with his seminal article “Die Europäische Union als Bund”<sup>16</sup> (from which this thesis borrows its title) and his magnum opus *Unionsbürger: Europas föderale Bürgerrecht in vergleichender Sicht*<sup>17</sup> [*Union Citizens: Europe’s Federal Citizenship-law in Comparative Perspective*]. *Unionsbürger* provides a comprehensive comparative study of EU citizenship based on the principles of federal citizenship law and as such it sheds light on a core pillar of the constitutional theory of the federation and the EU as a manifestation thereof. Because of the more or less exclusive focus on citizenship in *Unionsbürger* and the limited scope of “Die Europäische Union als Bund”, Schönberger’s writings do not exhaust the need for the development of a general constitutional theory of the EU as a federation.

Notwithstanding the significance of the contributions of Beaud, Forsyth and Schönberger, the theory of the federation remains underdeveloped. The task of answering the question asked by Beaud—*is the EU a federation?*—does therefore not merely consist in applying a pre-existing theory to the case of the EU. In order to account for contemporary constitutional problems in Europe such as the constitutionality of the government of the Eurozone crisis and the rise of authoritarianism in Poland and Hungary it has been necessary to develop hitherto unexplored or less developed aspects of the constitutional theory of the federation. Important constitutional questions such as those relating to emergency politics or constitutional guardianship and constitutional identity and homogeneity have only to a very limited degree been touched upon by previous scholars of the theory of the federation. For that reason, this thesis aims at contributing to several literatures. On the one hand, the thesis aims at contributing to EU

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<sup>15</sup> As will become clear later in this thesis, Forsyth’s concept of confederation is identical to my use of the concepts of federation and federal union of states. The reason I do not use the term confederation is not that it is theoretically or historically inadequate *per se* but that it is associated with the distinction between *Staatenbund* and *Bundesstaat* that has hindered the development of a constitutional theory of the federation as a discrete political form (Chapter 1).

<sup>16</sup> C Schönberger, “Die Europäische Union als Bund” (2004) *AöR* 129(1).

<sup>17</sup> C Schönberger, *Unionsbürger: Europas föderale Bürgerrecht in vergleichender Sicht* (Tübingen, Mohr Siebeck, 2005).

law scholarship by solving the mystery of the constitutional nature of the EU. On the other hand, the thesis aims at contributing to the theory of the federation, first, by developing less studied aspects of the theory of the federation such as those of constitutional guardianship and constitutional identity, and second, by an in-depth constitutional study of the EU—perhaps the only contemporary manifestation of a federation.

The overall aim of this thesis is to develop a constitutional theory of the EU as a federation in light of the contemporary constitutional problems raised by the manifold crises of the past decade. There are several ways in which such a task could be attempted. An obvious way would be a ‘deductive’ approach that first develops the theory of the federation and then applies it to the case of the EU. This approach was attempted and later discarded, both because it proved unhelpful for stylistic and didactic reasons, but more importantly because I realised that it did not allow for the ‘inductive’ aim of the thesis, namely, to show in what ways a study of the EU can contribute to the theory of the federation. Instead, the thesis is organised in accordance with a number of problems or themes in the constitutional theory of the federation that are important for a proper understanding of the contemporary constitutional order of the EU. Each chapter aims at developing a certain aspect of the theory of the federation and shedding light on an important constitutional problem or aspect of the EU. As the thesis unfolds, I hope to convey two stories to the reader: one about the constitutional history and contemporary problems of the EU, another about the federation as a discrete political form characterised by its own virtues and vices.

The thesis is divided into five chapters. Chapter 1 is concerned with the constitutional nature of the EU and the federation as an autonomous political form. The chapter shows how the federation can answer the problem of the generally understood enigma of the EU, namely, that it does not fit the theory of the state because it can neither be explained by public law nor by international law. The chapter argues that the legal and political form of the EU is that of a federation: a discrete legal and political form on a par with the state and the empire. It is maintained that whereas the federation is founded by a treaty between the federating states, it does not belong to the world of international law because the federation leads to a constitutional change in the contracting states by constituting among them a new political and public law existence, the Union, through which they henceforth govern themselves as ‘Member States’. It is further argued that the federation is incompatible with the concept of sovereignty and for that reason a genuine

constitutional theory of the federation has to be developed as a public law form without sovereignty. The federation is an autonomous political form that can only be misunderstood if it is conceptualised on the basis of the concepts of the state.

Following the development of the general principles of the constitutional theory of the federation, the thesis goes on to discuss the origins of the federation as a political form in general and the EU in particular. Chapter 2 maintains that previously relatively independent states decide to come together in a federation when they, for one reason or another, are incapable of maintaining their own political autonomy and existence. The medieval and early modern federations were constituted between smaller states and free cities in order to protect themselves by common military means from a strong neighbouring empire: they were 'defence federations'. With the industrial revolution, economic governance and the construction of larger internal markets became crucial for states to maintain their political autonomy. One way this was achieved was through *imperialism* (internal market creation by domination), another was through *federation* (internal market creation through free and equal contract). Federations that have economic governance/welfare as the primary aim are termed 'welfare federations'. The chapter maintains that the EEC/EU was born out of the collapse of the state as a political form in Europe after WWII. In the post-WWII period, there was a general consensus in the Western European and American elites that federation was the answer to the collapse of the European state-system. The chapter shows that the post-WWII period is characterised by attempts to constitute both a 'defence federation' and a 'welfare federation' in Western Europe but that only the latter was successful. The chapter concludes that the EU remains a 'welfare federation' with defence as a subsidiary aim.

Chapter 3 is concerned with the foundations and principles for the exercise of public power in the federation, that is, the principles of federal public law. The chapter maintains that the federation has a unique structure of public law that differs from that of the state. In contrast to the state, the key concept of the public law of the federation is not sovereignty. The federation is a union of states, a double political existence, with a dual governmental apparatus composed of the Union institutions and the governmental institutions of the Member States. Neither of these governmental structures govern 'as states'. The Union institutional framework is not a new omni-competent 'super state'. It is characterised by the principles of teleology and specialisation. That is, the Union institutions exercise public power to achieve the aims for which the Union was constituted and it only has the powers necessary to achieve those aims. The Member States govern

themselves as ‘Member States’ meaning, in the context of the EU, ‘constrained states’. This constrained statehood has to be constitutionally internalised. In the EU Member States this has been done either by ‘stealth’, through the constitutional imaginary of ‘constrained democracy’, or through the employment of ‘the return to Europe’ as a political myth.

Having provided an analysis of the federation as a discrete political form (Chapter 1), and explained both its origins (Chapter 2) and how it governs itself as a political order without sovereignty (Chapter 3), Chapters 4 and 5 expound the internal contradictions of the federations as a political form and their contemporary manifestations in the EU.

The federation is born out of the impotence or collapse of the state as a political form. Nevertheless, Chapter 4 argues, the federation is itself characterised by internal contradictions that constantly threaten its survival. The federation is at the same time committed to preserving the autonomy and diversity of its Member States *and* committed to constituting an ‘ever closer union’ between the peoples of the Union. The federal balance between these two contradictory ends can be maintained when there is a relative constitutional homogeneity between the Member States. In the case of the EU, the constitutional homogeneity is that of ‘constrained democracy’. However, a comparative constitutional analysis of the Member States shows that they have internalised this constitutional identity to varying degrees. This means that the federal balance—in the EU known as ‘constitutional tolerance’—can in no way be taken for granted. In order to preserve the federal balance, federations tend to claim the right to intervene in the internal constitutional affairs of its Member States if they diverge significantly from the constitutional identity of the Union. Notwithstanding the importance of such interventions for the stability and survival of a federal union, such interventions—like the EU’s potential actions against the rise of ‘illiberal democracy’ in Poland and Hungary—are nevertheless highly controversial because they threaten the political autonomy of its Member States.

Chapter 5 is concerned with the emergency government of the Eurozone crisis. It is argued that the government of the Eurozone crisis can be understood according to the theories of constitutional defence and emergency politics in the federation. The chapter maintains that the reason the government of the Eurozone crisis does not conform to the theory of the ‘state of exception’ is that the EU is a federation and not a state. The chapter first develops a theory of federal constitutional defence primarily based on the theory and praxis of the pre-civil war United States (the doctrine of states’ rights)

and the 19<sup>th</sup> century German Federation (the theory of federal execution and federal intervention). Based on these theories of federal constitutional defence, the chapter analyses both ‘Eurocrisis law’ and the contestation of the emergency government of the Eurozone crisis by EU Member States.

The thesis relies on a wide array of sources and literatures that are not often, if ever, brought in contact with one another. In terms of literatures, the thesis touches upon: (a) EU law scholarship, including, constitutional pluralism, constitutional tolerance, integration through law, Eastern enlargement, legal scholarship on Article 7 TEU, and ‘Euro crisis law’, (b) history of European integration and EU law, (c) theory and intellectual history of the federation, (d) theories of emergency politics, (e) nationalism studies, (f) social movement studies on the contestation of the government of the Eurozone crisis. In terms of sources, the thesis relies on (a) EU primary and secondary law, (b) speeches by EU and Member State officials, (c) meeting minutes from conventions between EU Member States, (d) legal material from previous federations, most importantly the 1781 Articles of Confederation, 1787 US Constitution and the constitutional documents of the German Federation, (e) constitutional and political debates in previous federations, most importantly the *Federalist Papers* and the debates between John Calhoun and Daniel Webster.

By relying on a wide array of sources and literatures, I hope to provide a politically and historically grounded constitutional theory of the EU as a federation. Two of the most important reasons why the constitutional nature of the EU remains a mystery is, first, that, aside from the EU, we have no contemporary experience of the federation as a political form, and for that reason, we have to turn to history to find that which we ought to compare it to in constitutional terms. Second, the main reason for why the federation belongs to constitutional theory and not international law is that it is a political association. A proper study of the constitutional theory of the EU can therefore not afford to dispense with either history or the political.

Notwithstanding the scope of the thesis and the material it relies on, the focus of the thesis is limited to the development of a constitutional *theory* of the EU. It is therefore important to stress that the purpose of the thesis is not to explicate the body of EU constitutional law in light of the theory of the federation<sup>18</sup>. The aim of this thesis is at a fundamental level to understand the foundations for authority in the EU, both of the Union and of the Member States. One of the core insights of the theory of the federation

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<sup>18</sup> This is the aim of Schütze’s *European Constitutional Law*.

is that a union of states has “two coexistent structures of government, one at the centre, and one at the level of the Member States”<sup>19</sup>. For that reason, a study of the question, *with what right are the citizens and states of Europe governed?* has to focus on the foundations of authority of both the Union and the Member States. The thesis aims to study the EU as a political association composed primarily of other political associations, namely the Member States. Central to the thesis therefore is the relationship between these two kinds of political associations the Union and its Member States. In contrast to many other studies of EU authority, the thesis is not concerned to any significant extent with the institutional dynamics between different EU institutions or their legal frameworks<sup>20</sup>.

The thesis is also not concerned with a more sociological understanding of EU authority as legitimacy. There is no treatment in the thesis of questions such as whether or why or to what extent the states and peoples of Europe believe in the legitimacy of the exercise of public power in Europe. Instead, the thesis is concerned with ‘constitutional imagination’. That is, the thesis aims to understand with reference to what principles and ideas authority is claimed and public power is exercised by the Union and its Member States. Neither is the thesis concerned with questions of normative legal or political theory, such as whether the EU is legitimate or not, or whether the federation is an inherently good or bad form of political association. The aim of the thesis is analytical in the sense that it aims to provide a better understanding of the foundations of authority in Europe.

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<sup>19</sup> M Forsyth, “The Relevance of Classical Approaches” in JJ Hesse and V Wright (eds) *Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems* (Oxford, OUP, 1996), 40.

<sup>20</sup> For a study of the dynamics between EU institutions in light of the theory of the federation, see, e.g., Fabbrini’s *Which European Union*.

# Constitutional Nature

## *The enigma of the European Union and the federation as a discrete political form*

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### INTRODUCTION

The debate on the constitutional nature of the European Union (EU) and the foundation for its authority is long and there is still no consensus in the field. Authority has been contested with regard to the EU, and earlier the European Economic Community (EEC), ever since the European Court of Justice (ECJ) declared direct effect and supremacy of European law in *Van Gend en Loos* (1963) and *Costa vs. ENEL* (1964). What is contested is not so much the doctrines of supremacy and direct effect *eo ipso* but their foundations and hence their scope and the ultimate laws and institutions they are governed by and subjected to. The central tension in this debate is between the scholars who emphasise the constitutional autonomy and sovereignty of the Member States and those who emphasise the constitutional status of EU law.

Scholars who emphasise Member State sovereignty tend to understand the foundation of EU authority along the lines of public international law arguing that the authority of EU law is rooted in national constitutions and that, ultimately, the Member States are the ‘masters of the treaties’<sup>1</sup>. Within this field, most scholars would not dispute the primacy or supremacy of EU law *eo ipso* but its source and hence its limitations. The argument presented is that the foundation for EU law is an interstate agreement and that the EU therefore—however complex—must be understood as a treaty organization governed by and subject to public international law. Other scholars emphasise the supranational level of the governmental structure of the Union arguing on the basis of

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<sup>1</sup> B de Witte, “The EU as an International Legal Experiment” in JHH Weiler and G de Búrca (eds) *The Worlds of European Constitutionalism* (Cambridge, CUP, 2012); D Grimm, “Sovereignty in the European Union” in J Van der Walt and J Ellsworth (eds), *Constitutional Sovereignty and Social Solidarity in Europe* (Bloomsbury, Nomos, 2015); T Schilling, “The Autonomy of the Community Legal Order: An Analysis of Possible Foundations” in *Who in the Law is the Ultimate Umpire of European Community Law* (1996) NYU School of Law Jean Monnet Working Paper; A Pellet, “Les Fondements Juridiques Internationaux du Droit Communautaire” in *Collected Courses of the Academy of European Law* Vol. 5 Book 2 (The Hague, Kluwer Law International, 1997).

the autonomy of the EU legal order, the development of EU fundamental rights legislation, the doctrine of implied powers, pre-emption, the fidelity principle and EU citizenship, that the EU must be understood as a constitutional order in its own right with an autonomous source of authority<sup>2</sup>. From this perspective, the insistence on the EU as a treaty organization of public international law is needlessly legalistic and misses the fundamental character of the Union as a legal and political order in its own right governed by its own, albeit peculiar, constitution. The EU is ‘sui generis’, the argument continues, and we should therefore try to understand its unique features and special nature that makes it ‘more’ than a treaty organisation of international law. The underlying consensus shared between these two positions is that the authority of the EU must be founded on *either* an international law treaty *or* a public law constitution. For that reason, the debate on the EU—even when it speaks in the language of ‘sui generis’—does not challenge the fundamental assumptions of the theory of the state that necessitates a resolute distinction between the worlds of international law and of public law. This thesis will challenge this underlying consensus.

Although it is understandable that EU scholars want to insist on the impossibility of reducing the EU to the world of international law, the idea of the EU as *sui generis*, i.e., that the legal and political form of the EU is *unprecedented*, is not correct. From the perspective of the history of political thought, the EU’s fundamental characteristic of ‘international yet constitutional’ is neither new nor unique. The puzzling legal and political form characterising the EU and its paradoxical foundations, this thesis maintains, can be understood on the basis the *constitutional theory of the federation* as theorised most importantly by Olivier Beaud, Christoph Schönberger, Murray Forsyth and Carl Schmitt<sup>3</sup>. In their writings Beaud, Schönberger, Forsyth and Schmitt use different terms—*fédération*, *Bund*, *confederation*, *union of states* and *federal union*—however, they all describe the same phenomenon, namely, a *political union of states founded on a constitutional treaty*. In this thesis, I will use ‘federation’, ‘federal union’, and ‘union of states’ interchangeably. In spite of the fact that Forsyth, the only Anglophone author on whose work I rely, uses the term

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<sup>2</sup> U Haltern and JHH Weiler, “Constitutional or International? The Foundation of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz” in AM Slaughter, AS Sweet, JHH Weiler (eds) *The European Courts and National Courts—Doctrine and Jurisprudence* (Oxford, Hart Publishing, 1998); JHH Weiler, “In Defense of the Status Quo, Europe’s Constitutional Sonderweg” in JHH Weiler and M Wind (eds) *European Constitutionalism Beyond the State* (Cambridge, CUP, 2003), 7-26.

<sup>3</sup> C Schmitt, *Constitutional Theory* (Durham and London, Duke University Press, 2008), 97; O Beaud, *Théorie de la Fédération* (Paris, PUF, 2007); M Forsyth, *Union of States: The Theory and Practice of Confederations* (New York, Leicester University Press, 1981); C Schönberger, “Die Europäische Union als Bund” (2004) *AöR* 129(1); C Schönberger, *Unionsbürger: Europas föderale Bürgerrecht in vergleichender Sicht* (Tübingen, Mohr Siebeck, 2005).

‘confederation’, I have chosen not to adopt it. The reason is not that it is historically or theoretically inadequate to describe the phenomenon in question but that it is associated with the ‘statist’ imaginary of the ‘*Staatenbund*’ that, as will become clear in this chapter, has hindered a genuine understanding of the constitutional theory of the federation. The statist distinction between *Bundesstaat* (‘federal state’) and *Staatenbund* (‘confederation’) that will be repudiated in this thesis has possibly been imported to the English language via the translation of Louis le Fur’s *État Fédérale et Confédération d’États*; a direct translation of the German distinction between *Bundesstaat* and *Staatenbund*<sup>4</sup>.

In their works, Beaud, Schönberger, Forsyth and Schmitt build on a much longer tradition of legal and political theorists who have struggled to describe an autonomous legal and political form irreducible to the other main political forms of modernity, most importantly, the *state* and, perhaps to a lesser degree, the *empire*. This tradition of legal and political thought includes figures such as Althusius, Pufendorf, Madison, Hamilton, Calhoun, Webster, de Tocqueville, Waitz, Le Fur and Seydel<sup>5</sup>. This ‘federal canon’ of political thought—less read than the state-centric canon of Hobbes, Locke, Rousseau, Kant and Hegel—was born out of an attempt to understand political associations, historical or contemporaneous, that could not comfortably be understood on the basis of the theory of the state. The most important examples of such political associations are the Old Swiss Confederation (1291-1798), the Restored Swiss Confederation (1815-48), the United Provinces of the Netherlands (1579-1795), the German Federation (1815-66), the Confederation of the United States of America (1781-9) and the United States of American (1789-Civil War).

In this thesis, I rely on works from the federal canon of legal and political thought and draw on important examples from the earlier federal unions of states, most extensively the German Federation and the United States. Of central importance, however, is the theory of the federation as developed by Beaud, Schönberger, Forsyth and Schmitt. In their works, these four scholars have with most clarity given accounts of the legal and political theory of the federation as a political association in its own right without falling into the ‘statist trap’ that tends to reduce the federation to *either* a loose alliance of *sovereign states* exclusively governed by international law *or* a *sovereign federal state*

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<sup>4</sup> Forsyth, *Union of States*, 135. The distinction between ‘*Staatenbund*’ and ‘*Bundesstaat*’ was coined by Georg Waitz in his article “Das Wesen des Bundesstaates” [“The Nature of the Federal State”] in 1853. However, it was only later, perhaps with the publication of Max von Seydel’s *Der Bundesstaatbegriff*, that it got the meaning with which it is currently associated, see R Emerson, *State and Sovereignty in Modern Germany* (New Haven, Yale University Press, 1928), 94-100.

<sup>5</sup> For a review of the ‘federal canon’ of political thought see Forsyth, *Union of States*.

exclusively governed by public law. What Beaud, Schönberger, Forsyth and Schmitt grasp is that the federation is a discrete form of political association with its own legal and political theory that cannot be understood on the basis of the theory of the state. The federation calls into question the state-centric categories we tend to think all political life in, most importantly, the idea of sovereignty. This problem of sovereignty in a federal union of states will be discussed in the final section of this chapter.

As previous theorists in the federalist canon, Schmitt, Beaud, Schönberger and Forsyth are interested in the theory of the federation in relation to concrete political associations. Schmitt was interested in the theory of the federation partly in order to make sense of the newly founded League of Nations<sup>6</sup> but also, it seems, the Soviet Union. The former he did not understand as a federation, the latter he was more ambiguous about. He was also interested in the federation in relation to the historical development of the German state. The questions of the nature of federalism and whether and to what extent the German state should be understood as a federation was still an ongoing debate in Germany even after the constitution of the Weimar Republic<sup>7</sup>. When the Nazis rose to power in 1933, the debates on federalism in Germany came to an end. Schmitt is in a way part of the closure of the German debate on the theory of the federation. He is part of the last generation of German constitutional scholars who found it necessary to present an argument for why Germany was a state and not a union of states, i.e., a 'Bund'<sup>8</sup>.

Studies of the EU as a federation constitute a new line in the history of the constitutional theory of the federation<sup>9</sup>. It is in order to understand the EU that Forsyth, Beaud and Schönberger turn to the theory of the federation. Schmitt's theory of the federation is one of the main theoretical foundations for this debate. It is at the heart of especially Beaud's and Schönberger's but also Forsyth's writings on the federation. Following the writings of the authors mentioned, this thesis maintains that the constitutional nature of the EU is a *federation*, i.e., the EU is a European *federal union of*

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<sup>6</sup> Schmitt, *Constitutional Theory*, 383-4.

<sup>7</sup> Emerson, *State and Sovereignty in Modern Germany*, 236-53.

<sup>8</sup> Schmitt, *Constitutional Theory*, 386.

<sup>9</sup> Together with the substantive work of Beaud, Forsyth and Schönberger, arguments for the EU as a federation have been presented by Robert Schütze, Sergio Fabbrini, Alexander Warleigh and Matej Avbelj. See R Schütze, *European Constitutional Law* (Cambridge, CUP, 2015), 43-76; R Schütze, "Federalism as Constitutional Pluralism: 'Letters from America'" in M Avbelj and J Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012); S Fabbrini, *Which European Union: Europe after the Eurozone Crisis* (Cambridge, CUP, 2015); S Fabbrini, "Intergovernmentalism in the European Union. A Comparative Federalism Perspective" (2017) *Journal of European Public Policy* 24(4); A Warleigh, "Better the Devil You Know? Synthetic and Confederal Understandings of European Unification" (1998) *West European Politics* 21(3); M Avbelj, "Theory of European Union" (2011) *European Law Review* 36(6).

*states*. The thesis will demonstrate how the theory of the federation can explain the core characteristics of the legal and political form of the EU and its paradoxical ‘international yet constitutional’ foundations.

This thesis therefore goes beyond the mainstream constitutional interpretation of the EU as ‘*sui generis*’. Notwithstanding that the EU is ‘more’ than an organisation of international law, this thesis maintains that the ‘*sui generis*’ thesis could only be convincing because the political form to which the EU belongs has been forgotten. The encounter with the EU—perhaps the only true federation of the contemporary world—will ‘naturally’ lead us to think that it is unique. Interestingly, Alexis de Tocqueville came to the same conclusion regarding the United States: “a form of government was found which was strictly neither national nor federal. Things have halted there but the *new word needed to describe this new state of affairs does not yet exist*”<sup>10</sup>. The description of the EU as ‘*sui generis*’ is problematic not only because of its historical and theoretical inaccuracy. As pointed out by Schönberger, the perception of the EU as one of a kind prevents us from endeavouring into comparative studies of the EU in relation to other federations or unions of states<sup>11</sup>. Besides, it prevents us from breaking away from the imaginary of the state that has co-opted the theory of the federation with the rigid distinction between a loose alliance of sovereign states (*Staatenbund*) and a sovereign federal state (*Bundesstaat*)<sup>12</sup>. The ‘*sui generis*’ thesis is merely a ‘superficial’ break with this classical distinction which allows for its perpetuation<sup>13</sup>. This state-centric orientation of EU scholarship leads to puzzling negative conceptualisations of the EU such as a ‘statelike non-state’ (*staatsanaloger Nichtstaat*) or a ‘federal state-like non-federal state’ (*bundesstaat analoger Nichtbundesstaat*)—in the words of Schönberger<sup>14</sup>. The political form of the state has been so influential—politically and theoretically—that we no longer understand political forms that question its basic assumptions. The categories of the state have blinded us to federalism<sup>15</sup> and so, in the name of theory, we have denied the reality existing before our eyes<sup>16</sup>.

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<sup>10</sup> A de Tocqueville, *Democracy in America* (London, Penguin, 2003), 185, emphasis added.

<sup>11</sup> Schönberger, “Die Europäische Union als Bund”, 119.

<sup>12</sup> *ibid* 83.

<sup>13</sup> *ibid*.

<sup>14</sup> *ibid* 84.

<sup>15</sup> Schönberger, *Unionsbürger*, 45ff.

<sup>16</sup> Forsyth, *Union of States*, x.

## I: THE FEDERATION AS A POLITICAL FORM

Besides the EU, the political form of the federation is neither a part of our lived experience nor of our political imagination. To understand the EU for what it truly is, we therefore need to retrieve the lost meaning of the federation as a discrete form of political association. That we have forgotten the federation as a political form does—unfortunately for this thesis—not mean that we have stopped using the words ‘federalism’ and ‘federation’. They just mean something else in contemporary political vocabulary. To understand the constitutional theory of the federation we must first isolate the federation as a discrete form of political association from other traditions in ‘federal thought’, more prevalent today, before a positive definition can be given. We must, in other words, provide a negative definition of the concept of the federation.

### A: The Negative Definition of the Federation

In the contemporary world, federalism is often understood as referring to a specific form of state government<sup>17</sup> or process where power is devolved from the central government to regions, cities or councils<sup>18</sup>. Federalism is thus reduced to a particular kind of devolution or decentralisation<sup>19</sup>. For the purposes of this thesis, the constitutional theory of the federation is neither concerned with a kind of organisation of the state nor a system of government or a process of devolution. In contrast, this thesis is concerned with the federation as a type of political association distinct from that of state and not ‘merely’ a form of state government. And while it is indisputably the case that federal states have come into being as a result of devolution, e.g., Belgium, these cases are left out of this study. The theory of the federation as a political form must be distinguished from the process of devolution and ‘federal’ forms of government of the state<sup>20</sup>. The origin of the federation is *foedus*<sup>21</sup>—covenant or treaty—requiring multiple political entities

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<sup>17</sup> DJ Elazar, *Exploring Federalism* (Tuscaloosa, University of Alabama Press, 1987); B Galligan, “Comparative Federalism” in RAW Rhodes, SA Binder and BA Rockman (eds) *The Oxford Handbook of Political Institutions* (Oxford, OUP, 2006); A Lijphart, *Patterns of Democracy*, (New Haven, Yale University Press, 1999).

<sup>18</sup> CJ Friedrich, *Trends in Federalism in Theory and Practice* (London, Pall Mall Press, 1968), 3-9, 12, 18.

<sup>19</sup> Friedrich, *Trends in Federalism in Theory and Practice*, 4-5.

<sup>20</sup> Beaud, *Théorie*, 33. See also J Cohen, *Globalization and Sovereignty—Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge, CUP, 2012), 86.

<sup>21</sup> SR Davis, *The Federal Principle: A Journey Through Time in Quest of Meaning* (Berkeley, University of California Press, 1978), 3; Beaud, *Théorie*, 112-116; DS Rufus, *The Federal Principle: A Journey Through Time in Quest of a Meaning* (Berkeley, University of California Press, 1978).

coming together in a common union and is thus distinct from a process of political devolution or decentralisation of a unitary state<sup>22</sup>.

To understand the federation as a discrete form of political association we must further isolate it from the ‘universalist’ idea of ‘cosmopolitan constitutionalism’ or the ‘constitutionalisation of world society’ that historically was manifest in the League of Nations<sup>23</sup> and today in the United Nations. This is an aspirational idea that historically has been presented during the Enlightenment by l’Abbé de Saint Pierre<sup>24</sup> and Immanuel Kant<sup>25</sup> and more recently in the context of the EU by Jürgen Habermas<sup>26</sup>. Within this strand of thought, a federation does not refer to a form of *political* association, but an aspiration to go beyond ‘the political’—most importantly war—as such. The EU is cherished by Habermas, not primarily as a political community in its own right, but as a stepping stone to a cosmopolitan world order based on Universalist aspirations for individual human rights and perpetual peace<sup>27</sup>. In contrast, the concept of the federation developed in this thesis is not a description of a ‘world society’ bound together in aspirational terms in order to secure universal human rights and perpetual peace. In this thesis, the concept of the federation as a political form refers to an *actual territorially bounded political association* with an outside and an inside<sup>28</sup>.

Accepting that the federation is a territorially bounded political association can lead to the most common misconception, namely, the equation of a federation with the empirical reality of present day consolidated federal states (‘federation=federal state’)<sup>29</sup>. This equation is understandable because federal states are today widespread and federations are not. If the EU is compared with a consolidated federal state like the contemporary United States or Germany, it is not a surprise that so many scholars conclude that the EU is ‘sui generis’ or an ‘incomplete federation’<sup>30</sup>. Notwithstanding that the EU perhaps is the only contemporary manifestation of a federation<sup>31</sup> and as such a ‘unique’ phenomenon in our contemporary world this does not make it ‘sui generis’. The

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<sup>22</sup> Cohen, *Globalisation and Sovereignty*, 112.

<sup>23</sup> Forsyth, *Union of States*, 9.

<sup>24</sup> *ibid* 86ff.

<sup>25</sup> I Kant, “Perpetual Peace: A Philosophical Sketch” (1795) available in I Kant, *Political Writings* translated by HB Nisbet (Cambridge, CUP, 1991), 93-115.

<sup>26</sup> J Habermas, *The Crisis of the European Union—A Response* (Cambridge, Polity Press, 2012).

<sup>27</sup> *ibid* 54ff.

<sup>28</sup> Forsyth, *Union of States*, 3; Schönberger, “Die Europäische Union als Bund”, 102; Schönberger, *Unionsbürger*, 157-8.

<sup>29</sup> Forsyth, *Union of States*, x; Schönberger, *Unionsbürger*, 41; Beaud, “La Répartition des Compétences dans une Fédération. Essai de Reformulation du Problème” (2016) *Foundations of Public Law* 16, 181.

<sup>30</sup> JE Fossum and M Jachtenfuchs, “Federal Challenges and Challenges to Federalism. Insights from the EU and Federal States” (2017) *Journal of European Public Policy* 24(4), 470.

<sup>31</sup> O Beaud, “Histoire. Fédération, l’Europe écrit ton nom” (*Libération*, 25 January 1995).

equation between the federation and the federal state leads to the unfortunate fallacy that since the EU is not a federal state like the United States, the EU cannot be a federation. This way of thinking relies on a historical misconception, namely, that since the United States is a federal state today this must always have been the case. However, the United States was not founded as a federal state but as a *federal union of states* and it can at the very earliest be described as a federal *state* after the Civil War<sup>32</sup> and was generally not described in these terms before the late 19<sup>th</sup> century<sup>33</sup>. It is worth remembering that the very concept of the ‘federal state’ or the ‘*Bundesstaat*’ was not even introduced in the intellectual history of the federation before around 1850<sup>34</sup> (importantly Georg Waitz’ 1853 *Das Wesen des Bundesstaates*<sup>35</sup> [*The Nature of the Federal State*])—and at that point in history it was meant as a conceptualisation of the ‘mixed regime’ of the federation; not a consolidated federal state. If the comparison of the EU with other federal polities is to be meaningful, we must compare it to that which it is comparable to, namely federal unions of states<sup>36</sup>.

In contrast to the federal state, the federation is a *union of states* based on a contract between them, i.e., a treaty. However, not all treaty organisations are federations and not all contracts between states are federal in nature. The argument that the federation is different from a consolidated federal state, like the contemporary United States, does not entail that all treaty organisations are federations. A federation is not ‘merely’ an interstate organisation (as e.g. WTO) or even a (temporary) alliance/*Bündnis* (as e.g. NATO)<sup>37</sup>. These interstate organisations are contractual relationships between two or more states that obligate the contracting states in the *particular instances* described by the contract; they are “obligatory commitments with a definable content”<sup>38</sup>. Notwithstanding that a contract of alliance (*Bündnisverträge*), following Schmitt, is more significant than other interstate contracts because it affects the contracting states’ *jus belli*, i.e., the right to wage war<sup>39</sup>, this contract does not affect the sovereign or constitutional status of the contracting states

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<sup>32</sup> Following Bruce Ackerman, the Reconstruction after the Civil War should be understood as a ‘re-founding’ where an important shift in the source of constitutional authority from federalism to nationalism took place, see B Ackerman, *We the People II: Transformations* (Cambridge MA, The Belknap Press of Harvard University Press, 1998), 198-200, 204, 209, 245, 269, 413. See also, Schmitt, *Verfassungslehre*, 375: “the war only meant that the character of the constitution was changed and that the federation as such ceased to exist”, my translation.

<sup>33</sup> Forsyth, *Union of States*, 41-2.

<sup>34</sup> P Riley, “Three 17<sup>th</sup> Century German Theorists of Federalism: Althusius, Hugo and Leibniz” (1976) *Publius* 6(3), 10.

<sup>35</sup> Forsyth, *Union of States*, 136.

<sup>36</sup> Beaud, *Théorie*, 27; TC Fischer, “Federalism in the European Community and the United States: A Rose by Any Other Name...” (1994) *Fordham Int’l LJ* 17(389), 391.

<sup>37</sup> Beaud, *Théorie*, 271; Beaud, “La Répartition des Compétences dans une Fédération”, 182.

<sup>38</sup> Schmitt, *Constitutional Theory*, 282-3. See also Schönberger, “Die Europäische Union als Bund”, 111.

<sup>39</sup> According to Schmitt (*Constitutional Theory*, 282-3) the right to wage war constitutes the decisive expression of the political existence of the state.

since they do not transfer their *jus belli* as such to a third party<sup>40</sup>. A state is not made ‘half-sovereign’ by its entrance into an alliance<sup>41</sup>. In most cases, neither do interstate trade organisations challenge the sovereign status of the contracting states because these organisations cannot make laws or measures which are directly binding *in* and *on* the states that created them<sup>42</sup>. They do not fundamentally alter the principle of the political autonomy and self-determination of the contracting states<sup>43</sup>.

The main remaining obstacle to a positive definition of the federation is an academic distinction originating in the German debates on federalism from the 1870s onwards on the basis of which all federations still tend to be perceived and classified: the distinction between *Bundesstaat* (‘federal state’) and *Staatenbund* (translated as either ‘state federation’ or, unfortunately, ‘confederation’)<sup>44</sup>. The distinction between *Bundesstaat* and *Staatenbund* relies on the assumption that all actual federations can be made sense of as *either* one sovereign state *or* many sovereign states; *either* public law subject *or* international law relationship; *either* constitution *or* treaty. The problem with this distinction is that while it presents deceptively clear alternatives, it also makes it impossible to understand the legal and political reality of the federation. It achieves jurisprudential clarity but ignores reality. Schmitt presents an explicit argument for the inadequacy of this distinction. The theory of the federation, he writes, must be developed independently of the distinction between *Staatenbund* and *Bundesstaat*:

“[This distinction] presents seemingly clear and striking alternatives, yet ones that are in fact logically peculiar or impossible. The *Staatenbund* should be a purely international law relationship, in contrast to a *Bundesstaat*, which is an unadulterated public law subject. The one rests on an international law *treaty*, the other has a public law *constitution*; the one is legal relationship, the other is legal subject, etc. With such schematic and convenient formulas, the common fundamental concept of the entire problem is left out of account (...) Today, this simple method is no longer possible”<sup>45</sup>.

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<sup>40</sup> Schmitt, *Constitutional Theory*, 282-3. See also Forsyth, *Union of States*, 14.

<sup>41</sup> *ibid.*

<sup>42</sup> Forsyth, *Union of States*, 13-4; Schmitt, *Constitutional Theory*, 382-3; Schönberger, *Unionsbürger*, 155-7.

<sup>43</sup> Forsyth, *Union of States*, 13-4.

<sup>44</sup> C Friedrich, “Federal Constitutional Theory and Emergent Proposals” in AW MacMahon (ed) *Federalism: Mature and Emergent* (New York, Doubleday & Company, 1995), 510-1.

<sup>45</sup> Amended translation of Schmitt, *Constitutional Theory*, 384 (or. *Verfassungslehre*, 366). Arguments for the inadequacy of the *Staatenbund-Bundesstaat* distinction have also been presented by Beaud, *Théorie*, 97; Beaud, “La Répartition des Compétences dans une Fédération”, 184-5; Schönberger, “Die Europäische Union als Bund”, 82ff; Schönberger, *Unionsbürger*, 145-6.

The theory of the federation has developed in order to describe political associations that could *not* be explained by the theory of the state. In contrast, the distinction between *Bundesstaat* and *Staatenbund* is created as an attempt to make the political non-state entity of the federation—*Bund*—conform to the theory of the state. But actual federations do not conform to the neat division into *either* one sovereign state (*Bundesstaat*) or an association of sovereign states (*Staatenbund*)<sup>46</sup>. This distinction, following Schmitt, endeavours to solve the problem of the political form of the federation by evading it<sup>47</sup>. The attempt to ‘solve’ the problem of the federation by literally ‘attaching’ the concept of the state to the federation—either ‘state-federation’ (*Staatenbund*) or ‘federal state’ (*Bundesstaat*)—is therefore not satisfactory. In order to understand the federation as a political form we must, in the words of Beaud, leave ‘the orbit of the state’<sup>48</sup>.

### **B: The Positive Definition of the Federation**

In his discussion of the constitutional nature of the EU, Joseph Weiler accepts the rigid distinction between ‘federal’ (*Bundesstaat*) and ‘confederal’ (*Staatenbund*) and, on that basis, mistakenly identifies the EU as ‘sui generis’: “Architecturally, the combination of a ‘confederal’ institutional arrangement and a ‘federal’ legal arrangement seemed for a time to mark Europe’s *Sonderweg*—its special way and identity”<sup>49</sup>. This mistaken conclusion is bound to be made if the distinction between *Bundesstaat* and *Staatenbund* is applied. In fact, the prevalence of the faulty distinction between *Bundesstaat* and *Staatenbund* is, following Forsyth, an important reason why the EEC/EU has not been understood in federal terms. He gives the interesting example of the adherence to this distinction by the first President of the Commission, Walter Hallstein<sup>50</sup>. If, on the one hand, Hallstein argued, a confederation was defined by its lack of the possibility of legislating directly for the individual members of the union, the EEC was indisputably ‘more’ than a confederation. On the other hand, the EEC was also clearly not a state and was for that reason not a federal state. “What was the Community then?”, Forsyth writes

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<sup>46</sup> M Forsyth, “The Relevance of Classical Approaches” in JJ Hesse and V Wright (eds) *Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems* (Oxford, OUP, 1996), 32.

<sup>47</sup> Schmitt, *Constitutional Theory*, 390. See also ER Huber, *Deutsche Verfassungsgeschichte seit 1789, Band I: Reform und Restauration 1789 bis 1830* (Stuttgart, Verlag W. Kohlhammer, 1957) [hereinafter Huber, *DV I*], 664-5.

<sup>48</sup> Beaud, *Théorie*, 37, 65. See also Schönberger, “Die Europäische Union als Bund”, 87.

<sup>49</sup> JHH Weiler, “Federalism Without Constitutionalism: Europe’s *Sonderweg*” in K Nicolaidis and R Howse (eds) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford, OUP, 2001), 58.

<sup>50</sup> Forsyth, “The Relevance of Classical Approaches”, 32.

“Hallstein was wary of calling it a federal body, and preferred to refer to it simply as a ‘Community’, but he also interestingly termed it a ‘union of states’”<sup>51</sup>. The allure of the distinction between *Staatenbund* and *Bundesstaat* is that it protects the neat division between international law and public law on which the political theory of the state relies. It makes it possible to think of the public power and authority of any given federal union as being founded on *either* a treaty *or* a constitution, *either* a creature of international law *or* a creature of public law. The problem is—as illustrated by Hallstein’s and Weiler’s problems of fitting the EEC in either category—that the reality of the federation contradicts this separation because the federation is *founded on a treaty that is also a constitution*.

A federation can positively be defined as follows: *A federation is a permanent union of two or more states that rests on a free agreement of all Member States with the common goal of self-preservation. This agreement politically changes the constitutional status of the Member States in relation to their common aim*<sup>52</sup>. We will now explicate the meaning of this definition. From a purely formalistic view it is difficult to distinguish the federation from the family of ‘international organisations’ because it always relies on a treaty between its Member States<sup>53</sup>. This treaty, however, is also a constitution because it gives birth to a new political existence and transforms its Member States’ constitutions politically<sup>54</sup>. The federation relies on a *status contract/treaty* (*Statusvertrag*) that encompasses the Member States in their entirety and gives them a new status<sup>55</sup>. A status contract, following Schmitt, differs from other contracts by founding

“an enduring life relation that takes into account the person in his *existence* and incorporates the person into a total order, which exists not only in definable individual relations and which cannot be set aside through voluntary termination or renunciation. Examples of such a status contract are engagement and marriage, the establishment of civil servant relationships, and in other legal orders, vassalage contracts and covenants (conjugations), etc.”<sup>56</sup>

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<sup>51</sup> *ibid* 32.

<sup>52</sup> Schmitt, *Constitutional Theory*, 383-4.

<sup>53</sup> Beaud, *Théorie*, 261.

<sup>54</sup> Huber, *DV I*, 661.

<sup>55</sup> “*The genuine constitutional contract is always a status contract*. The general constitutional contract presupposes several political units as contractual parties, which, as such, have a political status. In its content inheres the founding of a new status for all states participating in the agreement” (Schmitt, *Constitutional Theory*, 117).

<sup>56</sup> Schmitt, *Constitutional Theory*, 118.

A federation rests on a status contract between its Member States that establishes a new *comprehensive status* encompassing the Member States in their entirety and, beyond the merely individual, contractual obligations, alters them fundamentally by giving them a new status<sup>57</sup>. In this way, the federation establishes a *constitution in the positive sense*. The federal treaty is an independent constitutional order contracted in perpetuity that simultaneously is a component of the constitutions of all the Member States<sup>58</sup>.

That the federal treaty is in ‘perpetuity’ or ‘permanent’ does not mean that it necessarily lasts forever. The ‘permanence’ is part of the *intention* of the federal contract. A status contract is *meant* to bind the contracting partners ‘forever more’. That the federal contract, in actual historical cases, tends *not* to bind the contracting partners ‘forever more’ is another matter. To illustrate the meaning of ‘permanence’ we can look at another more common status contract: marriage<sup>59</sup>. While the average duration of a marriage in the UK is around 11 years<sup>60</sup>, it is not possible to go into a predetermined time-limited marriage. There is no such thing as a wedding vow stating, “I take you to be my wedded wife/husband for the next 11 years”. Similarly, in political history, city states, republics, empires, nation-states and federations alike have come into being and collapsed but in their foundational intention they tend to be in ‘perpetuity’ or ‘permanent’. Schmitt therefore qualifies the idea of the federation as a permanent constitutional order as follows:

“The federal treaty aims to establish a *permanent order*, not just a provisional regulation. That also follows from the concept of a *status* because a merely provisional individual regulation that can be promulgated and defined cannot establish status. So every federation is an ‘eternal one’, in other words, a federation is counted on for the long term”<sup>61</sup>.

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<sup>57</sup> *ibid* 119.

<sup>58</sup> *ibid* 385.

<sup>59</sup> For a comparison of marriage as a status contract with the federal contract as a status contract, see C Hughes, *Confederacies: An Inaugural Lecture Delivered in the University of Leicester 8 November 1962* (Leicester, Leicester University Press, 1963), 12.

<sup>60</sup> See report by Office for National Statistics, “Statistical bulletin: Divorces in England and Wales: 2015”, available via:

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2015#how-long-do-marriages-of-opposite-sex-couples-last> [last visited 6 March 2018].

<sup>61</sup> Amended translation of Schmitt, *Constitutional Theory*, 385 (or. *Verfassungslehre*, 137).

Federal treaties tend therefore to be of ‘unlimited duration’. This is also the case with the EU treaties<sup>62</sup> and was expressed by the ECJ in *Costa* in the following manner: “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”<sup>63</sup>.

The status treaty on which the federation relies leads to a political change in the constitutions of its Member States. This *constitutional change* of the Member States does not necessarily entail a change of *constitutional law* in the Member States<sup>64</sup>. The constitutional change regards something far more important, namely, “*the concrete content of the fundamental political decisions on the entire manner of the existence of the state*”<sup>65</sup>. There is, following Schmitt, a fundamental distinction between a constitution and constitutional laws. The constitution is not the sum of the constitutional laws<sup>66</sup>. The constitution—in its *positive sense*—consists in the fundamental political decision(s) on the political form and the fundamental structure of the state; its ‘identity’ or ‘mode of being’. In this way, Schmitt exemplifies, the fundamental decision on democracy is encapsulated in the preamble to the Weimar Constitution: “the German people provided itself with a constitution”, “state authority derives from the people” and “the German Reich is a republic”<sup>67</sup>. In the current German Basic Law, the ‘identity’ or the ‘constitution’—meaning the fundamental political decision made by the German constituent power—is encapsulated, or so the German Constitutional Court argues, in Art 1<sup>68</sup> and 20<sup>69</sup> of the German Basic Law together with article 79.3<sup>70</sup> (the so-called ‘eternity clause’) that makes the two first provisions

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<sup>62</sup> As is currently reflected in Article 53 TEU and Article 356 TFEU both stating that “This Treaty is concluded for an unlimited period”. See also Schönberger, “Die Europäische Union als Bund”, 102.

<sup>63</sup> C-6/64 - *Flaminio Costa v E.N.E.L.* [1964], emphasis added.

<sup>64</sup> Huber, *DV I*, 661.

<sup>65</sup> Schmitt, *Constitutional Theory*, 384, emphasis added.

<sup>66</sup> *ibid* 75.

<sup>67</sup> *ibid* 77-8.

<sup>68</sup> German Basic Law, Article 1: “(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law”.

<sup>69</sup> German Basic Law, Article 20: “(1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available”.

<sup>70</sup> German Basic Law, Article 79(3): “Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible”.

unamendable by law<sup>71</sup>. The constitution in its positive sense, however, is a dynamic entity subject to reinterpretation and can therefore never be fully absorbed by a written constitution<sup>72</sup>; not even by an ‘identity clause’.

In less legalistic constitutional settlements than the German Basic Law, it will be more difficult to pinpoint the constitution in its positive sense in any one text or, perhaps, in any text at all. That does not mean that these less legalistic constitutional settlements are without a constitution in its positive sense. The constitution or the identity is the body of principles characterizing the fundamental structure and manner of the existence of the state in its entirety<sup>73</sup>. The constitution in its positive sense relates to *the fundamental characteristics of how a political association governs itself*. It is this identity that the federal contract leads to a change in and it is for that reason that the federation ought to be understood as constitutional in nature. Following Schmitt, the legal foundation of the validity of a federal treaty-constitution is the political will of the contracting states and the existence of the federation that rests on it<sup>74</sup>. The constitutional nature of a federation is determined by the political change of its Member States and the concrete existence of a new political being, the common Union. Independently of whether this is discernible from a purely legal analysis, the federation is of a constitutional nature because it changes its Member States politically by virtue of their membership in the new common Union.

Juristically, it is indisputable that the EU relies on a treaty. From a purely legalistic perspective, the EU is therefore a treaty organization and as such it belongs to the world of international law as has correctly been pointed out by Bruno de Witte<sup>75</sup>. Nevertheless, it is wrong to conclude on that basis that it is without a constitution according to the theory of the federation. Politically, it is not meaningful to understand the EU as ‘merely’ a creature of international law because the EU has subordinated its constituent units in a way that has changed the fundamental state structure and constitutional identities of the contracting states and their relations *inter se*: “Once they have come together in a federal union, the Member States are no longer truly sovereign states, nor are they strangers to one another”<sup>76</sup>. The creation of the EU has led to a *political change in the constitution of the Member States* and it is this *constitutional change*—a change that affects the very identity of the contracting states—which distinguishes the EU from being ‘merely’ a creature of

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<sup>71</sup> BVerfG - 2 BvE 2/08 - *Lisbon Ruling* [2009], 216-8, 240.

<sup>72</sup> M Goldoni and MA Wilkinson, “The Material Constitution” (2016) *LSE Legal Studies Working Paper* 20, forthcoming in the *Modern Law Review*.

<sup>73</sup> Schmitt, *Constitutional Treaty*, 119.

<sup>74</sup> *ibid.*

<sup>75</sup> De Witte, “The EU as an international legal experiment”.

<sup>76</sup> Beaud, *Théorie*, 230, my translation.

public international law: “if the federation is neither an alliance nor an international organisation, it is because it is a political entity”<sup>77</sup>. Jacques Chirac, therefore, (unknowingly) described the constitutional nature of the EU when he was asked about whether the Constitutional Treaty was a constitution or a treaty: “Legally a treaty, but politically a constitution”, he said<sup>78</sup>. As other federations, the EU is founded on a *federal constitutional treaty/contract*. This concept is not an oxymoron, in contrast to what is often maintained due to the prevalence of the statist categories<sup>79</sup>. Following the theory of the federation, Dieter Grimm’s analysis that the EU cannot have an autonomous constitutional order because it relies on a treaty is therefore incorrect<sup>80</sup>.

## II: THE FEDERAL CONSTITUTIONAL TREATY

### A: The Concept of the Federal Constitutional Treaty

The federal constitutional treaty is a *contractual* constitution because it presupposes two or more politically existing states, each of which contain within them one subject of the constituent power<sup>81</sup>. The federation rests on a *constitutional contract* between the subjects of the constituent powers of all the Member States<sup>82</sup>. *Within* the modern state, a constitution will, in Schmitt’s view, always be a one-sided decision by the sovereign people or prince as the sole carrier of the constituent power<sup>83</sup>. The federal constitution is in this way a contract *between* two or more national subjects of the constituent power entered into on a free and equal basis<sup>84</sup>. Whereas the constitution of a state (ideal-typically) is born out of an exercise of *will*, the constitution of a federation is born out of a *contract* between its Member States. The constitution of a federation is therefore both a ‘federal treaty’ (*Bundesvertrag*) and a ‘constitutional contract’ (*Verfassungsvertrag*)<sup>85</sup>. There are no perfect

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<sup>77</sup> *ibid* 262, my translation.

<sup>78</sup> Jacques Chirac as cited by C Bickerton, *European Integration: From Nation State to Member State* (Oxford, OUP, 2012), 42. Following Schönberger (“Die Europäische Union als Bund”, 113), the notion of a ‘Constitutional Treaty’ is a perfect expression of the foundational principles of a federation. That the Constitutional Treaty was rejected does not change the constitutional validity of this claim: the EU was a federation before the project of the Constitutional Treaty (Chapter 2).

<sup>79</sup> Beaud, *Théorie*, 80.

<sup>80</sup> D Grimm, “Treaty or Constitution? The Legal Basis of the European Union after Maastricht” in EO Eriksen, JE Fossum, AJ Menedez (eds) *Developing a Constitution for Europe* (London, Routledge, 2004).

<sup>81</sup> Schmitt, *Constitutional Theory*, 113.

<sup>82</sup> *ibid* 383-5.

<sup>83</sup> This view is widely contested in constitutional theory, see, e.g., A Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford, OUP, 2016), 121ff.

<sup>84</sup> Schmitt, *Constitutional Theory*, 97.

<sup>85</sup> Schönberger, “Die Europäische Union als Bund”, 112; Schmitt, *Constitutional Theory*, 114.

English translations, however, a federal- and constitutional ‘covenant’, ‘treaty’, ‘contract’ or ‘compact’ are all possible.

The ideal-typical example of a federal constitutional contract is the 1787 Constitution of the United States. Due to the debates between the *Federalists* and the *Anti-federalists* it is also one of the best documented. We therefore have extensive knowledge of how the constitution of the United States was perceived at the time of the constitutional convention. In Federalist 39, Madison argued that the foundational act establishing the constitution of the United States was a *contract* between the peoples of the United States and not an act by a unitary American constituent power exercising its unitary sovereign *will*. The constitution was, following Madison, to be ratified directly by the ‘the people themselves’ by which he meant via a referendum and not by the legislative authority. It was, in other words, to be ratified not by the constituted power but by the constituent power. However, the US constitution was made *not* by the American constituent power (in the singular) but by the American constituent powers (in the plural). The authority of the constitution was at the time of the founding derived from a contract between the people of the states. The contractual nature of the foundational act was, according to Madison, expressed in the single consideration that the constitution was ratified by the will of the people—*not* as one nation—but as a

“result from the UNANIMOUS assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority, in the same manner as the majority in each State must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the States as evidence of the will of a majority of the people of the United States. Neither of these rules have been adopted. *Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act*”<sup>86</sup>.

The contractual basis is not altered by the fact that the Founding Fathers broke with the Articles of Confederation in their decision that the Constitution could rest on the ratification of 9 out of 13 states. As is clear from Article seven of the original Constitution, a hypothetical ratification of the Constitution by nine states would *only* bind these nine

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<sup>86</sup> Federalist 39 (Madison), emphasis added. See, e.g., *The Federalist Papers* (Oxford, OUP, 2008), 190.

states and not the remaining four: “The Ratification of the Conventions of nine states, shall be sufficient for the Establishment of this Constitution *between the States so ratifying it*”<sup>87</sup>. It was not possible for a majority of the states to enforce the constitution against a minority of the states. The federal constitution is thus a contract between several states, entered into on a free and equal basis. All federations are founded on a free and equal contract between the federating states.

The notion of a ‘free and equal contract’ is exclusively concerned with the question of the relationship *between* the federating states and not the internal relationship between governors and governed *within* the federating states. A federation is, in other words, not necessarily a union of democratic or republican states founded on an act or acts of the constituent power of the *people*. Historically, there are several examples of federal unions of *internally* ‘unfree and unequal’ states. Whereas the founding of the United States is a helpful ideal type for understanding the concept of a federal constitutional treaty, it is also easy to overgeneralise its meaning. The US Constitution had a ‘popular founding’ but that is not the case for all federations. The German Federation of 1815-1866 provides a good example of a non-democratic/non-republican federation not constituted by or in the name of the people(s). With the exception of the four ‘free cities’ (Bremen, Frankfurt, Hamburg and Lübeck), the German Federation of 1815 was a federal union of monarchs (*Monarchenbund*) founded on a constitutional treaty between the monarchical constituent powers of the German states and two foreign monarchs: the King of Denmark on behalf of Lauenburg and Holstein and the King of the Netherlands on behalf of Luxemburg and Limburg<sup>88</sup>. The federation is therefore not necessarily founded by an act of popular constituent power. The principle of the free and equal contract means that a federal union of states cannot be founded by an act of force or domination by one state over another. The origins of a federal union is *foedus*<sup>89</sup> (covenant, treaty, compact) and not *imperium* (command). With regard to its founding, the *freedom* of the states in their decision to come together in a common union is what distinguishes the political form of the federation from the political form of another kind of union of states, namely, the *empire*: “The federation is a free union of states whereas the empire is a coercive union of states. The federation stems from a mutual agreement, most often

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<sup>87</sup> For a transcript of the original 1787 Constitution of the United States see:

[http://www.archives.gov/exhibits/charters/constitution\\_transcript.html](http://www.archives.gov/exhibits/charters/constitution_transcript.html) [last visited 19 June 2018].

<sup>88</sup> See *Deutsche Bundesakte* (1815), Article 1. Available via: <http://www.documentarchiv.de/nzjh/dtba.html> [last accessed 2 March 2018]. From 1837, the King of Great Britain was also a contracting party because of the personal union between Great Britain and Hannover.

<sup>89</sup> Davis, *The Federal Principle*, 3; Beaud, *Théorie*, 112.

formalised (a federal covenant), whereas the empire rests on pure fact, the conquest of a state or country, or coercion”<sup>90</sup>.

In contrast to the empire, the federation does not commence by an act of violence, force or domination<sup>91</sup>. A federation is based on the free consent of the contracting parties in order to perpetuate their political existence as free and equal members of a common Union. The constitution of the common Union by the federal constitutional contract does, for that reason, neither eliminate the constitutions of the Member States nor their political existence<sup>92</sup>. On the contrary, a federation is created in order to perpetuate the political existence of its Member States as equal members of a common Union.

### **B: The Constitution of a United Europe**

Due to historical circumstances, the foundation of the EU/EEC differs in several important ways from the ideal typical example of the 1787 Constitution of the United States. The constitutional history of the EU will be discussed at length in Chapter 2, but two important differences have to be discussed immediately because they are central to why the constitutional and federal nature of European integration and especially of the early period is often disregarded. First, the lack of ‘extra-ordinary politics’<sup>93</sup> in the ratification of (early) European treaties and, second, the lack of explicit constitutional vocabulary.

The constitutional imaginary of the 1787 Constitution of the United States is that of the modern republican revolution bringing to life the notion of the constituent power of the people. As pointed out by Hannah Arendt, the revolutionary concept of the constituent power does not necessarily entail a doctrine of popular sovereignty. In *On Revolution*, Arendt argued that an important reason for the success of the American

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<sup>90</sup> Beaud, *Théorie*, 107-8, my translation. A related point has been made by Forsyth (*Union of States*, 3): “there is a difference between a pact of union made directly by political communities which either possess the de jure status of states or are asserting in the very act of union the independence characteristic of states, and a union which is in effect a jointly agreed regroupment of part of an already existing imperial state structure, and which is later recognized by the imperial power as a single federal state”. For this reason, Forsyth argues, neither Britain nor the Commonwealth can be understood on the basis of the theory of the federation. For a systematic account of the differences between the federation and the empire as political forms, see O Beaud, “Federation and Empire: About a Conceptual Distinction of Political Forms” in A Lev (ed) *The Federal Idea: Public Law Between Governance and Political Life* (Oxford, Hart Publishing, 2016). For an interesting reflection on the fundamental differences between federation and empire in the context of the transformation of the British empire, see EA Freeman, “Imperial Federation” in his *Greater Greece and Greater Britain and George Washington the Expander of England—Two Lectures with and Appendix* (London, MacMillan and co., 1886).

<sup>91</sup> Beaud, “La Répartition des Compétences dans une Fédération”, 180.

<sup>92</sup> Schmitt, *Constitutional Theory*, 123.

<sup>93</sup> A Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge, CUP, 2008).

Revolution, and the failure of its counterpart in France, was its rejection of the idea of popular sovereignty manifest, most importantly, in the American exceptionalism consisting of the federal nature of the Confederation and the pre-given republican institutional structure manifest most importantly in the town halls<sup>94</sup>. Notwithstanding the important differences between the two great modern revolutions, they bear, however, an important similarity, namely, a fundamental understanding that the constituent power of the people, which could express itself in acts of extra-ordinary politics was a source of power and freedom to be used for the creation of new constitutional orders.

The post-WWII European constitutional imaginary is fundamentally different from that of the modern revolutions. In contrast to the modern revolutionary constitutions, the post-WWII European constitutions, following Arendt, were written by experts ‘as puddings made from a recipe’ and imposed after the revolutions had failed<sup>95</sup>: “Their purpose was to stem the tide of revolution, and if they too served to limit power, it was the power of the government as well as the revolutionary power of the people whose manifestation had preceded their establishment”<sup>96</sup>. Despite still speaking in the language of ‘We, the people’, the constituent power of the people was generally perceived as something dangerous that ought to be constrained<sup>97</sup>. The general fear of ‘people’s power’ manifested itself in a general scepticism against plebiscites, especially in Germany and the German Basic Law of 1949 was not ratified via a referendum. With regard to the ratification of European treaties in the early post-WWII years, Charles de Gaulle was the only contemporaneous leader who seemed to have an appetite for ratifying European treaties by referenda in the Member States in the early days of European integration. The original European treaties, in contrast to the 1787 Constitution of the United States, were not ratified by acts of extra-ordinary politics but by acts of parliaments and, in formal terms in the BENELUX countries, by royal assent.

Leaving aside the case of Germany that to this day outlaws referenda, the general fear of ratification via referendum in the context of Europe has changed significantly over the years with the Enlargements of the Union. With the first round of enlargements, referenda on membership were held in 1972 in France (accepting the enlargement of the

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<sup>94</sup> H Arendt, *On Revolution* (New York, Penguin, 2006 [1977]), 144, 154, 172-4, 190.

<sup>95</sup> Arendt, *On Revolution*, 135.

<sup>96</sup> *ibid.*

<sup>97</sup> C Möllers, “We are (Afraid of) the People’: Constituent Power in German Constitutionalism” in M Loughlin and N Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford, OUP, 2008); JW Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven CT and London, Yale University Press, 2011), 128-9.

EEC) and in Ireland, Denmark and Norway (the latter rejecting membership)<sup>98</sup>. In 1975, the UK held a referendum on membership *ex post facto*. Except for Portugal, Bulgaria and Cyprus, all acceding Member States have had referendums on membership in the EEC/EU. That the first European treaties were not ratified by acts of extraordinary politics does therefore not mean that they are not constitutional in nature. Rather the lack of referendums is an expression of the predominant constitutional imaginary of the post-WWII world appositely named ‘constrained democracy’ by Jan-Werner Müller<sup>99</sup> (Chapter 3).

In contrast to the 1787 Constitution of the United States, the European treaties include constitutional vocabulary only to a very limited degree. The reason for this lack has to do with the genesis of the project of European integration. Whereas the 1787 Constitution of the United States was born out of the revolutionary development of what started out as a (modest) political project of amending the Articles of Confederation, the EEC was born out of the failure of a much grander constitutional project for a United Europe that spoke in crystal clear constitutional language (Chapter 2). In the 1957 Treaty of Rome, all the constitutional vocabulary of the newly collapsed constitutional projects of the European Defence Community and the European Political Community was left out except for the most important aim of European integration of clear political and constitutional significance, namely, the aim of ‘an ever-closer union among the peoples of Europe’. This constitutional aim became a key point of reference in the legal construction of European authority in the years to come through the process of ‘integration through law’. A precedent of achieving constitutionalism through the ‘back door’ or ‘by stealth’ was established that has haunted the project of European integration ever since, in recent years most openly and explicitly with the Lisbon Treaty that ratified most of the content of the Constitutional Treaty but left out the constitutional vocabulary.

In constitutional terms, the European treaties have been *attributed* to expressions of the will of the peoples of Europe—in the same way as the German Basic Law has been attributed to the will of the German people—irrespectively of whether they are founded on acts of ordinary or extra-ordinary politics. Dieter Grimm has, e.g., argued that “[t]he national parliaments when ratifying a treaty decide as representatives of their peoples. The result is attributed to the peoples. Hence, the Lisbon Treaty can be regarded as an

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<sup>98</sup> “Referendums on EU issues”, May 2016: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/582041/EPRS\\_BRI\(2016\)582041\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/582041/EPRS_BRI(2016)582041_EN.pdf) [last accessed on 5 March 2018].

<sup>99</sup> Müller, *Contesting Democracy*, 128-9.

expression of the will of the peoples of the Member States”<sup>100</sup>. A similar understanding of the source of constitutional authority of EU law was expressed by Advocate General Maduro in *Kadi*: the Treaty, he argues “is not merely an agreement between states but an agreement between the *peoples* of Europe” that creates a “municipal legal order of transnational dimension, of which it forms the ‘basic constitutional charter’”<sup>101</sup>.

Irrespective of the relative lack of constitutional language in the treaties, the project of European integration has established a constitution in the *positive sense*. It has united its Member States into a new concrete political order and created institutions capable of legislating directly for its citizens leading to a political change in the constitutions of the Member States. The development of the constitutional logic of the EEC/EU thus adheres to the core principles of the federation that will be discussed in the next section, namely, the double constitutional moment of ‘birth and transformation’.

### III: CONSTITUTIONAL BIRTH AND TRANSFORMATION

#### A: The Double Constitutional Moment

The federal constitutional treaty differs from treaties of international law because it binds not merely the states but also the peoples in an ‘ever closer union’. A federation is simultaneously a union of states and peoples (*‘Staaten- und Völkerverbindung’*)<sup>102</sup>. By entering into the federal contract, a new constitutional unity encompassing all the contracting states and their citizens is born. The federal constitutional contract is at the same time an interstate treaty and the foundation for the new federal legal order<sup>103</sup>: “The federal contract is at the same time treaty *and* constitution”<sup>104</sup>. The federal contract transforms the identity of the contracting states by the establishment of a new political relation of governors and governed that is not ‘international’ in nature. For republican and democratic states, this new relationship is (actively) established by a contract between the popular constituent powers of the Member States. The federal constitutional treaty is, in this way, a contract between all the peoples and states of the Union. The federal contract thus lies in between an ‘interstate contract’ (a contract of international law

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<sup>100</sup> Grimm, “Sovereignty in the European Union”, 48.

<sup>101</sup> Opinion of Advocate General Poiares Maduro in *Kadi*, 16 January 2008, 21.

<sup>102</sup> Beaud, *Théorie*, 271.

<sup>103</sup> Huber, *DVI*, 661-2.

<sup>104</sup> Schönberger, “Die Europäische Union als Bund”, 112.

between sovereign states) and an ‘intrastate contract’ (the ‘social contract’ that forms the political community as such)<sup>105</sup>.

The constitution of a federation is characterised by a double constitutional moment of *transformation* and *birth*: the transformation of the contracting states and the birth of a new a ‘federal existence’<sup>106</sup>. When coming together in a common Union, the contracting states give birth to a new political unity encompassing themselves and their citizens in their entirety<sup>107</sup>. However, the act of coming together in a common Union also changes the *status*, or ‘statehood’, of the founding states<sup>108</sup>. They are no longer ‘monadic’ independent states; they are *Member States* belonging to the Union at large<sup>109</sup>. The change in status from ‘monadic’ independent state to ‘Member State’ is manifest in that the contracting states, by coming together in a common political union, no longer have a purely ‘external relation’ to one another of international law. Their relation is primarily an ‘internal relation’ governed by the internal public law of the Union<sup>110</sup>. Moreover, the birth of the new constitutional order changes the status of the contracting states in that it bypasses the contracting states monopoly of public power within their own territories and over their populations by establishing a direct link with the Member States’ citizens. It is this double moment that makes the federal contract *constitutional* and distinguishes from other interstate contracts.

The change from independent monadic state to Member State has two dimensions in the context of the EU, *interstate* and *intrastate*. These dimensions, however, are inextricably linked to one another. The *interstate transformation* is manifest in a change of the mutual relationship between the Member States and the change in the relationship between the Member States and non-EU states. The relationship between the Member States is changed by the establishment of a common Union. After the contracting states have established among themselves a common union, the states no longer (primarily) relate to one another via international law: “the Member States of a federation are no longer foreign countries to one another. They no longer have the relationship described by classical international law as impermeable entities vis-a-vis one another”<sup>111</sup>. In contrast,

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<sup>105</sup> Forsyth, *Union of States*, 15-6; Beaud, *Théorie*, 271; Schönberger, “Die Europäische Union als Bund”, 111.

<sup>106</sup> Beaud, *Théorie*, 132; Schmitt, *Constitutional Theory*, 398-9.

<sup>107</sup> Schönberger, “Die Europäische Union als Bund”, 111.

<sup>108</sup> Schmitt, *Constitutional Treaty*, 117; Schönberger, “Die Europäische Union als Bund”, 111; Huber, *DV I*, 661-2.

<sup>109</sup> Beaud, *Théorie*, 205.

<sup>110</sup> Schmitt, *Constitutional Theory*, 397; Beaud, *Théorie*, 206; Forsyth, *Union of States*, 48; Huber, *DV I*, 662-3.

<sup>111</sup> Schönberger, “Die Europäische Union als Bund”, 116, my translation. See also Schönberger, *Unionsbürger*, 113.

they appear in front of each other as equal Member States, with equal rights, of a common Union<sup>112</sup>. Their mutual relations, cooperation and conflict are mediated via EU institutions and EU law. Any agreement concluded by the Member States *inter se* has to conform to EU law<sup>113</sup>. Though the Member States, in a sense, remain autonomous, they are at the same time interdependent<sup>114</sup>.

The Member States can furthermore no longer treat the nationals of other EU Member States as aliens<sup>115</sup>. As other federal unions, the EU breaks with the bipolar distinction of the nation-state between national and alien, inclusion and exclusion, and introduces in its place a tertiary distinction between citizen of a Member State, citizen of the Union and non-Union foreigner<sup>116</sup>. The category of Union citizenship allows a citizen of one Member State to become ‘quasi-citizen’ of another Member State. The ‘quasi’-citizenship of the federation can be termed ‘interstate citizenship’<sup>117</sup> in that it differs from the citizenship of a nation-state and a consolidated federal state. The core of ‘interstate citizenship’ is that, as a matter of Union law, the Member States have a duty to treat the citizens of the other Member States—subject to certain limits<sup>118</sup> and conditions<sup>119</sup>—as they treat their own<sup>120</sup> (Chapter 2). Schönberger uses the concept ‘*Indigenat*’ that originally described the fundamental principle of federal citizenship in the North German Federation of 1867<sup>121</sup>. The common ‘indigenat’ granted a right of a citizen of one Member State to be treated as a ‘non-alien’ in another Member State, i.e., the right to be treated

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<sup>112</sup> Member State equality is a core principle of EU law (Article 4(2) TEU).

<sup>113</sup> C-546/07 - *Commission v. Germany* [2010]. This is even the case for agreements between Member States *inter se* predating the establishment of the EEC in 1957. See A Rosas, “The Status in EU Law of International Agreements Concluded by EU Member States” (2011) *Fordham International Law Journal* 34(5), 1319.

<sup>114</sup> Beaud, *Théorie*, 216.

<sup>115</sup> Beaud, *Théorie*, 221; O Beaud, “The Question of Nationality within a Federation: A Neglected Issue in Nationality Law” in R Hansen and P Weil (eds) *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe: The Reinvention of Citizenship* (New York and Oxford, Berghahn Books, 2002), 318-9; Schönberger, *Unionsbürger*, 55, 63, 97; Schönberger, “Die Europäische Union als Bund”, 116.

<sup>116</sup> Beaud, “Nationality within a Federation”, 317.

<sup>117</sup> Schönberger, *Unionsbürger*, 64, 99; Beaud, *Théorie*, 222-5.

<sup>118</sup> As is the case with EU citizenship, comprehensive political rights were excluded from the rights associated with the common *Indigenat* in the North German Confederation. In the German case, a ‘*politische Indigenat*’ was first comprehensively included with the Weimar Constitution (Schönberger, *Unionsbürger*, 107-9).

<sup>119</sup> The right to make use of the rights associated with federal citizenship, the common *Indigenat*, is often subject to the border-crossing citizens not being a social burden on their host Member State. This is, at least to some extent, still the case for EU citizenship. This was also the case for federal citizenship in the North German Confederation until 1870 (Schönberger, *Unionsbürger*, 105). In the US, it was only with *Edwards v. California* in 1941 that state law prohibiting a non-resident US indigent citizen from entering the state was struck down as unconstitutional (Schönberger, *Unionsbürger*, 76). In Switzerland, it was only in 1976 decided that the cantons had a duty to care for resident poor natives of the other cantons (Schönberger, *Unionsbürger*, 76). This is discussed in more details in Chapter 2.

<sup>120</sup> Schönberger, *Unionsbürger*, 73.

<sup>121</sup> *ibid* 100ff.

equally with the ‘natives’ (*indigena, Eingeborener*) in the other Member States<sup>122</sup>. In the North German Constitution, Article 3(1) it is stated:

“In the entire extent of the federal area there exists a common *Indigenat* with the effect that the national (subject, state-citizen) of any constituent state must be treated as a non-alien in any other constituent state, and accordingly must be admitted under the same conditions as an indigenous person for the purposes of settled residence, economic activity, public offices, acquisition of land, acquisition of the right of state-citizenship and the enjoyment of all other civil rights, also that he or she is to be treated equally with regard to prosecution and legal protection”<sup>123</sup>.

The EU Treaties guarantee the EU citizens the right to move and reside freely within the EU<sup>124</sup>, the right to vote and stand for municipal elections in the Member State that the EU citizen chooses to reside in<sup>125</sup>, and the right to consular and diplomatic protection<sup>126</sup>. The substantial rights of EU citizenship, however, are primarily derived from the principle of non-discrimination<sup>127</sup>. When residing in Member States other than their own, the citizens of an EU Member State have the right to equal treatment with the nationals of the Member State they reside in within most areas of state life (with political rights as the main exception)<sup>128</sup>. This principle of horizontal mutual recognition is equivalent to that of *Indigenat*. As in other federations, ‘interstate citizenship’ of the EU is based on the principle of *horizontal mutual recognition*<sup>129</sup>. The status of ‘interstate-citizenship’, in the case of the EU as in other federations, is not based on international law but on the internal public law of the Union<sup>130</sup>. In the relationship between the EU states *inter se*, the distinction between ‘inside’ and ‘outside’ is no longer applicable in the same way as for ‘monadic’ states<sup>131</sup>.

The relationship between Member States and non-EU states is furthermore changed. Where the Treaties provide for it or where it is necessary in order to obtain an

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<sup>122</sup> *ibid.*

<sup>123</sup> Schönberger, *Unionsbürger*, 100-1, translation as presented by J Bierbach, “Who’s Afraid of Union Citizenship?” in (2009) *European Constitutional Law Review* 5(3), 517-27.

<sup>124</sup> Article 21 TFEU.

<sup>125</sup> Article 22 TFEU.

<sup>126</sup> Article 23 TFEU.

<sup>127</sup> Article 18 TFEU.

<sup>128</sup> The principle of non-discrimination is key to understanding the intermediary status of citizenship in federations, see Beaud, *Théorie*, 223-4; Schönberger, *Unionsbürger*, 69; Schönberger, “Die Europäische Union als Bund”, 116.

<sup>129</sup> Schönberger, “Die Europäische Union als Bund”, 116-7; Schönberger, *Unionsbürger*, 93-4.

<sup>130</sup> Beaud, *Théorie*, 225.

<sup>131</sup> Schönberger, “Die Europäische Union als Bund”, 116.

objective of the Treaties, the Union can make international agreements that are binding and directly applicable on the Member States as well as on the Union institutions<sup>132</sup>. Furthermore, by being a part of the common Union, the Member States' relationship and agreements with non-EU states cannot be against the interest of the Union<sup>133</sup>. Before undertaking any actions on the international scene which could affect the interest of the Union, the EU Member States are obliged to consult the other Member States in the European Council or the Council<sup>134</sup>. If the Member States conclude agreements of international law with third countries, these agreements will be understood by the Union as forming part of national law and they will therefore have to yield to Union law in case of conflict<sup>135</sup>. A hierarchy is thereby established between the Member States' *internal* relations *inter se* as governed by the Union which enjoys primacy over the Member States' *external* relationship with non-EU third countries. Commitments made by EU states within international law can, as a rule<sup>136</sup>, not be honoured if they conflict with the internal commitments of the Union.

The *intrastate transformation* is manifest in the alteration of the relationship between the contracting states and their own citizens which happens as a consequence of the establishment of the common Union. The governmental apparatus of the EU can, as pointed out by Weiler, be distinguished from other structures of 'governance beyond the state' because it has imposed its norms, not so much *on* the Member States as *in* the Member States<sup>137</sup>. Through the preliminary reference procedure, the EU has by way of the confluence of the principles of direct effect and supremacy bypassed the principle of *state responsibility* pertaining to public international law<sup>138</sup>. The individual citizens are directly governed as a subject of rights by the European legal order<sup>139</sup>.

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<sup>132</sup> Article 261 TFEU. See also Rosas, "The Status in EU Law of International Agreements Concluded by EU Member States", 1309; Beaud, *Théorie*, 54.

<sup>133</sup> Article 24(3) TEU: "[The Member States] shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations". This was also the case for the German Federation (Huber, *DVI*, 604).

<sup>134</sup> Article 32 TEU.

<sup>135</sup> Rosas, "The Status in EU Law of International Agreements Concluded by EU Member States", 1313.

<sup>136</sup> The main exceptions are international agreements predating the establishment of the EEC *and* the Member States' accession to the Union (Article 351 TFEU). That being said, following *Kadi*, Article 351 TFEU cannot be invoked to disapply the foundational principles of the Union hereunder fundamental rights. For exceptions to this general rule, see Rosas "The Status in EU Law of International Agreements Concluded by EU Member States", 1316-24.

<sup>137</sup> JHH Weiler, "Democracy without the People: The Extinction of European Legitimacy" (2012) *Schlossplatz* 3(13), 10.

<sup>138</sup> Weiler, "Democracy without the People: The Extinction of European Legitimacy", 11; JHH Weiler, "Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy" (2014) *I•CON* 12(1).

<sup>139</sup> C-26/62 - *Van Gend en Loos* [1963]; ECJ Opinion 1/91 [1991].

The direct governmental link between Union institutions and the citizens of its Member States is not a unique feature of EU law but a fundamental character trait pertaining to most federations<sup>140</sup>. The direct link between the Member State citizens and the legal order of the Union shows the shortcomings of the ‘statist’ distinction between international law and public law pertaining to the distinction between *Staatenbund* and *Bundesstaat* respectively<sup>141</sup>. Notwithstanding that the EU is founded on a contract of international law (a *Staatenbund* principle) it has established a direct governmental link with the citizens of its Member States and exercises public power under a system of internal public law (a *Bundesstaat* principle). The EU, as other unions of states, carries characteristics of both a *Staatenbund* and a *Bundesstaat*. A federal union of states is, in Madison’s words, a ‘mixed regime’ with both ‘national’ and ‘federal’ characteristics<sup>142</sup>.

As is the case with Union citizenship in other federations, EU citizenship fundamentally challenges the relationship between governors and governed *within* the Member States in that the monopoly of force of the state over its citizens no longer is in place. In the ‘mixed regime’ of the EU, the ‘inter-state privileges’ of EU citizenship allows the EU citizens to ‘escape’ their own states, if they so wish, and enjoy equal treatment with nationals in whichever Member State they choose to reside in<sup>143</sup>. The EU citizens are endowed with rights that they can claim against their own states and governments; most fundamentally and radically, the rights of free movement and non-discrimination. Through EU law, citizens of the Union can emancipate themselves from their states because they have a real possibility, through EU law, of enjoying the rights of ‘quasi-citizens’ in another state<sup>144</sup>. The relationship between governors and governed is fundamentally altered because the governed equally belong to another constitutional order on whose protection they can rely against their own states and other states of the Union.

## **B: The Double Political Existence**

The *political change* in the constitutions of the Member States that brings the federation beyond international law consists in the constitution of a new permanent constitutional order that simultaneously encompasses the Member States in their entirety

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<sup>140</sup> Schönberger, “Die Europäische Union als Bund”, 92.

<sup>141</sup> Schönberger, “Die Europäische Union als Bund”, 92.

<sup>142</sup> See Federalist 39 (Madison) in *The Federalist Papers* (Oxford, OUP, 2008), 190; M Diamond, “The Ends of Federalism” (1973) *Publius: The Journal of Federalism* 3(2), 133.

<sup>143</sup> F de Witte, “Emancipation through Law?” in L Azoulay, S Barbou des Places and E Patout (eds) *Ideas of the Person and Personhood in EU law* (Oxford, Hart Publishing, 2016), 21-2.

<sup>144</sup> De Witte, “Emancipation through Law?”, 27.

and makes up a part of the individual Member States' constitutions. The double constitutional moment of birth and transformation is therefore inherently connected. It is the creation of a public law framework consisting of governors and governed with a (nascent) political identity of its own that leads to a political change in the constitutions of the Member States. The constitutional change of the Member States consists in the establishment of a *permanent order* that includes the Member States in a *common political existence*<sup>145</sup>. The federation is characterised by a *double political existence*: those of the Member States and that of the Union as a whole: “existing alongside one another in every federation are two types of political existence: the collective existence of the federation and the individual existence of the Member States”<sup>146</sup>. The federation is (paradoxically) a political unity that is composed of other political unities<sup>147</sup>.

In the case of the EU, this double political existence has been written into the preamble of the EU Treaties from Rome to Lisbon as the political aim (*finalité politique*) of the Union: “DETERMINED to lay the foundations of an *ever-closer union* among the *peoples* of Europe”. From the perspective of the theory of the federation, it is crucial that this common political existence does not eliminate the existence of the individual Member States, the federation and the states exist politically alongside one another<sup>148</sup>: “Both types of political existence must continue to coexist as long as a federation is to remain in place”<sup>149</sup>. The ever-closer union is not supposed to eliminate the constitutional existence of a multiplicity of peoples: “The collective existence of the federation must not subsume the individual existence of the Member States, nor can the existence of the Member States subsume that of the federation”<sup>150</sup>.

The double political existence of the federation can be illustrated with the example of federal citizenship. In contrast to the unitary nature of citizenship in a nation-state, federal citizenship is by definition dual<sup>151</sup>: federal citizenship implies “*dual citizenship of the same person at the state and the federal level*”<sup>152</sup>. Whereas dual citizenship is an anomaly in the nation-state, it is the norm in the federation<sup>153</sup> because the citizens of the Member States also are citizens of the federation. They belong simultaneously to two political entities: a

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<sup>145</sup> Beaud, *Théorie*, 30-1, 103.

<sup>146</sup> Amended translation of Schmitt, *Constitutional Theory*, 388 (or. *Verfassungslehre*, 371).

<sup>147</sup> Beaud, *Théorie*, 103; Forsyth, *Union of States*, 7.

<sup>148</sup> Schmitt, *Constitutional Theory*, 114, 385; Beaud, “Nationality within a Federation”, 319.

<sup>149</sup> Schmitt, *Constitutional Theory*, 388.

<sup>150</sup> Amended translation of Schmitt, *Constitutional Theory*, 388 (or. *Verfassungslehre*, 371).

<sup>151</sup> Beaud, “Nationality within a Federation”, 317; Schönberger, *Unionsbürger*, 43, 67.

<sup>152</sup> C Schönberger, “European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism” (2007) *ERPL/REDP* 19(1), 66

<sup>153</sup> Beaud, “Nationality within a Federation”, 43, 67, 317.

Member State and the Union. With the birth of the federation, a new status comes into being, federal citizenship, through which the citizens of the Member States become direct subjects of federal authority<sup>154</sup>. Within their respective jurisdictions, the Union and the Member States create rights and obligations for their citizens<sup>155</sup>. The establishment of federal citizenship constitutes the establishment of a nascent ‘people’ or ‘nation’, albeit *not* an exclusive nationality that abolishes the nationality of the individual Member States. The establishment of federal citizenship does not imply the abolishment of the original status of Member State citizenship. Citizenship of a federation and of its Member States exist alongside one another. In EU law, this principle is expressed in Article 9 TEU: “Citizenship of the Union shall be additional to national citizenship and shall not replace it”. This dual political existence is what characterises the political form of the EU as a federal union of states.

#### **IV: THE TWIN SOURCES OF GOVERNMENTAL AUTHORITY**

##### **A: The Union and the Member States**

Since the federal constitutional contract entails a double constitutional moment that gives birth to a new constitutional order and transforms the constitutions of the Member States, the federal constitution has two sources for its authority: the new federal political existence and the transformed contracting states that have become Member States. This is manifest in the dual nature of the federal constitution the content of which simultaneously is the federal treaty and a part of the constitutions of the Member States<sup>156</sup>. The constitution of the federation does in this way include all its Member States in a common whole and makes up a part of their constitutional orders. In contrast to the authority of a state that ultimately relies on the unitary political existence of the state expressed in the will of the people or the prince, the federation, being a double political existence, has twin sources of public power: the political existence of the Union and the political existence of its Member States. Governmental authority in a federation can be wielded legally, and ultimately extra-legally, in the name of the security of the Member States and for the wellbeing of their citizens *and* in the name of the security of the Union

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<sup>154</sup> WJ Schrenk, “Citizenship and Immigration” in CJ Friedrich and RR Bowie (eds) *Studies in Federalism* (Boston and Toronto, Brown and Company, 1954), 635.

<sup>155</sup> Schrenk, “Citizenship and Immigration”, 635.

<sup>156</sup> Schmitt, *Constitutional Theory*, 385.

as a whole and for the wellbeing of its citizens<sup>157</sup> (Chapter 5). That is, authority can be wielded in the name of the people as one or the peoples as many; in the name of the *union* of states or the union of *states*.

From the acknowledgement of the dual political existence of the federation, the question of their relationship *inter se* presents itself: is either the Union or its Member States subordinated to the other part? From the perspective of the theory of the federation, this question must be answered in the negative: “The Member States are not simply subordinated, subjects of the federation, nor is the federation subordinated to and subject to them. *The federation exists only in this existential connection and in this balance*”<sup>158</sup>. In contrast to a state, a federation is characterised by a double political existence where neither the Union nor the Member States are subordinated to each other. For that reason, the different public powers in the federation constantly have to be balanced and coordinated<sup>159</sup> (Chapter 4).

The limitation of the statist distinction between *Staatenbund* and *Bundesstaat* becomes especially clear when one considers the relationship between the different constitutional orders of a federation<sup>160</sup>. From the perspective of the statist distinction, it is only possible to think in terms of hierarchy: *either* the Member States are the source of authority *or* the Union is the source authority<sup>161</sup>. Following the classical distinction, a convenient hierarchy is thereby established emanating *either* from top (*Bundesstaat*) *or* from bottom (*Staatenbund*). The federation is thereby made comprehensible to the general theory of the state. The same logic of hierarchy is predominant in the debate on the foundations of EU authority, where scholars will adopt a ‘particularistic’ or ‘monocular view’ favouring *either* the Union *or* the Member States in order to establish a hierarchical relationship between them<sup>162</sup>. From the particularistic perspective, it is thus possible to construct an EU-centred or a state-centred hierarchy (depending on one’s ‘ideological preference’<sup>163</sup>). The problem is that this conceptualisation, from an empirical point of view, is only an adequate description of the weak alliance and the centralised federal

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<sup>157</sup> ER Huber, “Bundesexekution und Bundesintervention: Ein Beitrag zur Frage des Verfassungsschutzes im Deutschen Bund” (1953) *ÄöR* 79(1).

<sup>158</sup> Amended translation of Schmitt, *Constitutional Theory*, 388 (or. *Verfassungslehre*, 371), emphasis added.

<sup>159</sup> Schönberger, *Unionsbürger*, 183; Schönberger, “Die Europäische Union als Bund”, 98.

<sup>160</sup> Schönberger, “Die Europäische Union als Bund”, 97.

<sup>161</sup> *ibid.*

<sup>162</sup> N MacCormick, “Beyond the Sovereign State” (1993) *MLR* 56, 5; N Walker, “Constitutional Pluralism Revisited” (2016) *ELJ* 22(3), 337-41.

<sup>163</sup> Walker, “Constitutional Pluralism Revisited”, 337-41.

state<sup>164</sup>. A hierarchical relationship between the Union and the Member States does not apply to federations<sup>165</sup>.

## **B: Constitutional Pluralism**

Constitutional pluralists have long argued that the EU is not characterised by the unitary hierarchical structure of the state. Following constitutional pluralism, the EU is characterised by a plurality of constitutional orders and claims to foundational authority—that of the Union and those of the Member States—that are in a heterarchical and interactive relationship to one another<sup>166</sup>. As pointed out by Alexander Somek, there is a fundamental resemblance between constitutional pluralism and the theory of the federation:

“Had those who introduced the notion of constitutional pluralism to European Union law either read Schmitt’s *Constitutional Theory* or remembered, from their reading, his perceptive remarks on the theory of the federal system, they might have addressed pluralism by using the characterisation that Schmitt had prepared for its occurrence”<sup>167</sup>.

What constitutional pluralism unknowingly has identified is a fundamental aspect of the constitutional theory of the federation. However, by describing the EU as a new and sometimes unique form of constitutionalism, constitutional pluralism—like the ‘sui generis’ thesis—unfortunately obscures the federal nature of the EU<sup>168</sup>. That being said, constitutional pluralism succinctly describes some of the fundamental problems relating to the relationship between the multiple constitutional orders of a federation in the context of the EU and is therefore of great importance to a federal study of the EU.

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<sup>164</sup> Schönberger, “Die Europäische Union als Bund”, 97.

<sup>165</sup> *ibid* 98.

<sup>166</sup> N MacCormick, “The Maastricht-Urteil: Sovereignty Now” (1995) *ELJ*, 1(3); N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford, OUP, 1999); N MacCormick, “Beyond the Sovereign State”; N Walker, “Constitutional Pluralism Revisited”; N Walker, “Late Sovereignty in the European Union” in N Walker (ed) *Sovereignty in Transition* (Oxford, Hart Publishing, 2003), 4; MP Maduro, “Three Claims of Constitutional Pluralism” and D Halberstam, “Systems and Institutional Pluralism” both in M Avbelj and J Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012).

<sup>167</sup> A Somek, “Monism: A Tale of the Undead” in M Avbelj and J Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012), 355. Instead of a federal interpretation of the EU legal order, Somek opts for a monistic interpretation. The similarity between constitutional pluralism and federalism is also pointed out by J Cohen, *Globalization and Sovereignty—Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge, CUP, 2012), 83.

<sup>168</sup> R Schütze, “Federalism as Constitutional Pluralism” in M Avbelj and J Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012), 211; R Schütze, *From Dual to Cooperative Federalism* (Oxford, OUP, 2009), 50-1.

Constitutional pluralism suggests that within the scope of their respective jurisdictions, the different constitutions will be interpreted as the highest source of law by their highest decision-making authority<sup>169</sup>. That is, within the domestic constitutional orders a domestic court or political institution has the final authority to interpret the domestic constitution and within its jurisdiction the domestic constitution is the highest source of law. Similarly, the ECJ has the final authority to interpret Union law and within its jurisdiction the EU treaties will be the highest source of law. Within each constitutional order, the highest decision-making authority will claim *Kompetenz-Kompetenz*:

“It is for the European Court of Justice to interpret in the last resort and in a finally authoritative way the norms of Community law. But equally, it must be for the highest constitutional tribunal of each Member State to interpret the interaction of the validity in the given state system. Interpretative competence-competence is a feature of the highest tribunal of any normative system”<sup>170</sup>.

If the multiple constitutional orders were completely independent from one another, the lack of hierarchy would be unproblematic. In that case, they would merely be coexisting parallel legal orders. However, the legal orders, constitutional pluralism continues, though independent from one another are also overlapping and interacting<sup>171</sup>. The problem then is *how* to decide on the borderline or scope of the two constitutional orders. In case of a conflictual overlap, the question is *what* constitution would prevail and *who* would settle that question?

Constitutional pluralism and the theory of the federation agree that there is no legal answer to this question<sup>172</sup>. Or, more precisely, there are two valid mutually exclusive legal answers based in respectively the EU Treaties and the constitutions of the Member States as ultimate sources of authority. On the basis of the authority granted by the Treaties and with reference to the uniform and efficacious application of EU law<sup>173</sup>, the ECJ has continuously asserted its right<sup>174</sup> to decide on the validity of EU law<sup>175</sup> and the

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<sup>169</sup> MacCormick, “The Maastricht-Urteil: Sovereignty Now”, 264; Kumm, “Rethinking Constitutional Authority”.

<sup>170</sup> MacCormick, “The Maastricht-Urteil: Sovereignty Now”, 264; Halberstam, “Systems and Institutional Pluralism”, 97ff; Maduro, “Three Claims of Constitutional Pluralism”, 70.

<sup>171</sup> MacCormick, “The Maastricht-Urteil: Sovereignty Now”, 264.

<sup>172</sup> *ibid.*

<sup>173</sup> C-11/70 - *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970].

<sup>174</sup> C-314/85 - *Foto-Frost* [1987].

<sup>175</sup> Following Article 19 TEU, the ECJ is entrusted with the authority to decide on all issues relating to the application and interpretation of EU law.

legality of all acts of the EU institutions<sup>176</sup>, including the EU Treaties that constitute the Union and confer competence upon it, and thereby the right to decide upon the boundaries of EU authority. The ECJ thus claims Kompetenz-Kompetenz with regard to EU law. However, this claim to authority has generally not been accepted by national constitutional courts. With reference to the principle of conferral<sup>177</sup> and their own constitutions, the national constitutional courts have argued that, ultimately, they are the guardians of the boundaries of EU authority. The most vocal proponent of this argument is the German Constitutional Court that with reference to German constitutional law and the principle of conferral has maintained that it has the ultimate authority to determine the boundaries of Union competencies and the legality of EU law<sup>178</sup>. The EU, the German Constitutional Court has argued, has not been endowed with Kompetenz-Kompetenz<sup>179</sup>. Furthermore, all German state institutions have a duty not to apply EU law which the German Constitutional Court deemed to be *ultra vires*<sup>180</sup>. Despite being bound by the principle of fidelity<sup>181</sup>, the ultimate loyalty of German institutions, the German Constitutional Court argues, resides not with the EU but with the German state.

The question of where Kompetenz-Kompetenz resides in the EU is especially salient in Germany and perhaps this has to do with the German debate on federalism and sovereignty that took place in late 19<sup>th</sup> century. In this debate, the question of Kompetenz-Kompetenz became understood as the deciding issue for where sovereignty lies in a federal polity which again would determine its constitutional nature<sup>182</sup>. If the federal level (*Bundesebene*) was endowed with Kompetenz-Kompetenz, the *Bund* was really a *Bundesstaat*; a *sovereign* federal state. Contrariwise, if the Member States were endowed with Kompetenz-Kompetenz, the *Bund* was really a *Staatenbund*; an alliance of *sovereign states*. In other words, the question of Kompetenz-Kompetenz became the means by which all federal unions could be brought to conform to the political form of the state, be that one or many, *Bundesstaat* or *Staatenbund*.

Nevertheless, in the EU, as in other federal unions, there is, as we have seen, no *legal* solution to the question of where Kompetenz-Kompetenz lies. There are always two

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<sup>176</sup> Following the Annulment procedure (Article 263 TFEU) it is within the jurisdiction of the ECJ to review the legality of all acts of EU institutions including legislative acts.

<sup>177</sup> Article 5(1)-(2) TEU

<sup>178</sup> BVerfG, *Lisbon Ruling*, 240.

<sup>179</sup> BVerfGE, *Lisbon Ruling*, 233

<sup>180</sup> Weiler, *The Constitution of Europe*, 288.

<sup>181</sup> Article 4(3) TEU.

<sup>182</sup> Grimm, "Was the German Empire a Sovereign State?" in SO Müller and C Torp (eds) *Imperial Germany Revisited: Continuing Debates and New Perspectives* (New York, Berghahn Books, 2011); D Grimm, "Sovereignty in the European Union", 45.

valid legal answers based, on the one hand, in the constitution of the Union, and, on the other hand, in the constitutions of the Member States. The legalistic ‘Kompetenz-Kompetenz-test’ of federal unions can only be applied if the claims of either the Union or the Member States are ignored, that is, the problem can only legally be ‘solved’ by a gross reduction of reality. Empirically, Kompetenz-Kompetenz is contested in the EU. What is less clear is what that means for the question of where—and whether—sovereignty persists in the EU.

## V: THE QUESTION OF SOVEREIGNTY

### A: The Antinomy of Sovereignty

The question of sovereignty in the federation is much broader in scope than the question of a jurisdictional hierarchy between the federation and the Member States and much older than the concept of Kompetenz-Kompetenz<sup>183</sup>. Within the predominant tradition of sovereignty beginning with Bodin and Hobbes in response to the European civil wars and rebellions that followed the Reformation, sovereignty was understood as the absolute and indivisible power and authority of the sovereign to command within a territorially bounded political community. Sovereignty became the key concept to understand the new political form of the state that was characterised by the triadic unity of one people, one territory and one ruling authority that enjoyed autonomy from outside intervention. It became the key to understand the autonomy of the state to govern itself unilaterally *within* and the autonomous relationship *between* the states<sup>184</sup>. It remains the most important concept for understanding the nature of the state, both public law and public international law. As valuable as the concept of sovereignty is to understand the state as a political form, it only leads to confusions and misunderstandings when it comes to the federation.

The Bodinian and Hobbesian conception of sovereignty is impossible to reconcile with the legal and political reality of the federation characterised by a plurality of partly overlapping constitutional orders that stand in a heterarchical relationship to one another. Within a federal union there is never an absolute or indivisible power to command nor any fully autonomous constitutional order. The double political existence of the

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<sup>183</sup> C Friedrich, “Federal Constitutional Theory and Emergent Proposals” in AW MacMahon (ed) *Federalism: Mature and Emergent* (New York, Doubleday & Company, 1995), 515-6.

<sup>184</sup> M Loughlin, “Political Jurisprudence” (2016) *Jus Politicum* 16: “Martin Loughlin’s Foundations of Public Law. A Critical Review”.

federation—the Union and the Member States—is, at the same time, characterised by political and constitutional autonomy (the federation is per definition characterised by political and constitutional pluralism) and interdependence (the federal constitution encompasses the Member States in their entirety and makes up part of their constitutional orders). The question of who is endowed with ultimate authority is as we have seen contested and the exercise of public power is divided between the Union and its Member States who stand in a relationship to one another of relative autonomy<sup>185</sup>. On the basis of a study of these features of the EU, Neil MacCormick concluded that “there now coexist these two entities or sets of entities, the states of Europe, now not-fully-sovereign states, and the European Union, still a non-sovereign Union”<sup>186</sup>. However, the concept of sovereignty cannot allow this to be the case. Its fundamental binary logic demands that sovereignty must rely *either* with the Union *or* with its Member States<sup>187</sup>. If an ‘absolute and indivisible’ concept of sovereignty is applied, it is not possible to understand the federation in terms of sovereignty<sup>188</sup>: the principle of sovereignty contradicts the principles of the federation<sup>189</sup>.

In the intellectual history of the federation, innumerable answers have been given in response to this predicament, the majority of which falls within the following two unsatisfactory categories. On the one hand, there is a cluster of theories that ‘resolve’ the antinomy by denying the existence of the federation and reducing it to the political form of the state; either *Staatenbund* or *Bundesstaat*. These theories are preoccupied with finding the ‘locus of sovereignty’, which must rely *either* with the Union *or* its Member States. Both the American debate between Calhoun and Webster over the constitutional nature of the United States prior to the Civil War and the German debates over the constitutional nature of the German Federation (1815-66) and the German Empire (1871-1918) can be read as contestations of the notion of sovereignty in order to establish its locus *either* with the Unions/Empire *or* with the individual Member States<sup>190</sup>. In all these debates, there was no consensus on whether the polity in question—German Federation, the German Empire or the United States—‘really’ was *one* sovereign state (*Bundesstaat*) or *several*

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<sup>185</sup> Friedrich, “Federal Constitutional Theory and Emergent Proposals”, 515-6; Friedrich, *Trends in Federalism in Theory and Practice*, 3-9.

<sup>186</sup> MacCormick, *Questioning Sovereignty*, 142.

<sup>187</sup> Beaud, *Théorie*, 44.

<sup>188</sup> Beaud, *Théorie*, 57-8; Friedrich, “Federal Constitutional Theory and Emergent Proposals”, 512; Friedrich, *Trends in Federalism in Theory and Practice*, 8.

<sup>189</sup> Beaud, *Théorie*, 43.

<sup>190</sup> For a summary of these debates see Forsyth, *Union of States*, 112-46; R Emerson, *State and Sovereignty in Modern Germany*, Chapters 2 and 3; Grimm, “Sovereignty in the European Union”, 39ff; Grimm, “Was the German Empire a Sovereign State?”.

sovereign states (*Staatenbund*). Acknowledging the division of the exercise of public power in federations, these debates tend to define sovereignty not on the basis of *capacity* (*potentia*) but exclusively on the basis of the ultimate *authority* (*potestas*). The strategy of this position is generally to construct a ‘sovereignty test’ that will allow for the trivialisation of the significance of either the Member States or the Union. Following Dieter Grimm, the German debate was closed with the answer Georg Jellinek gave, namely, that sovereignty resided with whomever held ultimately authority (*potestas*) understood in terms of Kompetenz-Kompetenz<sup>191</sup>. In order to preserve the concept of sovereignty, this cluster of theories is forced to reduce the legal and political complexity of the federation and resolve the problem by a number of clever but arbitrary tests or by coming up with the ‘proper definition’. The randomness of some of these conceptual creations led Rupert Emerson to comment that “[h]istorical and common-sense explanations having been discarded as having no necessary bearing on those of jurisprudence, the juristic imagination was free to clothe the given facts in such mystery of legal form as might be desired”<sup>192</sup>.

On the other hand, there is a cluster of theories that resolves the antinomy by trivialising the concept of sovereignty by introducing ideas of ‘double sovereignty’, ‘pooled sovereignty’, ‘divided sovereignty’, ‘half sovereignty’ or ‘shared sovereignty’<sup>193</sup>. These theories spring from the acknowledgement of the legal and political reality of the federation as multiple interacting authorities and public powers. What this cluster of theory is not interested in is sovereignty as the *ultimate* power or authority (*potestas*) or an analytical constitutional quest after the true ‘locus of sovereignty’. In order to do justice to the political reality of the federation, these theories reduce the concept of sovereignty to the exercise of public power (*potentia*). In the words of Beaud: “Such a solution has the merit of simplicity but it resolves the problem by evading it”<sup>194</sup>. Tellingly, the most dominant position within this cluster in the context of the EU has completely abandoned

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<sup>191</sup> Grimm, “Sovereignty in the European Union”, 45. Following Emerson (*State and Sovereignty in Modern Germany*, 236-54), it seems to be a selective reading of German constitutional history that Jellinek ‘closed the debate’ since it continued even after the constitution of the Weimar Republic.

<sup>192</sup> Emerson, *State and Sovereignty in Modern Germany*, 112.

<sup>193</sup> R Schütze, *From Dual to Cooperative Federalism* (Oxford, OUP, 2009), 72-3; JE Fossum and M Jachtenfuchs, “Federal Challenges and Challenges to Federalism. Insights from the EU and Federal States” (2017) *Journal of European Public Policy* 24(4), 477; Fabbrini, *Which European Union: Europe after the Eurozone Crisis*, xxxiii; Riley, “Three 17<sup>th</sup> Century German Theorists of Federalism: Althusius, Hugo and Leibniz”, 30. With regard to the German Federation, an influential theory of the ‘division of sovereignty’ in a federation was suggested by Georg Waitz (Emerson, *State and Sovereignty in Modern Germany*, 94-6).

<sup>194</sup> Beaud, *Théorie*, 61, my translation.

the concept of sovereignty and speaks instead of ‘multilevel governance’<sup>195</sup> and conclude that: “Both empirical research and theoretical arguments (...) have pointed out for some time now that the idea of the modern state as externally sovereign and internally hierarchical is more an idealization of nineteenth-century political thought than a useful analytical concept for the reality of the twenty-first century”<sup>196</sup>. Perhaps for that reason, very few studies in political and public law theory are done on the EU. Instead of inquiring into the difficult problems related to foundations of governmental authority in Europe, the dominant strand of research is concerned with the depersonalised activity of ‘governance’.

### **B: Bracketing Sovereignty**

Sovereignty is inadequate as a concept to understanding the federation. It is ‘like a scalpel’<sup>197</sup>, cutting through the complex reality of the mixed nature of the federation cleanly dividing it by the force of the binary logic of the state. At the same, any true appreciation of the complex reality of the federation might easily lead one to trivialise or even deny sovereignty as a concept. A way out of this unsatisfactory dilemma of either reducing the federation to the political form of the state or trivialising sovereignty as concept has been suggested by Beaud: in order to think the federation as a political form, one must bracket the question of sovereignty<sup>198</sup>. Rather than attempting to do the impossible, namely reconciling sovereignty with the federation, or sacrificing the one for the sake of the integrity of the other, we should isolate them from each other and recognise that they each have their merits in describing ways in which political associations can be organised<sup>199</sup>: “a theory of the federation ought to be developed without recourse to the concept of *sovereignty* because it is an obstacle to thinking [the federation]”<sup>200</sup>. The theory of the federation ought to be “a pure theory of anti-sovereignty”<sup>201</sup>. Sovereignty as a concept forbids us to think the federation as a theoretical possibility and hence, if we want to understand the federation, we must not begin with the quest for the location of

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<sup>195</sup> G Marks, L Hooghe, and K Blank, “European Integration from the 1980s: State-Centric v Multi-level Governance” (1996) *JCMS* 34(341); M Jachtenfuchs, “The Governance Approach to European Integration” (2001) *Journal of Common Market Studies* 39(2).

<sup>196</sup> Jachtenfuchs, “The Governance Approach to European Integration”, 258.

<sup>197</sup> Beaud, *Théorie*, 56, my translation.

<sup>198</sup> *ibid* 38.

<sup>199</sup> Beaud, *Théorie*, 63.

<sup>200</sup> *ibid* my translation.

<sup>201</sup> Riley, “Three 17<sup>th</sup> Century German Theorists of Federalism: Althusius, Hugo and Leibniz”, 18.

sovereignty: sovereignty is not the ‘right key’ for entering the political universe of the federation<sup>202</sup>.

The fundamental incompatibility between the federation and the concept of sovereignty is exactly an argument for why the federation has to be understood as a discrete political form<sup>203</sup>. Whereas sovereignty is the preeminent concept for understanding the legal and political form of the state, it is useless when it comes to the federation. That we cannot make sense of the federation on the basis of sovereignty means that the federation cannot be conceptualised on the basis of the theory of the state<sup>204</sup>. Within the federation, sovereignty is not a meaningful concept to understanding how public power and authority are derived and exercised. To understand the federation, we must ‘forget about sovereignty’<sup>205</sup>.

The federation is an autonomous political form characterised by the internal absence, repression or contestation of sovereignty. Depending on one’s view of the sovereign state, this tends to lead to opposite evaluations of the political sustainability of the federation as a political form. The disagreement between Schmitt and Arendt is an apt illustration. Despite his recognition of the federation as a political association irreducible to that of the statist distinction between *Staatenbund* and *Bundesstaat*, Schmitt viewed the federation as a mere transitory phenomenon on the road to the constitution of a nation-state characterised by a complete political unity<sup>206</sup>. Due to its political duality and lack of hierarchy, the federation was, in Schmitt’s view, a fundamentally unstable and contradictory political form that was bound to collapse into the form of the state when faced with an internal existential conflict<sup>207</sup>. Only the state, Schmitt thought, could provide political stability. In complete opposition to this view, Arendt maintained that only the federation as a political form held any promise for political life and freedom in modernity exactly because it was characterised by the internal absence of sovereignty. If the foundation for the nation-state was sovereignty, it was a foundation ‘built on quicksand’ because the sovereign will, if more than a legal fiction, would be ever-changing<sup>208</sup> and hence incapable of providing any kind of political stability. With its triadic unity of state-people-territory, the nation-state, Arendt believed, would always lead to internal repression of minorities and external domination and expansion. Sovereignty in political

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<sup>202</sup> Beaud, *Théorie*, 59.

<sup>203</sup> *ibid* 65.

<sup>204</sup> *ibid* 63.

<sup>205</sup> *ibid* 58.

<sup>206</sup> Schmitt, *Constitutional Theory*, 389, 404.

<sup>207</sup> *ibid*.

<sup>208</sup> Arendt, *On Revolution*, 154.

life for Arendt meant nothing but tyranny<sup>209</sup>. The state was, in Arendt's view, a fundamentally unsustainable political form. Only the federation—founded on a constitutional compact instead of sovereign command and entailing a true division of power manifest in the multiplicity of the constituting states and in real checks and balances—could provide the constitutional conditions for political freedom in the modern world<sup>210</sup>.

In this thesis, the federation will be treated as a discrete political form with virtues and vices of its own and in that sense neither Schmitt's dismissiveness nor Arendt's veneration will be emulated. Due to its incompatibility with sovereignty, the federation is undoubtedly saved from some of the vices of the political form of the state; however, this does not mean that it is a panacea. As will become clear in the last two chapters of this thesis, the federation is characterised by its own unique internal contradictions that might lead to its collapse. Maintaining that the federation is a discrete form of political association entails a treatment of both its strength and its weaknesses on its own terms.

From a more historical perspective on European integration, Arendt's understanding was prevalent in post-WWII Europe. After WWII, the nation-state was by most political elites perceived to be the problem and a European federation was understood as the solution (Chapter 2). Whether the absence of war on the European continent in the post-WWII era is due to European integration is impossible to answer. Whether the EU, and as such the only federal union of our times, will collapse in the near or distant future, only time will tell. We do without doubt live in a period with significant political demands of a return to the primacy of the nation as a source of authority and a resurgence in the demands for the protection of the sovereignty of the state. Whether these movements will be successful or not in reforming or abolishing the EU, the EU deserves to be treated as more than a transitory phenomenon having been a central part of the post-WWII political and constitutional settlement for more than seven decades. To do that, we must, as Beaud suggests, leave the orbit of the state and endeavour to understand how a federation in general—and the EU in particular—comes into existence and governs itself as a political union of states on its own terms without reducing it to the categories of the constitutional theory of the state. In short, we have to endeavour to understand the federation as a political order without sovereignty<sup>211</sup>.

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<sup>209</sup> *ibid* 143, 173.

<sup>210</sup> *ibid* 142-3, 172-3, 206.

<sup>211</sup> Beaud, *Théorie*, 64.

## 2

# Origins

*Why independent states in general and the post-WWII European states in particular have chosen to constitute among themselves a federal union*

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### INTRODUCTION

Having laid out the main feature of the federation as a discrete form of political association in the last chapter, the question of *why states choose to come together in a federation* presents itself. This chapter is about the *origins* of federal unions of states, hereunder the EU, that is, the question of why states decide to constitute among themselves a federal union. Federations are constitutional projects and as such they are often created in order to realise or perpetuate a specific political identity or ‘way of life’ for its Member States. Examples are *republicanism* in the case of the United States (1781—) and *monarchy* in the case of the German Federation (1815-1866). In Chapters 3 and 4, it will be argued that the constitutional project that the EU is meant to help realise for its Member States is ‘*constrained democracy*’. However, federations are not primarily concerned with the realisation of a specific vision of political life. As a general rule, states only chose to come together in a federal union because they are incapable of accomplishing one or more of their core aims—external security, internal stability or the wellbeing of their citizens—themselves. They come together, not only in order to ‘live well’ but out of necessity. Federations are for that reason created in order to secure one or more of the core aims of its Member States and thereby perpetuate their political existence<sup>1</sup>. Although public power is exercised in a fundamentally different way in the federation than in the state (Chapter 3), the substantive aims of the federation as well as those of the state are expressions of the same overall principle: *Salus populi suprema lex esto*.

Federal unions of states have historically emerged among smaller states or city-states, in order to secure their core aims, often in response to their relationship with a great neighbouring empire. Two of the main historical cases of federations were constituted in order to break free from an empire. The United Provinces of the

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<sup>1</sup> O Beaud, *Théorie de la Fédération* (Paris, PUF, 2007), 285.

Netherlands was constituted in 1579 against the rule of the Spanish Empire<sup>2</sup> and the Confederation of the United States of America was constituted in 1781 against the rule of the British Empire. The first German Federation was created in 1815 in order to create security and stability for the German states and a smaller number of ‘free cities’—and for Europe at large—in response to the collapse of the Holy Roman Empire and the end of the Napoleonic Wars<sup>3</sup>. Finally, the Old Swiss Confederation, usually dated from 1291, was created in order to ensure the security and stability of the Swiss cantons geographically situated in the outskirts of the Holy Roman Empire<sup>4</sup>.

Notwithstanding that European integration has been realised through economic and not military integration, this chapter maintains that the EU at a fundamental level has origins similar to those of previous federal unions. Created after WWII, European integration was the concrete outcome of a political vision of how to secure the core aims of Western Europe in a new world order dominated by two imperial ‘super powers’, the USA and the USSR, without dissolving the political autonomy of the Western European states through the constitution of a new ‘super-state’. As a Western European project, the European Economic Community (EEC) was created in order to provide additional protection to the liberal Western European states. The EEC was meant to create the foundation for stability and security—in a broad sense beyond military security—for the Western European states in response to their new geopolitical position. In order to understand the project of European integration, an analysis of the political significance of its substantive aims is therefore necessary. In order to understand the nature of the project of European Union, we need to understand what it was meant to achieve.

Before we turn to the concrete legal and historical analysis of the EEC/EU, the overall theory of the substantive aims of the federation—the federal *telos*—will be laid out. This chapter shows that federations can be subcategorised in terms of the content of their substantive aims: *defence* and/or *welfare*. Whereas a ‘defence federation’ primarily is concerned with military integration, a ‘welfare federation’ is primarily concerned with economic integration. Notwithstanding the multiple proposals for a federal European defence union after WWII, the chapter maintains that the project of European integration that was successfully established in the post-WWII era should be understood (primarily

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<sup>2</sup> M Forsyth, *Union of States: The Theory and Practice of Confederations* (New York, Leicester University Press, 1981), 30; LF Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Baltimore, Johns Hopkins University Press, 2001), 10, 68ff; Beaud, *Théorie*, 127-9; WH Riker, *Federalism: Origin, Operation, Significance* (Boston, Little, Brown and Company), 9-10.

<sup>3</sup> Forsyth, *Union of States*, 44.

<sup>4</sup> Forsyth, *Union of States*, 20, 43.

if not exclusively) in terms of a ‘welfare federation’. The fundamental aims of all federal unions of states—‘defence federations’ and ‘welfare federations’ alike—is, however, the same. Independently of whether a federation is primarily concerned with the government of military defence or economic life, a federation is a *political union* constituted in order to perpetuate the *political autonomy* of its Member States.

## I: THE SUBSTANTIVE AIMS OF FEDERATIONS

### A: The Dual Federal Telos of Defence and Welfare

The federal *telos* is the *raison d’être* of a federation<sup>5</sup>. By the federal *telos* is meant the purpose specific to a concrete federation, i.e., the reason for which it was constituted. An investigation into the federal telos is thus concerned with understanding both the political form of the federation and the constitutional aims of any actual federation. A study of the federal telos is concerned with the existential question of the fundamental *mission* the federation must accomplish if it is to be loyal to the purpose for which it was created<sup>6</sup>. Martin Diamond has expressed the importance of the federal telos, or the ‘ends of federalism’, for the study of federations in the following manner:

“Indeed it is only in the light of the ends of federalism that the nature of federalism becomes visible (...) At various times, men have sought varying ends from federalism, and the variety of federal systems has resulted from that variety of ends; each actual federal system differs from all others (...) by the peculiar blend of ends sought from the particular federal system”<sup>7</sup>.

As suggested by Diamond, the ends of federalism vary and for that reason all actual federal unions are unique. Within the theory of the federation, there is, however, a consensus that the substantive aims of the federations generally can be understood as belonging to two overall expressions of *salus publica*. First, *security* and second, *welfare*<sup>8</sup> by which is meant the government of the economy:

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<sup>5</sup> Beaud, *Théorie*, 273.

<sup>6</sup> *ibid* 279.

<sup>7</sup> M Diamond, “The Ends of Federalism” (1973) 3 *Publius* 2, 129-30.

<sup>8</sup> Beaud, *Théorie*, 285. See also RR Bowie, “The Process of Federating Europe” in AW MacMahon (ed) *Federalism: Mature and Emergent* (New York, Doubleday & Company, 1955), 493.

“federal unions developed from the inability of the individual states to provide adequate defence against actual or possible external threats to their existence, and the fact that needs for markets and vital supplies outran the capacity of any one state to satisfy them effectively. (...) military and economic problems had become common to all, could no longer be handled by each state in isolation, and obviously required the interposition of some authority to all the states concerned”<sup>9</sup>.

The most common reason why states come together in a federal union is to ensure *collective defence* against a *common enemy*. Often this is a hostile neighbouring empire that they only collectively stand a chance against<sup>10</sup>. Most federations are therefore *defensive* in origin<sup>11</sup>. The substantive aim of common security signified that the *raison d'être* of the federation is that of providing *common defence* in order to ensure the political *independence* of its Member States. Federal unions of states that have security, understood in terms of military defence, as its primary or exclusive aims will in this thesis be referred to as ‘defence unions’ or ‘military federations’.

The federal aim of defence always has a double political subject: the security of the Union as a whole and the security of its Member States<sup>12</sup>. Moreover, the federation’s aim of security is directed not merely towards *external threats* but also towards *internal threats*: “*Externally*, the federation protects its members against the dangers of war and against every attack. *Internally*, the federation necessarily signifies enduring *pacification* (...) a ‘civil peace’”<sup>13</sup>. Together with *external security* the federal aim entails *internal security*, that is, the repression of existential conflicts *between* and internal uprisings *within* its Member States<sup>14</sup>.

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<sup>9</sup> Bowie, “The Process of Federating Europe”, 493-4.

<sup>10</sup> In contrast to the weak powers of the Confederacy, Jay writes in Federalist No. 4 (see *The Federalist Papers* (Oxford, OUP, 2008), 22-5), that the new Government proposed by the Constitution “can place the militia under one plan of discipline, and by putting their officers in a proper line of subordination to the chief magistrate, will in a manner consolidate them into one corps, and thereby render them more efficient than if divided into thirteen or into three or four distinct independent bodies. What would the militia of Britain be, if the English militia obeyed the government of England, if the Scotch militia obeyed the government of Scotland, and if the Welch militia obeyed the government of Wales? Suppose an invasion: would those three governments (if they agreed at all) be able with all their respective forces, to operate against the enemy so effectually as the single government of Great-Britain would? (...) Leave America divided into thirteen, or if you please into three or four independent governments, what armies could they raise and pay, what fleets could they ever hope to have? If one was attacked would the others fly to its succour, and spend their blood and money in its defence?”

<sup>11</sup> Beaud, *Théorie*, 286; Forsyth, *Union of States*, 160; CF Friedrich, “Federal Constitutional Theory and Emergent Proposals” in AW MacMahon (ed) *Federalism: Mature and Emergent* (New York, Doubleday & Company, 1955), 519-20.

<sup>12</sup> Beaud, *Théorie*, 288.

<sup>13</sup> C Schmitt, *Constitutional Theory* (Durham and London, Duke University Press, 2008), 386, emphasis in original. See also C Schönberger, “Die Europäische Union als Bund” (2004) *AöR* 129(1), 104.

<sup>14</sup> Schmitt, *Constitutional Theory*, 386; Beaud, *Théorie*, 288ff. In the German Federation of 1815, the federal aim was explicitly formulated as securing both external and internal security (ER Huber, *Deutsche Verfassungsgeschichte seit 1789, Band I: Reform und Restauration 1789 bis 1830* (Stuttgart, Verlag W.

These aims of federal security are, following Beaud, inextricably linked to one another and mutually reinforcing<sup>15</sup>. If the federation is well protected against external attacks, it will be easier for it to develop and protect itself internally, and *vice versa*, a federation that is internally stable will be able to have a stronger unified external protection: “the independence and inviolability of the individual Member States could only persist when the independence and inviolability of the Federal Union as a whole [Bundesganzen] were avouched”<sup>16</sup>. This interdependence means that the common security of the federation is of interest for the security of the individual Member States and that the internal stability of the individual Member States is of interest for the security of the Union as a whole, and hence of interest to all the other Member States: “a disequilibrium in one part of the Federation may have a repercussion in all the other parts”<sup>17</sup>. The federation is characterised by a *mutualisation of risk* amongst its Member States<sup>18</sup> and there is therefore no ‘internal affairs’ of the Member States that cannot potentially be understood as a matter of common security<sup>19</sup>. By coming together into a common union, all internal conflicts between the Member States and instabilities and crises within the Member States, become potential ‘internal matters’ of common security for the Union as a whole<sup>20</sup> (Chapter 5).

Together with the aim of common security, some federations are constituted in order to promote the ‘general welfare’ or ‘prosperity’ of the community: “The prominence of economic provisions of all successful federations demonstrates the historic importance of economic factors in persuading separate States to unite”<sup>21</sup>. Welfare is here not understood in primarily its 20<sup>th</sup> century sense of the ‘welfare state’ but as the government of population, infrastructure and the economy at large. The simple reason for the importance of the welfare aim for federal unions is following Forsyth that “defence and security do not exist in a vacuum”<sup>22</sup>. Military protection is highly dependent on a functioning economy, a developed technology and infrastructure<sup>23</sup>. As is the case for the

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Kohlhammer, 1957) [hereinafter Huber, *DV I*], 594). See also Federalist No. 3 (Jay) (see *The Federalist Papers*, 18-21).

<sup>15</sup> Beaud, *Théorie*, 288-9.

<sup>16</sup> Huber, *DV I*, 594, my translation.

<sup>17</sup> Beaud, *Théorie*, 296, my translation.

<sup>18</sup> *ibid* 296.

<sup>19</sup> *ibid* 301.

<sup>20</sup> *ibid* 296.

<sup>21</sup> AE Sutherland, “Commerce, Transportation and Customs” in CJ Friedrich and RR Bowie (eds) *Studies in Federalism* (Boston and Toronto, Brown and Company, 1954), 297.

<sup>22</sup> Forsyth, *Union of States*, 160-2. See also Beaud, *Théorie*, 302 and Federalist No. 4 (Jay) (see *The Federalist Papers*, 22-5).

<sup>23</sup> Sutherland, “Commerce, Transportation and Customs”, 297. See also J Fischer, “Prerequisites of Balance” in AW MacMahon (ed) *Federalism: Mature and Emergent* (New York, Doubleday & Company, 1995), 62.

state, there is a strong interdependence in the federation between the aims of *security* and *prosperity*—military protection and economic government<sup>24</sup>—that few of the classical examples of federal unions escape: “Thus the old Swiss Confederation and the United Provinces of the Netherlands concerned themselves in practice with matters which were as much with common welfare as they were with common defence: coinage, trade, health, transport, and so on”<sup>25</sup>.

Article 3 of the 1781 Articles of Confederation is a clear example of the interdependence of the federal aims of security and prosperity that characterises many if not most federations:

“The said states hereby severally enter into a firm league of friendship with each other, for their *common defence, the security of their Liberties, and their mutual and general welfare*, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever”<sup>26</sup>.

Despite the explicit inclusion of general welfare as a federal aim, the lack of federal power to give it effect led to protectionism and ‘commercial wars’ between the states and hence a weakening of the Union<sup>27</sup>. Some states of the Union erected internal trade barriers that were even higher than their external trade barriers to Britain<sup>28</sup>. These internal commercial wars did, in Madison’s eyes, not only lead to negative economic outcomes but to political strife and internal alienation of the states of the Union<sup>29</sup>.

A key motivation for Madison, and perhaps to an even greater extent for Hamilton, for the drafting of the Constitution of the United States of 1787 was to strengthen the provisions for welfare contained in the Articles of Confederation<sup>30</sup>. The Annapolis Convention of 1786, the outcome of which was the support of the constitutional convention held in Philadelphia the year after, was therefore concerned with the question of *interstate trade*. More particularly, they were commissioned “to take into consideration the trade and commerce of the United States, to consider how far a

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<sup>24</sup> Beaud, *Théorie*, 302.

<sup>25</sup> Forsyth, *Union of States*, 160.

<sup>26</sup> Articles of Confederation, Article 3, emphasis added. Accessible via: <https://www.gpo.gov/fdsys/pkg/SMAN-107/pdf/SMAN-107-pg935.pdf> [last accessed 9 March 2018].

<sup>27</sup> Beaud, *Théorie*, 304-5; Bowie, “The Process of Federating Europe”, 493.

<sup>28</sup> *ibid.*

<sup>29</sup> Beaud, *Théorie*, 304-5; Bowie, “The Process of Federating Europe”, 493; Sutherland, “Commerce, Transportation and Customs”, 299.

<sup>30</sup> Forsyth, *Union of States*, 160; Sutherland, “Commerce, Transportation and Customs”, 297.

uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony”<sup>31</sup>. Notwithstanding that their meaning and scope were highly contested, common defence and general welfare were intertwined and interdependent aims of the United States of America from the very beginning.

The main historical examples of pure ‘defence unions’—federations with military security as their *sole purpose*—are, *first*, the Swiss Confederation of 1815-1848. According to Forsyth, the Swiss Confederation did, however, ‘prove unpopular’ exactly because it was not constituted in order to promote the general welfare<sup>32</sup> and for that reason one of “the strongest purposes of the Swiss Federal Constitution of 1848 was the elimination of the intercantonal trade barriers”<sup>33</sup>. The *second* example is the German Federation of 1815<sup>34</sup>. Despite the fact that the constitution of the German Federation *did* include a welfare clause (Article 19), it was incapable of giving it effect due to an internal disagreement between its two hegemonic states: Austria (favouring protectionism) and Prussia (favouring a liberal exchange economy)<sup>35</sup>. Out of this failure, a new kind of federal union emerged between some of the Member States: the German *Zollverein* (customs union) that began functioning in 1834<sup>36</sup>. This economic union—excluding Austria and with Prussia as its solitary hegemon—was concerned with the government of the economy and its primary aim was the promotion of general welfare<sup>37</sup>.

### **B: The Theory of ‘Economic Union’ or ‘Welfare Federation’**

The theory of economic union or welfare federation has been most succinctly developed by Murray Forsyth. Together with the Constitution of the United States of America of 1787, the *Zollverein* is the main historical case on the basis of which Forsyth develops his theory of the ‘economic union’; a federal union of states concerned with the

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<sup>31</sup> The Annapolis Resolution, 1786 as cited by Forsyth, *Union of States*, 163. See also Beaud, *Théorie*, 304-5.

<sup>32</sup> Forsyth, *Union of States*, 160. See also Beaud, *Théorie*, 306-12.

<sup>33</sup> Sutherland, “Commerce, Transportation and Customs”, 299.

<sup>34</sup> Huber, *DV I*, 595.

<sup>35</sup> Forsyth, *Union of States*, 160; Beaud, *Théorie*, 306-12; EN Roussakis, *Friedrich List, the Zollverein, and the Uniting of Europe* (Bruges, College of Europe, 1968), 35, 42-3.

<sup>36</sup> For a history of the *Zollverein*, see WO Henderson, *The Zollverein* (Cambridge, CUP, 1939). For a history of the ideational foundation of the *Zollverein*, see AH Price, *The Evolution of the Zollverein: A Study of the Ideas and Institutions to German Economic Unification between 1815 and 1833* (Ann Arbor, University of Michigan Press, 1949).

<sup>37</sup> Forsyth, *Union of States*, 48, 160-1; Beaud, *Théorie*, 302, 311; Roussakis, *Friedrich List, the Zollverein, and the Uniting of Europe*, 18; ER Huber, *Deutsche Verfassungsgeschichte seit 1789, Band II: Der Kampf um Einheit und Freiheit, 1830 bis 1850* [hereinafter Huber, *DV II*] (Stuttgart, Verlag W. Kohlhammer, 1968), 282ff. The *Zollvereinungsvertrag* of 1833 is accessible via: <http://www.verfassungen.de/de/de06-66/zollverein33.htm> [last accessed 9 March 2018].

promotion of welfare<sup>38</sup>. By granting the federal government extensive powers to regulate internal and external commerce in order to give effect to the federal aim of general welfare, the US Constitution is, in one respect, the ‘true beginning’ of the economic federation<sup>39</sup>. In another, the Zollverein is a more ideal typical example in that it had welfare as its exclusive aim. In the context of this thesis, federal unions of states with welfare as their primary or exclusive aim will be referred to as ‘economic unions’ or ‘welfare federations’. Whereas the Swiss Confederation of 1815 was a pure ‘military federation’ or ‘defence union’, the Zollverein was a pure ‘welfare federation’ or ‘economic union’.

Following Forsyth, it is important to understand that an ‘economic union’ is *qualitatively* different from a free trade agreement. An economic union, is “emphatically not a means or technique for the *liberalizing the external trade of states*”<sup>40</sup>. Rather, it is “the *transformation by mutual agreement of external trade into internal trade*”<sup>41</sup>. The process of Member State transformation characterising ‘defence unions’ is perfectly mimicked by the ‘economic union’. By coming together in a common union, the relationships between states (*external trade*) is transformed into an internal matter of the federation (*internal trade*)<sup>42</sup>. ‘Defence unions’ and ‘economic unions’ alike are characterised by the intrinsically linked constitutional principles of *birth* and *transformation* (Chapter 1): the birth of a new federal union and the constitutional transformation of the constituent states. For the welfare federations, this means that there is an intrinsic relationship between free trade internal to the union and an external protection of the union by a tariff barrier: a *customs union*<sup>43</sup>.

The political significance of the customs union was first theorised by the contemporaneous protagonist of the Zollverein, Friedrich List. List maintained that “[t]hrough the Zollverein the German nation has for the first time attained to one of the most important attributes of nationality”<sup>44</sup> namely “the internal freedom of exchange and the common external representation that was inherent in the concept of nationality”<sup>45</sup>. Federal unions are always characterised by an outside and an inside. In an economic union, this entails a difference between the internal regulation of economic activity

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<sup>38</sup> Forsyth, *Union of States*, 4-5, 160ff. See also Beaud, *Théorie*, 303.

<sup>39</sup> Forsyth, *Union of States*, 162.

<sup>40</sup> *ibid* 173.

<sup>41</sup> *ibid*.

<sup>42</sup> Beaud, *Théorie*, 309.

<sup>43</sup> Beaud, *Théorie*, 309.

<sup>44</sup> Friedrich List, *Das Nationale System* as cited by Forsyth, *Union of States*, 173.

<sup>45</sup> *ibid*.

between the Member States *inter se* and the external relationship of the Union with other states or organisations. By coming together in an economic union, “trade between states or nations was enclosed and subjected to uniform laws passed by a common power”<sup>46</sup>. The aim of the economic union is to transform the trade between states into the single internal federal market with a unilateral external representation and protection from foreign (economic) powers.

Notwithstanding the differences between welfare federations and military federations, their cardinal *telos* is the same: to *perpetuate the political autonomy of its Member States*. At the origins of the economic union is the Member States’ wish to remain politically autonomous: “Economic confederation begins to crystallize into a distinct form alongside security confederation when relatively small states begin to feel their independence and statehood threatened as much by the commercial and industrial power of larger states as by their military strength”<sup>47</sup>. As is the case for the defence union, the federating states come together in an ‘economic union’ in order to constitute and institutionalise a common new power that will protect them from foreign powers: “in order to preserve and secure their economic statehood each participating member has to place itself as a totality within a new overarching politico-economic body”<sup>48</sup>. In terms of their *raison d’être*, ‘defence unions’ and ‘economic unions’ alike are for that reason *political unions* constituted to ensure the political autonomy of its Member States.

This wish for political autonomy was a powerful reason for the 1787 Constitution of the United States that provided the federal government with much more extensive powers to regulate the commerce of the United States<sup>49</sup>. After winning the war against the British Empire and securing their independence, the United States was exposed to the commercial power of their former enemy without any common power of protectionism or economic regulation<sup>50</sup>. The individual states of the Confederation tried to create their own protectionist policies. However, these protectionist policies had the negative effect of leading to internal strife and instability in the Union and disinclined Britain to enter into trade negotiations with the Confederation<sup>51</sup>.

The emergence of the Zollverein at the end of the Napoleonic wars is in many ways similar to the consolidation of an economic union as part of the constitution of the

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<sup>46</sup> Forsyth, *Union of States*, 173.

<sup>47</sup> *ibid.*

<sup>48</sup> *ibid* 174.

<sup>49</sup> Forsyth, *Union of States*, 163.

<sup>50</sup> *ibid* 162-3.

<sup>51</sup> *ibid.*

United States after the war of liberation<sup>52</sup>. As was the case for the United States, the military struggles exposed the German states to both the economic force of the British Empire and protectionism from their neighbouring states, notably France and Russia<sup>53</sup>. This led the individual German states to engage in their own protectionist policies that harmed the other Member States of the German Federation<sup>54</sup>. This dire situation led many contemporary businessmen and economists—most importantly Friedrich List—to petition the Federal Diet in 1819 to create a German customs union within the German Federation to protect its Member States and citizens<sup>55</sup>: “the interests of the German people are not only endangered by foreign arms—foreign tariffs are the canker worms which devour German prosperity. For this reason we declare it to be the obligation of the Confederation to protect us not only by armed might, but by federal tariff”<sup>56</sup>.

In contrast to the United States, the German Federation did not create an economic union within its constitution. Such attempts were pre-empted by the conservative Austria that politically as well as economically and socially belonged to the *ancien régime*<sup>57</sup>. Instead, a welfare federation or economic union of the Zollverein emerged in the north of the German Federation around Prussia<sup>58</sup>. Despite its indisputable hegemonic nature, the Zollverein is viewed as a true federation by both Forsyth and Beaud<sup>59</sup>. The Zollverein is by the German constitutional theorist and historian Ernst Rudolf Huber described as a ‘federation in a federation’ (*ein Bund im Bund*)<sup>60</sup>.

The consolidation of general and mutual welfare in the 1787 Constitution of the United States and the formation of the German Zollverein show the emergence of welfare as a relatively autonomous aim of federal unions of states. Together with military defence, security in terms of economic welfare and stability became understood, at the very latest during the industrial revolution, as a vital condition for the political autonomy of the states and as such a substantive aim for federal unions of states.

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<sup>52</sup> *ibid* 164; Roussakis, *Friedrich List, the Zollverein, and the Uniting of Europe*, 96; Price, *The Evolution of the Zollverein*, 28.

<sup>53</sup> Forsyth, *Union of States*, 164; Price, *The Evolution of the Zollverein*, 28; Henderson, *The Zollverein*, 33-4.

<sup>54</sup> Forsyth, *Union of States*, 164; Price, *The Evolution of the Zollverein*, 28; Henderson, *The Zollverein*, 9, 21-3.

<sup>55</sup> Roussakis, *Friedrich List, the Zollverein, and the Uniting of Europe*, 35; Price, *The Evolution of the Zollverein*, 26, 37-46; Henderson, *The Zollverein*, 22-7.

<sup>56</sup> Excerpt from a petition to the Federal Diet, 1819, drafted by Friedrich List, as cited by Forsyth, *Union of States*, 164.

<sup>57</sup> Forsyth, *Union of States*, 165. See also Huber, *DV I*, 791-6.

<sup>58</sup> Huber, *DV I*, 796.

<sup>59</sup> Forsyth, *Union of States*, 167; Beaud, *Théorie*, 311.

<sup>60</sup> Huber, *DV II*, 287.

## C: Economic Federation as a Historical Alternative to Imperialism

If welfare and economic security became such an important aim in the late 18<sup>th</sup> century in the case of the United States and in the 19<sup>th</sup> century German Federation, one may rightfully wonder why economic federations were mostly if not completely absent<sup>61</sup> between the Zollverein and the post-WWII era? The simple answer to this question, following Forsyth, is that economic unions of states *did* exist in this period, however, they were *imperial* and not federal in nature<sup>62</sup>. The emergence of the global economy between 1870 and 1914 was characterised by a growing interdependence of the economies of most if not all sovereign states and by the struggle between these self-same states to extend their control of the emerging world economy via imperialism: “The classical age of the liberal world economic order was, in other words, also a classical age of empire. The struggle to extend the internal market thus did not disappear during this period, but took place by other means—through domination rather than through confederation”<sup>63</sup>.

From the 19<sup>th</sup> century onwards, it became impossible for most if not all minor states to provide security and welfare for their citizens. The conditions of politics could no longer be confined to the boundaries of the state—if they ever could. The predominant response to this condition was imperialism: *market-creation by domination*. Following Arendt, the predominance of imperialism has to be understood as a symptom of the general and systematic crisis of a political system, anchored in the nation-state, that no longer could live up to its most basic promises of security and stability:

“[N]ational sovereignty is no longer a working concept of politics, for there is no longer a political organization which can represent or defend a sovereign people, within national boundaries. Thus the ‘national state’, having lost its very foundations, leads the life of a walking corpse, whose spurious existence is artificially prolonged by repeated injections of imperialistic expansion”<sup>64</sup>.

As is well-known, WWI—the Great War of the European Empires—did not lead to a stable new world order. Instead, attempts were made to resurrect the old world order

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<sup>61</sup> Forsyth (*Union of States*, 177) argues that a few examples of genuine economic federations appeared between the Zollverein and the EEC, all of which involving a constellation of the BENELUX countries: the 1921 economic union between Belgium and Luxembourg, the monetary convention between the BENELUX governments’ in exile in 1943, and the Benelux Customs Union of 1948.

<sup>62</sup> Forsyth, *Union of States*, 175.

<sup>63</sup> *ibid.*

<sup>64</sup> H Arendt, “The Seeds of a Fascist International” H Arendt, *Essays in Understanding: 1930-1954: Formation, Exile, and Totalitarianism* (New York, Schocken Books, 1994), 143.

without the acknowledgement that its foundations had been weakened or irretrievably lost. The attempts to recreate the old world economy in the first decade after WWI proved unsuccessful because its foundations, in particular the strength of the British Empire, had been drastically weakened without a new hegemon (the United States) willing to take its place<sup>65</sup>. Following Forsyth, the last attempt to resurrect the old world of European empire, of market creation via domination, in the interwar period was the project of the Nazi *Großraum*:

“Hitler’s expanding Reich may indeed be seen as the last grotesque and extreme example of the traditional European effort to create a large internal market by imperial means. Having been stripped of its overseas possessions in 1919, Germany sought to establish a substitute for them within Europe itself—to make the great spaces of Eastern Europe into Germany’s equivalent of the [British] Raj”<sup>66</sup>

In contrast, an economic federation is the expansion of an internal market on the basis of *free* contract. A federation provides the possibility for the creation of a concrete economic order established not on land-grabbing but on mutual promises and pledges. In this way, federalism can be understood as a historical alternative to empire: “federalism holds out the prospects of organizing the world at large as the alternative to imperial domination”<sup>67</sup>. Economic federalism and imperialism alike are responses to the incapability of the state as a political form to govern their markets especially after the industrial revolution.

## II: THE AIMS OF POST-WWII EUROPEAN INTEGRATION

### A: The Crisis of the European Nation-State and the Birth of European Integration

With the close of WWII, the world order of the *Jus Publicum Europaeum* came to an end<sup>68</sup> and Europe was no longer the centre of the world order. On the contrary, Europe had become divided in two ‘spheres of influence’ of the two imperial powers of the post-WWII world: the USA and the USSR. With few exceptions—notably the United Kingdom, Ireland, Sweden and Switzerland—Europe was at the beginning of the post-

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<sup>65</sup> Forsyth, *Union of States*, 175.

<sup>66</sup> *ibid* 176.

<sup>67</sup> C Friedrich, *Man and His Government* (New York, Mac Graw Hill, 1963), 608.

<sup>68</sup> C Schmitt, *The Nomos of the Earth: in the International Law of the Jus Publicum Europeanum* (New York, Telos Press, 2006 [1950]).

WWII era a region of more or less failed states in the outskirts of emerging empires or 'super powers'. The only two additional unoccupied European states at the end of WWII to those already mentioned were Salazar's Portugal and Franco's Spain; both under fascist or authoritarian rule. With the dawn of the post-WWII era, most European states were faced with a long overdue crisis, namely, their fundamental inability to secure even the most basic aims of territorial defence and internal stability<sup>69</sup>. This crisis had its roots in the interwar period and did not evolve around one single threat or problem but several. Internal stability of the European states had during the interwar period been short-lived in most European states leading to civil wars, rebellions and ultimately to the rise of authoritarianism, fascism and Nazism. The Great Depression had left the European states incapable of providing economic security and stable governmental regimes<sup>70</sup>. The interwar period is characterised by an economic as well as political collapse of the European states<sup>71</sup>. "The truth was", Hannah Arendt wrote towards the end of WWII, "that the national State, once the very symbol of the sovereignty of the people, no longer represented the people, becoming incapable of safeguarding either its external or internal security"<sup>72</sup>.

The most potent example is perhaps the Weimar Republic that proved completely incapable of realising a stable form of government<sup>73</sup> leading to wide use of emergency decrees<sup>74</sup> that ultimately brought the Nazis to power with the promise of 'work, freedom and bread'; a promise that temporarily was redeemed by the creation of a war economy in Germany in their imperial quest for '*Lebensraum*'. Whether the collapse

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<sup>69</sup> AS Milward, *The European Rescue of the Nation-State* (London, Routledge, 1992), 5.

<sup>70</sup> *ibid* 25-6.

<sup>71</sup> Bowie, "The Process of Federating Europe".

<sup>72</sup> H Arendt, "Approaches to the German Problem" (1945) *Partisan Review* 12(1) as reprinted in H Arendt, *Essays in Understanding: 1930-1954: Formation, Exile, and Totalitarianism* (New York, Schocken Books, 1994), 111. John Fischer gave a similarly strong statement in 1955: "Among the Europeans (...) nationalism appears to have lost most of its vital force. They are realizing—in anguish—that the nation-state which they invented and used with pride for some five hundred years has finally lost its utility. Like the tribe and the walled city, it has become too small to serve as a satisfactory unit for human organization. For no state in Europe can now perform the functions for which it was designed. Standing alone, it can neither feed its people nor defend them. In time of war, national frontiers no longer have any real strategic significance. In peacetime, they have become a faintly comic annoyance—still clogging the natural flow of travel and trade, although an airliner can vault over a dozen of them in a single day. Because they are so obviously anachronistic, the European states no longer command the whole-hearted loyalty of their citizens (...) Whatever hope the Europeans can muster seems to be focused on new political patterns of one kind or another which appears to be more suitable for the contemporary world" (J Fischer, "Prerequisites of Balance" in AW MacMahon (ed) *Federalism: Mature and Emergent* (New York, Doubleday & Company, 1955), 59).

<sup>73</sup> Milward, *The European Rescue of the Nation-State*, 25-6.

<sup>74</sup> CJ Friedrich and AE Sutherland, "Defence of the Constitutional Order" in CJ Friedrich and RR Bowie (eds) *Studies in Federalism* (Boston and Toronto, Little, Brown and Company, 1954), 681; CL Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, PUP, 1948), 29-61.

of the Weimar Republic was caused by a distinctly German problem of nationalism and militarism there is no consensus on. The collapse of Weimar should according to Arendt not be read as specifically ‘German problem’ but as manifestation of the general collapse of the nation-state as a political form. Following Arendt’s perhaps controversial view, Nazism and fascism were “anti-national international movements” that should be understood as response to the chronic crisis of the nation-state that became acute after the end of WWI<sup>75</sup>. “Actually”, Arendt wrote “the Nationalist Socialist Party, since the end of the 1920s, was no longer a purely German party, but an international organization with its headquarters in Germany”<sup>76</sup>. Following Arendt, Nazism was never meant to apply merely to the German nation-state: it was the grand plan for a new order committed to the creation of a European *Großraum* governed by the ‘master race’.

The post-WWII project of European unification and integration should be understood against the background of this precarious situation in Western Europe<sup>77</sup>. After WWII, Western Europe was under the protection of the United States, however, it was widely acknowledged on both sides of the Atlantic that this protection was insufficient to ensure its stability and security<sup>78</sup>. Western Europe would have to recover economically and to be remilitarised in order to protect itself from the expansionist ambitions of the Soviet Union<sup>79</sup>. Economic security, in the post-WWI era, became understood as more crucial than ever. According to Alan Milward, the post-WWII period was characterised by a general change in the understanding of security that strongly emphasised economic security<sup>80</sup>. In the eyes of the new governments—especially the Christian Democratic governments that were successful in establishing a political hegemony in the immediate post-WWII era—economic security became understood as equally important to military

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<sup>75</sup> Arendt, “The Seeds of a Fascist International”, 143-4.

<sup>76</sup> *ibid* 147-8.

<sup>77</sup> Proposals for a European federation was put forward already during WWII. An interesting example is WI Jennings’ *A Federation for Western Europe* (Cambridge, CUP, 1940). In the opening chapter (pp. 1-2), Jennings writes: “We cannot, however, leave the conditions of 1939 to continue, and it is wise to make an attempt to solve the most immediate of our problems, and in particular those which gave rise to the present European war. The proposition on which this book is founded is that a large number of the difficulties which vex the world can be solved by the establishment of a democratic federation in Western Europe”.

<sup>78</sup> W Kaiser, *Christian Democracy and the Origins of European Union* (Cambridge, CUP, 2007), 271; E Fursdon, *The European Defence Community: A History* (London, Macmillan, 1980), 12; R Griffiths, *Europe’s First Constitution: The European Political Community, 1952-1954* (Federal Trust for Education and Research, 2000), 54-6.

<sup>79</sup> Fursdon, *The European Defence Community: A History*, 27.

<sup>80</sup> “Where did the real danger lie? In a land attack by the Soviet Union? Or in losing the battle for reconstruction and thus the economic and social competition with the Soviet system? Many (...) gave the second answer” (Milward, *The European Rescue of the Nation-State*, 173-4).

defence. Not merely in order to provide the material conditions for rearming<sup>81</sup> but equally in order to suppress the internal ‘communist threat’ of a Communist accession to power either by a *coup d’état* or by democratic majority<sup>82</sup>. In the words of the historian Wolfram Kaiser: “Western Europe had to respond to the ideological challenge of communism with its boundless promises of human welfare and its apparent technological and socio-economic advances”<sup>83</sup>.

After 1948—marked by both the Czechoslovak *coup d’état*, in which the Communist Party with Soviet backing assumed unlimited control of the government of Czechoslovakia initiating four decades of Communist rule and the 1948 Berlin Blockade that necessitated the Berlin airlift—the ‘internal communist threat’ as well as the external threat of the Soviet Union were felt ever more acutely by the Americans and by the European Christian democratic parties<sup>84</sup>. Economic security was in this regard perceived as pivotal for the creation of stable governmental regimes that were capable of securing the obedience and loyalty of its citizens and furthermore weaken the communist parties and ideology<sup>85</sup>. “[T]he post-war state in western Europe”, Milward writes “had to be constructed on a broader political consensus and show itself more responsible to the needs of a greater range and number of its citizens if its legitimacy was to be accepted”<sup>86</sup>.

To these manifold threats to the existence, autonomy and stability of the post-WWII Western European states, European unification became understood as integral to the solution. In Milward’s state-centric interpretation, the post-WWII European history should be understood as the history of the rescue of the nation-state from its long overdue crisis. European integration was a key element in the reassertion of the project of the political autonomy of the state because the new post-WWII political consensus on which the post-WWII states relied required European integration and the transfer of sovereign powers to the Community<sup>87</sup>: “Without it, the nation-state could not have offered to its

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<sup>81</sup> Fursdon, *The European Defence Community: A History*, 20.

<sup>82</sup> Milward, *The European Rescue of the Nation-State*, xi, 333-7; Kaiser, *Christian Democracy and the Origins of European Union*, 199, 223; E Timothy Smith, “United States Security and the Integration of Italy into the Western Bloc, 1947-1949” and Klaus Schwabe, “The Origins of the United States’ Engagement in Europe, 1946-1952”, 164-5 both in FH Heller and JR Gillingham (eds) *NATO: The Founding of the Atlantic Alliance and the Integration of Europe* (London, MacMillan, 1992), 74ff; REM Irving, “Italy’s Christian Democrats and European Integration” (1976) *International Affairs* 52(3), 406.

<sup>83</sup> Kaiser, *Christian Democracy and the Origins of European Union*, 199.

<sup>84</sup> T Smith, “United States Security and the Integration of Italy into the Western Bloc, 1947-1949”; Schwabe, “The Origins of the United States’ Engagement in Europe, 1946-1952”.

<sup>85</sup> Kaiser, *Christian Democracy and the Origins of European Union*, 199, 223.

<sup>86</sup> Milward, *The European Rescue of the Nation-State*, 27.

<sup>87</sup> *ibid* 4.

citizens the same measure of security and prosperity which it has provided and which has justified its survival”<sup>88</sup>.

For the ‘Founding Fathers of Europe’, the ‘European rescue’ was furthermore part of the ‘spiritual foundation’ of the post-WWII era that should protect the new order from the internal threats of fascism and communism. Together with military defence and economic stability, a new spiritual foundation for Europe became understood as necessary for the creation of political stability in post-WWII Europe in the eyes of the Christian democratic parties. ‘Political extremism’ on the right and on the left—the return of fascism and the internal uprising of communism—were equally feared by European Christian Democratic elites<sup>89</sup>. German Chancellor Konrad Adenauer thus argued that the German people should be offered an alternative system of belief to the void left by totalitarianism<sup>90</sup>. Together with the Christian values, *Europeanism became the viable myth* for the post-WWII Christian democratic parties that came to found the EEC<sup>91</sup>. Following the Italian Prime Minister Alcide de Gasperi, a European federation became the Sorellian myth of the post-WWII era<sup>92</sup>. Whereas Sorel believed the class struggle of the proletariat could be fuelled by the myth of the general strike<sup>93</sup>, the post-WWII Christian Democrats came to understand Europe as the myth that would allow for the rescue of the European states from their—primarily internal—enemies.

For most of the European resistance movements, European unification was understood as the only viable solution for political stability in the post-WWII world. Following Arendt, the main crisis, in the eyes of the European resistances movements, was the unsustainability of the nation-state and the main enemy was *not* Germany but fascism<sup>94</sup>. With Charles de Gaulle as the sole exception, Arendt argues, the solution to Europe’s problems in the eyes of the European resistance movements became a European federation<sup>95</sup>. Arendt quotes this interesting passage from the Dutch resistance:

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<sup>88</sup> *ibid* 3. Konrad Adenauer writes: “It may offend our national pride, but we must admit that under present conditions none of the European nation-states could, if left to itself, guarantee its’ citizens’ welfare, freedom and territorial integrity. The necessity for union for economic, political and military reasons is incontestable” (K Adenauer, *World Indivisible—With Liberty and Justice for All* (London, George Allen & Unwin Ltd, 1956), 50).

<sup>89</sup> Milward, *The European Rescue of the Nation-State*, 333; Kaiser, *Christian Democracy and the Origins of European Union*, 10, 218.

<sup>90</sup> Milward, *The European Rescue of the Nation-State*, 337.

<sup>91</sup> See e.g. Adenauer, *World Indivisible*, 5-15.

<sup>92</sup> Milward, *The European Rescue of the Nation-State*, 333.

<sup>93</sup> G Sorel, *Reflections on Violence* (Cambridge, CUP, 2004), 20-4.

<sup>94</sup> Arendt, “Approaches to the ‘German Problem’”, 112-3.

<sup>95</sup> *ibid* 113-9. Regarding ‘the special position’ of De Gaulle, Arendt (*ibid* 118) writes: “Unlike the others [leaders of the European governments-in-exile], he [De Gaulle] represents not the forces of yesterday but is, rather, a solitary reminder of the forces of the day before yesterday—a time which, whatever its faults,

“We are experiencing at present ... a crisis of state sovereignty. One of the central problems of the coming peace will be: how can we, while preserving cultural autonomy, achieve the formation of larger units in the political and economic field? ... A good peace is now inconceivable unless the States surrender parts of their economic and political sovereignty to a higher European authority: we leave open the question whether a European Council, or Federation, a United States of Europe or whatever type of unit will be formed”<sup>96</sup>.

This path for European security, stability and prosperity constitutes a fundamental break with the previous European public law in that it was not sought through a ‘balance of power’ but by the constitution of a United Europe. “A mere restoration of the nation-state system that existed before 1939 with territorial alterations would serve only to revive the causes that led to the collapse of Europe”, one scholar remarked in 1946 “[h]ence Europe needs to be refounded upon a new principle and not restored upon an old one. That new principle is a confederation of Europe”<sup>97</sup>. This path was consistently defended by the Christian democrats: “The Christian democrats were especially strongly united behind deeper integration and the long-term goal of European federation”<sup>98</sup>. The link between the perceived unviability of the nation-state and the project of European unification was, e.g., clearly expressed in the speeches of Adenauer:

“The age of national states has come to an end. Everybody must feel that a change has taken place, that an era has vanished and that a new age is dawning in which men will look beyond the borders of their own country and work in fraternal cooperation with other nations for the true aims of humanity. Whoever fails to realize this is beyond help. This very task and the construction of a Europe dedicated to this goal afford a great mission for German youth. And when this Europe, this new Europe, is built, our young people will once more find scope for active and peaceful lives. We in Europe must break ourselves of the habit of thinking in terms of national states (...) An age of peace and

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was considerably more propitious to human purposes than the recent past. In other words, he alone truly represents patriotism and nationalism in the old sense”.

<sup>96</sup> Arendt citing the Dutch underground in “Approaches to the ‘German Problem’”, 113.

<sup>97</sup> RD Lang, “The Germanic Confederation of 1815 and a European Confederation Today” (1946) *South Atlantic Quarterly* 45, 434.

<sup>98</sup> Kaiser, *Christian Democracy and the Origins of European Union*, 284. For an example, see Adenauer, *World Indivisible*, 48-9.

cooperation will dawn only when nationalist ideas are banned from politics. Here in Europe, we have made a start in that direction by building plans for European unity”<sup>99</sup>.

European unification served the political aims of internal European peace and pacification and strengthening Europe’s geopolitical position in relation to the USA and the USSR<sup>100</sup>. As other federal union of states, the project of European unification that emerged after WWII has to be understood on the basis of the fundamental wish for political autonomy on the part of its Member States and their incapability of securing this autonomy as fully independent states. This combination of a wish for autonomy and impotence in securing it led the states to constitute among themselves a common union and confer on it powers to achieve their fundamental aims. It is thus, as correctly pointed out by Milward, a fundamental misunderstanding to think of the EEC/EU as antithetical to the European states<sup>101</sup>. The emergence of post-WWII European states and European integration are inherently linked to one another.

### **B: The Post-WWII Projects of ‘Defence Union’ and ‘Economic Union’**

In response to the complex security threats to the Western European states in the immediate post-WWII era, there was a general and strong consensus amongst the Christian democratic leaders across Western Europe as well as the Americans, that European unification and ultimately a European federation or federal state was the only viable solution. European security could not continue to solely rely on American military support, from 1949 manifest in NATO, and American economic support of the Marshall Aid (1948-1952). Furthermore, European security and stability had to provide a solution to the problem of German remilitarisation that became a central question for the pacification of Western Europe. In the immediate post-WWII period, German remilitarisation was perceived as posing a contradictory threat to European security: German rearmament was feared by many European states after WWII—especially by France<sup>102</sup>—but a weak and unarmed Germany was a threat to the new American hegemony in Western Europe<sup>103</sup>. The only viable solution was a Western European

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<sup>99</sup> Adenauer, *World Indivisible*, 6-7.

<sup>100</sup> Kaiser, *Christian Democracy and the Origins of European Union*, 171.

<sup>101</sup> Milward, *The European Rescue of the Nation-State*, 3, 18.

<sup>102</sup> Fursdon, *The European Defence Community: A History*, 81. This sentiment is also strongly expressed in the Plevan Plan of 1950 (reprinted in AG Harryvan and J van der Harst (eds) *Documents on European Union* (London, MacMillan Press, 1997), 65-9).

<sup>103</sup> Forsyth, *Union of States*, 178-9; Kaiser, *Christian Democracy and the Origins of European Union*, 272; Griffiths, *Europe’s First Constitution*, 55.

unification including a Franco-German alliance. How this European unification was to be achieved was, however, not immediately clear<sup>104</sup>.

The first successful proposal for a ‘European’ solution was the Schumann Plan that led to the foundation of the European Coal and Steel Community (ECSC) in 1951. Even though the ECSC at the time was understood as a step towards the goal of a true European federation<sup>105</sup> it was itself not a federation<sup>106</sup>. Despite the ECSC being created for deeply political reasons<sup>107</sup> and notwithstanding that it established common institutions, purely *sectoral integration*—in this case the common market for coal and steel—is not federal in nature<sup>108</sup>. The Zollverein, according to Forsyth, was a federal union exactly because it encompassed its Member States in their totality: “the Zollverein was not merely an interstate commercial agreement, not a mere functional agency of states like the Universal Postal Union, but an acting economic totality of states, in the same way that a classical confederation is an acting defensive totality of states”<sup>109</sup>. A federal union of states encompasses its Member States in their entirety and constitutes a new common federal existence.

Despite the success of the ECSC in facilitating a stronger Franco-German alliance and a stronger economic stability for the Six, the problem of German remilitarisation remained. With the outbreak of the Korean War in 1950—widely understood as a prelude to a Soviet invasion of Western Europe<sup>110</sup>—it had become more urgent. A solution was proposed in the Pleven Plan—named after Prime Minister of France, René Pleven—in 1950 namely a proposal for “*the creation, for our common defence, of a European Army under political institutions of a united Europe*”<sup>111</sup>. The European Army envisioned by the Pleven Plan was not to be based on merely “the joining up of national military units”. It was not to be a mere alliance<sup>112</sup>. Rather, the Pleven Plan envisioned that “The army of a united Europe composed of men coming from different European countries, must bring about, as near

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<sup>104</sup> Fursdon, *The European Defence Community: A History*, 50-1.

<sup>105</sup> *ibid* 58; Griffiths, *Europe’s First Constitution*, 49; F Laursen, “Federalism: From Classical Theory to Modern Day Practice in the EU and Other Polities” in F Laursen (ed) *The EU and Federalism* (Farnham, Ashgate, 2011), 10.

<sup>106</sup> Forsyth, *Union of States*, 178; M Rasmussen, “The Origins of a Legal Revolution: The Early History of the European Court of Justice” (2008) *Journal of European Integration History*, 14(2), 81-2.

<sup>107</sup> Fursdon, *The European Defence Community: A History*, 58-9.

<sup>108</sup> Forsyth, *Union of States*, 168.

<sup>109</sup> *ibid*.

<sup>110</sup> Fursdon, *The European Defence Community: A History*, 67ff; Schwabe, “The Origins of the United States’ Engagement in Europe, 1946-1952”, 181.

<sup>111</sup> Pleven Plan (*Documents on European Union*, 67). See also Fursdon, *The European Defence Community: A History*, 89; Bowie, “The Process of Federating Europe”, 503ff.

<sup>112</sup> Pleven Plan (*Documents on European Union*, 67).

as possible, *a complete fusion of its human and material components under a single political and military European authority*”<sup>113</sup>.

This was to be realised by the European Defence Community (EDC) the establishing Treaty of which was signed in Paris in 1952<sup>114</sup>. The EDC was to create a common European Defence Force that was to be composed of Member State units “with a view to their fusion”<sup>115</sup> wearing common uniform<sup>116</sup>. Furthermore, no Member State “could recruit or maintain national armed forces other than those for which the Treaty had made special provisions”<sup>117</sup>. The Treaty’s duration was 50 years and was therefore not formally created as a perpetual union. However, after stating the 50 years’ time duration, the EDC Treaty adds that “If, before *the establishment of a European federation or confederation*, the North Atlantic Treaty should cease to be in effect or there should be an essential modification in the membership of the North Atlantic Treaty Organization, the High Contracting Parties shall examine together the new situation”<sup>118</sup>.

The EDC was seen as a conscious step<sup>119</sup> towards the establishment of a European federation<sup>120</sup>. Article 38 of the EDC treaty is of great importance because it committed the states to examine, within six month of signing the Treaty, the “creation of an Assembly of the European Defence Community elected on a democratic basis” bearing in mind that the transitional organisation created should “be conceived so as to be capable of constituting one of the elements of an ultimate *federal or confederal structure [bundesstaatlichen oder staatenbündischen Gemeinwesens]*, based upon the principle of the separation of powers and including, particularly, a bicameral representative system”<sup>121</sup>.

On the basis of Article 38, an Ad hoc Assembly with the Belgian Prime Minister Paul-Henri Spaak as its president was created in order to draw up a plan for the future

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<sup>113</sup> *ibid* emphasis added.

<sup>114</sup> Fursdon, *The European Defence Community: A History*, 150.

<sup>115</sup> European Defence Community Treaty (EDC Treaty), Article 9. Unofficial translation available via: <http://aci.pitt.edu/5201/1/5201.pdf> [last accessed 20 June 2018]. The original German Treaty, *Vertrag über die Gründung einer Europäischen Verteidigungsgemeinschaft* can be accessed via: <http://www.politische-union.de/evgy/> [last accessed 9 March 2018].

<sup>116</sup> Fursdon, *The European Defence Community: A History*, 153-4; E Fursdon, “The Role of the European Defence Community” in FH Heller and JR Gillingham (eds) *NATO: The Founding of the Atlantic Alliance and the Integration of Europe* (London, MacMillan, 1992), 221-2.

<sup>117</sup> Fursdon, *The European Defence Community: A History*, 153-4.

<sup>118</sup> EDC Treaty, Article 128. See also Fursdon, *The European Defence Community: A History*, 168, emphasis added.

<sup>119</sup> EDC Preamble: “Conscious that they are thus taking a new and essential step on the road to the formation of a united Europe”.

<sup>120</sup> EDC Article 8 and Article 38. See also Fursdon, “The Role of the European Defence Community”, 225.

<sup>121</sup> Griffiths, *Europe’s First Constitution*, 40; Fursdon, *The European Defence Community: A History*, 156.

federal political organisation of the EDC<sup>122</sup>. A Harvard study directed by Carl Friedrich was commissioned by the Committee for the European Constitution to prepare the work for the Ad Hoc Assembly<sup>123</sup>. In 1953, the Ad Hoc Assembly agreed and signed the Draft Treaty establishing the European Political Community (EPC) that echoing the 1787 Constitution of the United States opens with “*We, the Peoples*”. Article 1 of the draft treaty of the EPC speaks unambiguously in the language of federalism:

“The Community is founded upon a *union of peoples and states*, upon respect for their personality and upon *equal* rights and duties for all. It shall be *indissoluble*”<sup>124</sup>.

The EPC was meant to unify the EDC and the ECSC into a single legal entity<sup>125</sup>, which was to be governed by a bicameral legislature (Senate and Peoples’ Chamber), and dual executive power composing a European Executive Council and the Council of Ministers, a single Court of Justice and an advisory Economic and Social Council<sup>126</sup>. The EPC’s general aims were common security and defence, the coordination of foreign policy, contributions towards the endeavours of NATO, the Council of Europe and the European Convention for Co-operation, the protection of human rights and fundamental freedoms and finally economic and social unification of Europe through the establishment of a common market<sup>127</sup>.

It was especially the Dutch politicians who insisted on the treaty including economic and social unification among its fundamental aims specified in the preamble<sup>128</sup>. The Dutch politicians were, however, not convinced that the proposals for the EPC went far enough and they therefore came up with a supplementary plan for economic

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<sup>122</sup> Griffiths, *Europe’s First Constitution*, 68ff; Milward, *The European Rescue of the Nation-State*, 186.

<sup>123</sup> Rasmussen, “The Origins of a Legal Revolution”, 80. The study is published as CJ Friedrich and RR Bowie (eds) *Studies in Federalism* (Boston and Toronto, Little, Brown and Company, 1954).

<sup>124</sup> Draft Treaty embodying the Statute of the European Community Article 1 (Strasbourg, 11 March 1953) reprinted in AG Harryvan and J van der Harst (eds) *Documents on European Union* (London, MacMillan Press, 1997), emphasis added.

<sup>125</sup> EPC Treaty, Article 5.

<sup>126</sup> Griffiths, *Europe’s First Constitution*, 71-81.

<sup>127</sup> EPC, Article 2: “The Community has the following mission and general aims: (...) to promote, in harmony with the general economy of Member States, the economic expansion, the development of employment, and the improvement of the standard of living in Member States, by means, in particular, of progressive establishment of a common market, transitional or other measures being taken to ensure that no fundamental and persistent disturbance is thereby caused to the economy of Member States”.

<sup>128</sup> Griffiths, *Europe’s First Constitution*, 86; Milward, *The European Rescue of the Nation-State*, 187; RT Griffiths and A Milward, “The Beyen Plan and the European Political Community” in W Maihofer (ed) *Noi si mura: Selected Working Papers of the European University Institute* (Florence, Office for Official Publications of the European Communities, 1986), 596-623.

unification that became known as the Beyen Plan<sup>129</sup> (named after the Dutch diplomat Johan Willem Beyen). Whereas Beyen recognised that the Soviet threat made military integration necessary, he also held that a political integration of Europe, which only had military integration as its object, would only to a very limited degree lead to a unity between the Member States: “Political integration which has no content other than making possible coordinated military action and organising the production and marketing of certain important raw materials can only bring about a very limited unity”<sup>130</sup>. Central to the Beyen Plan was the idea that the EDC and the EPC had to be supplemented by an economic union the heart of which would be a customs union<sup>131</sup>. Where the Pleven Plan is a proposal for a defence federation, the Beyen Plan calls for a welfare federation or economic union.

The Beyen Plan commenced with the argument that together with common defence, the principal aim of European integration should be “the raising of the general standard of living of the European peoples”<sup>132</sup>. The Beyen Plan continues to assert that the general standard of living of the peoples of Europe cannot be achieved in a Europe “divided into a number of limited markets as a result of trade barriers and subject to monetary instability”<sup>133</sup>. The establishment of a united Europe ultimately of a “federal or confederal nature”, the plan continues, which is currently being proposed in EPC “should be bound up with the establishment of common bases of economic development and a merging of the essential interests referred to in the resolution”<sup>134</sup>. The Beyen Plan concludes with a list of concrete initiatives for economic and social integration of the EPC states in the form of a customs union that completely abolishes import duties within the union and that establishes common tariffs vis-à-vis the outside<sup>135</sup>. The Beyen Plan further concluded that the EPC ought to find a common solution to European agriculture<sup>136</sup>.

Initially there was limited support for the Beyen Plan across the Six. France was directly opposed to the inclusion of economic integration, and notwithstanding that there

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<sup>129</sup> Griffiths, *Europe's First Constitution*, 96; Milward, *The European Rescue of the Nation-State*, 185.

<sup>130</sup> Beyen, policy outline to the Dutch cabinet 1952 as cited by Griffiths, *Europe's First Constitution*, 100.

<sup>131</sup> “It was Beyen himself who proposed (...) that the EPC become a customs union. Furthermore, he proposed that the automatic steps by which the tariffs between its member-states would be progressively eliminated should be written in detail into the draft EPC treaty by the assembly. Previous experience demonstrated, he argued, that tariffs would not be lowered except by a supranational authority which had been set up to enforce a preordained, irrevocable course of action” (Milward, *The European Rescue of the Nation-State*, 187). See also Griffiths, *Europe's First Constitution*, 100.

<sup>132</sup> The Beyen Plan for Economic Integration, 11 December 1952, as reprinted in AG Harryvan and J van der Harst (eds) *Documents on European Union* (London, MacMillan Press, 1997), 71-4.

<sup>133</sup> *ibid.*

<sup>134</sup> *ibid.*

<sup>135</sup> *ibid.*

<sup>136</sup> *ibid.*

was some support for the plan in Italy and Germany, it was not of high importance to them<sup>137</sup>. Only Belgium fully supported the Beyen Plan<sup>138</sup> but also they were not completely satisfied because they believed it was not comprehensive enough<sup>139</sup>. When it came to the ratification of the EDC, no definite consensus on how to proceed towards the establishment of a customs union had been reached<sup>140</sup>.

On 30 August 1954, the grand project of a European military federation of the EPC and the EDC collapsed due to the rejection of the latter in the French Parliament<sup>141</sup>. But, interestingly, the previously relatively unpopular idea of a European economic union did not fall apart as a consequence of this failure. In May 1955, the BENELUX countries issued a collective memorandum proposing that a united Europe was to be reached in the ‘economic domain’ by *general economic integration*, the establishment of common institutions—including a supranational authority—a progressive fusion of the national economies, the creation of a common market and the progressive harmonisation of the national social policies<sup>142</sup>. The Benelux memorandum was extensively discussed at the 1955 Messina conference that led to the so-called ‘relaunch of Europe’<sup>143</sup>.

The result of the Messina conference was the Spaak Report proposing two qualitatively distinct projects of European integration: the common market that led to the establishment of the European Economic Community (EEC) and the proposal for sectoral integration of atomic energy that led to the establishment of EURATOM<sup>144</sup>. As argued with regard to the ECSC, sectoral integration, hereunder, EURATOM, is not federal in nature. The Spaak report’s proposal for the common market, however, speaks in the language of an economic federation<sup>145</sup>. The aim of a European common market, it is argued, ought to be the creation of “a large area with a common economic policy, so

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<sup>137</sup> Griffiths, *Europe’s First Constitution*, 102ff; Griffiths and Milward, “The Beyen Plan and the European Political Community”.

<sup>138</sup> Griffiths and Milward, “The Beyen Plan and the European Political Community”, 614.

<sup>139</sup> Griffiths, *Europe’s First Constitution*, 104, 124, 182.

<sup>140</sup> Griffiths and Milward, “The Beyen Plan and the European Political Community”, 617; Griffiths, *Europe’s First Constitution*, 111.

<sup>141</sup> Griffiths, *Europe’s First Constitution*, 121; Fursdon, “The Role of the European Defence Community”, 232ff.

<sup>142</sup> Benelux Memorandum, 18 May 1955 accessible via:

[http://resources.huylgens.knaw.nl/europeseintegratie/en/documenten?trefwoord=Benelux%20Memorandum%20\(1955\)&start=20](http://resources.huylgens.knaw.nl/europeseintegratie/en/documenten?trefwoord=Benelux%20Memorandum%20(1955)&start=20) [last accessed 13 March 2018]. See also Forsyth, *Union of States*, 182.

<sup>143</sup> The Benelux memorandum was partly copied directly into the resolution adopted after the Messina conference. The resolution is reprinted in AG Harryvan and J van der Harst (eds) *Documents on European Union* (London, MacMillan Press, 1997), 92-4.

<sup>144</sup> Spaak report, 21 April 1956, accessible via: [http://aci.pitt.edu/996/1/Spaak\\_report\\_french.pdf](http://aci.pitt.edu/996/1/Spaak_report_french.pdf) [last accessed 13 March 2018].

<sup>145</sup> Forsyth, *Union of States*, 182; See M Forsyth, “The Relevance of Classical Approaches” in JJ Hesse and V Wright (eds) *Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems* (Oxford, OUP, 1996), 38.

that a powerful unit of production is formed and continuous expansion is made possible, as well as an increased stability, an accelerated increase of the standard of living, and the development of harmonious relations between the Member States”<sup>146</sup>.

This zone of common economic policy, constituting one unity of production, can—in contrast to theories of global economic liberalisation, the Spaak Report continues—*only* be realised by a *limited number of states*<sup>147</sup>. Federations—defence unions and economic unions alike—are *never global orders* but concrete historical and territorially bounded unions of states with an outside and an inside. This was not lost on contemporaneous academics. As observed by one commentator in 1956, it was the customs union as the heart of the common market that distinguished it from ‘free trade agreements’:

“There are already international institutions, world-wide such as the General Agreement on Tariffs and Trade (GATT) or regional such as the Organization for European Economic Cooperation (OEEC), which pursue the abolition of trade barriers and have notable accomplishments to their credit; *but none of them has attempted to bind its members through a customs union*. Herein lies the innovation, the decisive and tangible step into an entirely *new kind of relationship* between a number of large continental countries (...) The customs union implies not only that the member countries ultimately abolish all duties on their mutual trade, but that they also *ultimately apply a uniform tariff to trade with third countries*”<sup>148</sup>.

The alternative approach of a free trade area was discussed at the Brussels’ Conference but rejected because “it was considered unsuited to the ultimate goal of economic unification”<sup>149</sup>. Instead, the common market was to be achieved by a customs union as the first step towards economic union.

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<sup>146</sup> Translation by CVCE (Étienne Deschamps), “The Spaak Report” accessible via: [https://www.cvce.eu/content/publication/2007/2/27/4b911a0a-6bd0-4e88-bff9-4c87690aa4e8/publishable\\_en.pdf](https://www.cvce.eu/content/publication/2007/2/27/4b911a0a-6bd0-4e88-bff9-4c87690aa4e8/publishable_en.pdf) [last accessed 13 March 2018].

<sup>147</sup> *ibid* 14.

<sup>148</sup> R Bertrand, “The European Common Market Proposal” (1956) *International Organisation* 10(4), 559-574, emphasis added.

<sup>149</sup> *ibid*.

### III: THE SUCCESS OF ECONOMIC UNION AND FAILURE OF DEFENCE UNION

Several proposals for the constitution of a European federal union of states were launched in the immediate post-WWII era, both in the form of ‘defence unions’ (the EDC and the EPC) and in the form of ‘economic unions’ (the Beyen Plan and the Spaak Report). The success rate of these two different strands of proposals for a federal union—initially thought of as complementary—proved unequal. Where the project of an economic union became realised in the EEC, the project of a defence union first manifest in EDC and the EPC, and, as we shall see in due course, in the Fouchet Plan, all failed. Due to these failures, the project of European integration that emerged had welfare/the economy as its primary if not exclusive aim. The post-WWII union of European states emerged as an economic federation.

#### A: The Constitution of a European Economic Federation

In contrast to the abortive project of the EPC and the EDC, the Spaak Report led to the successful ratification of the Treaty of Rome, which came into force 1 January 1958. Whereas the projects of a European defence union failed, the project of an economic federation was successfully constituted with the EEC. The EEC (now the EU) should, following Forsyth and Schönberger, be understood as a contemporary manifestation of a federal union of states whose primary aim is welfare<sup>150</sup>. That the EU/EEC has *welfare*, and not *defence* as its primary aim, in Schönberger’s interpretation, is one of the primary reasons that the federal nature of the EU/EEC has generally been overlooked<sup>151</sup>. Apart from Forsyth pioneering writings on the theory of the ‘economic union’ and Huber’s discussion of the constitutional nature of the Zollverein<sup>152</sup>, welfare as a relatively autonomous aim of federal unions of states is not widely acknowledged in the literature on federalism.

Following Forsyth, it is clear both from the form and the content of the Treaty of Rome that the EEC is a federation<sup>153</sup>. The EEC is clearly federal in *form*: “The Community is based on a treaty which is more than a conventional interstate treaty. It is a constitutive treaty which, in the act of creating a new body politic, alters the constitutions

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<sup>150</sup> Forsyth, *Union of States*, 183; Schönberger, “Die Europäische Union als Bund”, 101.

<sup>151</sup> Schönberger, “Die Europäische Union als Bund”, 101.

<sup>152</sup> Huber, *DV II*, 300-5.

<sup>153</sup> Forsyth, *Union of States*, 183.

of the partners to it”<sup>154</sup>. The Treaty of Rome has all the characteristics of a *federal constitutional treaty* (Chapter 1): a treaty that leads to a political change in the constitutions of its Member States and constitutes a new political unity<sup>155</sup>. The EEC is thus, following Forsyth’s interpretation, characterised by the federal principles of *birth* and *transformation* (Chapter 1). The Treaty of Rome, Forsyth continues, also creates common federal institutions capable of legislating for the citizens of the new Union<sup>156</sup>: “The treaty established common institutions which are capable of passing laws that are directly binding through the territory of the community, and which are also endowed with considerable discretionary powers to fulfil the general objectives of the union”<sup>157</sup>. The Treaty of Rome creates a new system of public law that is binding throughout the Union. Finally, the Treaty is not limited in time: “The treaty is concluded for an ‘unlimited period’”<sup>158</sup>. As other federal union the EEC is imagined as a new and permanent community<sup>159</sup> devoted to the ‘ever closer union’<sup>160</sup> of its peoples.

In its aims and general mission, the EEC is not a technical tool for the promotion of free trade but a political project of federation<sup>161</sup>. With regard to its *content*, Forsyth argues, the EEC is not a technique for the liberalisation of trade but “represents the transformation of the external economic relations between a numbers of states into an internal market”<sup>162</sup>. This transformation is a process of ‘enclosure’ towards the outside world by the creation of a common external tariff and common commercial policies towards non-EEC states<sup>163</sup>.

“The decision made in 1957 to go beyond the sectoral approach and to create a common market, subsequently defined more precisely as an ‘internal market’ or an ‘area without internal frontiers’, is clearly keeping with the idea of union, and makes the European Community a political entity in the sense outlined above. It draws a boundary between insiders and outsiders, and establishes a far-reaching form of internal preference”<sup>164</sup>.

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<sup>154</sup> *ibid.*

<sup>155</sup> Forsyth, “The Relevance of the Classical Approaches”, 38.

<sup>156</sup> Art 189 EEC.

<sup>157</sup> Forsyth, *Union of States*, 183.

<sup>158</sup> *ibid.* 183.

<sup>159</sup> Schönberger, “Die Europäische Union als Bund”, 102.

<sup>160</sup> Preamble to the Treaty of Rome.

<sup>161</sup> This was, e.g., clearly expressed in relation to the accession of the post-fascist Mediterranean states who wanted to join the EEC for deeply political reasons (see Chapter 4). See also Forsyth, “The Relevance of Classical Approaches”, 38-9.

<sup>162</sup> Forsyth, *Union of States*, 183.

<sup>163</sup> *ibid.*; M Cremona, “External Relations and External Competence of the European Union” in P Craig and G de Búrca (eds) *The Evolution of EU Law* (Oxford, OUP, 2011).

<sup>164</sup> Forsyth, “The Relevance of Classical Approaches”, 38-9.

The relationship between the EEC/EU and GATT/WTO is a good illustration of the ‘enclosure’ of the EEC to the outside world. Though the EEC/EU was not a formal member of the GATT/WTO until 1995, it was recognised as the *de facto* unilateral representative of its Member States as early as two years after the Treaty of Rome came into effect:

“The EC exercised practically all rights and fulfilled practically all obligations under GATT law in its own name like a GATT contracting party. Since 1960 all GATT contracting parties had accepted such exercise of rights and such fulfilment of obligations by the EC and had asserted their own GATT rights, even in dispute settlement proceeding relating to measures of individual EC Member States, almost always against the EC. Although this cannot be described as a case of State succession, the EC had effectively replaced, with the consent of the other GATT contracting parties, its Member States as bearers of rights and obligations under GATT”<sup>165</sup>.

As other federal unions<sup>166</sup>, the EEC is characterised by a common external representation which is clearly manifest in its effective replacement of its Member States in the negotiations of international trade agreements. The radical difference between the EEC/EU and the GATT/WTO is thus clear in the simple fact that whereas the EEC/EU could become a *de facto/de jure* member of GATT/WTO, the opposite scenario would never be possible.

Together with the construction of a *common exterior* representation of the Community to the outside world, the EEC creates a new *common interior* by removing barriers to the free movement of goods, services, workers and capital within the Community<sup>167</sup>. The new common interior constituted by the EEC is governed by its own system of public law. In contrast to other trade organisations like NAFTA and GATT/WTO, the EEC/EU has never relied on the public international law principles of state responsibility<sup>168</sup> and state retaliation<sup>169</sup> *internally* to enforce the treaty: “An essential

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<sup>165</sup> JHJ Bourgeois, “The European Court of Justice and the WTO: Problems and Challenges” in JHH Weiler (ed) *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?* (Oxford, OUP, 2001), 72.

<sup>166</sup> For a summary of the international treaties agreed by the Zollverein see Huber, *DV I*, 296-7.

<sup>167</sup> Bourgeois, “The European Court of Justice and the WTO: Problems and Challenges”, 184.

<sup>168</sup> Weiler, “Democracy without the People: The Extinction of European Legitimacy”, 11; JHH Weiler, “Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy” (2014) *I•CON* 12(1), 95-6.

<sup>169</sup> W Phelan, *In the Place of Inter-State Retaliation: The European Union’s Rejection of WTO-style Trade Sanctions and Trade Remedies* (Oxford, OUP, 2015), 15ff. See also joined cases C-90/63 and C-91/63 - *Commission of*

distinction between the EU and other international trade regimes is that the EU does not provide its member states with these legal mechanisms to unilaterally escape their previously assumed trade obligations to each other”<sup>170</sup>.

That the EEC is radically different from international organisations of trade liberalisation is clear in the public law form it creates to sanction treaty infringements. By constituting between themselves the then EEC, the Six could no longer treat each other as *aliens*. On the contrary, they appeared in front of each other as equal Member States, with equal rights, of a new common Union through which their relations *inter se* from now on and for the most part would be governed. This is a manifestation of the *interstate* dimension of the state transformation (Chapter 1). A central part of the *interstate* dimension of the state transformation relates to the altered relationship between the Member States and the nationals of other Member States whom they are no longer allowed to treat as aliens (Chapter 1). This is the heart of federal citizenship, and as will be shown in what follows, it was introduced with the EEC.

Following Schönberger’s work on citizenship, the federal character of the EEC is manifest in its introduction of the ‘true kernel of federal citizenship’, namely, the right to free movement and the right to non-discrimination on the basis of nationality<sup>171</sup>. These two rights constitute the core of the principle of *Indigenat* that characterises the interstate citizenship of federations<sup>172</sup>. When states come together in a federal union they all have their own citizenships. Once they conclude the federal treaty, however, they sow the seeds for a new citizenship—a new fundamental status—for their citizens, namely federal citizenship. That the EEC does not formalise these rights in a formal status of legal federal citizenship is typical of young or emerging federations<sup>173</sup>:

“Once they conclude the founding treaty of a new Union, this is also the beginning of the new federal citizenship. Usually this new status is not yet formalized and it does not yet need formalization. This is due to a simple fact: The federal citizenship only denotes the legal status of state citizens at the federal level; it serves as an abbreviation for the federal rights those citizens enjoys in addition to the legal position they continue to have

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*the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium* [1964]; joined cases C-142 and C-143/80 - *Amministrazione delle Finanze dello Stato v Essevi SpA and Carlo Salengo* [1981]; C-38/89 - *Ministère public v Guy Blanguernon* [1990].

<sup>170</sup> Phelan, *In the Place of Inter-State Retaliation*, 22.

<sup>171</sup> C Schönberger, “European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism” (2007) *ERPL/REDP* 19(1), 68, 73. See also EEC Treaty Article 7, Article 48.

<sup>172</sup> Schönberger, “Die Europäische Union als Bund”, 116-7.

<sup>173</sup> Schönberger, “European Citizenship as Federal Citizenship”, 74.

at the state level. It is, as it were, the additional hat the State citizens wear as far as the Federation is concerned”<sup>174</sup>.

The EEC, by conferring the core rights of federal citizenship on the citizens of its Member States without using formal citizenship as the ‘abbreviation’ of the status conferred, the EEC treaty is, following Schönberger, similar to other young federations.

As in other young federations, federal citizenship in the EEC/EU is *derived* from citizenship of one of the Member States, i.e., the status of federal citizenship is acquired and lost on the basis of citizenship in one of the Member States<sup>175</sup>. This derivative nature of federal citizenship can even continue to be the case in a federal state. This is the case in Switzerland where Swiss citizenship is a derivative status from cantonal citizenship<sup>176</sup>. In the United States, state citizenship became a derivative status to federal citizenship with the 14<sup>th</sup> Amendment after the Civil War. That the EEC did not—and that EU citizenship still does not—entail (full) political rights is in no way exceptional either. Following Schönberger, the main task of early federation is to eliminate the alien status of citizens of the different Member States: “In its beginnings, the main task of federal citizenship is to end the alien status of citizens of the sister states. (...) In founding times, the dimension of political participation remains secondary compared to such more fundamental problems”<sup>177</sup>.

The obvious objection that because the EEC only granted these rights to economically active citizens, it cannot be understood as constituting federal citizenship, is dismissed by Schönberger. Federal citizenship—not merely for young federations—tends to be conditional on the mobile citizens not being a social burden for the host Member States<sup>178</sup>. In the Articles of Confederation, the conditional status of free movement was expressed in Article IV:

“The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, *paupers, vagabonds, and fugitives from justice excepted*, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and

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<sup>174</sup> *ibid* 67.

<sup>175</sup> *ibid* 76.

<sup>176</sup> *ibid* 62.

<sup>177</sup> *ibid* 75.

<sup>178</sup> *ibid* 74.

commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof?.

“Poor migrants”, Schönberger argues, did not enjoy the rights of the yet untitled interstate citizenship of the United States under the Articles of Confederation and they were to wait a long time to have equal rights with the well-off citizens of the United States<sup>179</sup>. In the United States, it was only in 1941 with *Edwards v. California*, that free movement of US citizens within the United States could no longer be restricted for indigent citizens<sup>180</sup>. In Switzerland, the equality of indigent Swiss citizens was only fully accomplished in 1975<sup>181</sup>. Not merely young federations but also federations that have evolved into federal states tends to exclude ‘poor migrants’ from the benefits of interstate citizenship for significant periods. The EU, Schönberger argues, should rather be understood as exceptional with regard to how fast it has broken down the conditions of self-sufficiency to free movement in its case law in comparison with other young federations<sup>182</sup>.

## **B: The Failure of the Fouchet Plan**

With the Treaty of Rome, an economic federation was successfully established between the Six, but that did not silence the question of how to establish a political framework for common European defence. After the failure of the EDC and the EPC, a number of international treaties—none of them federal in nature—were concluded in order to solve the immediate problem of security in Europe, most importantly the Western European Union (WEU) and the inclusion of West Germany in NATO on 6 May 1955<sup>183</sup>. The security of Western Europe was thereby guaranteed by NATO (and hereunder the WEU), meaning ultimately by the military might and nuclear guarantee of the United States. Nevertheless, the idea of a European defence federation—or a ‘political union’<sup>184</sup> as it became known—was not abandoned. Interestingly, it was the French, led by de Gaulle, who in 1960 took the initiative for a European defence union with what

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<sup>179</sup> *ibid* 68.

<sup>180</sup> *ibid* 71; Sutherland, “Commerce, Transportation and Customs”, 297.

<sup>181</sup> Schönberger, “European Citizenship as Federal Citizenship”, 71.

<sup>182</sup> *ibid* 77.

<sup>183</sup> Fursdon, “The Role of the European Defence Community”, 236.

<sup>184</sup> It should be noted that from the perspective of the theory of the federation, the identification of a ‘political union’ with a ‘defence union’ is problematic because defence unions and economic unions alike are political unions whose most fundamental aim is the preservation of the political autonomy of its Member States.

became known as the Fouchet Plan(s)<sup>185</sup>. De Gaulle made it clear shortly after taking office in January 1959 that he disapproved of the contemporaneous organisation of NATO because it did not reflect his plans for the reestablishment of France as a world power<sup>186</sup>. De Gaulle envisioned France, together with Britain, as a European world power independent from the United States, with access to nuclear weapons<sup>187</sup>. As part of his grand design was a plan for expanding the *acquis communautaire* into a political and military project<sup>188</sup>. The Fouchet Plan was de Gaulle's vision for a European defence federation with France—the sole Member State with access to nuclear power—as the hegemon.

In Forsyth's interpretation, the first Fouchet Plan from November 1961 was “the strongest, clearest and most consistent call for a classic defensive confederation for western Europe” in the post-WWII era<sup>189</sup>. Whether this is a correct analysis or whether the EPC/EDC takes the price<sup>190</sup> is a hypothetical question seeing that both projects failed. What is clear is that both the first Fouchet Plan and the Heads of States in their official communiques in the lead up to the plan spoke in the clear language and intent of a classic defensive federation. A few examples will suffice. After a meeting in Bonn on 18 July 1961, the Heads of State of the Six, after taking note of the reports of the Study Committee, issued a statement declaring that they were

“anxious to strengthen the political, economic, social and cultural ties that exist between their peoples, especially in the framework of the European Communities, and to advance towards the union of Europe; convinced that only a united Europe, allied to the United States of America and to other free peoples, is in a position to face the dangers that menace the existence of Europe and the whole free world (...) have decided (...) to give shape to the will for political union already implicit in the Treaties establishing the European Communities”<sup>191</sup>.

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<sup>185</sup> A Teasdale, “The Fouchet Plan: De Gaulle's Intergovernmental Design for Europe” (2016) *LEQS* 117.

<sup>186</sup> F Bozo, *Two Strategies for Europe: De Gaulle, the United States and the Atlantic Alliance* (Lanham MD, Rowman & Littlefield Publishers, 2001), 9ff; Teasdale, “The Fouchet Plan”, 9-10.

<sup>187</sup> Bozo, *Two Strategies for Europe*, 34-50; Teasdale, “The Fouchet Plan”, 9-10.

<sup>188</sup> Bozo, *Two Strategies for Europe*, 49, 78, 254.

<sup>189</sup> Forsyth, *Union of States*, 180.

<sup>190</sup> After all, the Fouchet Plan did not envision a mutual guarantee of territory and the EPC/EDC proposed the fusion of all European military power into a single federal entity.

<sup>191</sup> Communiqué by the Heads of State of the Six, issued after a meeting in Bonn on 18 July 1961 (reprinted in European Parliament—Political Committee, *Towards Political Union: A Selection of Documents with a Foreword by Mr. Emilio Battista*, General Directorate of Parliamentary Documentation and Information, January 1964, 10).

In the first Fouchet plan, the preamble speaks of the High Contracting Parties being resolved to lay the foundation for a common destiny “to be henceforth irrevocably shared; resolved to this end, to give statutory form to the union of their peoples, in accordance with the declaration in Bonn on 18 July 1961”<sup>192</sup>. In Title I, “Union of the European Peoples”, Article 1, it is declared that “By the present Treaty, a union of States, hereafter called ‘the Union’, is established. The Union is based on respect for the individuality of the peoples and of the Member States and for equality of rights and obligations. It is indissoluble”<sup>193</sup>. In contrast to the ‘supranational’ institutional structure of the EEC—embodied in the Commission and the ECJ—the Fouchet Plan’s imagined an ‘intergovernmental’ design for the Union closer to the classical federal diet (Chapter 3) with the Council as the strongest institution taking decisions by unanimity<sup>194</sup>.

The response to the Fouchet Plan, however, was not univocally applauded by the other Five<sup>195</sup>. The strongest opposition came from the Dutch and the Belgian governments, both of whom were critical because they saw the Fouchet Plan as a threat both to the EEC and its governmental principles of ‘supranationalism’ and ‘independence’ and the close relationship between Europe and the United States in NATO<sup>196</sup>. The Dutch and Belgians further believed that the United Kingdom, who had applied for membership of the EEC in August 1961, should be included in the discussions for ‘political union’ of Europe<sup>197</sup>. While the response from the delegations of Italy, Germany and Luxembourg was not a blank opposition, they shared the Dutch and Belgian concern regarding the weakening of NATO by the Fouchet Plan<sup>198</sup>. These differences of opinions were further radicalised by an intervention by the European Parliament in December 1961—authored by René Pleven—arguing for the use of qualified or simple majority voting by the Council and the granting of new significant powers to the European Parliament and the ECJ<sup>199</sup>.

In response to the widening chasm, the French tabled a revised version of the Fouchet Plan in January 1962, the *second* Fouchet Plan, which, to the general astonishment

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<sup>192</sup> Negotiations on a Draft Treaty for the Establishment of a Political Union, (first Fouchet Plan), 2 November 1961 (reprinted in European Parliament, *Towards Political Union: A Selection of Documents with a Foreword by Mr. Emilio Battista*, General Directorate of Parliamentary Documentation and Information, January 1964, 11-2).

<sup>193</sup> *ibid* 12.

<sup>194</sup> Teasdale, “The Fouchet Plan”, 29; Forsyth, “The Relevance of Classical Approaches”, 40.

<sup>195</sup> Teasdale, “The Fouchet Plan”, 30.

<sup>196</sup> *ibid* 9, 17, 24.

<sup>197</sup> *ibid* 31.

<sup>198</sup> *ibid* 21, 29-32.

<sup>199</sup> *ibid* 36. See also the Recommendation of the European Parliament (reprinted in *Towards Political Union: A Selection of Documents with a Foreword by Mr. Emilio Battista*, 15-7).

and anger of the Five, included no concessions but hardened the French position significantly<sup>200</sup>. In response to the second Fouchet Plan, the Five quickly agreed and signed a Counter-Treaty in February 1962 for a 'European Union' of a stronger and even more explicit federal design. Article 1 of the Counter-Treaty states that "By the present Treaty, a union of States and of European peoples, hereafter called 'the European Union', is established. The European Union is based on the principle of the equality of the rights of and obligations of its members"<sup>201</sup>. The European Union proposed by the Five was much closer to the Pleven Plan than any of the Fouchet Plans. The Union's power should not prejudice the powers of the EEC, it would adopt a common defence policy within the framework of NATO, decisions in the Council would be taken by qualified majority voting, and the powers of the ECJ and the European Parliament were to be strengthened/included<sup>202</sup>. The proposal of the Five further entailed an automatic review of the Treaty when the EEC moved to the third and last stage of its transitional development in preparation of which the Council was to draft a constitution with highly integrationist goals: the extension of qualified majority voting, introduction of direct election to the European Parliament, and extending the powers of the ECJ<sup>203</sup>. The German delegations had further hoped to include European citizenship as a formal status<sup>204</sup>.

The proposal of the Five was not acceptable to the French and despite the efforts of the Italians to reach a reconciliation, the negotiations collapsed at the last meeting in Paris on 17 April 1962. At this meeting, the Dutch and the Belgians made it clear that their price for any deal was UK membership in both the EEC and the proposed European Union<sup>205</sup>. No agreement was reached at this meeting and the negotiations broke down never to be resumed. Less than a year later, De Gaulle vetoed the UK's accession to the EEC. When the Germans and the Italians launched a project of a less formal political union in 1964, this was again blocked by the French<sup>206</sup>. When the 1966 deadline for the beginning of the third stage of the transitional development and for the wider introduction of qualified majority voting, the French boycotted the meetings, initiating

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<sup>200</sup> Teasdale, "The Fouchet Plan: De Gaulle's Intergovernmental Design for Europe", 36-40.

<sup>201</sup> Proposal of the Five (reprinted in *Towards Political Union: A Selection of Documents with a Foreword by Mr. Emilio Battista*, 25-39).

<sup>202</sup> Teasdale, "The Fouchet Plan: De Gaulle's Intergovernmental Design for Europe", 41.

<sup>203</sup> Proposal of the Five (reprinted in *Towards Political Union: A Selection of Documents with a Foreword by Mr. Emilio Battista*, 3-33); Teasdale, "The Fouchet Plan: De Gaulle's Intergovernmental Design for Europe", 41.

<sup>204</sup> Teasdale, "The Fouchet Plan: De Gaulle's Intergovernmental Design for Europe", 41.

<sup>205</sup> *ibid* 46-8.

<sup>206</sup> *ibid* 53.

the ‘empty chair crisis’ and enforcing *de facto* Member State veto power with the Luxembourg Compromise.

### **C: Federal Teleology and ‘Integration through Law’**

With the failure of the Fouchet Plan, the idea of common European defence was abandoned for a number of years. As a result, the European federation that emerged came to have welfare, the economy, as its primary—and initially solitary—aim. In the Treaty of Rome, the aim of the Community, as defined by Article 2, belongs exclusively to the federal aim of welfare:

“The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it”.

When Forsyth published *Union of States* in 1981, the EEC was a ‘pure’ economic union or welfare federation. Until the conclusion of the Maastricht Treaty in 1992, the EEC had welfare—in its broad definition articulated in EEC Article 2—as its *sole* aim. Before the introduction of qualified majority voting with the Single European Act (SEA), the substantive aim of welfare, the *raison d’être* of the EEC was primarily advanced by the teleological interpretations of the Treaties by the ECJ—the so-called ‘integration through law’—starting with its two seminal judgements—*Van Gend en Loos* (1963) and *Costa v ENEL* (1964)—delivered in the two years following the breakdown of the Fouchet Plan.

The authority of EU law claimed in these two judgements relies heavily on the federal ‘spirit’ of European integration<sup>207</sup>, first expressed in the Pleven Plan and the Beyen Plan, the EDC/EPC and the EEC, and which had been reaffirmed in negotiations over the Fouchet Plan by all the Member States, including the French, and even more strongly in comments by the European Parliament. An argument to this effect has been presented by the legal historian Morten Rasmussen: “federalist ideology spurred a particular legal thinking about the ECJ as having a constitutional nature and therefore constitutional tasks. The ideology provided a particular way of looking at the role of the ECJ and the

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<sup>207</sup> Forsyth, “The Relevance of Classical Approaches”, 39.

European treaties, which would pave the way for legal activism by the new ECJ”<sup>208</sup>. Rasmussen argues that the notion of the special nature of the community invoked in the two seminal judgements had historical roots in the European federalist ideas of the 1940s and 1950s<sup>209</sup>. The federalist ideology and the experience of the failure of the EDC/EPC, according to Rasmussen, led to the development of a constitutional understanding of the ECJ during the 1950s shared amongst a transnational network of European legal actors, many of them Christian democrats<sup>210</sup>. Notwithstanding that the ECJ definitely was an activist Court, Rasmussen argues, it is a mistake to argue that the interpretations of Community law in *Van Gend en Loos* and *Costa* is a pure ‘invention’ of the ECJ grabbed out of thin air<sup>211</sup>.

In both *Costa* and *Van Gend en Loos*, the ECJ interprets the EEC Treaty as a federal constitutional treaty. A federal treaty is always concluded with the view to being a new political existence and thus of permanent character (“a community of unlimited duration”). It always creates federal institution(s) and tends to represent its Member States as a unitary political existence to the outside world (“having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane”). It constitutes a new internal public law order (“the Community constitutes a new legal order”). A federation always limits the sovereign powers of its Member States (“[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” and “the states have limited their sovereign rights”). Finally, it establishes a public law relation with the citizens of its Member States via most often non-formalised federal citizenship (“created a body of law which binds both their nationals and themselves” and “the subjects of which comprise not only Member States but also their nationals”)<sup>212</sup>. Notwithstanding that federalism is not mentioned by the ECJ, in both *Costa* and *Van Gend en Loos* the EEC is interpreted as a federal union of states.

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<sup>208</sup> Rasmussen, “The Origins of a Legal Revolution”, 90.

<sup>209</sup> *ibid* 97

<sup>210</sup> *ibid* 91-7.

<sup>211</sup> *ibid* 96-7.

<sup>212</sup> C-6/64 - *Flaminio Costa v E.N.E.L.* [1964]; C-26/62 - *Van Gend en Loos* [1963].

## D: The Introduction of Security as a Substantive Aim

As a consequence of the collapse of two grand post-WWII projects for more or less classical defence federations in Europe—the EDC/EPC and the Fouchet Plan—the EEC/EU has developed as a federation with welfare or the economy as its primary aim. That being said, the ideas of common European defence did never completely disappear. After the French Presidency went from De Gaulle to Georges Pompidou in 1969—elected on a pro-European manifesto—the stalemate that had developed after the failure of the Fouchet Plan could be remedied. British membership of the EEC became possible and some of the ideas expressed in the Pleven Plan and the Fouchet Plan could be taken up again<sup>213</sup> in the project of European Political Cooperation that since 1970 has been part of the informal relationship between the Member States of the EEC but separate from the legal order of the Community<sup>214</sup>. Before SEA, the European Political Cooperation had no formal legal standing<sup>215</sup> and even under SEA, it was formally separate from the EEC. It created no or limited<sup>216</sup> formal legal obligations and since it was excluded from the jurisdiction of the ECJ<sup>217</sup>, it was lacking a federal enforcement mechanism<sup>218</sup>. Furthermore, military security and defence were not included as substantive aims of SEA<sup>219</sup>.

It was not before the Maastricht Treaty in 1992 that the European Political Cooperation was included as one of the three pillars of the European Union and *security* became a substantive aim of the EU: “The Union shall set itself the following objective (...) to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence (...) to

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<sup>213</sup> Teasdale, “The Fouchet Plan”, 53. For a restatement of the legacy of the Pleven Plan and the Fouchet Plan, see especially “The European Commission on the Future of the European Community” (Brussels, 1 July 1968) and the Davignon Report (Luxembourg, 27 October 1970) both reprinted in AG Harryvan and J van der Harst (eds) *Documents on European Union* (London, MacMillan Press, 1997). See also the *Draft Treaty establishing the European Union* (14 February 1984), the so-called ‘Spinelli Draft’, accessible via: [http://www.cvce.eu/en/obj/draft\\_treaty\\_establishing\\_the\\_european\\_union\\_14\\_february\\_1984-en-0c1f92e8-db44-4408-b569-c464cc1e73c9.html](http://www.cvce.eu/en/obj/draft_treaty_establishing_the_european_union_14_february_1984-en-0c1f92e8-db44-4408-b569-c464cc1e73c9.html) [last accessed 13 March 2018].

<sup>214</sup> SJ Nuttall, *European Political Co-operation* (Oxford, OUP, 1992), 13ff; W Wessels, “EPC After the Single European Act: Towards a European Foreign Policy via Treaty Obligations” in M Holland (ed) *The Future of European Political Cooperation* (New York, Palgrave, 1991), 143.

<sup>215</sup> Nuttall, *European Political Co-operation*, 13; R Dehousse and JHH Weiler, “EPC and the Single Act: from Soft Law to Hard Law?” in M Holland (ed) *The Future of European Political Cooperation* (New York, Palgrave, 1991), 121-2.

<sup>216</sup> Weiler and Dehousse, “EPC and the Single Act: from Soft Law to Hard Law?”, 129-31.

<sup>217</sup> Nuttall, *European Political Co-operation*, 13; Wessels, “EPC After the Single European Act: Towards a European Foreign Policy via Treaty Obligations”, 145.

<sup>218</sup> Weiler and Dehousse, “EPC and the Single Act: from Soft Law to Hard Law?”, 131.

<sup>219</sup> With the Single European Act the general aim of the European Communities (EEC, ECSC and EURATOM) and the European Political Co-operation is “to contribute together to making concrete progress towards European unity” (Single European Act, Article 1).

develop close cooperation on justice and home affairs”<sup>220</sup>. These two objectives correspond to the double political subject to which a federal aim of security always is directed: *external* security of the Union as a whole (‘common foreign and security policy’) and the *internal* security of its Member States (‘cooperation on justice and home affairs’). The double aims of security were constituted as respectively the second and third pillar of the EU by the Maastricht Treaty: Common Foreign and Security Policy and Police (CFSP) and Police and Judicial Co-operation in Criminal Matters (PJCC).

Notwithstanding that the three pillars introduced by the Maastricht Treaty were governed by one institutional structure, it only constituted a notional entity<sup>221</sup>. In contrast to the first pillar of the EU—the amended European Communities—the second and third pillars were only to a limited degree governed by the institutional structure set up with the EEC<sup>222</sup>. They were almost exclusively governed by the European Council and the legal effect of its decisions were only binding on the level of international law. It was therefore left up to the Member States to determine the legal effect of these decisions within national law. Nevertheless, since the second and third pillars relied on the first, most importantly with regard to their budgets, a clear-cut distinction between the three pillars was always dubious. With the Treaty of Amsterdam, several substantive areas of the third pillar were transferred to the first pillar. Finally, with the Treaty of Lisbon, the Union replaced and succeeded the Community and assumed a legal personality. It is not before the Lisbon Treaty that the EU truly had security as a substantive aim. That being said, the powers of the EU within common security are limited when compared with classical defence federations. Defence unions tend to have *jus belli* and guarantee the territorial integrity of its Member States. Neither of these fundamental aspects are present in the EU even after the Lisbon Treaty. In the context of the EU, national security remains a reserved competence of the Member States<sup>223</sup>. To this day, the EU remains an economic federation with defence and military security as a subsidiary aim.

In 2016-2017, the project of a common European defence union, however, has once again gathered momentum<sup>224</sup>. The growing isolationism of the United States under

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<sup>220</sup> Maastricht Treaty, Article B.

<sup>221</sup> D Curtin, “The Constitutional Structure of the Union: A Europe of Bits and Pieces” (1993) *CMLR* 30, 24.

<sup>222</sup> S Peers, *EU Justice and Home Affairs Law*, third edition (Oxford, OUP, 2011), 15.

<sup>223</sup> Article 4(2) TEU.

<sup>224</sup> See e.g., Rome Declaration of the Leaders of 27 Member States and of the European Council (the European Parliament and the European Commission Brussels, 25 March 2017), available via: <http://www.consilium.europa.eu/en/press/press-releases/2017/03/25/rome-declaration/pdf> [last accessed 15 March 2018].

President Trump and the prospect of the UK (a long-time critic of stronger European defence) leaving the EU have been important motivational factors for a positive commitment of EU Member States to stronger cooperation on defence<sup>225</sup>. Whether these initiatives over time will lead to the establishment of a genuine European defence federation on a par with the ones imagined in the early days of European integration remains to be seen.

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<sup>225</sup> See e.g. the European Commission's White Paper on the Future of Europe: "Reflections and scenarios for the EU27 by 2025" (1 March 2017), available via: [https://ec.europa.eu/commission/sites/beta-political/files/white\\_paper\\_on\\_the\\_future\\_of\\_europe\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf) [last accessed 15 March 2018] and "EU to spend €1.5bn a year on joint defence" (EUobserver, Brussels, 7 June 2017).

# State Transformation and Teleology

## *The foundations and principles for the exercise of public power*

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### INTRODUCTION

The federation is a discrete political form and for that reason the foundations and principles for its exercise of public power are different from that of the state. For the state, the core concept of public law is sovereignty. Power and authority is generated in the relationship between the people and its representatives and this relationship is the foundation for the public power of the state. The federation, like the state, is a political association. Sovereignty, however, is not at the heart of its public law. Public power is exercised in the federation but we need to deemphasise the question of sovereignty to understand the principles in accordance with which public power is wielded and regulated. The federation has its own principles for the institutionalisation of public powers and the activity of governing. This chapter is concerned with understanding the foundations and principles for the exercise of public power in the federation and in the EU. The aim of this chapter is to understand how the federation in general, and the EU in particular, governs itself as a political order without sovereignty. The argument presented is that the federation has a public law structure that is fundamentally different from that of a state. For that reason, it is a fruitless endeavour to study the EU based on the assumption that the same logic that applies to the state will be replicated ‘beyond the state’ in the EU.

In contrast to the state, the federation is characterised by a dual and composite governmental structure: the Union institutional structure and the Member States. Both parts of this dual governmental structure differ from that laid out in the general theory of the state. The Union institutions do not amount to a new ‘super-state’ nor do its composite states govern themselves as independent sovereign states. Instead they govern themselves as ‘Member States’. ‘Member-statehood’ can in the case of the EU be characterised as ‘constrained statehood’ and should be understood as an integral part of the post-WWII constitutional project of ‘constrained democracy’. Another fundamental difference between the federation and the state as a political form is that the Union institutional structure is characterised by two governmental principles that differentiate it

from a state: *teleology* and *specialisation*. A federation is always constituted in order to obtain the fundamental aims common to its Member States. This means that the authority of the Union institutions is derived from and limited in relation to the realisation of that aim.

This chapter is structured as follows. After a preliminary discussion of the public law structure of the federation (I), the chapter goes on to discuss the principles for the exercise of public power by the Member States (II) and by the Union institutions (III).

## **I: THE PUBLIC LAW STRUCTURE OF A FEDERAL UNION**

### **A: Federal Duality**

The most important structural features of federal public law are the dual foundations of authority and its dual autonomous but interdependent ‘governments’. The federation as a political form is characterised by two qualitatively distinct and autonomous sources of public power: the political existence of the Union and the political existence of the Member States<sup>1</sup>. Whereas the state is a single political existence, the federation is a dual political existence. The federation is a ‘community of communities’ or, in Montesquieu’s famous definition a ‘society of societies’<sup>2</sup>. The implication for the exercise of public power is that whereas the state governs itself as a unity, the federation governs itself as a plurality. Consolidated federal states carry the mark of federalism in their exercise of public power. This is manifest in a significant division of public powers between the level of the composite states and the Union government. The principles of federal government in a federation and in federal states are therefore in many ways similar. A fundamental difference, however, relates to the foundation of authority. In a consolidated federal state, like present-day United States, the question of sovereignty has been irrevocably resolved and there is ultimately only *one* source of public power: the people or nation as one. The Member States are no longer an autonomous source of authority. In the case of the United States, ‘*We, the People*’ no longer carries an ambiguity between state peoples and one nation. With the end of the Civil War, the Constitution of the United States got a *nationalist* foundation. Importantly, this is manifest in the ratification of the 14<sup>th</sup> Amendment declaring for the first time the superiority of national citizenship over state citizenship and ignoring the old federalist ratification process for constitutional amendments. With the 14<sup>th</sup> Amendment, in the words of Bruce Ackerman, it was made clear “that the will of the nation was independent of, and superior to, the will

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<sup>1</sup> O Beaud, *Théorie de la Fédération* (Paris, PUF, 2007), 348.

<sup>2</sup> *ibid* 102-3.

of the states”<sup>3</sup>. Governmental authority in the United States was henceforth derived, not from the states, but from the United States as a nation. In contrast, the federation—being a dual political existence—has two sources of its public power (Chapter 1).

The federation, as the federal state, has two distinct ‘governments’ that exercise public power over the same subjects and within the same territories<sup>4</sup>. The structure of the constitutional framework of a federation is therefore dual, namely, the institutional structure of the Union and the institutional structure of the Member States. The federation as a concept is ambivalent in that it at the same time refers to a union of states (the federation as political association) *and* to an institutional structure that is autonomous from the Member States (the federation as institution)<sup>5</sup>. What is important to understand is that in contrast to a state there is no identity between the federation as political association and the federation as institution. The federation as a political association, a union of states, is governed by a dual governmental structure composed of the Union institutions (the federation as institution) and the constitutional regimes of the Member States.

This conceptual ambivalence also applies to the EU that simultaneously refers to the union of the Member States (the EU as political association) and to the institutional structure that is independent from the Member States (the EU as institution). The EU as a union of states is governed by the institutional structure of the Union (Council, Parliament, Commission, the ECJ, the ECB etc.) *and* the institutional structures of the Member States. As is the case for other federations, the government of the EU (as a political association) is characterised by the exercise of public power by a dual governmental structure: “[t]wo systems, the EU and the Member States, are established with each having a right to govern or rule”<sup>6</sup>. Together they make up the government of the EU as a union of states. The duality of public powers in the EU is manifest in the Treaties in the explicit division of competences between the Union and the Member States. Following the Treaties, some public powers are exclusively exercised by the Union<sup>7</sup> and some competences are shared between the Member States and the Union<sup>8</sup>. All

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<sup>3</sup> B Ackerman, *We the People I: Foundations* (Cambridge MA, The Belknap Press of Harvard University Press, 1991), 81.

<sup>4</sup> Beaud, *Théorie*, 348.

<sup>5</sup> *ibid* 103.

<sup>6</sup> D Chalmers, “European Restatements of Sovereignty” (2013) *LSE Law, Society and Economy Working Papers* 10, 6.

<sup>7</sup> Article 3 TFEU, Article 128 TFEU.

<sup>8</sup> Article 4 TFEU.

competences not conferred upon the Union remain the competences of the Member States<sup>9</sup>.

### **B: Independence and Interdependence**

The dual public powers of a federation are characterised by a ‘mixed autonomy’ or by the principles of *independence* and *interdependence*<sup>10</sup>. The Member States come together in a federation to preserve themselves politically. As such, their statehood and autonomy are not dissolved. However, it is not merely the Member States vis-à-vis the Union but also the Union vis-à-vis the Member States that has an autonomous status. The federation is characterised by a *double autonomy*: the autonomy of the Member States and the autonomy of the Union as a whole<sup>11</sup>. By coming together in a federation, the Member States give birth to a new political association that is autonomous from them<sup>12</sup>. A federal union of states is different from the sum of its parts.

The difference between a federation and the sum of its parts can be established not merely because many federations, including the EU, govern through majority decision or qualified majority decision within central areas of state power<sup>13</sup>. Even in cases where a decision is made on the basis of unanimity and all the Member States have a right to veto, there is a fundamental difference between a federation decision and a unanimous decision of international law because the decision of the federation needs no ratification through the individual Member States: “More precisely, every Member State is constitutionally (because the federal constitution is a component of its own constitution) bound directly and in public law terms by the federation decision”<sup>14</sup>. The federal constitutional contract gives birth to an autonomous legal order and a new source of law (*Rechtsquelle*)<sup>15</sup> and institutionalises a public authority which is autonomous from the public authorities of the Member States and directly binding on them without further ratification.

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<sup>9</sup> Article 4(1) TEU.

<sup>10</sup> Beaud, *Théorie*, 183-4.

<sup>11</sup> *ibid* 185.

<sup>12</sup> *ibid* 156.

<sup>13</sup> Under the Ordinary Legislative Procedure, the Council votes by qualified majority (55% of EU Member States representing 65% of the EU population). When the Council votes on a proposal that is made by neither the Commission nor the High Representative, there is a higher threshold (72 % of EU Member States vote in favour representing at least 65 % of the EU population).

<sup>14</sup> C Schmitt, *Constitutional Theory* (Durham and London, Duke University Press, 2008), 401, amended translation (or. *Verfassungslehre*, 385). See also ER Huber, *Deutsche Verfassungsgeschichte seit 1789, Band II: Der Kampf um Einheit und Freiheit, 1830 bis 1850* [hereinafter Huber, *DV II*] (Stuttgart, Verlag W. Kohlhammer, 1968), 294-5; C Hughes, *Confederacies: An Inaugural Lecture Delivered in the University of Leicester 8 November 1962* (Leicester, Leicester University Press, 1963), 13.

<sup>15</sup> Schmitt, *Constitutional Theory*, 399.

An interpretation of the EEC along those lines was made by the German Constitutional Court in 1967 with regard to the status of Community law. After acknowledging that the Community is neither a state nor a federal state but rather a Community of a ‘special nature’ committed to the process of ever closer integration to which Germany together with the other Member States has ‘transferred’ sovereign rights, the German Constitutional Court argued that “A new public authority has thereby been created, which is autonomous and independent vis-à-vis the public authorities of each Member State”<sup>16</sup>. As a consequence of that, the Court continues, “its acts do not require approval (‘ratification’) by the Member States, nor can they be annulled by those States. The EEC Treaty to a certain extent constitutes the Constitution of the Community”<sup>17</sup>. The Community “forms its own legal order which is part of neither public international law nor the national law of the Member States. Community law and municipal law of Member States ‘are two internal legal orders which are distinct and different from each other’”<sup>18</sup>. By the act of federating, the Member States have given birth to a new legal order which, though autonomous, is not external to them: “The effect of the Treaty, following its ratification in the Federal Republic, was to create an autonomous legal order inserted into the municipal legal order and enforceable by municipal courts”<sup>19</sup>. The European legal order is a new legal order *and yet it is internal to the Member States*.

The interdependence of the legal order of the Union and those of the Member States is manifest in that they, though autonomous, are not strangers to one another and accept parts of the others’ legal orders as their own. As is the case for all federations, the EU and its Member States are in an internal public law relation to one another<sup>20</sup>. This interdependence has a clear institutional expression. The classical example given in EU law is that of national courts that through the preliminary reference procedure also make up a component part of the European legal order. EU law is enforced by national courts acting as Union courts. Even more striking, perhaps, is the case of the central banks of the Eurozone Member States. After the creation of the European System of Central Banks (ESCB), the central banks of the Member States are completely independent from the Member States. More akin to branches of the ESCB, they answer only to the European Central Bank (ECB). The government of money, in the vocabulary of Madison,

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<sup>16</sup> BVerfG 1 BvR 248/63 and 216/67 [1967]. The translation here cited is from Andrew Oppenheimer (ed), *The Relationship between European Community Law and National Law: The Cases* (Cambridge, CUP, 1994), 413, emphasis added.

<sup>17</sup> *ibid* emphasis added.

<sup>18</sup> *ibid* emphasis added.

<sup>19</sup> BVerfG 2 BvR 225/69 [1971], 416.

<sup>20</sup> Beaud, *Théorie*, 192.

is a ‘national’ function of the ‘mixed regime’ of the EU. Another illustration, Union institutions are to a large extent made up by Member State officials. The Council of Ministers is made up of national ministers from each of the Member States (sitting in 10 configurations with regard to specialization), the European Council comprises the Heads of the Member States/Member State governments and the European Court of Justice comprises one judge from each Member State and appointed by common accord of the Member State governments<sup>21</sup>. The official personnel of the Union is to a large extent also part of Member State governments or bureaucracies. On a very concrete level, Union institutions are not ‘alien invaders’—they are mostly made up by Member State officials. In this way, the Member States govern themselves collectively by their own representatives through the EU.

Notwithstanding the institutional interdependence of the Union institutions and the Member States, they constitute two autonomous governmental entities characterised by different principles for the exercise of public powers. The exercise of public power by the Union and by the Member States is regulated in fundamentally different ways and as such there is an asymmetry between the two levels of ‘government’. What is shared between them, however, is that neither the Union nor the Member States exercise public power as sovereign states. In the rest of this chapter, the principles for the exercise of public power by the Union and by the Member States will be discussed.

## **II: MEMBER STATE TRANSFORMATION**

### **A: Member-Statehood and State Transformation**

When previously independent states decide to come together in a federation or accede to one (Chapter 4), they undergo a process of state transformation manifest in a change of their constitutional orders. This constitutional change of the Member States is not necessarily manifest in a change of their constitutional laws<sup>22</sup> (Chapter 1). Whether discernible by a purely legal analysis or not, the constitutional change is manifest in the transformation of the Member States’ constitutions in the *positive sense*<sup>23</sup>, namely the fundamental characteristics of how they govern themselves as political associations. By becoming Member States, the states of a federation are given a fundamentally new status.

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<sup>21</sup> Article 253 TFEU.

<sup>22</sup> Schmitt, *Constitutional Theory*, 384; ER Huber, *Deutsche Verfassungsgeschichte seit 1789, Band I: Reform und Restauration 1789 bis 1830* (Stuttgart, Verlag W. Kohlhammer, 1957) [hereinafter Huber, *DV I*], 661.

<sup>23</sup> Schmitt, *Constitutional Theory*, 384.

Notwithstanding the fundamental political change inherent in the process of state transformation, it does not eradicate the political autonomy of the Member States. In contrast to a decentralised state, the Member States are not mere administrative regions and neither does the process of state transformation deprive the Member States of their governmental, administrative or other institutional apparatuses. The Member States have a ‘political dignity’ that the federal constitutional treaty is meant to protect<sup>24</sup>. That being said, the “Member State of a federation is not a state in the classical sense”<sup>25</sup>.

The process of state transformation has two aspects: *interstate* (the transformation of the relations between the contracting states that have become Member States) and *intrastate* (the transformation of the internal constitutional arrangements of the Member States) (Chapter 1). At a fundamental level, the *interstate* dimension of state transformation is manifest in that the Member States no longer relate to each other or each other’s citizens as aliens. Their relations are henceforth (primarily) governed by the internal public law of the Union instead of international law. For that reason, the dichotomies of internal/external and national/alien pertaining to the theory of the state no longer apply to the relationship between the states. The Member States are ‘sister states’—the federation is “like a big family within which all the states are brothers and sisters”<sup>26</sup>. Being a Member State entails that many if not most of its decisions must be taken, not as a fully autonomous ‘sovereign’ entity, but as a member of a common community. Amongst other things, this entails accepting the validity of judgements made in other Member States<sup>27</sup>. The *intrastate* dimension of state transformation originates in the necessity of incorporating and accommodating the Union constitution in the constitutional orders of the Member States. The federal constitution incorporates the Member States in their totality and makes up a part of the domestic constitutional orders (Chapter 1). A part of the federal constitution thus lives at the heart of the Member States’ constitutions. An important consequence of this state transformation is that the Member States no longer have full control over their own citizens and borders. Being Union citizens, the citizens of the Member States, subject to some conditions and limitations, will have rights of free movement and the right to be treated on equal terms with the citizens of host Member States (Chapters 1 and 2).

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<sup>24</sup> Beaud, *Théorie*, 102.

<sup>25</sup> *ibid* 204 my translation

<sup>26</sup> *ibid* 215, my translation.

<sup>27</sup> *ibid* 207ff.

In the context of the EU, the process of state transformation that the Member States have undergone has been described in detail by Christopher Bickerton. European integration, in Bickerton's words, entails a transformation of the European *nation*-states into another type of state, the *Member State*. "Central to this process of transformation", Bickerton writes "is the way the state–society relationship has been *relativized*, becoming only one relationship amongst others constitutive of statehood. In contrast to traditional nation-states, national governments of member states understand their power and identity as dependent upon their belonging to a wider group or community"<sup>28</sup>. That is, the authority generating nexus between people and government that characterises state sovereignty as a relational concept is relativized due to EU membership. The Member State governments understand their authority and the activity of governing not merely in relation to their own peoples but also in relation to the EU and the other Member States.

This process of state transformation determines the Member States' decision-making procedures and their institutional apparatuses<sup>29</sup>. A central aspect of Bickerton's argument relates to the role played by Member State representatives in EU institutions<sup>30</sup>. Even in areas that traditionally are thought to remain exclusively under the control of the Member States, such as defence and policing, the Member States do not act as traditional state theory would suggest based on national sovereignty<sup>31</sup>. The EU does not work as a competition between different egotistical national actors. On the contrary, the national representatives tend to seek broad compromises and the EU institutions are therefore better understood as 'consensus generating machines'<sup>32</sup>. The states are at the heart of the EU, Bickerton argues, but they do not behave as independent nations.

The concept of 'Member State', following Bickerton, is not merely a legal title but a distinctive form of *status* or *statehood*<sup>33</sup>. The most important characteristic of EU member-statehood consists in the idea of the self-limitation of the state regarding its sovereign powers through external frameworks of rule<sup>34</sup>. 'Member-statehood', following Bickerton, consists in the voluntary consent of the Member States to constrain their sovereign powers through the EU<sup>35</sup>. It is a form of 'constrained statehood'. Bickerton wishes to distinguish 'member-statehood' from other forms of constitutionally limited government

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<sup>28</sup> CJ Bickerton, *European Integration: From Nation-States to Member States* (Oxford, OUP, 2012), 12.

<sup>29</sup> *ibid* 12.

<sup>30</sup> *ibid* 46-47.

<sup>31</sup> *ibid* 28-33.

<sup>32</sup> *ibid* 31.

<sup>33</sup> *ibid* 51.

<sup>34</sup> *ibid* 61.

<sup>35</sup> *ibid* 64.

in that the former appears as being *external* to the state whereas the latter is an *internal* expression of sovereignty<sup>36</sup>. The important difference consists in whether the state binds the exercise of its sovereign power via a national constitution ('internal constraint') or whether the state binds the exercise of its sovereign power via EU membership ('external constraint').

However, this distinction oversimplifies the constitutional transformation of the EU Member States by exclusively focusing on interstate state transformation. In a federation, the legal order of the federation (the 'external constraint') makes up a part of the Member States' own constitutions (the 'internal constraint'). 'Member-statehood' therefore always entails *constitutional internalisation* on the part of the Member States of the constitutional order of the Union. In the context of the EU this means that state transformation cannot be understood as a purely 'external' constraint. To understand state transformation, it is important to understand not only how the Member States relate to each other in a new 'non-sovereign' way but also how the domestic constitutional settlements have undergone a transformation. Whereas Bickerton has made a brilliant analysis of the interstate dimension of member-statehood, an analysis of intrastate constitutional transformation of the Member States is missing.

Because of the multiplicity of the types of constitutional orders of the EU Member States<sup>37</sup> (Chapter 4), the internalisation of the EU constitutional order and the transformation of the domestic constitutional settlements differ significantly between the Member States. In what follows, three different paths of constitutional transformation and internalisation will be discussed: those of the 'Original Six' founding Member States of the EEC, the 'continuous democracies' of the UK and Scandinavia, and lastly the post-Communist Member States of the 'Eastern enlargements'.

## **B: 'Constrained Democracy'**

The domestic constitutional internalisation of European integration has been relatively unproblematic<sup>38</sup> for the 'Original Six': France, Germany, Italy and the BENELUX countries. For the post-WWII Western European countries who founded

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<sup>36</sup> *ibid* 65-8.

<sup>37</sup> B Ackerman, "Three Path to Constitutionalism—and the Crisis of the European Union" (2015) *B.J.Pol.S.* 45.

<sup>38</sup> France is to some extent an outlier in this group (see Chapter 2). The French relationship to European integration has been characterised by significant both political and legal contestation of EU authority, see, e.g., LF Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Baltimore, Johns Hopkins University Press, 2001).

the EEC there is an inherent relationship between the ‘internal constraints’ of the domestic constitutional orders and the ‘external constraints’ of European integration. The post-WWII constitutional regimes of these Member States and the project of European integration ‘grew up’ together and should be understood as parts of the same constitutional project. An argument to this effect has been presented by Jan-Werner Müller.

European integration, following Müller, became central to the post-WWII constitutional settlement of ‘constrained democracy’ born out of a deep distrust in popular sovereignty, including parliamentary sovereignty<sup>39</sup>. Unconstrained political power and mass politics were by the political elites of the time (whether an accurate diagnosis or not<sup>40</sup>) understood as having been the direct causes leading to the totalitarian breakdown of Europe and the rise of fascism, Nazism and communism<sup>41</sup>. The post-WWII response became the coinage of a completely new governmental form cloaked in familiar terms—‘liberal democracy’—differing from not only the interwar ‘democratic’ settlements but also from ‘liberalism’ in the 19<sup>th</sup> century meaning of the term<sup>42</sup>. The new post-WWII ‘mixed regime’ was characterised by the reinstitutionalisation of liberal and moral natural law principles without redeploying liberalism as an overarching ideology because it generally was understood to have paved the way for totalitarianism<sup>43</sup>.

The new settlement can neither be reduced to any pre-given ideology nor is it manifest in the work of any one thinker. Following Müller, its most important political and ideological expression is the Christian Democratic parties that won terrain in all post-WWII Western European states that came to be the founders of the EEC<sup>44</sup> (Chapter 2). Their success was brought about by the electoral alliance between the middle class, labour and the peasantry<sup>45</sup>. Distancing themselves from fascism, liberalism and communism, the Christian Democratic parties presented themselves as the protectors of traditionalism and

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<sup>39</sup> JW Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven, Yale University Press, 2011), 5; JW Müller, “Beyond Militant Democracy?” (2012) *New Left Review* 73, 41.

<sup>40</sup> See MA Wilkinson, “The Reconstitution of Postwar Europe: Lineages of Authoritarian Liberalism” (2016) *LSE Law, Society and Economy Working Papers* 5; MA Wilkinson, “The Reconstitution of Post-war Europe: Liberal Excesses, Democratic Deficiencies” in MW Dowdle and MA Wilkinson (eds) *Constitutionalism beyond Liberalism* (Cambridge, CUP, 2017).

<sup>41</sup> The most important argument to that regard is perhaps manifest in Hannah Arendt’s, *The Origins of Totalitarianism* (New York, A Harvest Book • Harcourt Inc, 1994); Müller, *Contesting Democracy*, 126.

<sup>42</sup> Müller, *Contesting Democracy*, 5; Müller, “Beyond Militant Democracy?”, 41.

<sup>43</sup> Müller, *Contesting Democracy*, 5, 129.

<sup>44</sup> *ibid* 129ff; W Kaiser, *Christian Democracy and the Origins of European Union* (Cambridge, CUP, 2007), 9, 164ff.

<sup>45</sup> Müller, *Contesting Democracy*, 138; AS Milward, *The European Rescue of the Nation-State* (London, Routledge, 1992); Kaiser, *Christian Democracy and the Origins of European Union*, 223.

the dignity of the human person<sup>46</sup>. Under this banner, the Christian Democratic parties brokered compromises between economic liberals and social-conservative Catholics that made them powerful ‘in-between figures’ and sowed the seeds for the parties’ later transformation into ‘catch-all parties’<sup>47</sup>.

An important institutional innovation in the post-WWII constitutional settlement was the significant role given to constitutional courts. The Kelsenian guardian of the constitution became the central institution of post-WWII ‘militant democracy’<sup>48</sup>. The crux of the argument for militant democracy was laid out by Karl Loewenstein in 1937. If liberal democracy is to protect itself from the lures of fascist emotionalism, Loewenstein reasoned, it must not be afraid to use drastic means: “Democracy must become militant”<sup>49</sup>. Fascism, according to Loewenstein, was not an ideology but a most effective governmental technique<sup>50</sup> and for that reason it should not be taken seriously as an alternative way of organizing social life but merely as a despicable means to accumulate power for power’s sake and it should be fought accordingly. “Fascism is not a philosophy—not even a realistic constructive program—but the most effective political technique in modern history”<sup>51</sup>. The only way of conquering it was to employ a governmental counter-technique, namely outlawing the enemies of democracy, e.g., through the ban of certain political parties. Fighting fire with fire.

The principles of ‘militant democracy’ became influential in post-WWII Germany including ‘substantial democracy’ in the constitution and empowering the Constitutional Court<sup>52</sup>. The general hope was the ‘constitutional ethos’ that democracy could be checked but still preserved by way of a constitution and unelected institutions such as constitutional courts<sup>53</sup>. The fundamental idea of post-WWII ‘constitutionalism’ is to weaken national parliaments<sup>54</sup> and insulate certain aspects of social and political life, e.g., fundamental rights, from democratic control by way of a constitution protected by a strong constitutional court<sup>55</sup>. The post-WWII settlement is concerned with constraining democracy by minimizing popular control of the state apparatus.

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<sup>46</sup> Müller, *Contesting Democracy*, 138.

<sup>47</sup> *ibid* 139; Milward, *The European Rescue of the Nation-State*, 28.

<sup>48</sup> Müller, “Beyond Militant Democracy?”, 41; Müller, *Contesting Democracy*, 139, 146ff.

<sup>49</sup> K Loewenstein, “Militant Democracy and Fundamental Rights, I” (1937) *American Political Science Review* 31(3), 423.

<sup>50</sup> *ibid*.

<sup>51</sup> *ibid*.

<sup>52</sup> Müller, “Militant Democracy” (2012) *The Oxford Handbook of Comparative Constitutional Law*.

<sup>53</sup> Müller, *Contesting Democracy*, 5, 147; M Shapiro and A Stone Sweet, *On Law, Politics and Juridicalization* (Oxford, OUP, 2002).

<sup>54</sup> Müller, *Contesting Democracy*, 148; Müller, “Beyond Militant Democracy?”, 43.

<sup>55</sup> Müller, *Contesting Democracy*, 148.

The post-WWII ‘constitutional ethos’ was not merely institutionalized in constitutional courts but also through the transfer of power to other independent institutions and administrative agencies subject to judicial oversight<sup>56</sup>. A central way of constraining national democracy was by transferring sovereign powers to the newly founded project of European integration to secure perpetual peace amongst the European states. For the Christian Democratic Founders of the EEC—Alcide De Gasperi, Konrad Adenauer and Robert Schumann—national sovereignty was feared and had to be constrained:

“European integration—this is crucial—was part and parcel of the new ‘constitutionalist ethos’, with its inbuilt distrust of popular sovereignty and the delegation of tasks to agencies that remained under the close supervision of national governments. Member countries consciously delegated powers to unelected domestic institutions and to supranational bodies, in order to ‘lock in’ liberal-democratic arrangements and prevent any backsliding towards authoritarianism”<sup>57</sup>.

European integration was integral to the post-WWII ‘constitutional ethos’ in that it allowed the Member States to constrain their own sovereign powers through a common Union devoted to the common aim of European peace. The Member States could preserve their new constitutional identity—‘liberal democracy’—through their membership in a common Union<sup>58</sup>. The limitation of national sovereign rights to achieve European peace is thus written into several post-WWII constitutions<sup>59</sup>. In the Preamble to the French constitution of 1946 it is, e.g., declared that that ‘subject to reciprocity, France consents to limitations of sovereignty necessary for the realisation and the defence of peace’. The Italian constitution of 1948 contains a similar statement: ‘Italy may consent,

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<sup>56</sup> *ibid.*

<sup>57</sup> Müller, “Beyond Militant Democracy?”, 43.

<sup>58</sup> The EU is not the only federal union that has the preservation of a constitutional project as one of the core reasons for the states to federate (see Chapter 4). The United States and the German Federation, following Forsyth, are testimony to the fact that federations are constituted—not merely to achieve security and welfare—“but also to uphold particular principles of government. The American union of 1789 was markedly influenced by the need to protect and to uphold the republican ideals of the American Revolution (...) The German Bund by contrast was anti-revolutionary in character. It was deliberately constructed to hold in check the radical political principles that had been propagated by the French and American Revolutions, and to protect and uphold the monarchical principle of government”, see M Forsyth, *Union of States: The Theory and Practice of Confederations* (New York, Leicester University Press, 1981), 42.

<sup>59</sup> PF Kjær and N Olsen, “Conclusion and Perspectives: The Reconstitution of Europe” in PF Kjær and N Olsen (eds) *Critical Theories of Crisis in Europe: From Weimar to the Euro* (London, Rowman & Littlefield International, 2016).

on equal terms with other States, to limitations of sovereignty necessary to establish an order ensuring peace and justice among nations’.

The German Basic Law is perhaps the most interesting testament to that in that “the German people, in the exercise of their constituent power” *constitutes Germany* on the basis of their “determination to promote world peace as an equal partner in a united Europe”<sup>60</sup>. A united Europe is thus part of the post-WWII German constitutional identity, or as stated by the German Constitutional Court in the Lisbon Ruling “The Basic Law calls for European integration”<sup>61</sup>. From the very beginning, Germany decided to govern itself as a constrained democracy and as a member of a united Europe. In the case of Germany, EU membership is not something that can be decided on by any *constituted power*: “The constitutional mandate to realise a united Europe, which follows from Article 23.1 of the Basic Law and its Preamble (...) means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration”<sup>62</sup>. European integration is in this way protected from ‘ordinary politics’, as fundamental rights are, by the German Constitutional Court.

The project of European integration is a central aspect of the post-WWII constitutional model developed in Western Europe. For the founding members of the EEC, it has been largely possible to mediate between the domestic constitutional orders and the constraints of the European legal order. Nevertheless, even for these ‘core’ Member States, the mediation between national constitutions and the European legal and political order has required several constitutional amendments to constitutionally internalise the growing constraints that have come about with the development of European integration.

### **C: Constitutional ‘Modernisation’ by Stealth**

In contrast to the Original Six for whom the constitutional internalisation of membership in the EU has been relatively unproblematic due to their shared origins in the constitutional imaginary of constrained democracy, the constitutional internalisation of EU membership has been more difficult for the ‘continuous democracies’ of the UK

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<sup>60</sup> The Preamble of the 1949 German Basic Law opens with the following statement: “Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law”.

<sup>61</sup> BVerfG - 2 BvE 2/08 - *Lisbon Ruling* [2009], 225.

<sup>62</sup> BVerfG, *Lisbon Ruling*, 225.

and the Scandinavian Member States (Denmark and Sweden<sup>63</sup>). None of these Member States, contrary to the Original Six, have the collapse of the interwar period and WWII as the defining watershed in their constitutional imaginaries<sup>64</sup>. In their constitutional imaginaries, these states are ‘continuous democracies’ predating the post-WWII world. Instead of being founded on the fear of popular and parliamentary sovereignty, these constitutional regimes are proud of their traditions of parliamentary sovereignty and are all characterised by a relative lack of judicial review or judicial self-restraint<sup>65</sup>.

With its famous unwritten constitution characterised by the relatively unrestrained authority of Crown-in-Council-in-Parliament, the UK is perhaps the emblematic example. Famously, the UK constitution has developed historically in incremental steps allowing it to develop a modern constitutional order without a modern revolution. Despite its significance for British self-understanding, the incrementalism of British constitutional history means that WWII is not a particularly significant moment in the British constitutional imagination or if so it is only to illustrate and reinforce the power of parliamentary democracy. Notwithstanding significant differences such as the presence of written constitutions and modern though relatively non-violent revolutions, the two Scandinavian Member States share important constitutional features with the UK<sup>66</sup>. As is the case in the UK, the primacy of Parliament is the bedrock of the constitutional orders of Denmark and Sweden: “The Nordic democratic ideal is built on the motto: *no one over or besides the parliament*”<sup>67</sup>. For that reason, the idea of judicial review of acts of Parliament is viewed with suspicion as a political exercise of power by the judiciary. The judiciary in Denmark and Sweden have therefore been extremely cautious in exercising judicial

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<sup>63</sup> The third Scandinavian country, Norway, is an outlier. Norway is not a member of the EU and Norway was the first European country to recognise judicial review, see M Wind, “When Parliament Comes First—The Danish Concept of Democracy Meets the European Union” (2009) *Nordisk Tidsskrift for Menneskerettigheter* 27(2), 281; A Føllesdal, “Rawls in the Nordic Countries” (2002) *European Journal of Political Theory*, 183.

<sup>64</sup> “While the horrors of World War II led many Europeans to realise the necessity of constraining and checking the legislative branch to prevent the commission of future atrocities in the name of the ‘nation’, the Nordic peoples emerged with their national patriotism relatively unscathed. If anything, their experience underscored the illegitimacy of foreign interference with the popular will” (A Føllesdal and M Wind, “Nordic Reluctance towards Judicial Review under Siege” (2009) *Nordisk Tidsskrift for Menneskerettigheter* 27(131), 137).

<sup>65</sup> JE Rytter and M Wind, “In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms” (2011) *I•CON* 9(2); M Wind, “The Nordics, the EU and the Reluctance Towards Supranational Judicial Review” (2010) *JCMS* 48(4); Føllesdal and Wind, “Nordic Reluctance towards Judicial Review under Siege”, 132; R Hirschl, “The Nordic Counternarrative: Democracy, Human Development, and Judicial Review” (2011) *I•CON* 9(2), 450; M Scheinin, “Constitutionalism and Approaches to Rights” in J Nergelius (ed) *Constitutionalism: New Challenges—European Law from a Nordic Perspective* (Leiden, Martinus Nijhoff Publishers, 2008), 137.

<sup>66</sup> Hirschl, “The Nordic Counternarrative: Democracy, Human Development, and Judicial Review”, 459.

<sup>67</sup> Wind “The Nordics, the EU and the Reluctance Towards Supranational Judicial Review”, 288.

review. The Danish Supreme Court has, e.g., only ever declared one act of Parliament unconstitutional<sup>68</sup> and the Danish Constitution is silent on the question on whether judicial review is allowed<sup>69</sup>. Sweden presents a similar case<sup>70</sup>.

This kind of constitutional system is incompatible with the demands of EU law, which relies on the domestic courts to set aside national legislation that infringes EU law. The demands of member-statehood have therefore necessitated a relatively drastic constitutional transformation of these three states<sup>71</sup> paving the way for a system of *de facto* judicial review of national law (to ensure conformance with EU law<sup>72</sup>) despite the effort of some domestic courts to avoid it, e.g., by not making use of the preliminary reference procedure<sup>73</sup>. The introduction of judicial review has led to significant critique from media and politicians as conflicting with democracy<sup>74</sup> understood as the relatively unbound power and authority of Parliament. In the UK, *The Daily Mail* notoriously pronounced the judges of the *Miller* case ‘enemies of the people’<sup>75</sup>. Whereas the constraints of member-statehood for these states might generally be understood as externally imposed, as Bickerton suggests, EU membership has in fact fundamentally transformed the domestic constitutional regimes of majoritarian democracy, parliamentary sovereignty and judicial self-restraint characterising these three states.

Though largely unnoticed, the most drastic constitutional change has possibly taken place in the UK. For the British, the ‘external constraints’ of European law could never be easily ‘internalised’ as an act of self-binding of the people because the idea of popular sovereignty—let alone constrained democracy—is foreign to the British

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<sup>68</sup> The Danish Supreme Court, 1999.841 H - *The Tvind case* [1999].

<sup>69</sup> Hirschl, “The Nordic Counternarrative: Democracy, Human Development, and Judicial Review”, 450-1

<sup>70</sup> J Nergelius, “Judicial Review in Swedish Law—A Critical Analysis” (2009) *Nordisk Tidsskrift for Menneskerettigheter* 27(142).

<sup>71</sup> In relation to the transformation of the Swedish constitution, one scholar remarks: “I think it is fair to say that the ‘sub-ordination’, more or less, of Swedish law to European law represents the most important constitutional change in modern Swedish constitutional history” (Nergelius, “Judicial Review in Swedish Law—A Critical Analysis”, 150). See also J Nergelius, “The Nordic Countries and Constitutional Theory of the 21<sup>st</sup> Century” in J Nergelius (ed) *Constitutionalism: New Challenges—European Law from a Nordic Perspective* (Leiden, Martinus Nijhoff Publishers, 2008), x. For the transformation of the Danish Constitution, see H Koch, “Dansk Forfatningsret i Transnational Belysning” [“Danish Constitutional Law in Transnational Light”] (1999) *Juristen* 6, 217-8.

<sup>72</sup> Rytter and Wind, “In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms”, 488ff; Wind, “When Parliament Comes First—The Danish Concept of Democracy Meets the European Union”, 273; Føllesdal and Wind, “Nordic Reluctance Towards Judicial Review Under Siege”, 133; KG Algotsson, “From Majoritarian Democracy to Vertical Separation of Powers: Sweden and the European Union” (2001) *Scandinavian Political Studies* 29, 51-2; Nergelius, “Judicial Review in Swedish Law—A Critical Analysis”, 149-150; Scheinin, “Constitutionalism and Approaches to Rights”, 147ff.

<sup>73</sup> Rytter and Wind, “In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms”; Nergelius, “Judicial Review in Swedish Law—A Critical Analysis”, 152.

<sup>74</sup> Wind, “When Parliament Comes First—The Danish Concept of Democracy Meets the European Union”, 272ff.

<sup>75</sup> *The Daily Mail*, 4 November 2016.

constitutional imagination. That being said, after acceding to the EU, Britain was required, by virtue of EU law, to govern itself as a ‘constrained democracy’ and respect the supremacy and direct effect of European law. Via EU membership, the British Constitution, as argued by Martin Loughlin, has undergone a process of ‘modernization’ that has enabled judicial review to ensure the conformance of British law with EU law<sup>76</sup>, the adoption of fundamental rights and a distinction between constitutional statutes and ordinary legislation previously foreign to the British Constitution<sup>77</sup> and introduced the idea that popular sovereignty can express itself via referenda<sup>78</sup>.

The radical transformation of the British Constitution, however, should not exclusively be understood as an incorporation of the demands of the European order. The British Constitution has at least since the end of WWII been understood as in need of a fundamental reform. Without the revolutionary conditions present to affect a fundamental constitutional change, the constitutional ‘modernization’ of Britain has taken place via EU membership<sup>79</sup>. EU membership has allowed the UK to undergo an incremental constitutional ‘modernisation’ that has broadly brought it in line with continental constitutional regimes. In a structurally similar manner to Milward’s argument of the European rescue of the nation-state (Chapter 2), Loughlin maintains that EU membership has provided the conditions that have allowed the UK constitutional regime to ‘modernize’ and thereby rescue it from its “institutional and conceptual sclerosis”<sup>80</sup>. Importantly, EU membership has provided the conditions for a peace settlement in Northern Ireland by providing the conditions for its unique cross-border arrangement and helped develop its constitutional system of devolution of powers to its constituent nations<sup>81</sup>.

That Britain’s membership in the EU has led to a fundamental political change to its constitution, however, has at least to some extent gone unnoticed<sup>82</sup>. As argued by the UK Supreme Court in *Miller*, until the 1990s “it is fair to say that the legal consequences of the United Kingdom’s accession to the EEC were not fully appreciated by many lawyers”. The constitutional significance of EU membership, however, seems only now

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<sup>76</sup> For a similar argument regarding Denmark, see Rytter and Wind, “In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms”, 488ff.

<sup>77</sup> M Loughlin, “The British Constitution: Thoughts on the Cause of the Present Discontents” (2018) *LSE Legal Studies Working Paper 2*, 6.

<sup>78</sup> *ibid* 18.

<sup>79</sup> *ibid* 5-6.

<sup>80</sup> *ibid* 5-7.

<sup>81</sup> *ibid* 6, 13.

<sup>82</sup> The UK Supreme Court in *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union*, 60.

to be truly dawning on Britain as a consequence of the tremendous difficulties associated with trying to leave the EU (e.g. the question of the future of Northern Ireland). An important reason for this late reckoning is probably that the constitutional transformation undergone by the ‘continuous democracies’ has largely not been achieved by popular deliberation or through formal constitutional amendments<sup>83</sup>. The constitutional transformation from nation-state to Member States has taken place mostly by ‘stealth’ in these three states. For that reason, the UK has been able to hold on to the fiction that the old pre-EEC accession constitution and “the shibboleth of parliamentary sovereignty”<sup>84</sup> are still alive and well (or at least, the fiction is that they will be, as soon as the UK leaves the EU). Having undergone a fundamental political change and become a Member State of the EU, the implication of Brexit is not merely that the UK leaves the Union, it will also have to give itself a fundamentally new constitution.

#### **D: Federal Destiny and the ‘Return to Europe’**

Britain is perhaps the most extreme case, but it is in no way the only Member State for which the mediation of internal and external constitutional constraints has not been easily achieved. For the post-Communist countries of the ‘Eastern Enlargements’ that constituted themselves as ‘liberal democracies’ after the fall of the Soviet Union, the mediation between internal and external constraints was not easily achieved because the possibility of ceding sovereign powers to the EU or international organizations was not part of nine out of ten of the post-Communist constitutions<sup>85</sup>. In contrast to the reconstitution of Germany, France and Italy after WWII, the post-Communist countries did *not* constitute themselves as ‘open’ towards European law and European unification. All the post-Communist countries had to amend their constitutions when they decided to accede to the EU<sup>86</sup>. Furthermore, in contrast to the ‘continuous democracies’, the transformation of the post-Communist Member States affected all aspects of social and political life (Chapter 4). Perhaps for that reason, modernisation by ‘stealth’ was not an option. The internalisation of member-statehood was instead overwhelmingly achieved through employing the political myth of ‘the return to Europe’. A myth that had

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<sup>83</sup> Loughlin, “The British Constitution: Thoughts on the Cause of the Present Discontents”, 6. The Swedish case is somewhat an outlier. The Swedish Constitution was amended in 2009 strengthening several fundamental rights and freedoms and judicial review.

<sup>84</sup> Loughlin, “The British Constitution: Thoughts on the Cause of the Present Discontents”, 6.

<sup>85</sup> A Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (Cambridge, CUP, 2005), 25.

<sup>86</sup> Formally speaking, Estonia is an exception because its constitution was not formally amended but ‘supplemented’ by an independent constitutional act (*ibid* 19, 111).

previously influenced the ‘Mediterranean Enlargements’ of the 1980s (Spain, Greece, Portugal). The myth of ‘returning to Europe’ is that the transformation associated with becoming a Member State of the EU allows the country to fulfil its ‘true destiny’, to become what it was always meant to be, namely, a part of Europe. As such the idea of the ‘return to Europe’ was granted the mythical or religious quality of an inherent kinship and a shared destiny between the Member States.

The idea of a shared kinship and destiny of the Member States lies at the root of federalism as a concept and there is a direct link between the idea of *foedus* (pacte, alliance) and *fides* (fidelity or faith)<sup>87</sup>. Following Beaud, these two aspects of federalism are united in the idea of the *covenant* used by the American Founding Fathers<sup>88</sup>. The original biblical sense of covenant is the pact between God and man. Interestingly, a similar political-theological root can be found in the German term for a federation, *Bund*, which was originally used by Luther to describe the alliance between the people and God<sup>89</sup>. For the Anglican dissidents that were some of the first immigrants to the United States, the covenant was also used to describe the contractual founding of the protestant church. Here, the faithful individuals play a decisive role in creating the community to which they already belong<sup>90</sup>. When the Americans wanted to give themselves political institutions they turned to the community they knew best: the religious community<sup>91</sup>. The religious community can break the cycle of the constituent and constituted power<sup>92</sup> by virtue of being destined to create that to which it already belongs. The religious community is in this way capable of mediating between the past and the future by introducing a cyclical element to the federal contract. Similarly, the federation is created by the states that are destined to belong to it. In this way, they conserve themselves politically by becoming what they were always meant to be, by fulfilling their true destiny.

In the EU, the idea of the ‘ever-closer union of the peoples of Europe’ is an important myth binding together its Member States. As we saw in Chapter 2, for the Founding Fathers of European integration, ‘Europe’ was the Sorellian myth for the post-WWII era that was meant to fill the void left behind by totalitarianism. Linguistically, the idea of the ‘ever-closer union of the peoples of Europe’ mimics that of the founding of the protestant church by the faithful individuals who already belong to the community.

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<sup>87</sup> Beaud, *Théorie*, 112; SR Davis, *The Federal Principle: A Journey Through Time in Quest of Meaning* (Berkeley, University of California Press, 1978), 3.

<sup>88</sup> Beaud, *Théorie*, 113.

<sup>89</sup> *ibid* 114.

<sup>90</sup> *ibid* 113.

<sup>91</sup> *ibid*.

<sup>92</sup> H Arendt, *On Revolution* (New York, Penguin, 2006 [1977]), 175-6.

In this way, the European peoples (*the faithful*) can play an active role in forming the EU (*the church*) to which they already belong as peoples of Europe (*the religious community*). The transformation (“ever-closer”) allows the peoples to become ever-closer to what they were destined to become (the ‘union of the peoples of Europe’). For that reason, any prospective EU Member State also has to be a ‘European state’ (Chapter 4). The significance of this accession criteria lies in the mythical quality of ‘Europe’: *‘European states’ can accede to the European Union because they already belong to ‘Europe’*. This double use of the idea of Europe is, e.g., manifest in the statement of the Greek Prime Minister, Constantinos Karamalis made in relation to Greece’s application for membership in the EEC: “Greece belongs to Europe and desires to belong to Europe (...) Greece does not desire full membership solely on economic grounds, the reasons are mainly political and refer to the consolidation of democracy and the future of the nation”<sup>93</sup>. The ideas of a ‘reunification of Europe’<sup>94</sup> or a ‘return to Europe’<sup>95</sup> were even more prevalent in the case of the Eastern Enlargements:

“1989 was not only a revolution for freedom. 1989 was also a revolt to ‘return to Europe’. After World War II, the countries of Central and South Eastern Europe had fallen under the geopolitical and systemic control of the Soviet Union. For them, Cold War, Iron Curtain and totalitarian dictatorship also meant a separation from ‘Europe’, from its Western part and its common heritage. ‘Returning to Europe’ was the unfulfilled dream and obvious aspiration. 1989 opened the doors that had been slammed by the forces of a tragic history. 1989 meant the end of the order of Yalta. It meant a homecoming, the return to a common civilization of freedom, law and democracy”<sup>96</sup>.

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<sup>93</sup> E Karamouzi, “A Strategy for Greece: Democratization and European Integration” (2015) *Cahiers de la Méditerranée* 90, 1.

<sup>94</sup> See, e.g., L Kühnhard (ed), *The Reunification of Europe: Anti-totalitarian Courage and Political Renewal* (Brussels, EPP-ED Group, 2009).

<sup>95</sup> M Cremona, “Introduction” in M Cremona (ed) *The Enlargements of the European Union* (Oxford, OUP, 2003), 2; MA Vachudova, *Europe Undivided: Democracy, Leverage, and Integration After Communism* (Oxford, OUP, 2005), 83ff. A similar development took place in Spain where the transition from authoritarianism to liberal democracy after the Franco regime was closely linked to the accession to the EU: “In Spain, the transition to democracy was closely linked to accession. Spain’s political parties and general public unanimously endorsed the country’s EEC membership, which added legitimacy to Spain’s new civilian power. During the accession negotiations, Spain’s political leadership actively sought to underpin the country’s strategic ‘return to Europe’ by requesting to join the Council of Europe. Spaniards viewed this as a symbolic endorsement of the re-emerging democracy” (CB Sío-López “Reconditioning the ‘Return to Europe’: The Influence of Spanish Accession in Shaping the EU’s Eastern Enlargement Process” in *The Crisis of EU Enlargement—LSE IDEAS Special Report* SR018).

<sup>96</sup> Kühnhardt, “Introduction” in *The Reunification of Europe: Anti-totalitarian Courage and the Renewal of Europe*, 7.

These kinds of statements are meaningless if thought of in historical terms. Nevertheless, the ideas of European reunification or a ‘return to Europe’ provides a strong historical myth that was capable of making a bond between the future and the past, transformation and internalisation, by constituting the present in the image of ‘homecoming’ to, albeit a fictitious, past<sup>97</sup>. The prominent Polish political activist and intellectual Adam Michnik thus wrote: “For now two roads lie open before my country and our newly freed neighbours... one road leads to nationalism and isolationism, the other to a return to our ‘native Europe’”<sup>98</sup>. Similarly, in a speech at the European Parliament in 2009, Václav Havel stated: “I tend to say somewhat poetically that Europe is the ‘homeland of our homelands’”<sup>99</sup>.

The revolutions in Eastern Europe have, furthermore, been conceptualised as ‘rectifying revolutions’<sup>100</sup> by bringing the states back on the track they would have been on had they not been under Soviet rule:

“In Poland and Hungary, in Czechoslovakia, Romania and Bulgaria—in other words, in those countries which did not achieve the social and political structures of state socialism through an independent revolution, but rather ended up with them as a result of the war and the arrival of the Red Army—the abolition of the people’s republic has occurred under the sign of a return to old, national symbols, and, where this was possible, has understood itself to be the continuation of the political traditions and party organizations of the interwar years. Here—as revolutionary changes gather force and become revolutionary events—is also where one finds the clearest articulation of the desire to connect up constitutionally with the inheritance of the bourgeois revolutions, and socially and politically with the styles of commerce and life associated with developed capitalism, particularly that of the European Community”<sup>101</sup>.

‘Revolution’ is, as pointed out by Hannah Arendt, another concept which is capable of mediating between the past and the future by bringing something back to its original place

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<sup>97</sup> *ibid* 9.

<sup>98</sup> A Michnik, *Letters from Prison* (Berkeley, California University Press, 1998), 150 as cited in J Zilonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford, OUP, 2006), 23.

<sup>99</sup> Václav Havel and Jerzy Buzek on the 20th anniversary of political change (European Parliament Plenary Session 11, November 2009). Accessible via: <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20091110IPR64179> [last accessed 30 April 2018].

<sup>100</sup> J Habermas, “What Does Socialism Mean Today? The Rectifying Revolution and the Need for New Thinking on the Left” (1990) *New Left Review* 1/183.

<sup>101</sup> *ibid*.

by an act of ‘restoration’<sup>102</sup>. The political myth of ‘the reunification of Europe’ allowed the states to imagine a return to the pre-communist era and take the path they would otherwise have taken: the path of the West<sup>103</sup>. “For many Czechs, Hungarians and Poles, this development was merely a *restoration* of the region’s historical and cultural unity with the West”<sup>104</sup>, as one scholar remarks.

From a liberal-democratic perspective, most of the post-Communist countries had little to ‘return to’ (only Czechoslovakia had been a democracy in the interwar period<sup>105</sup>) and the post-Communist countries did, in fact, *not* return to their pre-WWII constitutions. Instead, they gave themselves fundamentally new constitutional orders. And so as the post-WWII order created an entirely new constitutional settlement in the guise of returning to the past, the Eastern European countries fashioned new constitutions in the guise of ‘returning to Europe’. As manifest in the 1990 Czechoslovakian Civic Forum election poster below, returning to Europe was imagined as crawling out of the abyss ‘back to Europe’. The Eastern European peoples had literally fallen off the map.



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<sup>102</sup> Arendt, *On Revolution*, 32ff.

<sup>103</sup> J Příbáň, *Legal Symbolism: on Law, Time and European Identity* (Aldershot, Ashgate, 2007), 94.

<sup>104</sup> *ibid* emphasis added.

<sup>105</sup> Vachudova, *Europe Undivided: Democracy, Leverage, and Integration After Communism*, 84.

Picture 1: A concrete example of political change in the guise of a return to the past is the 1990 election campaign for the Czechoslovakian Civic Forum with the slogan: “Back to Europe”<sup>106</sup>

### III: TELEOLOGY AND SPECIALISATION

#### A: The Foundations of the Governmental Authority of the Union

The federation is a union of states. The states, however, as we have just seen, are not states in the classical sense of the term. Instead they are Member States that in the context of the EU can be characterized as a form of ‘constrained statehood’. But what is the ‘union’ in the union of states and what are the foundations for its exercise of public power? Until now, the union has overwhelmingly been dealt with as a political association created by the Member States (the federation as political association). However, as argued earlier in this chapter the union is also an institutional apparatus created by the Member States (the federation as institution) with its own foundations for governmental authority different from that of the state. The foundations for the governmental authority of the Union institutions are qualitatively distinct from those of the state because union authority is always limited and directed towards a certain pre-given aim. For that reason, the federation as institution is distinct from the ‘omni-competence’ of the state<sup>107</sup>. The principles of Union authority are *specialisation* and *teleology*.

The public powers of the Union are born out of the Member States coming together in a common Union to obtain the common ends or goals of the federation. Union authority is therefore ‘functionally’ derived from the collective purposes of the Union<sup>108</sup>. To understand the foundations of Union authority we have to think in terms of the *purposes* for which it was created<sup>109</sup>. Union government is therefore always *teleological*. However, in contrast to the state, the union is not free to set its own aims or purposes<sup>110</sup>. In his analysis of the German Federation of 1815, Ernst Rudolf Huber writes: The German Federation “in contrast to a genuine state did not possess a universality of state-

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<sup>106</sup> Poster by Melantrich (Prague, 1990) from the V&A poster collection. Available via: <http://collections.vam.ac.uk/item/O118965/back-to-europe-of-civic-poster-melantrich/> [last accessed 27 April 2018].

<sup>107</sup> Beaud, *Théorie*, 348.

<sup>108</sup> This is a central aspect of Turkuler Isiksel’s, *Europe’s Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford, OUP, 2016), 78ff.

<sup>109</sup> J Cohen, *Globalization and Sovereignty—Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge, CUP, 2012), 87-8.

<sup>110</sup> Beaud, *Théorie*, 317.

ends [Staateszwecks] (...) The Federation was limited to certain individual ends [Einzelzweck] that the federal treaty enumerated, whereby it at the same time limited the federal competences ('enumeratio, ergo limitatio')<sup>111</sup>. The public powers of the EU are born out of the constraint but not annihilation of the Member States. For that reason, EU institutions only have competences to act within limited fields and it is only within those fields that EU law enjoys supremacy over Member State law<sup>112</sup>. The supremacy or primacy of EU law is therefore neither absolute nor unconditional<sup>113</sup>. The Member States have limited their powers in order to preserve themselves politically in a common union and government by Union institutions is therefore always directed towards this constitutional aim. In contrast to the governmental apparatus of a state, Union institutions cannot be conceptualised independently from their end, the federal *telos*.

But is this teleological orientation fundamentally different from that of the state? In political theory, it is a long debate whether the state should be understood in relation to the *ends* or *means* specific to it. The two extreme positions in this debate can be illustrated by the works of Thomas Hobbes and Max Weber. For Hobbes, the state is born out of a social contract between individuals to ensure their mutual security and stability. In the early history of the theory of state, therefore, the state cannot be understood as independent from its *telos*. Notwithstanding the continuing relevance of Hobbes for the theory of the state his teleological conception of the state is no longer the dominant one. At least since Max Weber, the state has for the most part been conceptualised in relation to the *means* specific to it, namely the monopoly of the legitimate use of physical force<sup>114</sup>. Whatever the relevance of the conceptualisation of the state in terms of the monopoly on the legitimate use of force, it is unhelpful to analyse the federation in these terms. The federation is characterised by a duality of public powers over the same territory and the same population<sup>115</sup>. The federation can, in other words, be defined by the *lack of a monopoly* of the use of public power (which is another way of saying that the federation is not a state). A state-centric analysis in terms of *means* will be incapable of understanding the constitutional significance of the federal *telos*.

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<sup>111</sup> Huber, *DV I*, 594, my translation.

<sup>112</sup> R Schütze, *European Constitutional Law* (Cambridge, CUP, 2015), 207.

<sup>113</sup> M Avbelj, "The Legal Viability of European Integration in the Absence of Constitutional Hierarchy" in D Augenstein (ed) *'Integration through Law' Revisited: The Making of the European Polity* (London, Routledge, 2012), 39-41.

<sup>114</sup> M Weber, "Politics as a Vocation" reprinted from HH Gerth and C Wright Mills (eds) *Max Weber: Essays in Sociology* (New York, OUP, 1946).

<sup>115</sup> Beaud, *Théorie*, 274.

The constitutional significance of the teleological orientation of the federation consists in the political intent of the federal founding and it is part of the institutional and juridical architecture of the federation as a constitutional order<sup>116</sup>. The states unite to obtain certain aims and they provide the institutional structure presiding over the Union with the powers to obtain those aims<sup>117</sup>. For that reason, the foundation of union authority is the constitutional aims for which the states united. There is a direct constitutional link between the *competences* and the *aims* of a federation<sup>118</sup>. In the EU, the link between competences and the aims or objectives of the Union is made in Article 1 TEU: “By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called ‘the Union’ on which the Member States *confer competences to attain objectives* they have in common”. In contrast to a state, it is impossible to understand the public powers of the EU independently of the Treaty aims that at the same time are their foundation and limitation: “The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties”<sup>119</sup>.

The aims of a federation are what limits and justifies its exercise of public powers. The public powers of the federation are directed towards, and limited in relation to, the aim specific to the federation, that is, the federal *telos*. What is important to understand is that the teleological basis for the exercise of public powers by the federation cannot be reduced to a sociological criterion through which obedience is established, that is, it is irreducible to so-called ‘out-put legitimacy’<sup>120</sup>. Whatever the sociological relevance of the concept of ‘output legitimacy’ to understand the grounds for relative obedience, it is unhelpful to determine the regime type or the foundations for governmental authority of any political entity. All regimes, in order to stay in power, need some degree of ‘output legitimacy’ (Machiavellian statesmanship holds true for monarchies and democracies alike: “a prince can never make himself safe against a hostile people: there are too many of them”<sup>121</sup>).

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<sup>116</sup> *ibid.*

<sup>117</sup> In *Van Gend en Loos*, the *telos* of the EEC is crucial for the establishment of the principle of direct effect: “The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states”.

<sup>118</sup> Beaud, *Théorie*, 274; Huber *DV I*, 597.

<sup>119</sup> Article 3(6) TEU.

<sup>120</sup> FW Scharpf, *Governing in Europe—Effective and Democratic?* (Oxford, OUP, 1999), 6ff.

<sup>121</sup> N Machiavelli, *The Prince* (London, Penguin Books, 2003), 33.

## **B: The Institutional Structure of the Union**

Despite their transformation from (independent) states to Member States, the Member States, as we have seen, retain their institutional structures and governmental apparatuses. The Member States' institutional and governmental structures, however, are not necessarily mirrored by a sophisticated institutional structure of the Union or any union 'government' in the traditional sense of the term<sup>122</sup>. The constitution of a federation always entails the creation of a permanent institutional apparatus (the federation as institution), but it can consist, as a minimum, of a single institution: the federal diet (assembly or council) composed of representatives of all the Member States<sup>123</sup>. The federal diet can be the sole federal institution exercising a wide array of legislative, executive and judiciary powers. In contrast to most modern states, federations are not necessarily based on the idea of the separation of powers<sup>124</sup>. That being said, the federal diet has to be collegial and as such the federal institution always entail a political balance between its Member States. In contrast to an empire, the federation is based on political equality and for that reason it cannot govern via monarchical institutions.

The federal diet is a genuine expression of the federal principles because its operational logic is neither purely interstate nor purely intrastate<sup>125</sup> and as such it differs both from a diplomatic conference and a state parliament<sup>126</sup>. On the one hand, the federal diet is distinct from an interstate diplomatic conference because its decisions will be immediately binding on the Member States without further ratification<sup>127</sup>. On the other hand, the federal diet differs from a national government, in that the Member States' representatives are 'derived' from another government. They are not elected for the office but appointed by the Member State governments, parliaments or other designated institutions of the Member States<sup>128</sup>. The federal diet is in that sense an 'intergovernmental' assembly. The Member States are generally equally represented irrespectively of the size of their populations reflecting the political equality of the Member States. The federal diet is therefore not based on the modern conception of political equality of citizens expressed in the idea of 'one person, one vote'. The federation is (primarily) a union of states; not an association of individuals.

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<sup>122</sup> Beaud, *Théorie*, 348.

<sup>123</sup> *ibid* 351.

<sup>124</sup> *ibid* 352.

<sup>125</sup> *ibid* 353.

<sup>126</sup> *ibid*.

<sup>127</sup> *ibid*; Schmitt, *Constitutional Theory*, 401.

<sup>128</sup> That was the case for, e.g., the Old Swiss Confederation (1291-1798) and the German Federation between 1815-1848, see Forsyth, *Union of States*, 24, 47; EN Roussakis, *Friedrich List, the Zollverein, and the Uniting of Europe* (Bruges, College of Europe, 1968), 19-20.

Nevertheless, federations of democratic or republican states tend to represent not merely the states but also their peoples<sup>129</sup>. This double representation is ideal-typically expressed in the bicameralism of Congress in the United States, with the House of Representatives as the ‘popular chamber’ and the Senate as the ‘state chamber’. In such a second ‘popular chamber’, the size of the population of the individual states will, as a rule, be considered. Bicameralism, however, is not a necessary character trait of a federation<sup>130</sup>. The EU has incorporated double representation to some degree with the European Parliament as the ‘popular chamber’ representing the European citizens and the Council of the EU as the ‘state chamber’ representing the Member States’ governments<sup>131</sup>. The Member States are furthermore represented by their Heads of States/governments in the European Council and the Eurozone Member States are (informally) represented by their finance ministers in the Eurogroup.

Nevertheless, the EU cannot be characterised as a genuine bicameral federation. The reason for that is not only the relative weakness of the European Parliament<sup>132</sup> but also, more importantly, the central role of the Commission in the legislative procedure<sup>133</sup>. In the words of Antoine Vauchez: “the problem is not that the citizens turn away from the European parliamentary elections but that politics in itself turn away from the European Parliament”<sup>134</sup>. In the EU, the legislative initiative is held by an unelected, relatively unaccountable and politically independent institution. If we are to understand the defining principles of Union government in the EU, we cannot focus exclusively on the EU’s representative institutions of the EU Member States and the EU citizens. What makes the governmental structure of the EU somewhat unusual from the perspective of the theory of the federation are the central legislative, executive and judicial institutions that fit the theory of neither a monocameral nor a bicameral federal diet, namely, the so-called ‘independents’<sup>135</sup>: The European Commission, the European Court of Justice (ECJ) and the European Central Bank (ECB). As pointed out by Vauchez, it is a mistake to try

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<sup>129</sup> Beaud, *Théorie*, 357; Forsyth, “Towards a New Concept of Confederation” in *The Modern Concept of Confederation* (Santorini, Venice Commission, 22-25 September 1994).

<sup>130</sup> Beaud, *Théorie*, 359.

<sup>131</sup> Both the European Parliament and the Council, however, are based on a compromise between the ‘federal’ principle of Member State equality and the ‘democratic’ principle of ‘one person, one vote’. The EP is thus based on a digressive proportional system. The Council is based on a system of weighted votes, as a constitutional default it makes decision on qualified majority voting requiring a triple majority, namely, a majority of weighted votes, cast by a majority of the Member State that together represents a majority of the Union population, see Schütze, *European Constitutional Law*, 156-7, 180-1.

<sup>132</sup> Schütze, *European Constitutional Law*, 154.

<sup>133</sup> With minor exceptions, the legislative initiative is the constitutional prerogative of the European Commission (Schütze, *European Constitutional Law*, 164-5).

<sup>134</sup> A Vauchez, *Démocratiser l’Europe* (Paris, Éditions du Seuil, 2014), 24, my translation.

<sup>135</sup> Forsyth, *Union of States*, 185.

to understand the governmental structure of the EU (exclusively, if at all) in terms of the principles of representative democracy because these institutions, the independents, clearly do not base their authority on this principle<sup>136</sup>. From a comparative historical perspective, the ECJ is the least ‘extraordinary’ because of its strong similarities with the Supreme Court in the United States.

The independents are neither representatives of the Member States nor the European citizens. These institutions are not elected by popular vote and their accountability is limited. Their authority relies, not on an electoral chain but on its exteriority to the ‘democratic passions’ and ‘national egoism’<sup>137</sup>. They are what would generally be termed ‘non-majoritarian’ or ‘counter-majoritarian’ institutions<sup>138</sup>. In short, their authority is very different from not only state governments but also from the federal diet. What makes the independents especially interesting is that their authority relies directly on the European federal constitution, that is, their authority is not derived from the Council and/or the Parliament. The independents owe their existence *directly to the EU constitution* and not to an Act of the EU’s representative institutions.

In terms of its institutional apparatus, the independents are perhaps the most singular aspect of the EU as a federation. That being said, the constitutional creation of a ‘non-partisan’ executive office of a federation is not a unique feature of the EU as a federation. The Constitution of the United States of 1787 also constituted a ‘non-partisan’ executive office which was not to be elected directly by the people: the Presidency. From a contemporary perspective, the comparison of the Commission with the office of the President of the United States might seem absurd. But that is only because the Presidency has undergone a series of constitutional transformations since the founding of the early Republic. In the early Republic, the Presidency was not, as we tend to think of it today, a plebiscitary office that carried with it a ‘mandate’ from the people<sup>139</sup>. On the contrary, the Electoral College that elects the President (which is still in place today) was designed by the Founding Fathers in order to avoid a plebiscitary President. The electoral college “aimed to encourage the selection of the man with the most distinguished past service to the Republic. *Republican virtue, not populist demagogy*, was to be the principal qualification”<sup>140</sup>. The Presidential veto that today makes the Presidency into something akin to a third legislative chamber, was in its original intent thought of as a ‘defensive’ mechanism to

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<sup>136</sup> Vauchez, *Démocratiser l’Europe*, 33.

<sup>137</sup> Vauchez, *Démocratiser l’Europe*, 34-5.

<sup>138</sup> *ibid* 34.

<sup>139</sup> B Ackerman, *We the People I*, 67ff.

<sup>140</sup> *ibid* 68 emphasis added.

protect the Constitution as well as the Presidency<sup>141</sup>. Whereas the US Presidency was meant to be appointed by the Electoral College for his ‘republican virtue’, the officials of the independents are appointed, not merely on the basis of federal principles and their general qualifications but also on the grounds of their unquestionable ‘independence’ and their ‘European commitment’<sup>142</sup>.

### **C: ‘Political Messianism’ and the ‘European Form of Government’**

The foundations of the independents’ authority can be understood based on the principles of federal government, namely, teleology and specialisation. The independents are constitutionally limited teleological institutions. From the very beginning of European integration, we can understand the authority of the Commission in that way. In the ESCS treaty the mandate of the Commission (then the ‘High Authority’) was defined as follows: “The High Authority shall be responsible for assuring the fulfilment of the purposes stated in the present Treaty under the terms thereof”<sup>143</sup>. Its independence is granted not as a set of arbitrary prerogative powers but as a constitutional mandate to seek a certain pre-given end independently. The source of the independents’ authority is not *representation* but *commission*: they are entrusted with the authority to do a certain task by the constitution. Their authority relies on a constitutional mandate to ensure the federal *telos*.

The constitutional mandate of the independents has two distinct meanings. First, the constitutional mandate of the independents is *conservative*: the independents are there to uphold the constitutional contract between the Member States. Together with the ECJ<sup>144</sup> that ensures “that in the interpretation and application of the Treaties the law is observed”<sup>145</sup>, the Commission is generally understood as the ‘guardian of the Treaties’<sup>146</sup>. If the EU as an integral part of post-WWII constitutionalism is born out of a fear of democracy and parliamentarism as suggested by Müller, it is understandable why the

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<sup>141</sup> *ibid* 68-9.

<sup>142</sup> Article 19(2) TEU and Article 17(3) TEU. See also Vauchez, *Démocratiser l’Europe*, 50.

<sup>143</sup> ECSC Treaty, Article 8.

<sup>144</sup> Article 17 (1) TEU: “The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to the Treaties. It shall oversee the application of Union law under the control of the Court of Justice of the European Union”.

<sup>145</sup> Article 19(1) TEU.

<sup>146</sup> The idea of the Commission as the guardian of the Treaties is not explicitly stated in the Treaties, but it is generally based on Article 258 TFEU: “If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union”.

European ‘guardian’, like the national constitutional courts, was not to be a ‘political’ institution with arbitrary prerogative powers but an ‘independent’ institution bound by a pre-given constitutional *telos*. The ‘European form of government’, manifest in the independents, following Vauchez, was created as a ‘counter-model’ to national parliamentary democracies<sup>147</sup>.

Being a guardian of the constitution, however, is not merely a conservative task that looks towards the past. It is also a transformative or *creative* task. In the act of uniting, the Member States express their foundational intention of being “RESOLVED to continue the process of *creating* an ever closer union among the peoples of Europe”. The institutional framework of the EU, following the Treaties “shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions”<sup>148</sup>. The independents are therefore also commissioned to look toward the future. The Member States have united for aspirational reasons in order to create a not-yet-there. The overall aims of the Union are of that nature: “to promote peace, its values and the well-being of its peoples”<sup>149</sup>. In addition to their conservative mandate, the independents have a constitutional mandate to promote the objectives of the Union for the benefit of which the Member States decided to unite in the first place.

In a similar fashion to the Member States of the ‘Eastern Enlargements’, an important way of balancing the creative and conservative forces of the independents’ constitutional mandate is by squaring the circle through the ‘idea of Europe’ as a political myth. The task of the independents is to create the ‘promised land’ of Europe and to make sure that the European states fulfil their destiny. The authority of the independents can therefore be understood based on what Weiler has termed ‘political messianism’<sup>150</sup>. It is the authority of the saviour of the chosen people. Following Weiler, the political messianism of Europe is first expressed in “Europe’s ‘Declaration of Independence’”, namely, the Schumann Declaration of 1950. The substance of this declaration, Weiler argues, is in itself “messianic”: “a compelling vision which has animated now at least three generations of European idealists where the ‘ever closer union among the people[s] of Europe’, with peace and prosperity icing on the cake, constituting the beckoning

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<sup>147</sup> Vauchez, *Démocratiser l’Europe*, 34.

<sup>148</sup> Article 13(1) TEU.

<sup>149</sup> Article 3 TEU.

<sup>150</sup> JHH Weiler, “Europe in Crisis—On ‘Political Messianism’, ‘Legitimacy’ and the ‘Rule of Law’” (2012) *Singapore Journal of Legal Studies*, 258.

‘Promised Land’<sup>151</sup>. A united Europe became understood as the ‘Promised Land’ that would allow for the Member States to preserve themselves as free and equal states bound together in a common union.

The authority of the independents relies on this political messianism. Their ‘imperative mandate’, following Vauchez, is that of the ‘European project’: “The ‘mandate’ on which the Court and the Commission—and ultimately the ECB—prevail finds neither its source nor its imperative in the general will of the peoples. Rather it ensues from the existence of ‘Europe’ as an ‘idea’, ‘spirit’, ‘consciousness’ or specific ‘project’<sup>152</sup>. Following Vauchez, this European form of government manifest in the independents and based on the imperative mandate of the European project has led to the development of two traditions of government specific to Europe: a ‘judicial tradition’ and a ‘bureaucratic tradition’<sup>153</sup>.

The judicial tradition of ‘integration through law’ manifest in the early transformative constitutionalism of the ECJ is one of the clearest manifestations of the ‘political messianism’ of the independents. The ECJ is, as we have seen, not a representative institution but a commissioner with the imperative mandate of a constitutional guardian. As such, the ECJ does not have any legislative power; it cannot make new laws. What it can do, however, is to interpret the European constitutional contract, the Treaties, in a teleological manner, that is, on the basis of the intent of the contracting parties; the aim or spirit of the law<sup>154</sup>. In this way, the case law can be construed not as new or original law because the ECJ’s interpretation is merely a clarification of the original intent of the contracting parties. The teleological process is further authorised by the judicial formalism of the ‘rule of law’. The idea that the ECJ is constrained by a judicial logic and the ‘rule of law’ makes it possible to fundamentally depoliticise an otherwise deeply political process<sup>155</sup>. According to Weiler, this is a typical trait of political messianism as such: “‘political messianic’ projects, by their very nature, go hand in hand with a formalist, self-referential concept of ‘rule of law’<sup>156</sup>. Whether this holds true or not, it is the case for the EU. The political messianism of Europe has depoliticised its own revolutionary development through judicialization. The constitutional revolution of the early case law of the ECJ, most notably *Van Gend en Loos*

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<sup>151</sup> *ibid* 257-8.

<sup>152</sup> Vauchez, *Démocratiser l’Europe*, 42, my translation.

<sup>153</sup> *ibid* 42-3.

<sup>154</sup> Schütze, *European Constitutional Law*, 207.

<sup>155</sup> Avbelj, “The Legal Viability of European Integration in the Absence of Constitutional Hierarchy”.

<sup>156</sup> Weiler, “Europe in Crisis—On ‘Political Messianism’, ‘Legitimacy’ and the ‘Rule of Law’”, 262

and *Costa* should be read in this light as the Court giving effect to “the project the High Contracting Parties encapsulated in their respective Treaties”<sup>157</sup>.

The ‘bureaucratic tradition’ invented, following Vauchez, is that of the ‘Monnet method’ of integration through ‘de facto solidarity’, that is, integration through the interdependence of the Member States which will lead to ‘spill-overs’ in other fields of integration<sup>158</sup>. The teleological meaning of the ‘bureaucratic tradition’ is best captured in the principle of implied powers<sup>159</sup> (Chapter 4). The principle of implied powers is an expression of the teleological logic of the exercise of public power in that the competences of a federation and the federal telos are intrinsically linked to one another. The public powers of the Union are always limited *in relation to* the aims of the federation, and therefore, the Member States must arguably have provided the federation with the means *necessary* to achieve the aims of the federation. As the other independents, the Commission does not have any ‘political authority’. What is deemed ‘necessary’ to obtain a certain aim can therefore not be justified on political grounds. Whereas the ECJ could ground the authority of its transformative constitutionalism on the basis of judicial procedure and the ‘rule of law’, the Commission and the ECB can ground their authority in ‘expertise’ and ‘technical’ solutions. The idea that the executive branch of government is intrinsically linked to the notions of rationalism and technicality is not unique to the ‘European form of government’. This connection lies at the origins of the modern state and the birth of government based on socio-practical experience<sup>160</sup>. As such, the Commission and the ECB introduce an element of *raison d’état* into the Union that will always threaten its internal balance in that general aims will justify unlimited means: “*He who wills the end must also will the means*”<sup>161</sup>.

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<sup>157</sup> *ibid* 263.

<sup>158</sup> Vauchez, *Démocratiser l’Europe*, 43.

<sup>159</sup> See also C-22/70 – *ERTA* [1971].

<sup>160</sup> C Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to the Proletarian Class Struggle* (Cambridge, Polity Press, 2014), 8-10.

<sup>161</sup> Huber, *DVI*, 597.

## 4

# United in Diversity

## *The problem of the federal balance and constitutional heterogeneity in the European Union*

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### INTRODUCTION

Having identified the federation as a discrete political form (Chapter 1) and discussed both its origins (Chapter 2) and how it governs itself as a political association without sovereignty (Chapter 3), this chapter is concerned with understanding the main problem that characterises the federation as a political form: the problem of the federal balance. This problem consist in how the federation can strike an internal balance between its dual political existence and its dual governmental structure? This chapter maintains that the federation as a political form is characterised by a fundamental internal contradiction expressed in the dual nature of the federal constitutional aim: the creation of an ever-closer union between the peoples of the Member States *and* the protection of the autonomy and diversity of the Member States.

A federation is a political union constituted by its Member States because for one reason or another they have found it difficult to maintain their own political autonomy (Chapter 2). The *raison d'être* of all federations is therefore to perpetuate the political existence and autonomy of its Member States<sup>1</sup>. The perpetuation of the political autonomy and existence of its Member States, however, is not the sole aim of the federation. By coming together in a federation, the Member States aim to constitute a *new political existence*, the Union (Chapters 1 and 3). A federal constitution is therefore committed to create and protect the political existence and autonomy of the Union as a whole. Whereas a state, if understood in terms of ends and not means, has a unified (if not unitary) *telos*—the security and wellbeing of its people—the federation has a *double telos* which is planted in it with the founding: the will to preserve the states as autonomous

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<sup>1</sup> O Beaud, *Théorie de la Fédération* (Paris, PUF, 2007), 276.

and the will of living together in a common union<sup>2</sup>. The double federal aim means that the Union at the same time is committed to unity and diversity, transformation and conservation, the past and the future.

In order to persist as a political form, the federation needs to strike a balance between these contradictory forces. This chapter is concerned with the *precariousness* of this balance that in the EU recently has manifested itself in the rise of authoritarian constitutionalism in Poland and Hungary seemingly breaching the foundational values of the Union. This chapter is concerned with understanding whether, how and to what extent a federal union of states can maintain the federal balance if one of its Member States adopts a constitution that is hostile to the Union constitution. Does the EU have the authority to intervene in the constitutional developments of its Member States in order to ‘save’ a Member State, and the Union at large, from the ‘dangers of democratic choice’? How can the EU live up to its motto of being ‘United in Diversity’?

## **I: THE PROBLEM OF THE FEDERAL BALANCE**

### **A: The Double Telos of the Federation**

The double telos of the federation originates in the curious sentiment from which all federal constitutions are born: on the one hand, the wish to live together, however, without being one, and, on the other hand, the wish of remaining autonomous, however, without being fully separate from one another. The precondition for the establishment of a federation is in the words of Albert Dicey:

“[T]he existence of a very peculiar sentiment among the inhabitants of the countries which it is proposed to unite. They must desire union, and must not desire unity. If there be no desire to unite, there is clearly no basis for federalism (...) If, on the other hand there be a desire for unity, the wish will naturally find its satisfaction, not under a federal, but under a unitary constitution (...) [T]he sense of common interest, or common national feeling, may be too strong to allow of that combination of union and separation which is the foundation of federalism”<sup>3</sup>.

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<sup>2</sup> Beaud, *Théorie*, 383; ER Huber, *Deutsche Verfassungsgeschichte seit 1789, Band I: Reform und Restauration 1789 bis 1830* (Stuttgart, Verlag W. Kohlhammer, 1957) [hereinafter Huber, *DV I*], 659-60; M Diamond, “The Ends of Federalism” (1973) *Publius* 3(2), 129-152.

<sup>3</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (Indiapolis, Liberty Fund, 1982), 75-6.

In the context of the EU, this ‘peculiar sentiment’ is perfectly captured in the constitutional aim of the Union: ‘the ever-closer union among the peoples of Europe’. The EU is born out of an aspiration for *an ever-closer union* among the peoples of Europe—a clear expression of a desire for *union*. At the same time, this union can never become a *unity*. The constitutional aim insists that it is a union among *the peoples of Europe*. The constitutional aim of the EU is in other words a desire for union but not unity, paraphrasing Dicey. A similar interpretation of the political aim of the EU has been advanced by Joseph Weiler:

“No matter how close the Union, it is to remain a union among distinct peoples, distinct political identities, distinct political communities. (...) The rejection by Europe of that One Nation ideal or destiny is, as indicated above, usually understood as intended to preserve the rich diversity, cultural and other, of the distinct European peoples as well as to respect their political self-determination”<sup>4</sup>.

In Weiler’s interpretation, the idea of ‘the ever-closer union of the peoples of Europe’ comes to symbolise what he understands to be the ‘unique brand of European constitutional federalism’ whose normative hallmark is that of ‘constitutional tolerance’<sup>5</sup>. That is, the prevalence of Member State obedience to European law despite the lack of a sovereign act of the people of Europe as its source of authority<sup>6</sup>. However, contrary to what Weiler argues, the double telos of the EU expressed in its constitutional aim is a clear manifestation of the ‘peculiar sentiment’ that is at the origins of *all federations*—not just the EU. For that reason, *neither* the aim of ‘an ever-closer union of the peoples of Europe’ *nor* the lack of a sovereign people as the source of constitutional authority is unique<sup>7</sup> (Chapters 1 and 3).

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<sup>4</sup> JHH Weiler, “Federalism without Constitutionalism: Europe’s Sonderweg” in K Nicolaidis and R Howse (eds) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford, OUP, 2003), 67.

<sup>5</sup> *ibid* 61-70.

<sup>6</sup> *ibid* 68.

<sup>7</sup> On the contrary, they are core constitutional principles of all federations: “a federal government will hardly be formed unless the many of the inhabitants of the separate States feel stronger allegiance to their own State than to the federal state represented by the common government. This was certainly the case in America towards the end of the eighteenth century, and in Switzerland at the middle of the nineteenth century, in 1787 a Virginia citizen of Massachusetts felt a far stronger attachment to Virginia or to Massachusetts than to the body of the confederated States. In 1848 the citizens of Lucerne felt far keener loyalty to their Canton than to the confederacy, and the same thing, no doubt, held true in a less degree of the men of Berne or of Zurich. The sentiment therefore which creates a federal state is the prevalence throughout the citizens of more or less allied countries of two feelings which are to a certain extent inconsistent—the desire for national unity and the determination to maintain the independence of each

In contrast to what is often argued, the United States at the time of the Constitutional Convention “were not a nation by any modern standard”<sup>8</sup>. “Most citizens of the United States in 1790”, Samuel Morrison writes “if asked their country or nation, would not have answered American but Carolinian, Virginian, Pennsylvanian, New Yorker or New Englander”<sup>9</sup>. Following Eric Hobsbawm: “Early political discourse in the USA preferred to speak of ‘the people’, ‘the union’, ‘the confederation’, ‘our common land’, ‘the public’, ‘public welfare’ or ‘the community’ in order to avoid the centralizing and unitary implications of the term ‘nation’ against the rights of the federated states”<sup>10</sup>. The characteristics of the EU that following Weiler makes it unique are therefore a clear manifestation of the federation as a political form. This is not recognised by Weiler because, in his treatment of federalism and the EU, he relies on the statist imaginary of the ‘federal/confederal’ (*Bundesstaat/Staatenbund*) dichotomy<sup>11</sup>.

Notwithstanding that it has been more pronounced in the case of the EU than other young federations<sup>12</sup>, the phenomenon of ‘constitutional tolerance’ is not unique to the EU either. Constitutional tolerance, as will be argued in this chapter, is a manifestation of how the federation governs itself when the internal tensions and contradictions pertaining to the federation as a political form can be managed. As we shall see, it is only under certain circumstances that the federation can manage internal constitutional conflicts and maintain ‘constitutional tolerance’. ‘Constitutional tolerance’ is not an unconditional gift of federalism. The reason for that has to do with the internal contradiction or tension pertaining to the federal aim:

“Federalism is always an arrangement pointed in two contradictory directions or aimed at securing *two contradictory ends*. One end is always found in the reason why the member units do not simply consolidate themselves into one large unitary country; the other end is always found in the reason why the member units do not choose to remain simply small wholly autonomous countries (...) [A]ny given federal structure is always the institutional expression of *the contradiction or tension* between the particular reasons the member units

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man’s separate State. The aim of federalism is to give effect as far as possible to both these sentiments” (Dicey, *Introduction to the Study of the Law of the Constitution*, 76).

<sup>8</sup> SE Morrison, *History of the United States* (London, OUP, 1927) as cited by Wheare, “Federalism and the Making of Nations” in AW MacMahon (ed) *Federalism: Mature and Emergent* (New York, Doubleday & Company, 1955), 30.

<sup>9</sup> *ibid.*

<sup>10</sup> EJ Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Cambridge, CUP, 1990), 18.

<sup>11</sup> Weiler, “Federalism without Constitutionalism”, 58.

<sup>12</sup> LF Goldstein, *Constituting Federal Sovereignty: the European Union in Comparative Context* (Baltimore, Johns Hopkins University Press, 2001).

have for remaining small and autonomous but not wholly, and large and consolidated but not quite”<sup>13</sup>.

Following Martin Diamond, the ‘peculiar federal sentiment’ discussed above means that the double telos of the federation is *inherently contradictory*. On the one hand, the states come together in a new common Union because they want to preserve their own political identity and autonomy; they come together in order to ‘remain who they are’<sup>14</sup>: “In other words, in spite of the federation or rather still because of it, they want to stay themselves, that is, remain autonomous political entities”<sup>15</sup>. The federation is for that reason always *conservative* in nature<sup>16</sup>, directed towards the *past* and committed to preserving the *diversity* of its Member States<sup>17</sup>. This is, borrowing the terminology of Beaud, the ‘particularistic aim’ of the federation<sup>18</sup> because it is particular to the individual Member States of the Union and it introduces a *centrifugal force* into the federation.

On the other hand, the federation is constituted because the Member States have rejected the status quo and desire to come together into an ‘ever-closer union’ with their future fellow Member States<sup>19</sup>. The federation is for that reason always *creative* in nature, directed towards the *future* and committed to creating and perpetuating the *unity* of its Member States. This is, again using Beaud’s vocabulary, the ‘common aim’, because all the founding states converge around it, and it introduces a *centripetal force* into the federation<sup>20</sup>. The federation as a political form is therefore characterised by two political forces that haul it in opposite directions: the creation and protection of the common political Union and the conservation of the political existence and autonomy of its Member States. These contradictory political forces pertaining to the double telos is at the heart of all federations exactly because the federation is a *new political unity* (‘common aim’) constituted in order to perpetuate the *political existence and autonomy of its Member States* (‘particularistic aim’).

The double telos of the federation will therefore always threaten to pull the federation apart. The federation as a political form carries within itself a fundamental contradiction that it constantly needs to balance if it is to preserve its own political form.

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<sup>13</sup> Diamond, “The Ends of Federalism”, 130, emphasis added.

<sup>14</sup> Beaud, *Théorie*, 279.

<sup>15</sup> *ibid* 279, my translation.

<sup>16</sup> Dicey, *Introduction to the Study of the Law of the Constitution*, 99.

<sup>17</sup> C Hughes, *Confederacies: An Inaugural Lecture Delivered in the University of Leicester 8 November 1962* (Leicester, Leicester University Press, 1963), 4.

<sup>18</sup> Beaud, *Théorie*, 279.

<sup>19</sup> *ibid*.

<sup>20</sup> *ibid*.

This is what Schmitt refers to when he writes: “*The federation exists only in this existential connection and in this balance*”<sup>21</sup>. If this balance is not struck, the federation as a political form will tend to dissolve either into its composite states—a full realisation of the ‘particularistic aim’—or a fusion of the Member States into a fully-fledged federal state—a full realisation of the ‘common aim’. The logic of sovereignty will prevail either in the form of one sovereign state or many.

The federation is therefore always conditioned on an *incomplete realisation* of the two core aims of the federation<sup>22</sup>. On the one hand, the aspiration of the Member States of remaining fully autonomous must be curbed in the federation because membership in a federal union imposes limits on the sovereignty of the Member States—membership of a federation always entails the transformation from independent ‘monadic state’ to ‘Member State’ (Chapters 1 and 3). On the other hand, the aspiration of an ‘ever-closer union’ must be curbed because the powers of the Union are inherently limited. The federation does not enjoy the ‘omni-competence’ of a state; its powers are always governed by the principles of specialisation and teleology (Chapter 3).

If a constitutional conflict erupts between the Union and one or more of its Member States, there is ultimately no legal answer to the question of *what* constitution(s) should prevail and *who* settles that question. Or rather: there are *two strong, viable claims* based in respectively the public law of the Union and the constitutions of the Member States as ultimate sources of authority (Chapters 1 and 5). This chapter is concerned with understanding the conditions—both legal and extra-legal—for the persistence of a federal balance.

## **B: Why the Federal Balance cannot be Maintained by a ‘Division of Competences’**

Is it possible merely to legally stipulate the federal balance by way of a formal division of competences? Following this argument, the danger of upsetting the balance between the constitutional orders of the Union and those of its Member States is overstated because the powers of the Union always are enumerated and hence limited (Chapter 3). In the EU, this is spelled out by the principle of conferral (Art 5 TEU)<sup>23</sup>. In this understanding, the federal balance is protected by the clear-cut division of labour

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<sup>21</sup> C Schmitt, *Constitutional Theory* (Durham and London, Duke University Press, 2008), 388, emphasis added.

<sup>22</sup> Beaud, *Théorie*, 280.

<sup>23</sup> The principle of conferral together with the principle of subsidiarity were introduced into EU law with the Maastricht Treaty, see L Azoulay, “Introduction: The Question of Competence” in L Azoulay (ed) *The Question of Competence in the European Union* (Oxford, OUP, 2014), 6.

between the Union and its Member States: the EU only has the power granted to it by its Member States.

The theory of the federation rebuts the idea that a legal limitation alone can preserve the federal balance between the Union and the Member States. Notwithstanding that the Union is not endowed with the ‘omni-competence’ of the state, the theory of the federation maintains that the powers of Union government are limited *in relation to a certain aim* (Chapter 3). In the context of the EEC/EU, the powers of the Community/Union have, following Loïc Azoulay, from the very beginning been limited on a ‘functional basis’ in relation to the aims it was meant to realise:

“From the outset, the European Community was said to operate on the basis of broad objectives provided by the Treaties. Community competences were derived from the list of objectives associated to each policy area. As a result, the way in which the objectives of the Treaty were construed dictated the reality of the allocation of powers between the Community and its Member States”<sup>24</sup>.

The governmental structure of the Union, thus conceived, will have the governmental authority *necessary* to obtain the aim for which it was constituted: the objectives of the treaty ‘dictate’ the allocation of powers. In the Treaties, this is expressed in Article 6(4) TEU: “The Union shall provide itself with the *means necessary* to attain its objectives and carry through its policies”<sup>25</sup>. This is the *doctrine of implied powers*<sup>26</sup> that is adequately summarised in a statement by ECJ Judge Pescatore: “the vision of objectives must be accompanied by a corresponding reality of powers”<sup>27</sup>. This form of teleological government or ‘competence creep’ is not unique to the EU. The growth of the governmental powers of the Union is an *inherent feature of the structure of federal government*<sup>28</sup>. The limitation of Union powers in relation to the ‘common aim’ means that the limited character of Union government (the principle of conferral) is undermined by its teleological orientation. A *general governmental principle of necessity* (the principle of teleology/‘functionality’) is thereby introduced into the heart of federal government (Chapter 3).

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<sup>24</sup> Azoulay, “The Question of Competence”, 6.

<sup>25</sup> Article 6(4) TEU, emphasis added

<sup>26</sup> In the context of the EU, the paradigmatic case is the *ERTA case*, see Azoulay, “The Question of Competence” 4ff; P Eeckhout, *EU External Relations Law* (Oxford, OUP, 2011), Ch 3.

<sup>27</sup> P Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (Leiden, Sijthoof, 1974), 41-2.

<sup>28</sup> See e.g. Webster’s interpretation of the ‘necessary and proper’ clause (Forsyth, *Union of States*, 119-20).

The teleological orientation of Union government therefore presents a threat to the idea of a constitutional balance of the federation if imagined to be checked only by the idea of 'limited competences'. The federation as a political form can only persist if it is capable of balancing its internally contradictory double aim *that its governmental structure is predisposed to undermine* because the powers of the Union government are limited in relation to transitory forces. This cannot be done by way of a legal demarcation of federal competences because the teleological orientation of the federal government can always authorise a transgression of this demarcation.

### **C: The Problem of the Political Balance**

If a real political conflict emerges between the Union and its Member States, legal limitations of power are of little value. As remarked by Azoulai, "Confronted with real value conflicts and substantial solidarity issues, legal rules of conflict resolution like the pre-emption rule, the primacy rule, or the rules of competence laid down by the Treaties are of little use"<sup>29</sup>. But how then can the federal balance be maintained? The only way for the federal balance between unity and diversity to persist is to ensure a *political balance* between the Union and its Member States<sup>30</sup>. No one was more acutely aware of this than Hannah Arendt: "only power arrests power", she famously stated in *On Revolution* with reference to Montesquieu, that is, she added, "without destroying it by putting impotence in its place (...) Laws, on the other hand", she continued, are "always in danger of being abolished by the power of the many, and in a conflict between law and power it is seldom the law which will emerge as victor"<sup>31</sup>. The problem of the federal balance is for that reason ultimately political and not legal in nature.

That this is the case can be gathered from the debates around the constitution of the United States. The main problem for the Founding Fathers was, following Arendt, "how to establish a union out of thirteen 'sovereign', duly constituted republics; their task was the foundation of a 'confederate republic'"<sup>32</sup>. The task of the Constitution, she

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<sup>29</sup> Azoulai, "The Question of Competence", 15.

<sup>30</sup> C Schönberger, "Die Europäische Union als Bund" (2004) *ÄöR* 129(1), 104-5.

<sup>31</sup> H Arendt, *On Revolution* (New York, Penguin, 2006 [1977]), 142. In a similar spirit, John Fischer writes: "the question which dominated the first seventy-five years of American political life was, quite simply: How can such a federal system be held together against the splintering pressures of divergent interests? From the very beginning, therefore, American politicians were preoccupied with the problems of balancing these pressures against one another. They recognized that no constitutional or legalistic device could save the republic, unless the underlying real forces could be kept in equilibrium: As John Randolph put it: 'You may cover whole skins of parchment with limitations, but power alone can limit power'" (J Fischer, "Prerequisites of Balance" in AW MacMahon (ed) *Federalism: Mature and Emergent* (New York, Doubleday & Company, 1955), 63).

<sup>32</sup> Arendt, *On Revolution*, 143.

continued, was not constitutionalism in the sense of securing a negative sphere of freedom from government but the “erection of a system of powers that would check and balance in such a way that the power neither of the union nor its parts, the duly constituted states, would decrease or destroy one another”<sup>33</sup>. The core of the problem of the founders—as it is for all federations—was how to balance the political existence of the Union with the political existence of the Member States: “Both kinds of legal-political existences must continue to survive side by side, otherwise the federation can no longer exist. The mark of the federation is therefore a precarious condition of equilibrium, a *state of uncertainty*”<sup>34</sup>.

That a mere legal division of competences is insufficient to stabilise federal government was acknowledged by Alexis de Tocqueville in *Democracy in America*. The federal system, de Tocqueville writes, “necessarily brings two sovereignties into confrontation. The legislator manages to make the operation of these two sovereignties as simple and equal as possible and is to enclose both of them into their own carefully defined spheres of action. But he cannot meld them together into one single entity or prevent their bumping into each other at some point”<sup>35</sup>. Since the legislators, he continues “are unable to avoid dangerous collisions between the two sovereignties which the federal system brings face to face, their efforts to divert confederated peoples from war must be supplemented with special arrangements for promoting peace”<sup>36</sup>. For that reason, de Tocqueville concludes “the federal agreement cannot last long unless, in the peoples to which it applies, certain conditions of union guarantee a measure of comfort in their common life as well as smoothing out the task of government. Thus *the federal system not only needs sound laws to achieve success but also favourable circumstances*”<sup>37</sup>.

In all federal systems, de Tocqueville argues, law is incapable of preventing a clash between the powers of the Union and those of the states and ultimately incapable of diverting the confederate peoples from war. Countries that therefore only adhere to the federal ‘letter of the law’ of divided competences like the contemporaneous Mexico, de Tocqueville remarks, will fail because they will be incapable of transferring the necessary “spirit which gave it life”<sup>38</sup>. The federal balance necessitates, following de Tocqueville, not only sound laws but also a federal ‘spirit’ and some circumstances favourable to it. But what are they?

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<sup>33</sup> *ibid.*

<sup>34</sup> Schönberger, “Die Europäische Union als Bund”, 105, my translation.

<sup>35</sup> Alexis de Tocqueville, *Democracy in America* (London, Penguin, 2003), 192-3.

<sup>36</sup> *ibid.* 196.

<sup>37</sup> *ibid.*

<sup>38</sup> *ibid.* 194.

## II: THE CONDITIONS FOR THE FEDERAL BALANCE

### A: The Principle of Homogeneity

The political balance between the Union and its Member States can be maintained as long as there is *a general convergence of the wills* of all the Member States. As long as the will of one, on a fundamental level, is the same as the will of all, an existential conflict between the Union and its Member States can be repressed and the federal balance can be maintained. In this case, there is no fundamental conflict between the ‘common aim’ and the ‘particularistic aim’ of the federation. If there is a convergence of the wills of the Member States, there is little ground for an existential conflict between them and hence the question of sovereignty can be ignored. As long as there is a convergence of wills, it can remain an idle theoretical question who ultimately decides. But under what conditions will there be a general convergence of the wills of the Member States?

Following the theory of the federation, the primary requirement for the convergence of the wills of the Member States is the persistence of a *substantial homogeneity across the Member States*. Every federation, Schmitt writes, rests on “an essential presupposition, namely the *homogeneity of all the Member States*, that is, on a substantial similarity that lays the foundation for the conformity of the concrete mode of being [seinsmäßige Übereinstimmung] of the Member States and ensures that the extreme case of conflict does not occur within the federation”<sup>39</sup>. In other words, the conditions for the coexistence of unity and diversity in the federation is that its Member States do not differ too much from one another on a fundamental level, that they converge with regard to their ‘mode of being’. The federal constitution, Montesquieu wrote, “should be composed of states of the same nature”<sup>40</sup>. Whereas the ‘common interest’ or ‘common national feeling’, as we saw earlier can be too strong for a proper foundation for federalism<sup>41</sup>, so is it the case that, on a fundamental level, the Member States need to be substantially similar for the federal balance to be maintained. There is, in other words, *a stark limitation to the degree of plurality that can exist in a federation*. In the context of the EU, this has been most clearly expressed by Jan-Werner Müller: “the EU has always been about *pluralism within common political parameters*”<sup>42</sup>.

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<sup>39</sup> Schmitt, *Verfassungslehre*, 376, my translation.

<sup>40</sup> Montesquieu, *The Spirit of the Laws* (Cambridge, CUP, 1989), 132 (IX:2).

<sup>41</sup> Dicey, *Introduction to the Study of the Law of the Constitution*, 75-6.

<sup>42</sup> JW Müller, “Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission” in C Closa and D Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge, CUP, 2016), 221.

Following Beaud's comparative work on the political forms of the state, the empire and the federation, the latter lies in between the two other forms of political modernity with regard to its tolerance of plurality<sup>43</sup>. When compared with the political form of the state, both the empire and the federation are characterised by a high tolerance of diversity<sup>44</sup>. Whereas the empire, *ruling through domination*, does not need homogeneity to govern—and in many cases does not aspire to establish it<sup>45</sup>—the federation, founded on free contract and characterised by legal and political heterarchy (Chapter 1), needs a certain degree of unity to preserve the order and stability of the Union as a whole. Whereas a general consensus exists within the theory of the federation regarding the necessity of a relative substantial homogeneity across the Member States, it is contested what this homogeneity must consist in. What is it that needs to be shared by the Member States in order for the federal balance to be preserved?

Returning to *Democracy in America*, the answer given by de Tocqueville is, first, *shared material interests*<sup>46</sup>. States tend to federate on the basis of *necessity* because they are incapable of providing for the defence or welfare of the peoples and hence incapable of maintaining themselves politically (Chapter 2). But in itself, this is not enough to preserve the federal balance. “To ensure the long life of a confederation”, de Tocqueville writes, “a uniformity of civilization is no less necessary than a uniformity of needs in the diverse peoples forming it”<sup>47</sup>. On that basis, de Tocqueville maintained that the government of Switzerland was not ‘truly federal’ because of what he perceived as being a strong civilizational heterogeneity between the cantons: “The difference between the canton of Vaud and that of Uri resembles the difference between the nineteenth and fifteenth centuries”<sup>48</sup>. De Tocqueville was for a similar reason very critical of the prospects of Canada which he understood to be “divided into two hostile nations”<sup>49</sup>. The good fortune of the United States in contrast to Switzerland and Canada, in de Tocqueville's eyes, was therefore that

“From the state of Maine to that of Georgia is a distance of some one thousand miles.

However, there is less difference between the civilization of Maine and that of Georgia

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<sup>43</sup> O Beaud, “Federation and Empire: About a Conceptual distinction of Political Forms” in A Lev (ed) *The Federal Idea Public Law Between Governance and Political Life* (London, Hart Publishing, 2017), 72.

<sup>44</sup> *ibid* 69.

<sup>45</sup> *ibid*.

<sup>46</sup> De Tocqueville, *Democracy in America*, 196. See also RR Bowie, “The Process of Federating Europe” in AW MacMahon (ed) *Federalism: Mature and Emergent* (New York, Doubleday & Company, 1955), 493.

<sup>47</sup> De Tocqueville, *Democracy in America*, 196-7.

<sup>48</sup> *ibid* 197.

<sup>49</sup> *ibid* 199.

than between that of Normandy and that of Brittany. Consequently, Maine and Georgia, at the distant ends of a vast empire, have by nature more real opportunities to forge a confederation than Normandy and Brittany, separated only by a stream”<sup>50</sup>.

A similar answer had been given by John Jay in Federalist No. 2: “Providence has been pleased to give this one connected country, to one united people; a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs”. Under Jay’s (and de Tocqueville’s) idea of a community granted by ‘providence’, however, hides a very different historical reality. Leaving aside Jay’s obviously faulty assertion of common ‘ancestors’ in an immigrant country, as the other Founding Fathers, Jay ignored the other populations inhabiting the United States: the Native Americans and the enslaved black population. These populations were, by the founders, not considered to belong to ‘We, the People’.

With the infamous three-fifths compromise<sup>51</sup>, the 1787 Constitution of the United States explicitly constructed the slave population as inferior human beings to the ‘American people’. In concrete terms, for the representation and taxation purposes of the States, each slave counted for three-fifths of a white person. This was reinforced in the 1856 *Dred Scott* case where the Supreme Court answered in the negative the question of whether

“a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen”<sup>52</sup>

The inferior legal and political status accorded to the Native Americans is clearly expressed in the 1831 case of the Supreme Court of the United States, *Cherokee Nation v Georgia*<sup>53</sup>. Native Americans were in this case excluded from federal jurisdiction by the Supreme Court on the grounds that they were a ‘domestic dependent nation’ standing in

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<sup>50</sup> *ibid* 197.

<sup>51</sup> “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other Persons*”, The Constitution of the United States, Article I, Section 2, emphasis added.

<sup>52</sup> U.S. Supreme Court, *Dred Scott v. Sandford*, 60 U.S. 19 How. 393 393 [1856].

<sup>53</sup> U.S. Supreme Court, *Cherokee Nation v. Georgia*, 30 U.S. 5 Pet. 1 1 [1831], Section 2.

a relationship to the United States resembling that of a ‘ward to his guardian’<sup>54</sup>. Due to their ‘inferior status’, the Cherokees, the Supreme Court ruled, were neither citizens of the United States nor were they entitled to be treated as a true foreign nation or state.

That the United States was constituted by white settlers only was, in other words, not down to the ‘providence’ of a pre-given existence of a homogenous population—in terms of neither culture, civilisation, language nor ethnicity—on the territory of the United States but the *construction of political identity along racist lines*. This is a deeply *political project* of inclusion and exclusion, it is a political decision on who belongs to ‘the people’. The homogeneity that following Jay and De Tocqueville constitutes the ‘good fortune’ of the United States is, in other words, down to a *political decision on who ‘the people’ is*. The emergent American nationalism of the late 18<sup>th</sup> and (early) 19<sup>th</sup> century was, in this way, relying on racism as an ideology.

The case of the United States is a neat illustration of the fact that rather than relying on a homogenous common nationality granted by ‘providence’, the constitution of a federation entails the political construction of a new people, a federal nation. That is, the federation is not constituted by the federal nation, it is the other way around. This is the strongest possible expression of the ‘common aim’ of the federation: “The deepest meaning of the federal mission is to *transform the entirety of the different regions into a political community* (...), all the while safeguarding the initial allegiance of the individual members with respect to the member-state[s]”<sup>55</sup>. All federations are characterised by a double construction of political identity<sup>56</sup>. These are the ‘common aim’ and the ‘particular aim’ of the federation. The double construction of political identity is clearly visible in federal citizenship law that always consists of dual citizenship (Chapters 1-3): the citizenship of the original Member States and the construction of a new common federal citizenship that, at least in young and emergent federations, is derived from Member State citizenship. Federal citizenship establishes a common ‘indigenat’: a common status that forbids the Member States to treat citizens of other Member States as ‘aliens’, i.e., the right to be treated equally with the ‘natives’ in the other Member States. As a minimum, the common status of the ‘indigenat’ is the content of the embryonic ‘federal nationality’ that is

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<sup>54</sup> *ibid.*

<sup>55</sup> O Beaud, “The Question of Nationality within a Federation: a Neglected Issue in Nationality Law” in R Hansen and P Weil (eds) *Dual Nationality, Social Rights and Federal Citizenship on the U.S. and Europe: The Reinvention of Citizenship* (New York and Oxford, Berghahn Books, 2002), 319, emphasis added.

<sup>56</sup> M Forsyth, “The Relevance of Classical Approaches” in JJ Hesse and V Wright (eds) *Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems* (Oxford, OUP, 1996), 35.

constructed by the constitution of a federation. Because of the structure of federal citizenship law, a federation is always characterised by ‘dual nationality’<sup>57</sup>.

The question is what influence cultural heterogeneity has on this double construction of political identity? In Forsyth’s view in “a heterogeneous federal system there will be an additional, natural, *built-in limit on the nation-building capacity of the centre*”<sup>58</sup>. Notwithstanding the probable influence of a cultural, ethnic and linguistic heterogeneity between the Member States for the construction of a common federal political identity, its significance can easily be overstated. After all, few if any states could rely on a ‘pre-given’ homogeneity for their nation-building: “in ethnic, linguistic, or any other terms,” Hobsbawm writes “most states of any size were not homogenous and, could not simply be equated with nations”<sup>59</sup>. A ‘nation’ is not a product of nature and it is less dependent on ‘pre-given similarity’ than its ideological and political capacity to construct and enforce one: “Nations as a natural, God-given way of classifying men (...) as an inherent political destiny is a myth; nationalism, which sometimes takes pre-existing cultures and turns them into nations, sometimes invents them, and often obliterates pre-existing cultures; *that is a reality*”<sup>60</sup>. The political homogeneity on which a federation relies is, as is the case with all political identity, not something natural but an ideological product of history. It is not something that springs into life spontaneously. On the contrary, it is essentially constructed ‘from above’<sup>61</sup>. Nations are a product of nationalism, not the other way around<sup>62</sup>.

Whereas it is definitely the case that federalism—both the federation and the federal state<sup>63</sup>—is only capable of dealing with a certain degree of sub-Union nationalism, this is not down to the existence of multiple heterogeneous populations but to the existence of strong political ideologies of Member State nationalisms. A multi-national federation is preconditioned on the mutual recognition of the legitimate claim of a share

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<sup>57</sup> “[A] federation features only one true form of nationality: dual nationality. By dual nationality we mean not the classic state-based notion, according to which an individual would be at the same time a national of two different countries (...) but the coexistence of two nationalities that do not necessarily depend on the existence of two separate countries” (Beaud, “The Question of Nationality within a Federation”, 317).

<sup>58</sup> Forsyth, “The Relevance of Classical Approaches”, 33, emphasis added.

<sup>59</sup> Hobsbawm, *Nations and nationalism since 1780*, 17. Later in the book, Hobsbawm adds: “In any case, nobody ever denied the actual multinationality or multilinguality or multiethnicity of the olders and most unquestionable nation-states, e.g. Britain, France and Spain”. For Hobsbawm’s critique of linguistic or ethnic homogeneity as a necessary pre-given condition for the construction of nationhood, see *ibid* 51-67.

<sup>60</sup> E Gellner, *Nations and Nationalism* (Oxford, OUP, 1983), 48-9.

<sup>61</sup> Hobsbawm, *Nations and Nationalism Since 1780*, 10.

<sup>62</sup> “Nations do not make states and nationalisms but the other way around” (Hobsbawm, *Nations and Nationalism Since 1780*, 10).

<sup>63</sup> The secession of Pakistan from India is a good example (Wheare, “Federalism and the Making of Nations”, 30-1).

of public power of all the sub-Union nationalities. Federalism and extreme nationalism—be it manifest in “nation-building at the centre and province-building at the periphery”<sup>64</sup>—are incompatible with one another:

“People of differing nationality cannot form a federal union unless they are prepared to accept a government in which those who differ from them in nationality have some share. In many cases, too, some nationalities must expect that, though they may have their own way in their own state or province of the federation, they will be in a minority in the government of the whole federation. A federal union usually implies, too, that those who join will expect or be expected to develop some common nationality in addition to their distinct nationalities. When people of different nationalities are unwilling to accept these consequences, federal union cannot be made to fit their case”<sup>65</sup>.

During the nineteenth century, a number of ethnically and linguistically heterogeneous federations and federal polities emerged, most importantly the Restored Swiss Confederation of 1815<sup>66</sup> constituted, for the first time, on the basis of the political equality of the Germanophone and Francophone Cantons<sup>67</sup>. The Swiss example provides proof that the ‘civilisation thesis’ put forward by de Tocqueville is overstated. Another example is the Canadian Confederation that, however, from the perspective of this thesis will have to be treated with some care because it was united under the British Crown by the Constitution Act of 1867 and not as an autonomous federation on the basis of a federal constitutional treaty<sup>68</sup>. In the 20<sup>th</sup> century, federalism via devolution—and hence not the political form of the federation described in this thesis—has been used as a way of managing strong manifestations of diversity in previously unitary states<sup>69</sup>. With its current 24 official languages, the EU surpasses all previous federal unions with regard to linguistic and cultural heterogeneity and the content of its substantive homogeneity is clearly not that of a common pre-given linguistic, ethnic or cultural homogeneity. The homogeneity of the EU is not constructed along the lines of ‘ethno-nationalism’.

In his writings on the constitutional theory of the federation, Schmitt argued in line with his political existentialism that the content of the substantive homogeneity was

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<sup>64</sup> Forsyth, “The Relevance of Classical Approaches”, 33. See also Wheare, “Federalism and the Making of Nations”, 35.

<sup>65</sup> Wheare, “Federalism and the Making of Nations”, 30.

<sup>66</sup> Beaud, “Federation and Empire”, 71.

<sup>67</sup> Forsyth, *Federalism and Nationalism* (Leister and London, Leicester University Press, 1989), 3.

<sup>68</sup> See, however, Beaud, *Théorie*, 126.

<sup>69</sup> Forsyth, *Federalism and Nationalism*, 4-5.

unimportant: “There can be a national, religious, cultural, social, class, or another type of homogeneity”<sup>70</sup>. What mattered, in Schmitt’s view, was that the *intensity of the connection* was sufficiently strong to maintain a concrete existential agreement between the Member States ensuring that that no extreme case of conflict emerged within the federation<sup>71</sup>. The political, in Schmitt’s view, ultimately boils down to the friend-enemy distinction: a discrimination between ‘us’ and ‘them’. Following Forsyth, in a federation a firm line is always drawn between insiders and outsiders to the community:

“At the minimum—in a union whose content is economic [an ‘economic federation’]—it means a body in which systematic preference is given by insiders to insiders within an enclosed economic space. The maximum, it means a body capable of conducting war—the most intense form of the friend-enemy relation”<sup>72</sup>.

The substantive homogeneity existing between the Member States is manifest in the justification of the new common status of ‘member-statehood’ that, e.g., disallows the Member States to treat the citizens of other Member States as ‘aliens’. The content of the substantive homogeneity of a concrete federation will be what is perceived to be most politically salient for the Member States, something close to their political or constitutional identity, and will therefore *differ from federation to federation*. Schmitt considered ‘national similarity’ to be the dominant content around which the friend-enemy distinction was drawn contemporaneously. An important exception in his eyes, however, was the Soviet Union; a polity that clearly drew the friend-enemy distinction on something other than nationalism. The opening statement from the preamble of the 1924 Soviet Constitution—the Constitution of the Federation of Soviet Socialist Republics—attests to this:

“Since the foundation of the Soviet Republics, the states of the world have been divided into two camps: the camp of capitalism and the camp of socialism. There, in the camp of capitalism: national hate and inequality, colonial slavery and chauvinism, national oppression and massacres, brutalities and imperialistic wars. Here, in the camp of

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<sup>70</sup> Schmitt, *Constitutional Theory*, 392.

<sup>71</sup> *ibid.*

<sup>72</sup> Forsyth, “The Relevance of Classical Approaches”, 37.

socialism: reciprocal confidence and peace, national liberty and equality, the pacific co-existence and fraternal collaboration of peoples”<sup>73</sup>.

The substantial homogeneity set out by the 1924 Constitution between the different peoples of the Soviet Union is that they all belong to the proletariat. Nationalism is on the basis of the 1924 constitution understood as being incapable of solving the problem of peaceful ‘collaboration of peoples’: it belongs to the world of capitalism and imperialism. The Constitution of the Russian Socialist Federated Soviet Republic of 1918 is even more explicit in that citizenship is determined neither on the basis of blood nor soil but *exclusively on class*: any foreigner living in the Soviet Republic and who belongs to the ‘toiling class’ is granted political rights and can obtain citizenship ‘without complicated formality’ (Article 20) and the Soviet Republic recognizes ‘the equal right of all citizens, irrespective of their racial or national connection’ and further forbids any discrimination on the basis hereof (Article 22). Capitalism is the enemy in relation to whom the political identity of the Soviet Union is constructed.

This discrimination between friend and enemy is often very present in emergent federations because they mostly are *defensive* in origin (Chapter 2). States tend to come together in a federal union in response to a concrete enemy that they are incapable of defending themselves from individually but against whom they might stand a chance if united<sup>74</sup>. With regard to the United States, Jay writes that ‘providence’ has been pleased to unite a people “who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence”<sup>75</sup>.

In order to maintain the political autonomy of the Member States, a federation is never exclusively concerned with defence in a material sense. With the modern revolutions, the constitution of federations is part of the creation and solidification of a political order and constitutional imaginary. As constitutional projects, federations are also concerned with the protection of a certain ‘way of life’ and their common political identity—their political homogeneity—tends to be constructed around that constitutional project. A common constitutional project manifest in a common form of government can therefore be one of the most important ways of securing a political homogeneity between

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<sup>73</sup> The 1924 Constitution of the Federation of Soviet Socialist Republics can be accessed via: <http://mailstar.net/ussr1924.html> [last accessed 11 April 2018], emphasis added.

<sup>74</sup> Beaud, *Théorie*, 286; Forsyth, *Union of States*, 160; Friedrich, “Federal Constitutional Theory and Emergent Proposals”, 519-20.

<sup>75</sup> Federalist No. 2 (Jay) (see *The Federalist Papers*, 14-8).

the Member States of a federation: “A Federation has better chances of surviving when the Member States have the same form of government”<sup>76</sup>.

This observation was already made by Montesquieu who argued that “a confederate government ought to be composed of states of the same nature, especially of the republican kind”<sup>77</sup>. Montesquieu favoured republicanism over monarchy because he considered the spirit of the latter to be warlike and prone to enlargement by domination whereas the spirit of republicanism was that of peace and moderation<sup>78</sup>. For that reason, Montesquieu considered the Holy Roman Empire—a political union of monarchies and free cities—to be inferior to that of the United Provinces of the Netherlands and Switzerland<sup>79</sup>. But history supports neither Montesquieu’s thesis of the incompatibility of the federation as a political form with the monarchical form of government of its Member States nor his thesis of the inherently peaceful nature of republican federations. The monarchical German Federation as well as the republican federations of Switzerland and United States had violent civil wars in the 19<sup>th</sup> century. It is, however, generally agreed that he was right regarding the importance of a homogeneity with regard to the governmental form of the Member States of a federation: “opposing types of state principles and political outlook cannot exist together in a federalist construct”<sup>80</sup>. At least from the modern revolutions onwards, homogeneity with regard to the constitutional identity of the Member States provides one of the most important substantial contents for the political homogeneity of federal unions.

## **B: Homogeneity in the European Union**

The early period of European integration is also characterised by the protection of a certain political ‘way of life’, not merely from the concrete territorial threat of the USSR but also from the political ideologies of *fascism* and *communism*<sup>81</sup> (Chapters 2-3). These ideologies are understood as Western Europe’s ‘other’: an internal and external threat that European integration was perceived as being key in checking. The constitutional imaginary of the EU as an ‘elite construction’<sup>82</sup> belongs to the post-WWII

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<sup>76</sup> Beaud, “Federation and Empire”, 70.

<sup>77</sup> Montesquieu, *The Spirit of the Laws*, 132 (IX:2).

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

<sup>80</sup> Schmitt, *Constitutional Theory*, 392

<sup>81</sup> K Adenauer, *World Indivisible—With Liberty and Justice for All* (London, George Allen & Unwin Ltd, 1956).

<sup>82</sup> B Ackerman, “Three Path to Constitutionalism—and the Crisis of the European Union” (2015) *B.J.Pol.S.* 45, 707-8.

‘constitutional ethos’ of ‘constrained democracy’<sup>83</sup> (Chapter 3). An important tenet of the construction of a common political homogeneity in the EU, as was the case for the modern revolutionary federations, is around this shared constitutional project.

Formally, the EU is a ‘mixed federation’ of republics and constitutional monarchies. This does not mean that the EU is without a constitutional identity but rather that it does not belong to the modern revolutionary type<sup>84</sup>. The EU is neither born out of a modern republican revolution against monarchy nor as a monarchical counter-revolution to republicanism. It guarantees neither the republican nor the monarchical form of government of its Member States. The question of ‘constitutional monarchy’ or ‘republic’ is not politically significant for the Union and in no way divides the Member States politically. It is therefore a mistake to think about constitutional identity in the EU on the basis of the classical forms of government (democracy, aristocracy, monarchy) or those of the modern revolutions (constitutional monarchy and republicanism).

From a formal perspective, the constitutional identity of the Union is expressed in Article 2 TEU that has its origins in the constitutional imaginary of a substantive *value order* that emerged as part of the post-WWII political imaginary of ‘constrained democracy’. Article 2 TEU states:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. *These values are common to the Member States* in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”<sup>85</sup>.

That democracy, following Article 2 TEU, is understood as one substantive ‘value’ that has to be respected as part of a broader value order—and *not as a form of government* comparable to, e.g., monarchy—highlights that the constitutional imaginary of the EU would be incomprehensible from the perspective of the modern republican revolutionary

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<sup>83</sup> JW Müller, “Beyond Militant Democracy?” (2012) *New Left Review* 73, 43; JW Müller, “Safeguarding Democracy Inside the EU: Brussels and the Future of Liberal Order” (2013) *Transatlantic Academy* 3, 11; JW Müller, “Should the EU Protect Democracy and the Rule of Law Inside Member States”, 7. Available via: <https://www.princeton.edu/~jmueller/ELJ-Democracy%20Protection-JWMueller-pdf.pdf> [last accessed 2 November 2017], 22.

<sup>84</sup> Ackerman, “Three Path to Constitutionalism”, 705-14.

<sup>85</sup> Article 2 TEU, emphasis added

tradition. The constitution of the EU is a manifestation of ‘value-order’ constitutionalism<sup>86</sup>.

The presupposition of Article 2 TEU is that there is a relatively *homogenous constitutional identity* across the Union (“*these values are common to the Member States*”). At the most fundamental level, Article 2 surmises that the Member States share a similar understanding of the constitution as a value order and that this value order is identical to or at least compatible with that of the EU. If the constitutional identities of the Member States are not compatible with Article 2 TEU, there is an open constitutional conflict at the heart of the EU. This would spell the end of, or at least constitute a fundamental threat to, ‘constitutional tolerance’ and ‘constitutional pluralism’. As we shall see in this chapter, this may very well be the case because of the constitutional heterogeneity of the Member States, beyond the ‘Original Six’, that later have acceded to the Union.

### **C: The Introduction of Political Heterogeneity with the Enlargements to the EU**

The most significant reason for the introduction of political heterogeneity in the case of the EU is its enlargements. The political elites of the ‘Original Six’—France, Germany, Italy and the BENELUX—were relatively united around the same anti-fascist and anti-communist political project of ‘constrained democracy’ with European integration as focal point for the new post-WWII constitutional imaginary<sup>87</sup> (Chapters 2 and 3). This constitutional imaginary that lies at the heart of the constitutional identity of the EU, however, is not shared to the same degree by all the Member States that later have acceded to the EU (Chapter 3). The enlargement of the EU has therefore introduced a strong element of political heterogeneity. Notwithstanding that the EU prescribes a certain constitutional identity, it is not a given that *all* its Member States belong to this constitutional type, or at least experience the same intensity of relationship to it.

An argument in favour of the compatibility of the value order of the Union and the constitutional identities of the Member States can be advanced with regard to the states of the ‘Mediterranean Enlargements’ (Spain, Portugal and Greece). These states adopted constitutional settlements that fit the notion of constitutionalism as a ‘value order’ because of their direct experience of fascism, dictatorship or authoritarianism. They

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<sup>86</sup> For a discussion of the idea of the constitution as an order of values, see M Loughlin, “The Silences of Constitutions” (2018) *I•CON* 16 (forthcoming).

<sup>87</sup> Gaullism proved, however, to be the very significant exception to this general pattern and led, as we saw in Chapter 2, to the collapse of the project of a European military federation in the 1950s.

belong to the world of ‘constrained democracy’ or what Alexander Somek calls ‘Constitutionalism 2.0’ because of their experience of the breakdown of the liberal constitutional order<sup>88</sup>. For these states, membership in the EU has been understood as an important protection against the return of political extremism, specifically of fascism or authoritarianism. This sentiment was aptly expressed by the European Commission in a report in the “General considerations on the problems of enlargement” in 1978:

“When Greece, Portugal and Spain, newly emerging as democratic States after a long period of dictatorship, asked to be admitted to the Community, they were making a commitment which is primarily a *political one*. Their choice is double significant, both reflecting the concerns of these three new democracies for *their own consolidation and protection against the return of dictatorship* and constituting an act of faith in a united Europe, which demonstrates that the ideas inspiring the creation of the Community have lost none of their vigour or relevance. *The three countries have entrusted the Community with a political responsibility which it cannot refuse, except at the price of denying the principles in which it is itself grounded*”<sup>89</sup>.

For these states, member-statehood of the EU has been an important way of realising their own understanding of constitutional autonomy by protecting themselves, via membership in the EU, from the return of the main enemy of the liberal constitution: *fascist dictatorship*. For both the ‘Original Six’ and the countries of the ‘Mediterranean enlargements’, the project of European unification was understood as a possibility for the realisation of a new domestic constitutionalism by constraining the possibilities of democratic choice. In a very concrete sense, it is a part of their own domestic constitutional settlements<sup>90</sup>. There is accordingly a strong affinity between the identity of the European project and the constitutional project of those Member States. It is for that reason that the Commission writes that it cannot deny these states membership ‘*except at the price of denying the principles in which it is itself grounded*’.

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<sup>88</sup> A Somek, *The Cosmopolitan Constitution* (Oxford, OUP, 2014), Chapter 2.

<sup>89</sup> The European Commission, “General Considerations on the Problems of Enlargement” (Communication sent by the Commission to the Council on 20 April 1978), COM(78)120 final, 6, emphasis added.

<sup>90</sup> Habermas, therefore, speaks for these states when he writes: “What forms the common core of a European identity is the character of the painful learning process it has gone through, as much as its results. It is the lasting memory of nationalist excess and moral abyss that lends to our present commitments the quality of a peculiar achievement. This historical background should ease the transition to a post-national democracy based on the mutual recognition of the differences between strong and proud national cultures” (J Habermas, “Why Europe Needs A Constitution” (2001) 11 *New Left Review*, 21).

This shared understanding of constitutionalism, however, is much less prevalent in both the ‘continuous democracies’ of Scandinavia and the UK and the ‘new democracies’ in the Central and Eastern European states of the ‘Eastern Enlargements’ (Chapter 3). All these Member States have a much stronger ‘sovereignist’ understanding of their constitutions. In the constitutional self-understanding of the ‘continuous democracies’, the constitution is a ‘framework for regulating political conflicts’<sup>91</sup> and not a substantive order of values. The constitutional imaginaries of these states belong in many ways to the pre-WWII world. The constitutional orders of these states are not based in a fear of the internal collapse into fascism and for that reason the idea of granting a substantive value order the status of ‘super-legality’ has not become part of their constitutional imagination.

The idea of ‘constrained democracy’, however, did not have a strong resonance for the acceding Central and Eastern European states either. In some ways this is surprising taking into account their own experience of authoritarian rule and the central role of EU membership to their constitutional reform process<sup>92</sup>. A process that—as had been the case of the Mediterranean states<sup>93</sup>—was understood as an important part of national renewal and the achievement of the countries ‘true destiny’, allowing their ‘return to Europe’<sup>94</sup> (Chapter 3). Nevertheless, there is an important difference between the constitutional imaginary of the ‘post-fascist’ and the ‘post-Communist’ states. In contrast to the post-fascist constitutions, the constitutional imaginary of the post-Communist constitutions was not born out of the internal collapse of the nation-state (Chapter 2) but out of the collapse of a foreign empire. The ‘enemy of the constitution’ for the Central and Eastern European states was represented by an *external imperial foe* (the *Soviet Union* and *Communism* as an ideology); not as an ‘enemy within’.

The Central and Eastern European countries gave themselves constitutions with a strong accentuation of national sovereignty after the fall of the Soviet Union<sup>95</sup>. For these

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<sup>91</sup> Loughlin, “The Silences of Constitutions”.

<sup>92</sup> J Příbání, *Legal Symbolism: on Law, Time and European Identity* (Aldershot, Ashgate, 2007), 94; W Sadurski, *Constitutionalism and the Eastern Enlargement of Europe* (Oxford, OUP, 2012).

<sup>93</sup> CB Sío-López “Reconditioning the ‘Return to Europe’: The Influence of Spanish Accession in Shaping the EU’s Eastern Enlargement Process” in *The Crisis of EU Enlargement—LSE IDEAS Special Report* SR018.

<sup>94</sup> M Cremona, “Introduction” in M Cremona (ed) *The Enlargements of the European Union* (Oxford, OUP, 2003), 2; MA Vachudova, *Europe Undivided: Democracy, Leverage, and Integration after Communism* (Oxford, OUP, 2005), 83ff.

<sup>95</sup> Sadurski, *Constitutionalism and the Eastern Enlargement of Europe*, 71-4. See also A Sájo, “Becoming ‘Europeans’: The Impact of EU ‘Constitutionalism’ on Post-Communist Pre-Modernity” in W Sadurski, A Czarnota and M Krygier (eds) *Spreading Democracy and Rule of Law? The Impact of EU Enlargement on Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht, Springer, 2006), 178-9.

countries, in contrast to the post-fascist countries, sovereignty and nationalism were not perceived as being threats to democracy<sup>96</sup> but on the contrary a vehicle for it. The necessary limitation of sovereignty entailed in EU membership, therefore, was not always met with great enthusiasm<sup>97</sup>. At times it was even understood as a new form of foreign dominance ('We have just got rid of Moscow's domination and are about to subject ourselves to domination by Brussels' was the slogan of some anti-EU political movements<sup>98</sup>). This may be part of an explanation as to why the constitutions of these countries, despite the use of Europe as a myth (Chapter 3), are less 'open to European law' (in one famous case, the Polish Constitutional Tribunal's accession ruling, flatly rejecting the notion of supranationality entirely<sup>99</sup>). As a Polish commentator put it in regard to this ruling, 'the Tribunal's reasoning was based on fears of losing sovereignty, or not retaining enough of it'<sup>100</sup>. The accession to the EU was therefore for the Central and Eastern European states characterised by the paradox that, on the one hand, accession was understood as a key factor in the consolidation of their newly won democratic freedoms, but, on the other hand, their constitutional imaginary relied on a strong emphasis on nationalism and sovereignty incompatible with the constitutional imaginary and reality of the Union they were acceding to: "the EU is thus perceived both as a source of the *promotion* of democracy and as a *threat* to democracy"<sup>101</sup>.

#### **D: The Government of Constitutional Homogeneity and Heterogeneity in the EU**

Enlargement of a federation is a clear (but not the only) example of why the initial shared material interest and sense of a common enemy is insufficient for the long-term stability and survival of a federation. A political homogeneity consisting in a common threat and common material interests changes with the political winds and fortunes of its Member States and is therefore highly *volatile*. In contrast to districts or provinces of a state, the Member States of a federation retain their political autonomy and hence their right to decide on their own fate. This means that they constantly have the potential to develop in opposite directions and give themselves constitutions that contradict the political homogeneity of the federation. If the federation is to maintain its internal balance,

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<sup>96</sup> Sadurski, *Constitutionalism and the Eastern Enlargement of Europe*, 67ff.

<sup>97</sup> J Habermas, "Why Europe Needs a Constitution", 8; Sadurki, *Constitutionalism and the Enlargement of Europe*, 66.

<sup>98</sup> Sadurski, *Constitutionalism and the Eastern Enlargement of Europe*, 67.

<sup>99</sup> *ibid* 121.

<sup>100</sup> *ibid*.

<sup>101</sup> *ibid* 103.

it will need to find a more stable and permanent solution to deal with political, social and constitutional changes of its Member States beyond the fortuitous existence of a common enemy and shared interests to provide a political homogeneity. The federation therefore needs to foster and protect the content of the substantial homogeneity of its Member States if the federation is to survive.

Whereas the content of the political homogeneity of the Member States of any given federation ultimately is an extra-legal question, the *government* of the homogeneity of the Member States is a question of federal public law. The government employs a variety of laws and measures in order to protect what it understands to be the politically salient substantial homogeneity of its Member States. In the rest of this chapter, two of the most important tools for the government of political homogeneity and heterogeneity in the federation will be examined: the government of the states acceding to a federation and provisions relating to the government of the constitutional identity or form of government of the Member States. These governmental tools are an important way for the federation to manage its internal constitutional contradictions by securing the unity of its Member States with regard to their fundamental substantial homogeneity. That being said, this exercise of public powers presents a new conundrum for the federation: how does the federation ensure a continuous political homogeneity of its Member States without destroying their political autonomy? The government of federal homogeneity and heterogeneity, in other words, risks reproducing the problem it was indirectly meant to solve—the problem of the federal balance—by eroding the political autonomy of its Member States.

### **III: ADMISSION OF NEW MEMBER STATES**

#### **A: The Government of Accession**

An important way for a federation to protect the federal balance is to make sure that no state with a ‘different nature’ from the existing Member States (in the eyes of the Union) is allowed to accede to the federation. One way of securing that is simply not to allow for any new Member States. Switzerland is often portrayed as an example of such a ‘closed’ or ‘restricted’ federation. After the collapse of the Austro-Hungarian Empire with WWI, Vorarlberg attempted to leave Austria for Switzerland. Despite the people of Vorarlberg voting 80.75% in favour of acceding to Switzerland in the 1919 referendum, and despite public support in Switzerland for their membership, the government of

Switzerland let the Allies decide the question in the Treaty of Saint-Germain-en-Laye (which they did in favour of Austria). Due to its commitment to neutrality and its internal balance<sup>102</sup> between the Germanophone and Francophone communities, the Swiss government withheld any opinion in order not to jeopardize either their internal balance or their relationship with Austria, which potentially would have endangered their continued neutrality: “The Swiss federation, a small state surrounded by powerful neighbours, found it therefore wiser to refuse to admit any new State to safeguard its external security and its internal cultural balance”<sup>103</sup>.

As is the case for federal states, federations are not necessarily expansive in nature. In contrast to the United States, both Switzerland (pre-1848) and the German Federation have been relatively restricted federations however, all three of them have had to deal with the problem of admitting new Member States<sup>104</sup>. Switzerland has not admitted any new Member States since the full and equal inclusion of the francophone cantons (Neuchâtel, Geneva and Valais) in 1815, however, from its foundation in 1291 it has grown from its original three Member States (Uri, Schwytz and Unterwalden) to 22 cantons<sup>105</sup>. The German Federation was also a relatively closed federation. This is manifest in one of its founding treaties stating that the federation is “restricted to the states currently participating” and only allows for the admission of new Member States “when the entirety of the Confederal membership finds such to be compatible with existing circumstances and appropriate to the advantage of the whole”<sup>106</sup>. Nevertheless, in 1820 it allowed for the inclusion five new Member States.

The EEC/EU was from the very beginning conceived of as an *expansive federation* that was meant to ‘unite Europe’; not merely the Original Six<sup>107</sup>. This is, e.g., visible in the Preamble to the Treaty of Rome “calling upon the other peoples of Europe who share their ideal to join in their efforts”. That the expansion of the EU continues to be a central

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<sup>102</sup> The 1820 ‘Missouri compromise’ in the United States is another example where the admission of new states did upset the internal federal balance. This political compromise had to do with the federal balance in the United States between slave states and non-slave states in relation to the expansion of the US. Missouri (slave state) was only allowed to accede to the Union if Maine (non-slave state) was allowed to accede as well (WM Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca, Cornell University Press, 1972), 141ff).

<sup>103</sup> CJ Friedrich, “Admission of New States, Territorial Adjustment, and Secession” in CJ Friedrich and RR Bowie (eds) *Studies in Federalism* (Boston and Toronto, Little, Brown and Company, 1954), 761.

<sup>104</sup> Beaud, *Théorie*, 234-5.

<sup>105</sup> *ibid* 234.

<sup>106</sup> Final Act of the Viennese Ministerial Conferences (May 15, 1820), Article 6. Available via [http://germanhistorydocs.ghi-dc.org/pdf/eng/1\\_C\\_NS4\\_Vienna%20Final%20Act.pdf](http://germanhistorydocs.ghi-dc.org/pdf/eng/1_C_NS4_Vienna%20Final%20Act.pdf) [last visited 27 October 2017].

<sup>107</sup> Friedrich, “Admission of New States, Territorial Adjustment, and Secession”, 753.

political aim of the Union was reaffirmed in a 2002 speech by the President of the European Commission, Romano Prodi:

“we have restored the historical unity of the peoples of Europe. Our common destiny is once again to build a common future. A future built on shared fundamental values: those of peace, democracy, the rule of law, human rights and the protection of minorities (...) [the] enlargement is not just about economics. It is important primarily for political and ethical reasons. *Enlargement is the fulfilment of the European project.* This project has given us half a century of peace and prosperity, and it should be extended to the whole continent”<sup>108</sup>.

True to its original aim, the EU has more than quadrupled over the years. Even so, the admission of new Member States has presented the EU with much greater problems than it did for the federations of the 18<sup>th</sup> and 19<sup>th</sup> century. The main reason for that is that in contrast to the new Member States of the EU, the states that acceded to the aforementioned federations were generally not fully independent states<sup>109</sup> and definitely not fully formed nation-states: “New members of existing federations were usually small units incorporated into a larger body; territories, colonies or provinces”<sup>110</sup>.

The United States provides an interesting example. Together with the EU, the United States is the most expansive federation. However, only two of the states that acceded to the Union—Vermont (1791) and Texas (1845)—were fully independent states<sup>111</sup>. The majority of the states admitted gained their statehood through the United States’ expansion into the Western territories. The Westward expansion of the United States was governed by a number of laws—importantly the Land Ordinances of 1784 and 1785 and the Northwest Ordinances of 1787 and 1789<sup>112</sup>—stipulating the conditions under which the Western territories would be included into the United States ‘on equal footing’<sup>113</sup> with the original 13 states. These territories—ceded to the United States from

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<sup>108</sup> Speech by Romano Prodi, President of the European Commission: “Enlargement—the final lap” (European Parliament Brussels, 9 October 2002). Available via: [http://europa.eu/rapid/press-release\\_SPEECH-02-463\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-02-463_en.htm) [last accessed 30 October 2017], emphasis added. See also J Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford, OUP, 2006), 50-2.

<sup>109</sup> “The cases of independent states joining federations are very few and usually the independence of the state has existed for a short period only. Some racial or national connection frequently exists between the admitted state and other States of the Union” (Friedrich, “Admission of New States, Territorial Adjustment, and Secession”, 756).

<sup>110</sup> Friedrich, “Admission of New States, Territorial Adjustment, and Secession”, 754.

<sup>111</sup> *ibid* 753, 756-8.

<sup>112</sup> For an introduction to the Northwest Ordinance, see PS Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Bloomington and Indianapolis, Indiana University Press, 1987).

<sup>113</sup> See Land Ordinance of 1784 and Northwest Ordinance 1787.

some of its Member States, occupied by American settlers or bought from other colonial empires or Indian Tribes—were not yet states.

An important part of the aforementioned laws is therefore concerned with ‘state building’ measures such as procedures for the basic spatial organisation of the territories that would make them governable<sup>114</sup>. This entailed the geographical division of land into states<sup>115</sup> and townships, a standardized system for the acquisition of settler land, documentation of natural resources, and the share of Congress in these resources, e.g., precious metals<sup>116</sup>. The question of governability was crucial on a political level because the Westward expansion was controversial at the time (“many easterners feared that it would lead to the depopulation and impoverishment of their states and to the weakening of the union”<sup>117</sup>). Moreover, on entering into the Union, the new Member States were to be liable for parts of the debt of the United States<sup>118</sup>: “Not only did the United States stand to forfeit tremendous economic resources and a vast area for growth by failing to maintain federal authority in the West, but it would also become increasingly vulnerable to disunion and counterrevolution”<sup>119</sup>.

Beyond the *possibility of government*, the Land Ordinances and the Northwest Ordinances are concerned with the *form of government* of the new states. Importantly, the new states needed to give themselves constitutional forms of governments, specifically, a *republican form of government*<sup>120</sup>. The westward expansion of the United States was in this way done through state-building and despite the enormous scope of such a task, it presented the United States with relatively few serious problems. The reasons for this, following Carl Friedrich, is primarily that the westward expansion did not introduce any substantial heterogeneity into the Union: “Most of the leaders and settlers of all territories admitted to statehood have been Americans. All of the territories admitted to the United States, with the exception of California, have been contiguous to the rest of the nation”<sup>121</sup>.

The EU, being situated in the middle of the ‘old world’ is presented with a qualitatively different problem than that of the United States. Whereas the problem for the United States was that the territories were not yet states, the problem for the EU is

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<sup>114</sup> See JC Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, Yale University Press, 2005), 49-51.

<sup>115</sup> Northwest Ordinance 1787.

<sup>116</sup> Land Ordinance of 1785, reprinted in Onuf, *Statehood and Union*, 23-4.

<sup>117</sup> Onuf, *Statehood and Union*, xv.

<sup>118</sup> Land Ordinance of 1784, Northwest Ordinance 1787.

<sup>119</sup> Onuf, *Statehood and Union*, 4.

<sup>120</sup> Land Ordinance of 1784, Northwest Ordinance 1787.

<sup>121</sup> Friedrich, “Admission of New States, Territorial Adjustment, and Secession”, 758.

how to make sure that the state apparatuses, constitutional regimes and societal models *already present* in the acceding states—whether fragile or consolidated, new or old—does not become a threat to the constitutional homogeneity of the Union as a whole. Being situated in the ‘old world’, the potential Member States of the EU have all had long histories and political, cultural and societal norms of their own; none of them were ‘blank slates’<sup>122</sup>. This is clearly manifest in that six of the Member States that have acceded to the EU—the UK, Ireland, Austria, Finland and the Scandinavian states—were fully formed nation-states with consolidated constitutional regimes of their own at the time of accession.

Notwithstanding the long histories and very diverse societies of the rest of the states who have joined the EU, they have an interesting commonality with the expansion of the United States into the Western territories. For all these states, accession to the EU has been tied to a political, societal and constitutional ‘rebirth of the state’ after the collapse of either an authoritarian/fascist regime (Greece, Spain and Portugal) or the collapse of Communism that led to independence for some states (Poland, Hungary, Bulgaria and Romania) and statehood for others (the Baltic states, Czech Republic, Slovakia and Slovenia). In all these cases, the states had to be radically rebuilt politically, culturally, socially and economically. Because of the long histories of these states and regions, the EU has nonetheless been confronted with the need to govern an unprecedented amount of plurality. As has been noted by Bruce Ackerman, a distinctive feature of the EU that differentiates it from “other great federations—most notably the United States” is that the Member States of the EU have approached the EU along different constitutional paths<sup>123</sup>. The *constitutional diversity* of the EU is much more pronounced than in any previous federation.

The EU has attempted to protect its constitutional homogeneity when admitting new Member States through the establishment of a set of provisions that the acceding

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<sup>122</sup> In truth, the Western Territories were not ‘empty lands’ either. First and foremost, there were the Native Americans who had to be violently removed to make way for the settlers. But even where that was not the case, the state-building did not commence *ex nihilo* but had to deal with an already unruly situation. As one commentator remarks: “Speculators, squatters, and other adventures infested the new settlements, promoting their private interests, defying state and national authority, and entertaining overtures from foreign powers; north of the Ohio, hostile Indians remained a formidable presence. The frontier would have to be transformed so the West could play its part in a revitalised union, a transformation that required the exercise of authority—to maintain order, protect legitimate land titles, and foster economic developments—by a strong national government” (Onuf, *Statehood and Union*, xiii).

<sup>123</sup> Ackerman, “Three Path to Constitutionalism”, 712.

states should adhere to if they are to be admitted: accession criteria<sup>124</sup>. The accession criteria, as we saw in the case of the westward expansion of the United States, allow for an extensive government of the acceding states. They allow the Union to pre-emptively ‘engineer’ new Member States that are substantially homogeneous with its existing Member States with regard to what it perceives to be most politically salient.

In contrast to what Jan Zielonka has argued in the context of the ‘Eastern Enlargements’<sup>125</sup>, accession processes are *not imperial* (at least not from a public law perspective) because the new Member States accede on the basis of their own initiative, on free contract and the acceding states are promised to become politically equal partners (Chapter 1). To be sure, this does not mean that accession conditionality is not a means for the federation to extend its powers and gain influence over the acceding states<sup>126</sup>. On the contrary, the accession process is a very effective ‘foreign-policy instrument’ of the Union that allows it to influence the domestic and foreign policy of the applicant state<sup>127</sup>. As the accession of the post-Communist states to the EU bears witness to, accession conditionality can be equally intrusive for the political and constitutional structures of the acceding states as for states under imperial dominance<sup>128</sup>. For the period of the accession, the acceding state is *de facto* if not *de jure* a kind of dependency of the Union, albeit on a voluntary basis and with the promise of political equality post-accession.

Notwithstanding that Zielonka’s analysis of the EU as empire<sup>129</sup> from a public law perspective is incorrect, he is nonetheless right with regard to the dominance of the Union over the acceding states. The ‘Eastern Enlargements’ were without a doubt a means for the Union to “assert political and economic control over the unstable and impoverished eastern part of the continent (...) It was about conquering, reforming, and regulating new emerging markets. In essence it was about securing peace and prosperity in the future Europe through the skilful use of EU membership conditionality”<sup>130</sup>. That being said, in

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<sup>124</sup> For an account of the historical development of the EU’s accession criteria, see KE Smith, “The Evolution and Application of EU Membership Conditionality” in M Cremona (ed) *The Enlargement of the European Union* (Oxford, OUP, 2003).

<sup>125</sup> Zielonka, *Europe as Empire*, 44-59.

<sup>126</sup> Smith, “The Evolution and Application of EU Membership Conditionality”, 121.

<sup>127</sup> *ibid* 108; Vachudova, *Europe Undivided*.

<sup>128</sup> “The ‘There Is No Alternative’ to the liberal democracy and market economy narrative presented the people in post-communist Europe with something that was disturbingly familiar to them. When they lived in ‘really existing socialism,’ they were left with no choice but to submit to the laws of historical necessity steering them to a better (socialist) future. Throughout the 1990s, they were again simple ‘marionettes’ in a historical process that takes place independently of their will and drags them with it to a better future’—this time liberal democracy and market economy, which awaited them at the end of history” (J Komárek, “Waiting for the Existential Revolution in Europe” (2014) *I•CON* (12)1, 195). See also, Zielonka, *Europe as Empire*, 56-7.

<sup>129</sup> Zielonka, *Europe as Empire*.

<sup>130</sup> *ibid* 44-5.

contrast to imperialism, federalism allows for the creation of a concrete economic order established not on land-grabbing but on mutual promises and pledges (Chapter 2). Notwithstanding the intrusiveness of accession conditionality, an accession process to a federation is a peaceful and voluntary expansion of the federal union and market.

### **B: The Copenhagen Criteria and the Requirement of Political and Economic Homogeneity**

The EU accession criteria are of great interest because they are a manifestation of what the EU perceives to be the most important substantial character-traits pertaining to its Member States. They are in this way an important source for understanding the EU's 'constitutional identity'. In concrete terms, there will of course always be discrepancies between the criteria for the acceding states and the 'reality' of the old Member States<sup>131</sup>. The accession criteria are therefore, in precise terms, a source for understanding the 'ideology' of a federation (in the context of the United States, it was thus an important debate whether the newly admitted states were to allow for slavery or not<sup>132</sup>). It is not only about what the Union is but what it understands itself destined to become.

Accession to the EU is governed by Article 49 TEU, which tells us that "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union". The criterion of being a 'European state' is not legally specified and since there are no clear geographical, historical or cultural borders to Europe, it is a *political question* for the Union and its Member States to define, at their discretion, what they perceive as the borders of Europe and what constitutes a 'European State'<sup>133</sup>. Such criteria are therefore subject to geopolitical shifts and power relations between the Member States. After the fall of the Soviet Union, several countries belonging to the former Soviet Union or the Eastern bloc were thus permitted to 'return to Europe' (Chapter 3), whereas Turkey has been unable to join despite submitting its formal application for membership three decades ago.

In order to be considered for membership in the Union, the 'European' state in question has to respect, and be committed to promote, the foundational values of the Union (as defined by Article 2 TEU). In the lead up to the 'Eastern enlargement', the

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<sup>131</sup> The Copenhagen Criteria have therefore been accused of imposing double standards (Smith, "The Evolution and Application of EU Membership Conditionality", 120).

<sup>132</sup> Friedrich, "Admission of New States, Territorial Adjustment, and Secession", 758.

<sup>133</sup> D Kochenow, *EU Enlargement and the Failure of Constitutionality: Preaccession Conditionality in the Fields of Democracy and the Rule of Law* (Alphen aan den Rijn, Kluwer Law International, 2008), 15, 27ff.

accession requirements were further developed and specified in the Copenhagen criteria, laid down by the European Council in Copenhagen in 1993:

“Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union”<sup>134</sup>.

The Copenhagen criteria can be broken down into three separate requirements. First, a ‘functional’ requirement regarding the candidate country’s *ability* to take on the obligations of Union membership. Another ‘functional’ requirement was added in Madrid in December 1995, regarding the candidate country’s administrative and legislative capability to transpose and implement EU directives in a secure and sufficient manner. These requirements, stating that the Member State has to be capable of being a functional and law-observing member of the Union, are of interest in that, like the Northwest and Land Ordinances of the United States, *they intend to make the new Member States governable*. Their intention is to make the new states conform to a governmental pattern comprehensible from the perspective of the Union. This allows the EU institutions to evaluate and measure the exercise of governmental power by the new Member States; it makes them apprehensible in the eyes of an outsider. A federation is always based on a mutualisation of risk and it can therefore not admit an ungovernable state into the Union.

The two other requirements are ‘substantial requirements’ regarding the implementation of a *concrete political and economic order*. *First*, the candidate country is required to maintain (and create) stable institutions capable of protecting the liberal-democratic political order: democracy, rule of law, human rights, and the protection of minorities. *Second*, the candidate country is required to implement and sustain a functioning market economy capable of coping with the competitive pressure and the market forces of the Union. One of the strongest criteria for a substantial homogeneity demanded and monitored by the Union for any state acceding to the Union is a requirement related to the Economic and Monetary Union (EMU). All states acceding to the EU obligate themselves to adopt the euro as their legal tender. In order to do that

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<sup>134</sup> European Council in Copenhagen, 21-22 June 1993. Conclusion of the Presidency.

they will need to align their economies in accordance with the convergence criteria,<sup>135</sup> which further insure a substantial homogeneity between the Member States of the Eurozone Area. The convergence criteria require the Member States ‘with a derogation’<sup>136</sup> to achieve a high degree of price stability, sustainable government finances, exchange-rate stability and stability of long term interest rates. The purpose of the convergence criteria is that the acceding Member States to the euro do not endanger its primary objective: price stability.<sup>137</sup>

The Copenhagen criteria thus highlight the centrality of the protection by the Union of a constitutional homogeneity with regard to the ‘*economic constitutions*’ of its Member States. The economic order protected by the Union as part of the constitutional homogeneity of its Member States, however, is not identical over time. Whereas the immediate post-WWII period of the ‘*trentes glorieuses*’ was characterised by different forms of ‘embedded liberalism’ aimed at market correction, protecting domestic welfare states and allowing for the development of different ‘varieties of capitalism’,<sup>138</sup> the collapse of the Soviet Union arguably signals a watershed in the development of Europe’s economic constitutionalism. With the end of the Cold War, which signalled the global victory of American capitalism, it is widely held that European political economy and Europe itself began to acquire a new identity with the constitutionalisation of the EMU based on a ‘substantive value order’ influenced by ordoliberalism and neoliberalism<sup>139</sup>. However, if the constitutional identity protected by the EU is understood as including a specific economic order and set of economic prescriptions, another problem of constitutional heterogeneity has to be raised, namely, that in the constitutional settlements of various Member States of the EU very different relationships between state and society and different economic models persist<sup>140</sup>. The most profound example is the difference between the economic and societal models for the countries of the Eastern enlargements before and after the post-Communist transition. The transformation of the former

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<sup>135</sup> Article 140 TFEU.

<sup>136</sup> Article 139(1) TFEU.

<sup>137</sup> Article 127 TFEU.

<sup>138</sup> P Hall and D Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford, OUP, 2001).

<sup>139</sup> W Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (London, Verso, 2014); É Balibar, “The Rise and Fall of the European Union: Temporalities and Teleologies” (2014) *Constellations* 21(2).

<sup>140</sup> M Höpner and A Schäfer, “Integration among Unequals” (2012) *MPjG Paper* 12(5); FW Scharpf, “The Asymmetry of European Integration, or Why the EU cannot be a ‘Social Market Economy’” (2010) *Socio-Economic Review* 8.

communist countries from centrally planned economies to market economies is one of the most radical state transformations imaginable<sup>141</sup>. As remarked by one scholar:

“The closest parallel to the disruption that the countries of formerly communist Europe are bringing on themselves is with natural or man-made disasters: floods, earthquakes, famines, or wars. But even those parallels understate the enormity of social dislocation that economic transition is bound to cause. It is an easier matter to repair physical damage, even if it is extensive, than to change the beliefs, the habits, and the skills of an entire population”<sup>142</sup>.

The post-Communist transition called for nothing less than an ‘existential revolution’; the introduction of a complete and comprehensive new societal ‘way of life’ and a complete ‘liberation’ from the totalitarian past<sup>143</sup>. Notwithstanding that post-Communist transition was not entirely tied to the process of accession to the Union, it was without a doubt one of the key events—if not *the* key event—that shaped the new constitutional regimes that emerged post-1989<sup>144</sup>. The countries of Central and Eastern Europe provide the example where the conformance with the Maastricht ‘economic order’—as laid out in the Copenhagen criteria—has entailed the most radical state transformation. In the words of Zielonka: “before 1989 crossing the East-West divide was like entering a totally alien, if not hostile empire, with different laws, economy, education, ideology and culture”<sup>145</sup>. That example aside, important differences persist even in the relatively ‘old’ Member States between the social market economies and the liberal market economies<sup>146</sup>.

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<sup>141</sup> According to some scholars, the post-Communist countries that have acceded to the EU, however, are not the only Member States that have been required to substantially transform central aspects of their identity in order to conform to the economic constitution of the EU. Following Fritz Scharpf (“The Asymmetry of European Integration”), the constitutionalisation of the economy in the EU and the wide-ranging teleological interpretations of its main principles by the ECJ has led to an asymmetric dynamic of European integration because its liberalizing and deregulatory impact on the socio-economic regimes of the Member States is much stronger for the Continental and Scandinavian social market economies than the liberal market economies.

<sup>142</sup> M Mandelbaum, “Introduction” in S Islam and M Mandelbaum (ed) *Making Markets: Economic Transformation in Eastern Europe and the Post-Soviet States* (New York, Council on Foreign Relations Press, 1993), 1-2.

<sup>143</sup> Komárek, “Waiting for the Existential Revolution in Europe”, 208.

<sup>144</sup> Sadurski, *Constitutionalism and the Enlargement of Europe*, xxi, 148ff; J Rupnik and J Zielonka, “Introduction: The State of Democracy 20 Years on: Domestic and External Factors” (2013) *East European Politics and Societies and Cultures* 27(1), 11.

<sup>145</sup> Zielonka, *Europe as Empire*, 23.

<sup>146</sup> Scharpf, “The Asymmetry of European Integration”.

The government of the accession to the EU has been a way for the EU to stay true to its founding mission of ‘uniting Europe’ without allowing states ‘of different nature’ into the Union. By way of the accession criteria, especially the Copenhagen criteria used in the case of the ‘Eastern Enlargements’, the EU has ‘engineered’ the new Member States in what it perceives to be its own image. From a formal perspective, the radical state transformation associated with accession is not a danger to the autonomy and diversity of the acceding states because they undergo this transformation before they become Member States. The radical state transformation this has necessitated has been done ‘pre-emptively’ to ensure that the federal balance of the EU was not endangered by the admission of the new Member States. The problem, however, is that this radical state transformation that the Central and Eastern European states had to undergo to become Member States of the EU has not necessarily been genuinely internalised: “Many analysts today agree that while post-Communist countries were successful in building democratic *institutions*, they were much less so as regards democratic *culture*—one Czech commentator describes this as ‘democracy without democrats’”<sup>147</sup>. If it is not properly internalised, the demands of EU member-statehood are likely to be experienced as a ‘foreign’ or even ‘imperial’ force. In that case, there is no guarantee that the Member States will continue to adhere to the homogeneity imposed by the accession process. Accession criteria are meant to ensure that the states who *enter* into a federation are substantially similar to the existing Member States. It can, however, not ensure that *they stay the same* (“there is no such thing as ‘post-accession conditionality’”<sup>148</sup>).

This leads us to a more general problem of the introduction of political heterogeneity into a federation: *the problem of political and constitutional change*. This problem, of course, applies to all the Member States of a federation; not merely to the danger of the ‘new’ Member States ‘backsliding’ into their ‘old ways’. In a federation, the Member States remain politically and constitutionally autonomous and they are therefore politically free to decide on their own destiny and give themselves new constitutions. The question is: what happens if a Member State gives itself a new constitution that is politically in conflict with the identity of the federation and therefore presents a threat to the federal balance? In what ways can the federation exercise constitutional defence?

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<sup>147</sup> Komárek, “Waiting for the Existential Revolution in Europe”, 195. For data collection on the citizens of the acceding states’ support for different types of democratic communities, see Zielonka, *Europe as Empire*, 41. See also Sajo, “Becoming ‘Europeans’: The Impact of EU ‘Constitutionalism’ on Post-Communist Pre-Modernity”, 175-8.

<sup>148</sup> Sadurski, *Constitutionalism and the Enlargement of Europe*, 156.

## IV: CONSTITUTIONAL CHANGE AND CONSTITUTIONAL DEFENCE

### A: The Government of Constitutional Change through a Federal Guarantee Clause

Radical political and constitutional change in the constitutions of the Member States presents the federation with a paradox. On the one hand, the federation cannot allow the Member States to develop politically and constitutionally in a way that is incompatible with the constitutional identity of the Union as a whole. This would endanger the substantial homogeneity between the Member States on which the federal balance and the very existence of the federation relies. On the other hand, the federation is created exactly in order to protect the political existence and autonomy of its Member States. The political right of a community to decide on its own fate and give itself a new constitution is one of the most important expressions of the political existence and autonomy of a state. It is therefore highly controversial for the federation to interfere with the constitutional autonomy of its Member States. Constitutional change in the Member States therefore presents the federation with a conundrum: it needs to limit the constitutional autonomy of its Member States but this limitation cannot be understood as an intrusion into their constitutional autonomy. The problem of constitutional change is one of the most difficult manifestation of the contradictory nature of the federal telos: how to balance unity and diversity when what is at stake is the very identity of the Member States?

One of the most important tools for the federation to manage constitutional change in its Member States is a *federal guarantee clause*, i.e., a guarantee by federal law of the shared form of government/constitutional identity of its Member States. A federal guarantee clause has a *double purpose*: on the one hand, it is meant to create a new unitary order and extend the scope of federal power over the constitutional structure of the Member States. On the other hand, it is meant to conserve the Member States constitutional identities and diversity and distinct ‘ways of life’<sup>149</sup>. The ante-bellum United States and the German Federation are both good examples of the double role played by the federal guarantee of constitutional identity.

The federation of the United States, born out of the American Revolution, emerged in opposition to the absolute monarchy of the Old World. Desiring to protect

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<sup>149</sup> Beaud, *Théorie*, 369; Wiecek, *The Guarantee Clause*, 4.

their newly found republican freedom, the former colonies guaranteed a *republican form of government*, not merely via their own state constitutions, but also in the new federal Constitution of the United States<sup>150</sup>: “The United States shall guarantee to every State in this Union *a Republican Form of Government*, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence”<sup>151</sup>. In addition to their own republican constitutions, the newly-won republican spirit of the former colonies now enjoyed protection from the constitution of the United States and the federal government. By guaranteeing the republican form of government of the Member States, the Constitution of the United States is a clear expression of the preservation of the constitutional identities of its Member States. At the same time, this guarantee enabled the creation of a new federal constitutional unity and allowed for the possibility of the federal government to intervene against ‘unrepublican’ constitutional amendments and uprisings in the Member States<sup>152</sup>. While preserving the constitutional identity of the states, the guarantee clause also extended the powers of the federal government over the constitutional developments of its Member States.

Whereas the United States was meant to protect the spirit of the republican revolution from the monarchical order of the Old World,<sup>153</sup> the German Federation was created as an anti-revolutionary union of monarchies in order to suppress the liberal and nationalist revolutionary potential of the German states<sup>154</sup>. The German Federation thus guaranteed the *monarchical form of government* in its Member States<sup>155</sup> and on requests by individual princes, the federation performed numerous military federal interventions to quell liberal and nationalist uprisings in the individual Member States<sup>156</sup>. In this way, the relatively wide powers of the German Federation to which the German princes submitted themselves were in a very concrete sense a means for constitutional self-preservation of the monarchical order for the individual Member States. At the same time, however, the federal guarantee of the monarchical form of government created the possibility for the

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<sup>150</sup> Wiecek, *The Guarantee Clause*, 11ff, 42, 48-9.

<sup>151</sup> The Constitution of the United States, Article IV, Section 4, emphasis added.

<sup>152</sup> Beaud, *Théorie*, 369; Wiecek, *The Guarantee Clause*, 1ff, 28, 33, 42, 67; Federalist No. 21 (Hamilton) (see *The Federalist Papers*, 101-5).

<sup>153</sup> Wiecek, *The Guarantee Clause*, 14.

<sup>154</sup> Forsyth, *Union of States*, 42; Beaud, *Théorie*, 390-7; Huber, *DV I*, 595-6, 619-20; EN Roussakis, *Friedrich List, the Zollverein, and the Uniting of Europe* (Bruges, College of Europe, 1968), 20.

<sup>155</sup> Forsyth, *Union of States*, 42.

<sup>156</sup> ER Huber, “Bundesexekution und Bundesintervention: Ein Beitrag zur Frage des Verfassungsschutzes im Deutschen Bund” (1953) *ÄöR* 79(1).

federal level to intervene extensively in the internal affairs of the Member States in order to preserve the unity of the federation<sup>157</sup> (Chapter 5).

The federal guarantee of the constitutional identity of the Member States is meant to protect the *constitutional orders of both the Union and its Member States*. It allows the federation to bridge the gap between the contradictory forces of the federation: on the one hand, the transformative forces directed towards the future and demanding unity and, on the other hand, the conservative forces directed towards the past and requiring diversity. A federal guarantee of the constitutional identity of the Member States is a 'Janus-faced gateway' that allows for the articulation of transformation as a means of conservation, the creation of unity as the preservation of diversity, and the future as a return to or continuation of the past. The federal guarantee of constitutional identity can in this way allow for the articulation of the birth of a new unitary order and the transformation of the federating states as an expression of constitutional conservation and self-determination. It is in many ways an ingenious constitutional mechanism in that it allows for the possibility of balancing the contradictory forces of the federation. It is a means to square the circle. That being said, in order for it to work, at least two preconditions need to be met.

A federal guarantee clause of the Member States' shared form of government self-evidently requires, *first*, that the Member States share the same form of government; they need to be relatively constitutionally homogeneous. The federal guarantee clause will grant the Union the authority to intervene in the internal constitutional affairs of the Member States. These interventions need to be authorised and preferably perceived as a 'help' on the part of the Member States for them to further their own constitutional projects and not as a threat to their autonomy. This only works if there is a relative homogeneity of the Member States' constitutional identities. This entails not merely a 'formal' constitutional homogeneity, e.g., 'a republican form of government', but also a relatively homogeneous interpretation of the *meaning* of 'republicanism'. The need for constitutional homogeneity is not surprising—the guarantee clause is, after all, meant to deal with the problem of constitutional change and it thus presupposes an already existing homogeneity. The *second* precondition is therefore more controversial: the possibility of constitutional change in the Member States needs to be limited *de jure* or only exercised to a limited degree *de facto* for the federal guarantee clause to work. The consequence of the guarantee of the constitutional identity of the Member States is a guarantee of the

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<sup>157</sup> *ibid*; Beaud, *Théorie*, 366-70.

*status quo* of the constitutions of the Member States<sup>158</sup>. In other words, it gives the Member States *rigid constitutions*.

Constitutions, however, are always in flux. They are a process of becoming, and that is the case whether they are of an ‘evolutionary’ (UK), ‘revolutionary’ (USA) or ‘elitist’ (Germany) type<sup>159</sup>. Nevertheless, the constitutions of the Member States cannot be allowed to evolve so as to present a threat to the unity of the federal order. For example, the ‘people’ of an individual state of the United States could not be allowed to give itself an ‘unrepublican’ constitution; neither could the German Federation allow for the rise of republican/liberal constitutionalism in the individual *Länder*. What this means is that the federation is characterised by an inherent paradox, namely that in order to preserve the political existence and autonomy of its Member States, it must impose restrictions on one of the most important expressions of the political existence of the state: its political right to decide on “the type and form of its own political existence”<sup>160</sup>. The Member States, therefore, should preferably give themselves internally rigid constitutions that mirror that of the federation and thereby establish a constitutional ‘double bind’.

The federal guarantee clause does not solve the problem of constitutional change in the Member States. Its primary purpose is the creation of a shared framework—a constitutional imaginary and, as we shall see in the next chapter, a governmental apparatus—through which the problem of constitutional change can be dealt with. In the context of the United States, it allowed constitutional changes and conflicts—in the Member States and the Union as a whole—to be mediated through a political contestation over the meaning of ‘republicanism’. A concept that changed radically over time from being primarily the antithesis to monarchy/nobility and direct democracy at the time of the Founding to the idea of political equality and anti-slavery at the time of the Reconstruction<sup>161</sup>. As the United States bears witness to, this framework can only deal peacefully with a certain degree of political and constitutional conflict. Ultimately, the debates over the compatibility of slavery with republicanism could not be settled through constitutional and political debates. In the end, the question was politically settled with the Civil War.

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<sup>158</sup> Wiecek, *The Guarantee Clause*, 78.

<sup>159</sup> Ackerman, “Three Path to Constitutionalism”.

<sup>160</sup> Schmitt, *Constitutional Theory*, 125.

<sup>161</sup> Wiecek, *The Guarantee Clause*, 4-5, 11-21, 42-3, 136-7, 142-3, 157-8, 166-210.

## B: Constitutional Change and Constitutional Defence in the EU

How does the EU manage the problem of constitutional change in its Member States? This question is not merely of academic interest. There are currently two Member States where ‘liberal democracy’ and the foundational values of the Union set out in Article 2 TEU are under serious threat due to fundamental changes to their constitutional orders: Hungary and Poland.

Hungary’s slide towards authoritarianism started with the election of the ultra-right-wing party Fidezs led by Viktor Orbán to government in 2010. The political programme of Fidezs is often illustrated with reference to a speech Orbán gave in 2014 where he explained that “the new state that we are constructing in Hungary is an illiberal state, a non-liberal state”<sup>162</sup>. Having the necessary two thirds majority in Parliament, Fidezs has pushed through a number of constitutional and other fundamental reforms meant to consolidate their own power<sup>163</sup>. These fundamental reforms include an overhaul of the constitutional court ensuring that Fidezs appointed judges are in the majority and narrowing the jurisdiction of the court, a new election law with legislative districts favourable to Fidezs, extension of voting rights to ethnic Hungarians in neighbouring countries who are deemed likely to vote for Fidezs, the creation of a new media authority run by Fidezs loyalists and finally an amendment to the National Higher Education Act (nicknamed ‘Lex CEU’<sup>164</sup>) that in practical terms might entail the closure of the Central European University (CEU)<sup>165</sup>.

With the combined parliamentary and presidential victory of the Law and Justice Party (PiS) in 2015, a form of political authoritarianism has emerged in Poland that in many ways mirrors Hungarian developments. Like Fidezs, the PiS has taken over the control of the Constitutional Tribunal, engaged in blatant court packing and fundamentally overhauled the general judiciary in a way where it is widely agreed that rule

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<sup>162</sup> L Pech and KL Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU” (2017) *Cambridge Yearbook of European Legal Studies* 19, 4.

<sup>163</sup> M Bánkuti, G Halmai and KL Scheppele, “Disabling the Constitution” (2012) *Journal of Democracy* 23(3), 139.

<sup>164</sup> G Halmai, “Legally Sophisticated Authoritarians: the Hungarian Lex CEU” (Verfassungsblog, 31 March 2017).

<sup>165</sup> A Puddington, “Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians”, Chapter 5: “Illiberal Democracy: The Rise of ‘Illiberal Democracy’” (2017) *Freedom House*. Available via:

[https://freedomhouse.org/sites/default/files/June2017\\_FH\\_Report\\_Breaking\\_Down\\_Democracy.pdf](https://freedomhouse.org/sites/default/files/June2017_FH_Report_Breaking_Down_Democracy.pdf) [last accessed 1 April 2018]; GA Toth (ed), *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law* (Budapest, CEU Press, 2012); “Editorial Comments, Hungary’s New Constitutional Order and ‘European Unity’” (2012) *CMLR* 49(3), 871–883; A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (London, Hart, 2015); Bánkuti, Halmai and Scheppele, “Disabling the Constitution”.

of law has come under fundamental threat if it has not been entirely eliminated in Poland<sup>166</sup>. Whereas the reform of the judiciary is the most discussed manifestation of Polish authoritarianism, another important example is the amended counterterrorism laws allowing the security services expansive powers over telecommunications and personal information<sup>167</sup>. Like Hungary under Orbán, Poland ruled by the PiS has clearly undergone constitutional changes, both formal and informal<sup>168</sup>, that are incompatible with the constitutional identity of the EU as expressed in Article 2.

In contrast to the United States, the EU does not have one designated guarantee clause of a shared constitutional identity of its Member States. The problem of constitutional change in the Member States is dealt with in three separate Articles: Articles 2, 4(2) and 7 TEU. Article 2 TEU sets out the value order common to the Member States—“respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”—on which the Union understand itself to be founded. It sets out the constitutional identity which, following Union law, is meant to be shared by the Member States. It is an expression of the ‘common aim’ of the federal telos. Nevertheless, Article 2 TEU *does not guarantee this shared constitutional identity*. It merely spells out the value order on which the Union is founded. The question of a guarantee of the constitutional identity of the Member States is dealt with in Article 4(2) and Article 7. Article 4(2) reads:

“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. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State”.

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<sup>166</sup> For a detailed account, see W Sadurski, “How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding” (2018) *Sydney Law School Legal Studies Research Paper* 18(1). See also Puddington, “Illiberal Democracy: The Rise of ‘Illiberal Democracy’”.

<sup>167</sup> Puddington, “Illiberal Democracy: The Rise of ‘Illiberal Democracy’”.

<sup>168</sup> “Many changes which are part of democratic backsliding occur *without a formal change* of institutions and procedures, so they are invisible to a purely legal account”, see Sadurski, “How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding”, 5, italics original. For examples of constitutional changes via ordinary statutory measures in Poland see pp. 12-13. See also, A Śledzińska-Simon “Poland’s Constitutional Tribunal under Siege” (Verfassungsblog, 4 December 2015).

Whereas Article 2 is a manifestation of the ‘common aim’ of the Union, Article 4(2) is a manifestation of the ‘particularistic aim’ of the Union. It is an expression of the Union’s respect for the political and constitutional diversity and autonomy of its Member States.

In contrast to a federal guarantee clause, Article 2 and Article 4(2) provide a poor constitutional mechanism for dealing with the problem of constitutional change in the Member States because the link between the ‘particularistic aim’ and the ‘common aim’ is not legally established. There is no direct legal identification of the value order on which the Union ‘is founded’ (Article 2) and the constitutional identities of the Member States that the Union is bound to ‘respect’ (Article 4(2)). *This identity is merely surmised* (‘these values are common to the Member States’). There is no common overall denominator—however unspecific, e.g. ‘liberal democracy’—that formally unifies Article 2 and Article 4(2). It is therefore possible to justify a discrepancy between the constitutional identity prescribed by the Union (Article 2) and the constitutional identities of its Member States (Article 4(2)) on the basis of the framework of the Treaties.

Even in cases where such an overall denominator is present (e.g. ‘a republican form of government’ in the Constitution of the United States), there will always be a discrepancy between the identity clause in the federal constitution and the concrete manifestation of it in the constitutions of the Member States (tellingly it is not *the* republican form of government but *a* republican form of government). That being said, a common denominator allows for the contestation and negotiation of constitutional conflicts within the same constitutional imaginary and constitutional structures. The lack of a common denominator in the case of the EU—however vague—therefore limits the possibilities for managing constitutional conflicts within the Union as a matter of EU law.

This lack of a common denominator is not the only problem. In contrast to the earlier discussed cases of the United States and the German Federation, the EU does not *guarantee* the constitutional identity of its Member States. As argued, the guarantee clause is ingenious because it allows for the identification of the contradictory forces of the federation. It allows for the possibility of both the Member States and the Union internalising each other’s constitutional orders. Instead of guaranteeing the constitutional identity of its Member States, the Union, following Article 4(2) TEU is bound to *respect* the constitutional identities of its Member States. The accentuation of the Union’s need to ‘respect’ its Member States suggests that the Union is *more of a constitutional threat than a constitutional guardian*. Article 4(2) is a means for the Member States to protect themselves from the power of the Union.

In a similar manner, Article 7 is a means for the Union to protect itself from a *threat from the Member States*. It sets out the Union's primary powers of constitutional defence of the Union *against* its Member States. In contrast to a federal guarantee clause, it does not simultaneously protect the Union and its Member States. The scope of Article 7 is not limited to Union law, meaning that the EU may act in the event of any breach within all areas where the Member States act autonomously, because a breach of the fundamental values of the Union are likely to undermine the very foundations of the Union<sup>169</sup>. Article 7 TEU allows the Council to determine the existence of a persistent and serious breach, or clear risk of a serious breach, by a Member State of the foundational values of the Union expressed in Article 2 TEU. These are respectively known as the 'sanctioning arm' (Article 7(2)-(3)) and the 'preventive arm' (Article 7(1)). The two 'arms' of Article 7 can be triggered independently of one another, that is, the use of the 'sanctioning arm' does not require a previous use of the 'preventive arm'.

The 'preventive arm' has a lower threshold than the 'sanctioning arm'. Following Article 7(1), on a reasoned proposal by either one third of the Member States, the EP or the Commission, the Council acting on a 4/5 majority after obtaining the consent of the EP, may determine that there is a clear risk of a serious breach by a Member State of the foundational values of the Union. The Council may further address recommendations to the Member State in question. In itself, this is an almost insurmountable threshold. The 'sanctioning arm', however, has an even higher threshold. As established by Article 7(2)-(3), the Council acting by unanimity (minus the Member State in question) on a proposal by either one third of the Member States or the Commission and after obtaining the consent of the EP, may determine the existence of a serious and persistent breach of the values of Article 2 TEU. If a persistent and serious breach by a Member State of the foundational values of the Union is established, the Council can authorise the suspension of certain Treaty rights including the political representation of the Member State in the Council<sup>170</sup>. These sanctions do not free the Member State in question from being bound by EU law<sup>171</sup>. The deprivation of political rights is quite radical in that it, for the duration of the sanctions, effectively reduces the Member State in question to a *dependency*. The Member State in question would be fully bound by Union laws but deprived of political equality and influence. It is effectively reverted to the legal and political status of an applicant state during the accession process.

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<sup>169</sup> Pech and Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU", 5.

<sup>170</sup> Article 7(3) TEU.

<sup>171</sup> Article 7(3) TEU.

Though radical, the suspension of the political equality of the Member States is not necessarily effective. Even if applied, the Union could end up by having a *de facto* authoritarian dependency instead of an authoritarian Member State. For that reason, there is an argument to be made that the Union needs to have stronger sanctions or the possibility of intervening directly in the internal affairs of the Member States in order to combat the rise of authoritarianism in a Member State. Article 7 does not provide this possibility: “the core of Article 7 consists of a mechanism to *insulate* the rest of the Union from the government of a particular Member State deemed to be in breach of fundamental values; it enables a kind of *moral quarantine*, not an actual intervention”<sup>172</sup>.

Until recently, Article 7 had never been triggered and it was generally considered a ‘nuclear option’ deemed too controversial to be used. This perception is at least partly based on the EU’s incapability of relying on Article 7 against Austria in the so-called ‘Haider affair’<sup>173</sup> involving the inclusion of the extreme right-wing party FPÖ in the Austrian government in January 2000<sup>174</sup>. However, in December 2017, the Commission, relying for the first time on Article 7(1) TEU and backed by the European Parliament, called upon the Council to determine whether there is a clear risk of Poland breaching the foundational values of the Union<sup>175</sup>. This is in response to the complete overhaul the Polish judiciary has undergone in the past year that has undermined judicial independence<sup>176</sup>.

Even if the clear risk is established, the probability that Poland will be sanctioned through the Article 7 procedure is low. The threshold for the ‘sanctioning arm’ of Article

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<sup>172</sup> JW Müller, “Should the EU Protect Democracy and the Rule of Law Inside Member States”, 7; Müller, “Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission”, 212.

<sup>173</sup> A Teasdale, “Haider affair” in A Teasdale and T Bainbridge, *The Penguin Companion to European Union*, available via: [https://penguincompaniontoeu.com/additional\\_entries/haider-affair/](https://penguincompaniontoeu.com/additional_entries/haider-affair/) [last accessed 29 March 2018]. For an account of the historical evolution of Article 7 and the significance of the ‘Haider affair’, see W Sadurski, “Adding Bite to Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider” (2010) *Columbia Journal of European Law* 16.

<sup>174</sup> D Kochenov and L Pech, “Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction” (2015) *EUI Working papers—RSCAS* 24.

<sup>175</sup> European Commission, press release: “Rule of Law: European Commission Acts to Defend Judicial Independence in Poland” (Brussels, 20 December 2017). Available via: [europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm) [last accessed 29 March 2018]; European Commission: “Reasoned Proposal in Accordance WITH Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland—A Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law” (Brussels, 20 December 2017).

<sup>176</sup> For an overview of these reforms, see European Commission for Democracy through Law (Venice Commission) Opinion No. 904 /2017 CDL-AD (2017)031: “Poland: Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act Amending the act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts” (Strasbourg, 11 December 2017).

7 is so high that it in practice is very difficult if not impossible to rely on<sup>177</sup>. The requirement of unanimity in the Council for the establishment of a persistent and serious breach means that as long as the authoritarian state in question has just one ally, Article 7 cannot be used. Victor Orbán has pledged on several occasions to veto any EU attempts to sanction Poland<sup>178</sup>. In response to this situation, a few scholars have suggested an *effet utile* interpretation of Article 7 that would allow the Council to bring a case against Poland and Hungary simultaneously and thereby deprive both of them of a vote<sup>179</sup>. Such an interpretation, however, has not yet been seriously considered by the EU.

How can the EU deal with the problem that as long as there is more than one ‘bad egg’, Article 7 cannot be triggered? Some scholars have suggested that the EU could attempt to prevent the authoritarian ‘backsliding’ by social pressures and shaming<sup>180</sup>, fundamental rights protection by national courts acting in the capacity of European courts<sup>181</sup>, systematic infringement procedures<sup>182</sup> and by recommendation via the Commission’s ‘rule of law framework’<sup>183</sup>. Apart from the ‘Reverse Solange proposal’<sup>184</sup>, these measures are mostly of technical nature and are therefore largely incapable of dealing with the general political challenge of the rise of authoritarianism. This is neatly illustrated by the fact that the Commission only could deal with Orbán’s court-packing as a matter of age discrimination<sup>185</sup>. Besides, the possibilities of sanctions through these alternative routes are even weaker than Article 7 because there is no way of forcing the Member State to comply. As remarked by Jan-Werner Müller: “as of now, the EU has no convincing toolkit to deal with the situation”<sup>186</sup> in Poland and Hungary<sup>187</sup>.

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<sup>177</sup> On top of this insurmountable threshold, EP party politics makes it even less likely for Article 7 to be triggered, see U Sedelmeier, “Political Safeguards against Democratic Backsliding in the EU: the Limits of Material Sanctions and the Scope of Social Pressure” (2017) *Journal of European Public Policy* 24(3), 339-41; Pech and Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU”, 32-4.

<sup>178</sup> “Orban Promises to Veto any EU Sanctions Against Poland” (Financial Times, 8 January 2016).

<sup>179</sup> Pech and Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU”, 35.

<sup>180</sup> Sedelmeier, “Political Safeguards against Democratic Backsliding in the EU”; U Sedelmeier, “Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania” (2014) *Journal of Common Market Studies* 52(1).

<sup>181</sup> A von Bogdandy, M Kottmann, C Antpöhler, J Dickschen, S Hentrei, and M Smrkolj, “Reverse Solange — Protecting the Essence of Fundamental Rights against EU Member States” (2012) *CMLR* 49; Müller, “Safeguarding Democracy Inside the EU”, 19.

<sup>182</sup> KL Scheppele, “Enforcing the Basic Principles of EU Law through Systematic Infringement Actions” in C Closa and D Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge, CUP, 2016).

<sup>183</sup> Communication from the European Commission to the Council and the Parliament, “A New EU Mechanism to Strengthen the Rule of Law”, COM(2014) 158 final/2 (10 March 2014).

<sup>184</sup> Bogdandy et al, “Reverse Solange”.

<sup>185</sup> C-286/12 - *Commission v Hungary* [2012].

<sup>186</sup> Müller, “Safeguarding Democracy Inside the EU”, 4.

<sup>187</sup> See also C Closa, D Kochenov and JHH Weiler, “Reinforcing Rule of Law Oversight in the European Union” (2014) *EUI Working Paper—RSCAS* 25, 2.

To make up for this lack, Müller has suggested two new forms of sanctions: first, the establishment of a ‘Copenhagen Commission’ that should act as a political guardian of the Copenhagen criteria and be able to investigate Member States and, via the Commission, to apply sanctions in the form of cutting funding or imposing fines<sup>188</sup>. More radically, he also suggests that the Union ultimately should have the right to *expel a Member State* from the Union in order to save the constitutional integrity of the Union as a whole<sup>189</sup>. This would, however, be highly controversial because it threatens the perpetual nature of the Union—it is an anti-federal measure that the EU cannot undertake without endangering its own constitutional foundations<sup>190</sup>.

### **C: A Political Right of Intervention?**

In contrast to the federal guarantee clause, the constitutional defence of the EU as set out in Articles 2, 4(2) and 7, arguably does not give the Union a legal mandate to intervene in the internal constitutional developments of its Member States to prevent a constitutional capture. On the contrary, the Treaties have set up two legal and political bases for constitutional defence: the defence of the Union *against* the Member States and the defence of the Member States *against* the Union. As we have seen, these two clauses are only poorly connected by Article 2 because of the lack of a common denominator through which political conflict could be mediated. There is, in other words, only a poor and limited connection between the ‘common aim’ and the ‘particular aim’ of the Union. That being said, the question is whether the EU has a *political* right to protect the Union and its Member States from a Member State committing ‘democratic suicide’? Notwithstanding the legal limitations, “does the EU have the authority to act as a guardian of liberal democracy”<sup>191</sup>?

Despite the comparatively limited possibilities provided by Articles 2, 4(2) and 7 TEU for the EU to intervene in the internal constitutional developments of its Member

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<sup>188</sup> Müller, “Protecting the Rule of Law (and Democracy!) in the EU”, 25.

<sup>189</sup> Müller, “Safeguarding Democracy Inside the EU”, 23; Müller, “Protecting the Rule of Law (and Democracy!) in the EU”, 212.

<sup>190</sup> The federation is founded on a status contract whose founding intention is to establish a perpetual community (Chapter 1). For that reason, once established, the federation—unlike, e.g., a free trade agreement—is meant to be an involuntary association. However, as we shall see in Chapter 5, though highly controversial, there is always the possibility for a Member State of a federation to present an argument in favour of the right of secession as a means to constitutional defence (the doctrine of Calhoun). However, this right is not mirrored by a right of the federal government to expel or ostracise a Member State but rather by an, albeit controversial, right of the federal government to intervene in the internal constitutional affairs of its Member States as a means to constitutional defence. For that reason, ostracism is arguably more controversial than secession in a federation.

<sup>191</sup> Müller, “Should the EU Protect Democracy and the Rule of Law Inside Member States”, 6.

States to ‘save it from democratic suicide’, there are strong political—*though highly controversial*—arguments in favour of the existence of the Union’s right to do so. The strongest *political arguments* for the EU’s right of intervention have been presented by Müller.

The EU, Müller argues, has for most of its Member States been part of the formation and consolidation of the constitutional project of liberal democracy, albeit in different ways. For that reason, the EU is an extra layer of constitutional guarantee of liberal-democratic constitutionalism. Membership in the EU is a way for the Member States to ‘lock in’ liberal democracy; it is part and parcel of ‘constrained democracy’<sup>192</sup>. The rigid constitutionalism that member-statehood entails is a way for the Member States to guarantee an anti-authoritarian form of constitutionalism. “Governments in turn sought to lock themselves into Europe to prevent ‘backsliding’”, Müller writes, “it was like Ulysses binding himself to the mast in order to resist the siren songs of illiberal antidemocratic demagogues in the future”<sup>193</sup>. Membership in the EU was a way of ‘anchoring democracy from above’<sup>194</sup>. Müller’s argument is that a central reason for the constitution of the EEC/EU—like the United States and the German Federation (though Müller does not make the connection)—was the protection of a specific constitutional identity or ‘way of life’. Following this argument, the protection of liberal democracy is a central telos of the Union. The Member States wanted to join the EU to protect themselves from the return of fascism. The EU, therefore, has *not only a right but also a duty to intervene* in the constitutional developments of its Member States in order to save them from ‘democratic suicide’.

There is, however, a problem with this argument, namely that not all Member States of the EU belong to the constitutional type of ‘constrained democracy’<sup>195</sup>. Whereas the ‘Original Six’ and the ‘Mediterranean Enlargements’ Member States clearly are ‘constrained democracies’, this is, as we have seen, less so the case for the rest of the Member States. Seeing that EU membership was perceived as key to the consolidation of democracy for the Central and Eastern European countries, the only full exception to ‘constrained democracy’ constitutionalism is the ‘continuous parliamentary democracies’ of the UK and Scandinavia. For these countries, the distrust of unrestrained popular

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<sup>192</sup> Müller, “Safeguarding Democracy Inside the EU”, 11; Müller, “Should the EU Protect Democracy and the Rule of Law Inside Member States”, 22.

<sup>193</sup> Müller, “Safeguarding Democracy Inside the EU”, 9.

<sup>194</sup> Sedelmeier, “Anchoring Democracy from Above?”.

<sup>195</sup> Something that Müller to a certain degree concedes to, see, e.g., Müller, “Should the EU Protect Democracy and the Rule of Law Inside Member States”, 23-4.

sovereignty, including parliamentary sovereignty, is not part of their post-WWII DNA<sup>196</sup>. As argued earlier, despite the importance of the idea of ‘the return to Europe’, the countries of the ‘Eastern Enlargements’ differ from the post-fascist countries because the constitutions are defined against an external imperial enemy and not internal democratic collapse. They are therefore to a lesser degree defined by a ‘distrust’ in sovereignty. For the Member States of the EU, it seems, there is no consensus on the question of whether ‘democracy’ means ‘constrained democracy’ and to what extent the EU is a legitimate guardian of European democracy. The EU is not the first federation where the meaning of the constitutional identity of the Union as a whole has been highly politically contested. A good historical example is the debate over whether slavery was compatible with a republican form of government in the United States that began in the 1820s and which only was settled by the Civil War<sup>197</sup>. When the constitutional identity is highly politically contested, an intervention to save the Member States ‘from themselves’ is difficult to authorise and can lead to violent conflict.

That being said, there is another political argument in favour of a Union right of intervention in order to prevent a Member State from committing ‘democratic suicide’ based on the principle of the *political interdependence* of the Member States. As other federations, the EU is characterised by a high degree of mutualisation of risk. This means that there are no ‘internal affairs’ of a Member State that are not also potentially a common concern for the Union at large<sup>198</sup>. “Strictly speaking, there are no purely internal affairs in EU member states”, Müller writes “all EU citizens are affected by developments in a particular member state”<sup>199</sup>. In concrete terms, this means that the rise of authoritarian constitutionalism in one or more Member States potentially affects all the other Member States. An example given by Müller is that an authoritarian Member State, when acting through its representatives in the EU, will influence laws that are made for all the citizens of the Union<sup>200</sup>. The citizens of the authoritarian Member States are also citizens of the Union and the Union therefore has a political right to protect its citizens from any ‘anti-

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<sup>196</sup> Müller, “Safeguarding Democracy Inside the EU”, 10; Müller, “Should the EU Protect Democracy and the Rule of Law Inside Member States”, 9; R Tuck, “Brexit: A Prize in Reach for the Left” (Policy Exchange, 17 July 2017).

<sup>197</sup> For the development of this debate and its relationship to Article IV, Section 4 of the Constitution of the United States (the ‘guarantee clause’) see Wiecek, *The Guarantee Clause*, Chapters 5-7.

<sup>198</sup> Beaud, *Théorie*, 301.

<sup>199</sup> Müller, “Safeguarding Democracy Inside the EU”, 12.

<sup>200</sup> *ibid.* See also C Closa, “Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations” in C Closa and D Kochenow (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge, CUP, 2016), 18.

constitutional behaviour' of its Member States<sup>201</sup>. Following this line of argument, in order to save the citizens of the Union from authoritarian influence, the Union will therefore have to repress any form of authoritarian constitutionalism *in the name of the safety of the citizens of the European Union*. This political right, however, is highly controversial because both the Member States and the Union have a political right to act as the 'guardian of the constitution' (Chapter 5). Moreover, as will become clear in the next chapter, by relying on constitutional guardianship a strong element of *raison d'état* is introduced into the federation that risks the destruction of the federal balance and the federation as a political form.

The EU has as of yet not been capable of intervening in any significant manner in the internal affairs of Poland or Hungary to combat the rise of authoritarian constitutionalism. The lack of an explicit guarantee clause, the poor interconnection between TEU Articles 2, 4(2) and 7, and the relatively limited possibility of sanctioning the 'backsliding' Member States are without a doubt important reasons for that. Notwithstanding these reasons, the lack of action by the EU cannot fully be explained by these factors. As we shall see in the next chapter, the EU has in response to the Eurozone crisis developed a strong executive apparatus that allows it to take over more or less full control of the government of 'deficit' Member States. These interventions, as we shall see, have been authorised in a structurally similar manner to the arguments in favour of an EU intervention in authoritarian Member States presented by Müller. This form of 'emergency government' conforms to the theory of executive constitutional defence in the federation. As will become clear, it is a highly controversial and contradictory form of emergency government that threatens not only the autonomy of the Member States but ultimately also the very existence of the federation as a political form.

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<sup>201</sup> Müller, "Should the EU Protect Democracy and the Rule of Law Inside Member States", 37.

# Emergency Rule without a Sovereign

## *The emergency government of the Eurozone and the contestation of constitutional guardianship in the federation*

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### INTRODUCTION

In the last decade, the question of whether the EU has the authority to intervene in the internal constitutional affairs of its Member States has not merely been raised in the context of the rise of ‘illiberal democracy’ (Chapter 4) but arguably to a greater extent in the context of the Eurozone crisis. A good example is the so-called ‘golden rule’ that requires the Member States to introduce domestic constitutional guarantees for fiscal consolidation<sup>1</sup>. The intrusion by the EU into the constitutional affairs of its Member States during the Eurozone crisis, however, has not been limited to this. The government of the Eurozone crisis has been characterised by a radical extension in the governmental powers of the Union and ‘micro-management’ of deficit Member States to the degree that their political autonomy—*de facto* if not *de jure*—has been eroded. It is therefore generally maintained within academic debates that the government of the Eurozone has led to a change in the constitutional architecture, a constitutional transformation, a constitutional mutation or a distortion of the constitutional balance of the EU<sup>2</sup>. Extensive arguments regarding the implications for the constitutions of the Member States have been put forward regarding the erosion of the powers of Member State parliaments vis-à-vis the

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<sup>1</sup> M Adams, F Fabbrini, P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (London, Hart Publishing, 2014).

<sup>2</sup> F Fabbrini, “States’ Equality v States’ Power: the Euro-crisis, Inter-state Relations and the Paradox of Domination” (2015) *Cambridge Yearbook of European Legal Studies* 17, 3-35; P Craig, “Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications” *The Constitutionalization of European Budgetary Constraints*; C Joerges, “The European Economic Constitution and its Transformation through the Financial Crisis” (2015) *ZenTra Working Papers in Transnational Studies*, 47; K Tuori and K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge, CUP, 2014); G Martinico, “EU Crisis and Constitutional Mutations: A Review Article” (2014) *Revista de Estudios Políticos* 165, 247-80; M Dawson and F de Witte, “Constitutional Balance in the EU after the Euro-Crisis” (2013) *MLR* 76(5); K Lenaerts, “EMU and the European Union’s Constitutional Framework” (2014) *ELR* 39, 753; E Chiti and PG Teixeira, “The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis” (2013) *CMLR* 50.

Member State executives and the infringement of constitutionally protected social rights<sup>3</sup>. The extraordinary measures used to govern the Eurozone crisis have been justified with reference to ‘necessity’ and an impending ‘emergency’. It is therefore widely agreed that the government of the Eurozone crisis conforms to the idea of ‘emergency politics’, albeit not the classical statist model of the ‘state of exception’<sup>4</sup>.

Notwithstanding the magnitude of the constitutional implications of the emergency government of the Eurozone, this chapter argues that—in one limited sense—the constitutional mutation thesis is overstated. The chapter maintains that the emergency government of the Eurozone can be understood as a manifestation of federal constitutional defence. What this means is that ‘emergency Europe’ and the Europe of ‘constitutional tolerance’ are both manifestations of how the federation as a form of political association governs itself—in peaceful times and in times of profound crisis. In other words, whereas the constitutional balance or identity of the Union might have changed, its constitutional character has not, at least not yet. This also provides an explanation for why the government of the Eurozone crisis can be a form of ‘emergency rule without a sovereign’<sup>5</sup>. As has been argued throughout this thesis, the federation is a discrete political form on a par with, though distinct from, the state and the empire. One of the main characteristics of the federation as a political form is the internal absence or repression of sovereignty. As will become clear, the federation also governs itself in a qualitatively different way than the state in times of crisis. This chapter argues that ‘emergency Europe’ does not conform to the theory of the ‘state of exception’ because the EU is not a state but a federation.

Emergency government or executive constitutional defence—despite its controversial nature—is crucial for the survival of all constitutional governments<sup>6</sup>, including that of a federation. That being said, emergency government is particularly dangerous for the federation because it introduces a strong unitary element of *raison d'état* that threatens the dual political nature of the federation. As will become clear, the

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<sup>3</sup> T Beukers, B de Witte, and C Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge, CUP, 2017); B de Witte and C Kilpatrick (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (2014) *EUI Working Paper Series Law* 5. See also country specific reports published as part of the “Constitutional Change through Euro Crisis Law”-project at the EUI. Available via: [www.eurocrisislaw.eui.eu](http://www.eurocrisislaw.eui.eu) [last accessed 26 January 2018]; see also Fabbrini et al, *The Constitutionalization of Budgetary Constraints*.

<sup>4</sup> J White, “Emergency Europe” (2015) *Political Studies* 63.

<sup>5</sup> *ibid* 308.

<sup>6</sup> J Ferejohn and P Pasquino, “The Law of the Exception: A Typology of Emergency Powers” (2004) *I•CON* 2(2); CL Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, PUP, 1948).

government of an internal crisis can be what finally destroys the federal balance and takes the federation beyond its double political existence into the realm of statehood, either through the collapse of the Union or in the form of its transformation into a more unitary federal state. Notwithstanding that the government of the Eurozone crisis has arguably brought the Union closer to *both* the brink of collapse *and* statehood, neither of these scenarios has yet come to pass.

The chapter is structured in three sections. First, a theory of constitutional defence and emergency politics in the federation as a political form is developed (I). Special attention is given to the employment of different modes of constitutional defence and emergency politics in two historical federations: the pre-civil war United States and the 19<sup>th</sup> century German Federation (*Deutscher Bund*). Based on the theory developed, the chapter goes on to discuss respectively the emergency government of the Eurozone crisis (II) and its contestation by the Member States (III).

## **I: CONSTITUTIONAL DEFENCE AND EMERGENCY GOVERNMENT IN THE FEDERATION**

### **A: Emergency Rule in the Federation**

Being founded on a federal constitutional treaty, federations have constitutional forms of government. This means that the exercise of governmental authority is subject to such limitations as institutional checks and in some cases protection of fundamental rights. The most important constitutional limitation in a federation is the constitutional balance between the Union and its Member States (Chapter 4). Nonetheless, situations may arise—war, secession, subversion, insurrection, natural or socio-economic catastrophes or crises—where the survival of the federation necessitates measures incompatible with these constitutional limitations. In the words of Clinton Rossiter:

“Wars are not won by debating societies, rebellions are not suppressed by judicial injunctions, the reemployment of twelve million jobless citizens will not be effected through a scrupulous regard for the tenets of free enterprise, and hardships caused by the eruptions of nature cannot be mitigated by letting nature take its course”<sup>7</sup>.

In such situations, the federal constitution must, in the same manner as the constitution of a state, *either* explicitly provide for the possibility for the exercise of

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<sup>7</sup> Rossiter, *Constitutional Dictatorship*, 6.

emergency powers *or* the governmental structure of the Union must be provided with enough flexibility so that it can deal with the state of crisis through the exercise of similar extraordinary measures<sup>8</sup>. In either case, the difficulty consists in how the temporary relaxation of constitutional constraints can be ensured without incurring permanent harm to the constitutional norms and the constitutional balance of the federation<sup>9</sup>. The purpose of all constitutional emergency government is neither more nor less than the reestablishment of the *status quo ante crisis*. This is the general aporia of emergency politics that applies to the state and the federation alike.

Nevertheless, there are fundamental and qualitative differences between the mode of emergency government of the state<sup>10</sup> and of the federation. In contrast to the state, the federation has a double political existence. This means that emergency politics can be exercised *by a variety of different constitutional actors* (Union institutional actors and Member State institutional actors) and wielded *on behalf of different existential units* (the Union and the Member States). The debate on ‘who is the guardian of the constitution’ is therefore not reducible to the Schmitt/Kelsen debate on President vs. constitutional court<sup>11</sup>. The federation allows for a contest not merely between different institutions but also between different political entities—claims to governmental authority that can lead to highly toxic conflicts. There is of course the possibility of a ‘perfect storm’ that hits all the Member States in the same manner and where the Member States can collectively declare a Union-wide state of exception through federal institutions on behalf of both the Member States and the Union as a whole. This would be a kind of ‘symmetrical’ state of exception in many ways similar to that within a state. That being said, the political form of the federation means that the exercise of emergency powers will most often be more intricate than that.

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<sup>8</sup> CJ Friedrich and AE Sutherland, “Defence of Constitutional Order” in RR Bowie and CJ Friedrich (eds) *Studies in Federalism* (Boston and Toronto, Little, Brown and Company, 1954), 676.

<sup>9</sup> *ibid.*

<sup>10</sup> There is a vast—and controversial—literature on emergency government in the state including C Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to the Proletarian Class Struggle* (Cambridge, Polity Press, 2014); C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago, University of Chicago Press, 2006); G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, Stanford University Press, 1998); G Agamben, *The State of Exception* (Chicago, University of Chicago Press, 2005); E Frankel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York, OUP, 1941); B Honig, *Emergency Politics Paradox, Law, Democracy* (Princeton, PUP, 2011); WE Scheuerman, “The Economic State of Exception” (2000) *Cardozo L.Rev.* 21; Rossiter, *Constitutional Dictatorship*. A general review of this literature is outside the scope of this thesis. For a general introduction to the history and theory of emergency politics, see Ferejohn and Pasquino, “The Law of the Exception”.

<sup>11</sup> See L Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge, CUP, 2015). It should be noted that emergency politics in a state more often than not is more complex than this question.

Emergency politics in the federation is complex because the multiple constitutional orders of the federation stand in a relationship to one another of both *independence* and *interdependence* (Chapter 3). On the one hand, since the constitutional orders of the Union and the Member States are *independent* from one another, the federation allows for two sets of emergency actors (Union and Member State actors) on behalf of two constitutional orders (Union and Member State constitutions). On the other hand, because the constitutional orders of the Union and the Member States are *interdependent*, there is no necessary correspondence between a crisis in a constitutional order and the actor that claims emergency authority to govern that particular crisis.

The interdependence has its roots in the fundamental *mutualisation of risk* amongst the Member States<sup>12</sup> (Chapter 2). By coming together in a common Union, some of the most important concerns of the Member States—defence and/or welfare—become common concerns. A disequilibrium in one part of the Union can have repercussions in all the other parts of the Union<sup>13</sup>. In a federation, there are therefore no ‘internal affairs’ of the Member States that cannot *potentially* be understood as Union matters<sup>14</sup> (Chapters 3 and 4). Besides, by coming together in a common Union, the Member States renounce their right to self-help and their relationship *inter se* is governed by the internal public law of the Union (Chapters 1-3). This means that in case one of the Member States breaches the fundamental law of the Union, the Member States no longer possess the rights of international law such as state retaliation or ultimately war. It is therefore necessary that the Union, by way of its own public law, can enforce and defend the constitution against constitutional threats or breaches by its Member States. All conflicts *between* the Member States and crises *within* the Member States are potential matters of common security and stability for the Union as a whole and they have to be governed by Union law<sup>15</sup>.

For that reason, emergency politics in the federation *cannot* be understood on the basis of the matrices: Member State crisis = Member State emergency rule *and* Union crisis = Union emergency rule. That is, when a Union institution exercises emergency politics it is not necessarily with reference to a Union-wide state of exception and seldom exclusively so. As we shall see, Union institutions will often justify the exercise of emergency powers with reference to both a crisis of one or more of the Member States and a crisis of the Union as a whole. Similarly, when a Member State exercises emergency

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<sup>12</sup> O Beaud, *Théorie de la Fédération* (Paris, PUF, 2007), 296.

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.* 301.

<sup>15</sup> *ibid.* 296.

politics, it is not necessarily purely with reference to a threat to its own constitutional order. The Member State may also claim to act as the guardian of the Union constitution. In other words, the fundamental interdependence of the constitutional orders of the federation means that the claims to emergency powers in the federation are not parallel but overlapping. Besides, the exercise of emergency politics in the federation will tend to involve both Union institutions and Member State institutions because of the interdependence of the governmental orders of the Union and the Member States (Chapter 3). *Federal emergency politics is a form of ‘mixed emergency rule’ more often than not involving multiple actors and multiple claims to emergency authority.*

In this mixed form of emergency rule, the different actors can relate to each other in multiple ways. This is especially clear in that Union institutions tend to employ two different modes of emergency politics in relation to its Member States. The Union institutions can exercise emergency power both *against* a Member State and *on behalf* of a Member State. *First*, they can act *against a Member States* that breaches or threatens the federal constitution. *Second*, they can act *on behalf of a Member State* that is incapable of dealing with an internal crisis or conflict. This latter form of intervention tends to be justified both with reference to the stability of the crisis-ridden Member State and the Union as a whole. The most coherent theory of these two qualitatively different forms of emergency politics has been developed on the basis of the praxis of the German Federation to which we will now turn.

## **B: Federal Execution and Federal Intervention in the German Federation**

In the German Federation (*Deutscher Bund*)—established in 1815 after the collapse of the Holy Roman Empire and dissolved in 1866 after the Austro-Prussian War—two qualitatively distinct forms of executive constitutional defence were available to the federal diet (*Bundesversammlung/Bundestag*): the ‘federal execution’ (*Bundesexekution*) and the ‘federal intervention’ (*Bundesintervention*)<sup>16</sup>. The ‘federal execution’ authorised the use of executive measures *against* a non-complying Member State. The ‘federal intervention’ authorised the use of executive measures *on behalf* of a Member State incapable of dealing with an internal crisis. The main legal basis for both the federal execution and the federal intervention was the second constitutional treaty (*Verfassungsvertrag*) on which the German Federation relied: the *Wiener Schlussakte* of 1820. The federal execution was governed by

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<sup>16</sup> ER Huber, “Bundesexekution und Bundesintervention: Ein Beitrag zur Frage des Verfassungsschutzes im Deutschen Bund” (1953) *ÄöR* 79, 1-2.

Article 19 and Article 31-34 and the federal intervention by Article 25-28 of this treaty<sup>17</sup>. These two forms of executive constitutional defence were frequently used during the lifespan of the German Federation, notably to defend the ‘monarchical form of government’ of the Member States guaranteed by the German Federation against the national-liberal political uprisings of the mid-19<sup>th</sup> century<sup>18</sup>. In this way, executive constitutional defence was in the German Federation intimately linked to the federal ‘guarantee clause’ (Chapter 4). Federal emergency politics was, e.g., used against the revolutionaries of the *Frankfurter Wachensturm* of 1833 to authorise the federal occupation of Holstein during the Second Schleswig War of 1864, and in the attempt to stop Prussia seceding in 1866<sup>19</sup>. The most important theoretical study of federal constitutional defence in the German Federation has been done by the German constitutional historian and constitutional theorist, Ernst Rudolf Huber<sup>20</sup>. In the following, I will sketch out the main lines of his theory of the two forms of federal executive constitutional defence.

According to Huber, federal execution and federal intervention have often been conflated<sup>21</sup>—and for good reasons. The conflation happens because the *concrete measures* used in federal execution and federal intervention were often identical. The scope and intensity varied from case to case but ultimately military enforcement, temporary suspension of the targeted Member State’s constitution in parts or in its entirety and ‘forced administration’ of a Member State could be authorised<sup>22</sup>. The ‘federal commissioner’ acting on behalf of the German Federation could in both a federal execution and a federal intervention temporarily take over the whole governmental apparatus of the Member State concerned. Notwithstanding that they can be difficult to tell apart in practice, federal execution and federal intervention are distinct from one another in theory with regard to their mode of authorisation.

The *federal execution* is the embodiment of the executive coercive measures or sanctions through which the Union can act *against* one of its Member States to persuade

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<sup>17</sup> *ibid* 2. The *Wiener Schlussakte* can be accessed online via:

<http://www.documentarchiv.de/nzjh/wschlakte.html> [last visited 15 August 2017].

<sup>18</sup> Forsyth, *Union of States*, 42; Beaud, *Théorie*, 390-7; ER Huber, *Deutsche Verfassungsgeschichte seit 1789 Band I: Reform und Restauration 1789 bis 1830* (Stuttgart, Verlag W. Kohlhammer, 1957) [hereinafter *DV I*], 595-6, 619-20; EN Roussakis, *Friedrich List, the Zollverein, and the Uniting of Europe* (Bruges, College of Europe, 1968), 20.

<sup>19</sup> Huber, “Bundesexekution und Bundesintervention”, 3.

<sup>20</sup> The works of Ernst Rudolf Huber are not widely studied, at least not within Anglo-American academia, but he is one of the most important theorists of the federation in the 20th century. For an introduction to his writings, see Forsyth, *Union of States*, 155-9.

<sup>21</sup> Huber, “Bundesexekution und Bundesintervention”, 9.

<sup>22</sup> *ibid* 6-9, 18-27; Huber, *DV I*, 636.

it to fulfil the constitutional obligations that it has neglected<sup>23</sup>. A federal execution is thus an executive act decided on and authorised by the Union in order to force a Member State, which in some way presents a threat to the constitution of the Union, to comply with the federal constitution. Federal execution is meant to secure the unity, order and legal system of the Union against the reluctant or separatist state forces that can always be powerful in a federation<sup>24</sup>. A federal execution is an act against the government of a Member State that has infringed the federal constitution and it is enforced against the will of the Member State in question<sup>25</sup>. During the federal execution, the Member State that is under federal execution will be deprived of its political rights at the federal level<sup>26</sup>. The federal executioner who enforces the federal execution in the non-complying Member State can act as a ‘commissarial dictator’ in that Member State, temporarily taking over the full powers and authority of the Member State government<sup>27</sup>.

In contrast, the *federal intervention* is the embodiment of the coercive measures through which the Union is obligated to restore or maintain a Member State government—loyal to the federal constitution—if the internal security or order of the Member State or its constitution is under threat<sup>28</sup>. Historically, a federal intervention was used by the German princes to strengthen their power positions vis-à-vis national-liberal insurgencies by allowing the princes to rely not only on their own executive powers but also those of all the other Member States. The federation will normally intervene on a formal *request* of the crisis-ridden Member State. However, if the Member State is incapable of requesting help because of the internal instability, the federation is equally obligated to intervene *on behalf of* the Member State to preserve its internal order and stability<sup>29</sup>.

In theory, therefore, the federal execution and the federal intervention are clearly distinct from one another. Nevertheless, the sharp distinction between the federal execution and the federal intervention is impossible to uphold due to the fundamental mutualisation of risk in a federation. If the internal threat to the constitution of the Member State is understood as having effects beyond the boundaries of the Member State

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<sup>23</sup> Huber, *DV I*, 635; Huber, “Bundesexekution und Bundesintervention”, 6. The federal execution was included in all three German constitutions that succeeded the German Federation. In Article 19 of the 1871 Imperial Constitution, in Article 48(1) of the ill-fated 1919 Weimar Constitution and in Article 37 of the 1949 German Basic Law.

<sup>24</sup> Huber, “Bundesexekution und Bundesintervention”, 7.

<sup>25</sup> Huber, *DV I*, 636.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.* 635-6.

<sup>28</sup> Huber, “Bundesexekution und Bundesintervention”, 4.

<sup>29</sup> *ibid.*

(which is arguably the case for most if not all serious crises of a Member State), the federation has a political—if not legal—right to intervene in the Member State concerned in the interest of the security and stability of the Union and its constitution as a whole<sup>30</sup>. Even in cases where the security interest of the Union is the dominating factor for a federal intervention, the Union is no less obligated to also preserve the constitution of the Member State concerned<sup>31</sup>. In this latter case—known as the ‘*unrequested* intervention’<sup>32</sup>—where the Member State has not requested the assistance or even explicitly requested the federation *not* to intervene, the Union may have to rely on the *fiction* that it saves the constitutional order of the Member State<sup>33</sup>.

If this proves untenable, i.e., due to persistent resistance by the Member State concerned, it is possible to make a formal link between the federal execution and the federal intervention by making it a *duty* of the Member State—by federal law—to inform the federation of internal threats to their constitutional orders as was done in the German Federation<sup>34</sup>. If the Member State chose to inform the Union of an internal instability and request assistance, the Union could act through a federal intervention; if the Member State chose not to inform the Union, the federation could intervene by way of a federal execution maintaining that the Member State had neglected its constitutional duty to inform the Union of internal instabilities<sup>35</sup>. In this way, the German Federation established a *comprehensive apparatus of executive emergency powers* capable of intervening in practically all internal affairs of the Member States.

The executive emergency apparatus of the federal intervention and the federal execution has its foundation in federalism. It is created to resolve conflicts internal to the federation by way of federal public law. The *raison d’être* of this apparatus is that the Member States do not have to resort to the enforcement mechanisms of international law, such as state retaliation or war, that would be a threat to the public law of the Union. It is, in other words, an important way for the Union to protect the main principles of federalism. However, by intervening in the internal affairs of its Member States, the

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<sup>30</sup> *ibid* 5.

<sup>31</sup> *ibid*.

<sup>32</sup> *ibid* 10.

<sup>33</sup> *ibid* 10-1, 15-7.

<sup>34</sup> *ibid* 17.

<sup>35</sup> *ibid* 9.

executive emergency powers may destroy the foundational principles of federalism. *Federal executive constitutional defence is therefore inherently contradictory*<sup>36</sup>.

The federal commissioner who acts either via a federal execution or a federal intervention will, if deemed necessary, have the authority to act as a constitutional dictator for the Member State concerned. During the federal intervention/execution, the federal commissioner becomes a kind of *protector* for the Member State<sup>37</sup> and the Member State is degraded to a *de facto* dependency of the Union. Even if this is done on a request by the government of the Member State concerned—a ‘*requested* federal intervention’—this action can be a threat to the principle of federalism because the government of the Member State—*de facto* if not *de jure*—might be without a choice. The government that has requested a federal intervention, following Huber’s description, finds itself between the Scylla of the internal crisis it is incapable of solving and the Charybdis of the power and authority of the federal intervention<sup>38</sup>. If the Union decides to make an ‘*unrequested* federal intervention’ in the internal affairs of its Member States, the situation is even more grievous for the principles of federalism. In this case, the Union oversteps the principle of the autonomy of the Member States, not only *de facto* but also *de jure*, by declaring a state of exception on its behalf. This action is authorised in the name of the security and stability of the Union as a whole. It is a form of a ‘union-wide state of exception’ (*Bundes-Ausnahmezustand*)<sup>39</sup>.

Together, the federal execution and the federal intervention make up a comprehensive apparatus of executive emergency government of the federation that potentially gives the Union the possibility of intervening in all internal affairs of its Member States and declare a state of exception both for the Union at large and for the individual Member States. Despite the fact that this governmental apparatus is derived from the principles of *federalism*—it is meant to ensure that the Member States do not resort to state retaliation or armed conflict—it has an extremely *unitary* or *statist* effect<sup>40</sup>. The federal executive emergency government is constantly in danger of destroying the core principles of federalism: the constitutional balance between the Union and its Member States<sup>41</sup>.

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<sup>36</sup> For another argument of the contradictory nature of constitutional defence in a federal union, see AN Holcombe, “The Coercion of States in a Federal System” in AW MacMahon (ed) *Federalism: Mature and Emergent* (New York, Doubleday & Company, 1955), 137.

<sup>37</sup> Huber, “Bundesexekution und Bundesintervention”, 10.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.* 12.

<sup>40</sup> *ibid.* 7. See also, Holcombe, “The Coercion of States in a Federal System”, 147-8.

<sup>41</sup> Holcombe, “The Coercion of States in a Federal System”, 153.

### C: The Doctrine of States' Rights in the Pre-Civil War United States

The Founding Fathers of the US Constitution were acutely aware of the problems related to federal executive constitutional defence, especially the possibility of the employment of federal military force against a non-complying Member State<sup>42</sup>. In the Virginia Plan, presented to the Federal Convention 29 May 1787, a provision was included granting the new Congress the power “to call forth the force of the Union against any member of the union failing to fulfil its duty”<sup>43</sup>. However, a few days after presenting the plan, Madison, who was its chief author, suffered a change of heart and recommended that the clause was postponed. According to the meeting minutes,

“Mr. Madison, observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually.—*A union of the States containing such an ingredient seemed to provide for its own destruction.* The use of force ag<sup>st</sup> [*sic*] a State would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attached as a dissolution of all previous compacts by which it might be bound. He hoped that such a system would be framed that might render this resource unnecessary”<sup>44</sup>.

Instead of military coercion, Madison suggested what he termed a ‘congressional negative’ on state laws, by which he meant a congressional veto on state legislation<sup>45</sup>. This solution was not accepted by the Convention<sup>46</sup>. The question of military coercion of the states as a means of constitutional defence was hotly contested at the convention but eventually the majority of the delegates “preferred, and Madison and his associates ultimately accepted, the method of judicial review as that best suited to maintaining the supremacy of the constitution”<sup>47</sup>. Instead of executive constitutional defence, the Convention settled on judicial constitutional defence. The Constitution of the United States that came to be

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<sup>42</sup> *ibid* 140.

<sup>43</sup> *ibid*. See also JN Rakove “The Origins of Judicial Review: A Plea for New Contexts” (1996-1997) *Stan. L. Rev.* 49, 1044-6.

<sup>44</sup> United States Congress, House of Representatives, *Documents Illustrative of the Formation of the Union of the American States*, Session 69th Congress, 1st Session Volume Serial Set Vol. No. 8573, Session Vol. No.12, edited by CC Tansill, first published in 1926, 131, emphasis added.

<sup>45</sup> Holcombe, “The Coercion of States in a Federal System”, 140. See also Rakove “The Origins of Judicial Review: A Plea for New Contexts”, 1044-8.

<sup>46</sup> Holcombe, “The Coercion of States in a Federal System”, 141.

<sup>47</sup> *ibid*. For historical corrections to the idea that the Supreme Court created its authority of judicial review *ex nihilo* in *Marbury v Madison* (1803) and that the Founders never authorised judicial review, see SB Prakash and JC Yoo, “The Origins of Judicial Review” (2003) *The University of Chicago Law Review* 70(3), 891-2, 928ff, 939-940; Rakove “The Origins of Judicial Review: A Plea for New Contexts”.

adopted, however, did also include the federal ‘guarantee clause’<sup>48</sup> (Chapter 4) and wide-ranging presidential powers, through which the federal government ultimately could exercise some degree of executive constitutional defence on behalf of and against the States<sup>49</sup>. Nevertheless, compared to the ample possibilities for federal executive constitutional defence in Germany, the scope of the US guarantee clause was relatively limited.

Federal constitutional defence—executive as well as judicial—is, however, highly controversial; something the history of all young federations attests to<sup>50</sup>. From the perspective of the Member States, it is in no way self-evident that the Union has a right to act as the guardian of their constitutions or as the guardian of the federal constitution at the expense of their autonomy and right of self-determination. The Member States of a federation therefore often claim the right to act as the guardian of their own constitution *and* the Union constitution against constitutional breaches by the Union institutions by way of judicial, legislative as well as executive measures. Whereas the most comprehensive theory of executive constitutional defence by federal institutions has been put forward to understand the praxis of the German Federation, the most comprehensive arguments for the Member States’ right to act as the guardian of the constitution has been put forward in the context of the early history of the United States.

There are several examples in early US constitutional history where a State decided to defend itself by a wide array of means, including executive measures, from what it perceived as *ultra vires* acts of the federal government or the US Supreme Court, e.g., the reaction of Ohio to *McCulloch v Maryland* (1819), the reaction of Georgia to *Cherokee Nation v Georgia* (1831) and *Worcester v Georgia* (1831)<sup>51</sup>. These contestations of federal authority relied (rightly or wrongly) on the so-called ‘doctrine of ‘98’, namely the Kentucky and Virginia Resolutions of 1798 and 1799—drafted by James Madison and Thomas Jefferson—that insisted that the ultimate authority to decide on the constitutionality of federal law lay with the States<sup>52</sup>. The controversial nature of the Supreme Court’s authority to act as the guardian of the constitution is expressed in this way in the Kentucky

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<sup>48</sup> The Constitution of the United States, Article IV.

<sup>49</sup> For the use of the US guarantee clause as a means to constitutional defence, see Wiecek, *The Guarantee Clause*. For the use of the guarantee clause during the Reconstruction, see specifically *ibid* 166-210.

<sup>50</sup> For a study of contestation of federal authority in young federations, see LF Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Baltimore, Johns Hopkins University Press, 2001). Goldstein presents an impressive comparative study of constitutional contestation in the European Union, the United Provinces of the Netherlands, the early American Republic and the nineteenth-century Swiss federation.

<sup>51</sup> Goldstein, *Constituting Federal Sovereignty*, 21-31, 49-50.

<sup>52</sup> *ibid* 21.

Resolution: “as in all other cases of compact among powers having no common judge, *each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress*”. Following the Southern States’ interpretation of the ‘doctrine of ‘98’, the States had a right to declare void (nullify) federal law that they deemed to be unconstitutional<sup>53</sup>. In the United States Civil War, most Confederate States relied on an interpretation of the ‘principle of 98’ and thus cited the ‘dangerous infractions of the Constitution’ by the Federal Government as one of the main reasons in their ‘Declarations of Causes Justifying Secession’<sup>54</sup>. The ‘Declaration of Causes Justifying Secession of South Carolina’, e.g., opens with the following statement:

“The people of the State of South Carolina, in Convention assembled, on the 26th day of April, A.D., 1852, declared that the frequent violations of the Constitution of the United States, by the Federal Government, and its encroachments upon the reserved rights of the States, fully justified this State in then withdrawing from the Federal Union”<sup>55</sup>.

The argument that the Member States, and not the Union, are the guardians of the constitution was, in the history of the theory of the federation, first put forward in a comprehensive manner by the political theorist and 7<sup>th</sup> Vice President of the United States, John C. Calhoun. Calhoun argued that the United States was a union of sovereign States constituted by a compact between them. Concluding part of his argument, Calhoun writes:

“Taken all together, it follows, from what has been stated, that the constitution was ordained and established *by* the several States, as *distinct, sovereign communities*; and that it was ordained and established by them for *themselves*—for their common welfare and safety, as *distinct and sovereign communities* (...) the authority which ordained and established the constitution, was the joint and united authority of the States ratifying it; and that,

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<sup>53</sup> *ibid.*

<sup>54</sup> The “Declarations of Causes Justifying Secession” are available via: [https://www.civilwar.org/learn/primary-sources/declaration-causes-seceding-states#South\\_Carolina](https://www.civilwar.org/learn/primary-sources/declaration-causes-seceding-states#South_Carolina) [last accessed 20 November 2017]. See also RJ Friel, “Providing a Constitutional Framework for Withdrawing from the EU: The Article 59 of the Draft European Constitution” (2004) *The International and Comparative Law Quarterly* 53(2), 415-7.

<sup>55</sup> *ibid.*

among the effects of their ratification; it became a contract between them; and, *as a compact*, binding on them; —but only as such”<sup>56</sup>.

Calhoun argued against the doctrine of divided sovereignty<sup>57</sup> that had been predominant in the early history of the United States<sup>58</sup> and argued that sovereignty remained fully with the states-peoples of the Union<sup>59</sup>; not with the people of the United States constituting one nation. “There is, indeed, no such community, *politically* speaking, as the people of the United States, regarded in the light of, and as constituting one people or nation”, Calhoun forcefully argued<sup>60</sup>. For that reason, the citizens of the United States ultimately owed their allegiance to the States and not the Union<sup>61</sup>. The States, Calhoun maintained, had as an essential attribute of their sovereignty the right to judge the constitutionality of federal law and, if necessary, to nullify it<sup>62</sup>. In this way, the States would have an effective veto power regarding federal legislation<sup>63</sup>. Calhoun further argued that the States had a right to dissolve their relationship with the Union—the right to secede—rather than submitting themselves to federal law they deemed to be unconstitutional<sup>64</sup>. The right of secession was the ultimate right of constitutional defence of the Member States. In a response to his contemporaneous adversary, the Senator of Massachusetts Daniel Webster<sup>65</sup>, Calhoun thus argued:

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<sup>56</sup> JC Calhoun, *A Discourse on the Constitution and Government of the United States* in RK Crallé (ed), *The Works of Calhoun Volume 1: A Disquisition on Government and A Discourse on the Constitution and Government of the United States* (Charleston SC, Stem Power-Press of Walker and James, 1851), 130-1, italics in original. See also *ibid* 111-6, 126-9.

<sup>57</sup> Calhoun’s famous declaration against the notion of divided sovereignty reads: “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 maybe be vested in one man, or in few, or in many. But how sovereignty itself—the supreme power—can be divided,—how the people of the several States can be partly sovereign, and partly *not* sovereign—partly supreme, and partly *not* supreme, it is impossible to conceive. Sovereignty is an entire thing;—to divide, is,—to destroy it” (*ibid* 146, italics in original).

<sup>58</sup> See F Palermo and K Kössler, *Comparative Federalism Constitutional Arrangements and Case Law* (London, Hart Publishing, 2017), 89.

<sup>59</sup> Calhoun, *A Discourse on the Constitution and Government of the United States*, 147. See also CE Merriam, “The Political Theory of Calhoun” (1902) *American Journal of Sociology* 7(5), 588.

<sup>60</sup> Calhoun, *A Discourse on the Constitution and Government of the United States*, 162.

<sup>61</sup> *ibid* 122.

<sup>62</sup> See e.g. Calhoun’s South Carolina Exposition of 1828, reprinted in special issue by AB Hart and E Channing (eds) *Constitutional Doctrines of Webster, Hayne and Calhoun in American History Leaflets: Colonial and Constitutional* (Harvard University, 1896); JC Calhoun, “Speech in Support of the Veto Power”, delivered in the United States Senate (28 February 1842): Calhoun, *A Discourse on the Constitution and Government of the United States*, 236ff, 277-8; Merriam, “The Political Theory of Calhoun”, 589-90.

<sup>63</sup> See e.g., Merriam, “The Political Theory of Calhoun”, 584-5.

<sup>64</sup> Calhoun, *A Discourse on the Constitution and Government of the United States*, 277-8; Merriam, “The Political Theory of Calhoun”, 584-5.

<sup>65</sup> For an introduction to the debate between Webster and Calhoun, see Forsyth, *Union of States*, 117-32.

“I rest the right of a State to judge of the extent of its reserved powers, in the last resort, on higher grounds—that the constitution is a compact, to which the States are parties in their sovereign capacity; and that, as in all other cases of compact between parties having no common umpire, each has a right to judge for itself. To the truth of this proposition the Senator from Massachusetts has himself assented, if the constitution be a compact—and that it is, I have shown, I trust, beyond the possibility of doubt. Having established that point, I now claim, as I stated I would do in the course of discussion, the admissions of the Senator, and among them, the right of secession and nullification, which he conceded would necessarily follow if the constitution be indeed a compact”<sup>66</sup>.

Calhoun’s doctrine was enormously influential in American history, both with regard to the so-called ‘nullification crisis’ of 1832-1833 that he participated actively in and after his death (in 1850) in the Civil War. However, his controversial legacy is not merely American. The doctrine of States’ rights was appropriated by the so-called ‘Bavarian Calhoun’<sup>67</sup>: the German constitutional theorist Max von Seydel<sup>68</sup>. Inspired by Calhoun’s writings, Seydel argued that the German *Länder* had merely delegated certain powers or functions to the federal government but that this delegation did not entail a transfer of sovereignty itself<sup>69</sup>.

As was the case for the doctrine of federal intervention and federal execution, the doctrine of States’ rights is founded on the principles of federalism. Since the States have created the Union through a compact between themselves in order to preserve themselves politically, they have a right to nullify federal laws and ultimately to dissolve this same treaty as a means to constitutional self-defence if the constitution has been breached. Nevertheless, this form of constitutional guardianship—creating as many constitutional guardians as there are Member States—also presents a fundamental threat to the unity, stability and order of a federation and can ultimately lead to its collapse. This was Webster’s argument in response to Calhoun: “could anything”, Webster declared “[be] more preposterous, than to make a government for the whole Union, and yet leave its

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<sup>66</sup> JC Calhoun, *Speech in Reply to Mr. Webster, on the Resolution Respecting the Rights of the States, Delivered in the Senate, Feb. 26<sup>th</sup>, 1833* printed in RK Crallé (ed) *The Works of John C. Calhoun Volume II: Speeches of John C. Calhoun delivered in the House of Representatives and in the Senate of the United States* (New York, D. Appleton and Company, 1881), 301-2.

<sup>67</sup> Forsyth, “The Relevance of Classical Approaches”, 36; Forsyth, *Union of States*, 136-8.

<sup>68</sup> Merriam, “The Political Theory of Calhoun”, 592.

<sup>69</sup> Palermo and Kössler, *Comparative Federalism Constitutional Arrangements and Case Law*, 87. A line of argument that today is manifest in the doctrine of the German Constitutional Court in, e.g., the *Lisbon Ruling* - 2 BvE 2/08 [2009].

power subject, not to one interpretation, but to thirteen or twenty-four interpretations?<sup>70</sup>. Constitutional defence by Member States—as is the case for constitutional defence by Union institutions—can ultimately be a fundamental threat to the federation by breaking it apart. The doctrine of States' rights is therefore also confronted by the conundrum of federal constitutional defence by bringing the logic of the state into the federation.

### **D: Competing Claims to Constitutional Guardianship**

In contrast to the authority of a state that has as its ultimate source the unitary political existence of the state expressed in the will of the people (or the prince), the federation, being a double political existence, has a twin source of public power: the political existence of the Union and the political existence of its Member States (Chapter 1). Governmental authority in a federation can therefore be wielded legally—and ultimately extra-legally<sup>71</sup>—in the name of the security of the individual States and for the wellbeing of their citizens *and* in the name of the security of the Union and for the wellbeing of its citizens<sup>72</sup>. That is, authority can be wielded in the name of the people as one or the peoples as many; in the name of the 'Union of States' or in the 'Union of *States*'. Due to the multiple constitutional orders of the federation that stand in a heterarchical relationship to one another of relative autonomy, there is no unequivocal answer to the question of who has the authority to act as the guardian of the constitution, what or which constitution(s) should be saved, and in the name of whom the emergency powers are authorised. The Union can, on the one hand, ultimately suspend the political autonomy of one or more of its Member States to defend the constitution and security of the Union as a whole. On the other hand, the Member State can ultimately suspend or nullify the constitutional order of the federation in whole or in part within its territory in order to protect its own constitutional order or stability, welfare or security.

The conflict between these forms of constitutional defence—the doctrine of federal execution and federal intervention versus the doctrine of states' rights—are manifest both in the case of the American Civil War where the Southern States' attempt of secession was crushed by the Union army and in the case of the Austro-Prussian War that led to the collapse of the German Federation after a failed attempt to hinder Prussian

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<sup>70</sup> Speech by Daniel Webster as cited by TC Fischer, "Federalism in the European Community and the United States: A Rose by Any Other Name..." (1994) *Fordham Int'l LJ* 17(389), 431.

<sup>71</sup> Huber, "Bundesexekution und Bundesintervention", 54-5.

<sup>72</sup> *ibid.*

secession via a federal execution<sup>73</sup>. Both sides, in both conflicts, could present strong and valid arguments founded on the principles of federalism and their respective constitutional orders<sup>74</sup>. Whereas the Member States ultimately had a right to secede as a means of constitutional defence, the Union ultimately had a right to intervene to preserve the order and stability of the Union. Both of these actions, though based on the logic of federalism, will, however, bring the federation to the brink of collapse by introducing the logic of the state into the federation. This is the most fundamental paradox of constitutional defence in a federal union of states.

## II: THE EMERGENCY GOVERNMENT OF THE EUROZONE

### A: Constitutional Defence Prior to the Eurozone Crisis

In the EU, the Union institutions have not had the possibility of the German Federation, as a last resort, to enforce Union law via executive measures. In contrast to the German Federation, EU law does not allow the Union's executive branch to, e.g., make use of 'forced administration' of a crisis-ridden Member State. The EU is not unique in this regard. As we saw earlier, executive enforcement was also discarded in the United States in favour of judicial review. Like the early United States, constitutional defence has in the EU primarily been a judicial matter. The unity, stability and order of the EU has been secured by the preliminary reference procedure<sup>75</sup> and the infringement procedure<sup>76</sup>. The annulment procedure<sup>77</sup> has, furthermore, provided a possibility for judicial review of EU law.

When the importance of the federal balance for the stability of the federation is taken into account (Chapter 4), the US model of judicial constitutional defence is in many ways preferable to the German model of executive constitutional defence because it presents a comparatively minor threat to the political autonomy of the Member States. As Madison realised, the enforcement of the federal constitution by force "would look more like a declaration of war" and might lead to the dissolution of the federal union<sup>78</sup>. Unfortunately, judicial constitutional defence is limited regarding the kinds of crises it can

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<sup>73</sup> *ibid* 46, 55-6.

<sup>74</sup> *ibid* 52-6.

<sup>75</sup> Article 267 TFEU.

<sup>76</sup> Article 258 TFEU.

<sup>77</sup> Article 263 TFEU.

<sup>78</sup> United States Congress, House of Representatives, *Documents Illustrative of the Formation of the Union of the American States*, Session 69th Congress, 1st Session Volume Serial Set Vol. No. 8573, Session Vol. No.12 (edited by CC Tansill), first published in 1926, 131, emphasis added.

deal with. War, secession, subversion, insurrection, natural or other unforeseen catastrophes and economic depressions might all demand an *immediate response of executive measures*. Whereas a court retrospectively can authorise, legalise or otherwise justify executive acts of emergency politics, the court itself cannot act. Judicial constitutional defence alone is therefore incapable of dealing with fundamental internal threats to the constitutional order and stability of a federal union. Or, in the words of Rossiter: “If a situation can be dealt with judicially, it is probably not a crisis”<sup>79</sup>. With the outbreak of the Civil War, judicial constitutional defence could, e.g., no longer preserve the constitution and public order of the United States and executive constitutional defence was employed by Lincoln to repress the rebellious Southern States. Judicial constitutional defence, however “valuable and important it is for the defence against subversions and constitutional disorder” is, in the words of Huber, “incapable of safeguarding the Union as a whole against the area of conflict between the fundamental political existences and vital powers of the Union”<sup>80</sup>.

Compared to other young federations, the history of the EU has until the outbreak of the Eurozone crisis been characterised by relative internal stability, lack of major crises, and surprisingly little contestation of Union authority<sup>81</sup>. Perhaps this can explain why the EU, until the Eurozone crisis, has been capable of surviving without a governmental apparatus for executive constitutional defence or its extra-legal employment. In notable comparison to the young United States, the contestation of the authority of the EU and the ECJ has, as shown by Leslie Goldstein’s detailed comparative study<sup>82</sup>, been sparse. In general, Member State courts have accepted the doctrines of primacy/supremacy and direct effect of EU law and have for the most part only insisted on their right to act as the guardian of the constitution as a theoretical possibility<sup>83</sup>.

In her explanation for the relatively sparse constitutional contestation in the EU, Goldstein argues that by institutionalising a form of Member State veto, as recommended by Calhoun, the Member States could retain control of politically sensitive issues and were

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<sup>79</sup> Rossiter, *Constitutional Dictatorship*, 9.

<sup>80</sup> Huber, “Bundesexekution und Bundesintervention”, 1 my translation.

<sup>81</sup> Following Goldstein, France is the only Member State of the Original Six that repeatedly has defied European authority (Goldstein, *Constituting Federal Sovereignty*, 36-7).

<sup>82</sup> Goldstein, *Constituting Federal Sovereignty*, 14-42.

<sup>83</sup> *ibid* 20, 43. See, however, recent case from the German Constitutional Court on the European Arrest Warrant, BverfG - 2 BvR 2735/14 [2015]. See also the ‘Slovak Pension’ cases as summarised by J Komárek, “Playing with Matches: The Czech Constitutional Court’s Ultra Vires Revolution” (Verfassungsblog, 22 February 2012) and the Danish Supreme Court - 15/2014 *Danske Industri (DI) Acting for Ajos A/S vs. The Estate left by A* as summarised by MR Madsen, HP Olsen, U Šadl, “Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS” (Verfassungsblog, 30 January 2017).

therefore less likely to rebel against federal authority<sup>84</sup>. She furthermore highlights certain institutional features of the judicial structure of the EU—the equal representation of the Member States in the ECJ, the appointment of ECJ judges for a fixed number of years, and the use of national courts as European courts—as central reasons for the relative lack of Member State resistance<sup>85</sup>. Whether these institutional features of the EU were the decisive reasons for the sparse constitutional resistance and whether the Member States really were capable of reining in the power of EU law against politically sensitive issues remains controversial. If one accepts Fritz Scharpf's work on the dynamic between negative and positive integration for instance, it seems hard to believe that the Member States were in actual fact capable of reining in the power of EU law against politically sensitive issues even before the Eurozone crisis<sup>86</sup>.

Whatever the reasons for the relative lack of contestation of EU authority historically<sup>87</sup>, the Eurozone crisis has, at least temporarily, brought an end to the idea of European 'constitutional tolerance'. The crisis has led to an escalation of the wave of constitutional contestations in Member State courts, political parties and in the public sphere that began with the end of the 'permissive consensus'<sup>88</sup>. With the dawn of the Eurozone crisis, 'Europe' and 'Brussels'—like 'Washington' in the US—had become one of the most important fault lines for political contestation. Furthermore, with the unfolding of the crisis, the EU's lack of executive constitutional defence became apparent. Europe found itself in the most serious economic crisis since the Great Depression with few—if any—real emergency powers at the Union level. If executive constitutional defence was not deemed necessary earlier, it quickly became so.

## **B: The Rise of European Emergency Rule**

Executive constitutional defence is not straightforwardly employed in the EU for a number of reasons. As we saw earlier, emergency government is often made *legally* possible either by having a direct provision for emergency government *or* by giving the

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<sup>84</sup> Goldstein, *Constituting Federal Sovereignty*, 43-4, 63. Goldstein here relies on Weiler's argument in "The Transformation of Europe" (1991) 100 *The Yale Law Journal*, 8.

<sup>85</sup> Goldstein, *Constituting Federal Sovereignty*, 45-8, 62-3.

<sup>86</sup> See F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford, OUP, 1999) Chapter 2. Whether they were under the impression that they could rein in the public powers of the Union is of course another matter.

<sup>87</sup> Another prominent explanation in EU law scholarship for the relative lack of contestation by domestic courts of EU authority is that the doctrine of the ECJ led to judicial empowerment in the Member States. See Weiler "The Transformation of Europe", 2426; AM Burley and W Mattli, "Europe Before the Court: A Political Theory of Legal Integration" (1993) *International Organization* 47, 63-4.

<sup>88</sup> L Hooghe and G Marks, "A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining" (2009) *British Journal of Political Science* 39(1), 5.

governmental institutions the flexibility necessary to the exercise emergency government within the scope of the law. The EU governmental institutions did not have any of these options to any significant degree. Prior to the crisis, there was a very limited legal basis available for economic emergency politics beyond the scope of Article 122(2)<sup>89</sup> and Article 143 TFEU<sup>90</sup> in the Treaties. And due to the rigidity and detailed nature of the EU Treaties, the narrow constitutional mandates of the governmental institution of the EU and the complex process of Treaty revision, the flexibility of the EU's executive branch of government is highly restricted. In contrast to systems of parliamentary sovereignty where emergency government can be exercised within the boundaries of the constitution because of the lack of a strict separation between legislative and executive powers and the relative flexibility of cabinet<sup>91</sup>, the governmental institutions of the EU are not constituted with the flexibility that would allow them, in an unproblematic manner, to exercise emergency powers without going beyond their legal mandate.

Emergency politics in the EU must therefore be authorised on more *political* grounds. The EU is not unique in that regard. Executive constitutional defence must often go beyond the constitution in order to save the political community. This was perhaps best expressed by Abraham Lincoln in response to critiques of his employment of emergency measures to repress the rebellious Southern States:

“Every man thinks he has a right to live and every government thinks it has a right to live. Every man when driven to the wall by murderous assailants will override all laws to protect himself, and this is called the great right of self-defense. So every government, when driven to the wall by a rebellion, will trample down a constitution before it allow itself to be destroyed. This may not be constitutional law, but it is fact”<sup>92</sup>.

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<sup>89</sup> Article 122(2) TFEU reads: “Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken”. In May 2010, the Council was able to extend help to the Greek financial authorities via Article 122 thus interpreting the financial crisis of 2008-2009 as an exceptional occurrence beyond the control of the Greek government, see W Schelkle, *The Political Economy of Monetary Solidarity: Understanding the Euro Experiment* (Oxford, OUP, 2017), 212, 141.

<sup>90</sup> Article 143 TFEU allows for the Union to provide assistance to a non-Eurozone Member State that is experiencing balance of payments difficulties that “jeopardise the functioning of the internal market or the implementation of the common commercial policy”. The three non-Eurozone bailouts—Hungary, Latvia and Romania—were all based on Article 143 TFEU, see C Kilpatrick, “Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?” (2014) *EuConst* 10, 400.

<sup>91</sup> Rossiter, *Constitutional Dictatorship*, 135-6; 139; 154-8.

<sup>92</sup> Lincoln to Hodges, as cited by Rossiter, *Constitutional Dictatorship*, 11.

There is an argument to be made that the *extension* of executive powers will be of greater importance in federal systems than in unitary states because of the division of powers between the Union and the Member States<sup>93</sup>. The division of powers in a federation can have the implication that no one—neither the Union nor the Member States—can address the problem within the scope of the law. Whereas centralised states merely have to *concentrate* the powers already granted to government on fewer hands or *transfer* powers from civil authority to military authority<sup>94</sup>, federal systems will have to *extend* the powers available to government as such. A good historical example of this is the New Deal that led to a profound change to the US constitution and significantly altered and enlarged the powers of the US government<sup>95</sup>.

Whether this can be upheld as a general rule or not, it has definitely been the case in the Eurozone crisis. Following the ‘no-bailout clause’ (Article 125 TFEU), the Union was not allowed to bail out a Member State on the brink of default and the ECB was forbidden from acting as a lender of last resort to sovereigns (Article 123 TFEU)<sup>96</sup>. However, seeing that the Member States had given up their old national currencies, they had lost one of their most important policy tools to deal with the crisis, namely, an independent monetary policy<sup>97</sup>. The possibility of, e.g., devaluation and (internal) Quantitative Easing and large scale fiscal investment based on deficit spending no longer existed for the Member States who had adopted the Euro. At the beginning of the Eurozone crisis, neither the EU nor the Member States had adequate powers available to them to deal with a recession of this scale.

Despite these constraints, a permanent European governmental emergency apparatus has been instituted during the Eurozone crisis with a view to governing not only the crisis but also the future developments of the Eurozone and the EU. This governmental apparatus relies on a patchwork of legal instruments and governmental

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<sup>93</sup> “If successful constitutional dictatorship involves either a union of the ordinarily separated powers or a simple disregard of that hoary principle of constitutionalism, then it would seem axiomatic that the less rigidly a government conforms to the theory of the separation of powers, the more easily it can adapt itself to the rigors of any particular crisis” (Rossiter, *Constitutional Dictatorship*, 154).

<sup>94</sup> In France, the ‘state of siege’ is characterised by the transfer of powers from civil administration to military commanders. Similarly, martial law in Britain is characterised by the extension of military government to domestic areas and civil persons (Rossiter, *Constitutional Dictatorship*, 79-90, 140).

<sup>95</sup> B Ackerman, *We the People II: Transformations*, Part Three.

<sup>96</sup> P de Grauwe, “The European Central Bank as Lender of Last Resort in the Government Bond Markets” (2013) *CE.Sifo Economic Studies* 59(3), 520–35.

<sup>97</sup> P de Grauwe, “The Governance of a Fragile Eurozone” (2011) *CEPS Working Document* 346. As has been pointed out by Waltraud Schelkle, the *de facto* constraint on the Member States’ monetary sovereignty predates the euro. Notwithstanding that the Member States *de jure* had more policy tools available to them under the ERM system, the ERM crisis of the 1992-1993 made it clear that they could not make use of them effectively: “The ERM crisis had shown most governments how little monetary sovereignty they had” (Schelkle, *The Political Economy of Monetary Solidarity*, 128-9, 181-2).

agreements of contested legal nature: the ‘Six Pack’, the ‘Two Pack’ and the ‘European Semester’ (all three formally EU law), the European Stability Mechanism (ESM)<sup>98</sup> and the ‘Fiscal Compact’<sup>99</sup> (both formally international law), the ‘Memoranda of Understanding’ (MoUs) specifying loan conditionality (the legal status of which is ‘liminal’/contested<sup>100</sup>), Banking Union<sup>101</sup> and finally the ‘non-standard monetary policy instruments’ of the ECB, importantly the Outright Monetary Transactions programme (OMT) and Quantitative Easing (QE). Following Claire Kilpatrick, I refer to this body of (legal) instruments as ‘Eurocrisis law’<sup>102</sup>.

Whereas the early history of constitutional defence in the EU is best understood on the basis of the US model of judicial constitutional defence, the emergency government of the Eurozone crisis is more readily comprehended on the basis of the model of executive constitutional defence of the German Federation. The emergency apparatus created allows EU institutions, *first*, to exercise emergency powers *on behalf* of a Member State ‘loyal to the Union’ that is incapable of dealing with an internal crisis (‘federal intervention’). *Second*, it allows EU institutions to act *against* a Member State that breaches EU law and threatens the stability of the Union (‘federal execution’). Both forms of emergency rule entail a significant interference in the ‘internal matters’ of the targeted Member State.

Before the Eurozone crisis, there was a legal ban for a Member State, ‘loyal to the Union’ but in a crisis beyond its command, to ask for help from the Union or the other Member States beyond the limited scope of Articles 122 and 143 TFEU. There was, in short, only a limited possibility for a federal intervention. With the creation of the ESM in 2012, a permanent legal structure was put into place that allows for a federal intervention. Following the conclusion of the ESM Treaty, an ESM Member State that finds itself in a financial crisis beyond its control may request financial assistance in the form of a loan from the ESM<sup>103</sup>. When a request is made, the ESM Board of Governors shall entrust the Commission and the ECB with the task of assessing the emergency situation. In the ESM, the link between a threat to a Member State and a threat to the

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<sup>98</sup> And early in the crisis the European Financial Stability Facility (EFSF).

<sup>99</sup> Formally “The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union” (TSCG).

<sup>100</sup> Kilpatrick, “Are the Bailouts Immune...?”, 395-6, 409; C Kilpatrick, “The EU and Its Sovereign Debt Programmes: The Challenges of Liminal Legality” (2017) *EUI Working Papers LAW* 14.

<sup>101</sup> S de Rynck, “Banking on a Union: The Politics of Changing Eurozone Banking Supervision” (2016) *Journal of European Public Policy* 23(1), 119-35; Schelkle, *The Political Economy of Monetary Solidarity*, 217-22.

<sup>102</sup> C Kilpatrick, “Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry” (2015) *EUI Working Papers Law* 34.

<sup>103</sup> ESM Treaty, Article 13.

Union that always exists implicitly for federal interventions is made explicit. The ESM can only provide stability support if “indispensable to safeguard the financial stability of the euro area as a whole and of its Member States”<sup>104</sup>. A federal intervention based on the ESM is therefore always linked to a ‘Eurozone-wide state of exception’ (i.e. a ‘*Bundes-Ausnahmestand*’).

Perhaps because it arguably breaches EU law<sup>105</sup>—or so it seemed until the ECJ’s creative interpretation in *Pringle*<sup>106</sup>—, the ESM was (formally) created outside EU law. Nevertheless, as most other forms of emergency politics, the ESM is anchored in public law and exercised by public law institutions. The legal basis for the ESM is Article 136 TFEU, amended *ex-post facto* to allow for the establishment of “a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole”<sup>107</sup>. Furthermore, the Commission and the ECB “perform the tasks provided for” in the ESM treaty<sup>108</sup>. The ESM is thus outside the public law structure of the EU but at the same time firmly anchored in it. It is a true, albeit unconventional, emergency regime: it suspends the public law norm but operates with the force of law through public law institutions. It is a form of “liminal legality” existing in the “contested border zone between law and non-law (...) and EU law and non-EU law”<sup>109</sup>. The narrative that the bailout-programmes formally fall outside EU law—and in case of the MoUs their formal a-legal nature—has, as will come clear, been used by EU institutions as well as Member State courts to immunise bailout conditionality from fundamental rights challenges<sup>110</sup>. It is an alternative way of creating a zone where the law is suspended but where public power can still be exercised with the force of law.

The ESM works differently than the German federal intervention because *de jure* an EU ‘federal commissioner’ can neither (partially) suspend the targeted Member State’s constitution nor rely on ‘forced administration’. The ESM does, however, *de facto* allow

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<sup>104</sup> ESM Treaty, Article 12.

<sup>105</sup> As maintained by Thomas Pringle in *C-370/12 - Thomas Pringle v Government of Ireland and Others* [2012], see J Tomkin, “Contradictions, Circumvention and Conceptual Gymnastics: The Impacts of the Adoption of the ESM Treaty on the State of European Democracy” (2013) *GLJ* 14(1), 174-7.

<sup>106</sup> Tomkin, “Contradictions, Circumvention and Conceptual Gymnastics”, 187-8.

<sup>107</sup> Decision (EU) 2011/199, European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.

<sup>108</sup> ESM Treaty, Preamble (10) and (17).

<sup>109</sup> Kilpatrick, “The EU and Its Sovereign Debt Programmes: the Challenges of Liminal Legality”, 3.

<sup>110</sup> Case *C-370/12 - Pringle v Ireland* [2012], 178-182; Tomkin, “Contradictions, Circumvention and Conceptual Gymnastics”, 186-7; A Nolan, “Welfare Rights in the Eurozone: Ireland” in *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges* (2014) *EUI Working Paper Law* 5, 38-9; A Marketou, “Greece: Constitutional Deconstruction and the Loss of National Sovereignty” in *Constitutional Change through Euro-Crisis Law*, 179-82; Kilpatrick “Are the Bailouts Immune...?”, 394-5.

for just that because the price of an ESM loan is the ‘strict conditionality’ specified in a MoU negotiated between the ESM and the Member State concerned<sup>111</sup>. With the constant threat of cutting off funds, a Member State government and/or parliament requesting an ESM intervention is thus caught, paraphrasing the words of Huber, between the Scylla of defaulting and the Charybdis of the Troika (the Commission, the ECB and the IMF)<sup>112</sup>. The loss of political autonomy, it must be stressed, is *not formal but material* in nature since the ESM is a ‘requested intervention’. For that reason, the current President of the ECJ, Koen Lenaerts, can apparently without irony write the following:

“a national parliament may, where the constitution requires its approval, reject the conditions attached to ESM financial assistance. Of course, in so doing, national parliaments must strike the right balance between the risks associated with default and the adoption of austerity measures that will inevitably give rise to discontent among the electorate”<sup>113</sup>.

Setting aside the question of whether a Member State (or which Member States!) in actual fact would have been allowed to default seeing that a sovereign default might have led to contagion across the Eurozone, Lenaerts is correct in his analysis of the *formal* political autonomy of a Member State to reject ESM conditionality. Being ‘free to default’, the Member State’s governmental apparatus stays in place and submits itself ‘freely’ to the conditionality programmes attached to the ESM programme. That being said, from a more material perspective, voting in favour of defaulting is not a viable choice for most Member State parliaments. *De facto*, if not *de jure*, the Troika acting on behalf of the ESM therefore becomes a ‘protector’ for the bailout Member States as the federal commissioner did under the federal intervention in the German Federation.

The role of the ECB and the Commission as ‘protectors’ is further strengthened by the ‘stricter version’ of the Stability and Growth Pact created during the crisis with the Six Pack, the Two Pack and the Fiscal Compact. The Two Pack, e.g., created the possibility for strengthening the economic and budgetary surveillance of Eurozone Member States who receive *either* external financial assistance under the EFSM<sup>114</sup>, the EFSF, the ESM, the IMF or another bilateral basis *or* who “experience or are threatened with serious difficulties with respect to their financial stability or to the sustainability of

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<sup>111</sup> ESM Treaty, Article 13(3) and 13(4).

<sup>112</sup> Huber, “Bundesexekution und Bundesintervention”, 10.

<sup>113</sup> Lenaerts, “EMU and the European Union’s Constitutional Framework”, 766.

<sup>114</sup> The European Financial Stabilisation Mechanism.

their public finances, leading to potential adverse spill-over effects on other Member States in the euro area”<sup>115</sup>. It is for the Commission—not the Member State concerned—to decide when the latter is the case<sup>116</sup>. If the formal request for assistance is what preserves the political autonomy of the Member States from a formal perspective, the Two Pack undermines this autonomy. Because of the potential spill-overs of a crisis internal to a Member State, the Two Pack allows European institutions to intervene in the internal fiscal affairs of EU Member States and subject them to ‘enhanced surveillance’ without a formal Member State request. The Two Pack, therefore allows the Commission *to declare a form of ‘state of exception’ on behalf of its Member States*. Whereas the ESM is a form of ‘*requested* federal intervention’, the Two Pack creates the possibility for a form of ‘*unrequested* federal intervention’.

A Member State subjected to ‘enhanced surveillance’ shall in cooperation with the Commission and the ECB “adopt measures aimed at addressing the sources or potential sources of difficulties”<sup>117</sup>. This is done by directing recommendations at the Member State, e.g., a macroeconomic adjustment programme. If the Member State concerned is “experiencing insufficient administrative capacity or significant problems in the implementation of the programme” it is *obligated* to seek “technical assistance from the Commission”<sup>118</sup>. A Member State subjected to ‘enhanced surveillance’ thus has a legal obligation to inform the Union if it is not capable of implementing the ECB’s and the Commission’s recommendations itself. In that case, the ECB and the Commission will supply “technical assistance” which “may include the establishment of a *resident representative and supporting staff* to advise authorities on the implementation of the programme”<sup>119</sup>. In this way, the Two Pack creates the possibility for the Commission and the ECB, through their resident representative, to exercise emergency public powers directly in and on the Member States subjected to ‘enhanced surveillance’. That is, the Two Pack creates the possibility of a ‘forced administration’. Similarly, if the Council, on a proposal by the Commission, decides that a Member State has an ‘excessive deficit’<sup>120</sup>, the Member State has a duty to present to the Council and the Commission “an economic

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<sup>115</sup> Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, Article 1, 1(b) and Article 1,1(a).

<sup>116</sup> Regulation (EU) No 472/2013, Article 2, 1(a)

<sup>117</sup> Regulation (EU) No 472/2013, Article 3, 1.

<sup>118</sup> Regulation (EU) No 472/2013, Article 7, 8.

<sup>119</sup> Regulation (EU) No 472/2013, Article 7, 8, italics added.

<sup>120</sup> Article 126(6) TFEU and regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, Article 7.

partnership programme” that specifies “the policy measures and structural reforms that are needed to ensure an effective and lasting correction of the excessive deficit”<sup>121</sup>. The implementation of the programme shall be monitored by the Commission and the Council<sup>122</sup>.

In case of serious non-compliance with the recommendations made in the different ‘adjustment programmes’ for the Member States, the Stability and Growth Pact has established a link between a ‘federal intervention’ and a ‘federal execution’ under Article 126(9)-(11) TFEU and strengthened by the ‘stricter’ Stability and Growth Pact. A Member State that persistently fails to take action in response to the recommendations by the relevant EU institutions—a Member State that *resists* a federal intervention—can, e.g., be required to lodge a deposit with the Commission amounting to 0.2 % of its GDP in the preceding year<sup>123</sup>, or it can have a fine imposed on it by the Commission amounting to 0.2 % of its GDP in the preceding year<sup>124</sup>. The federal intervention blends into the federal execution because, due to the mutualisation of risk, there is no internal affairs of the Member States that cannot become a Union matter.

As is generally the case for emergency politics in the federation, in the concrete praxis of the government of the Eurozone crisis, it is not always clear who authorises the extended use of executive powers and for the sake of whom. This is, e.g., manifest in the ESM where stability support only can be granted to a crisis-ridden state if necessary to safeguard the Eurozone and its Member States<sup>125</sup>. The European governmental emergency apparatus is a form of ‘executive federalism’ that has strengthened the executive branch of government of the Union and, in many cases, of the Member States. This is, e.g., manifest in a widespread use of ‘rule by decree’ by Member State governments and the granting of wide ranging powers to government ministers<sup>126</sup>. As other forms of ‘executive lawmaking’, Eurocrisis law has worked as a kind of ‘enabling act’<sup>127</sup> transferring

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<sup>121</sup> Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, Article 9, 1.

<sup>122</sup> Regulation (EU) No 473/2013, Article 9, 6.

<sup>123</sup> Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, Article 4. See also, Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, Article 3.

<sup>124</sup> Regulation (EU) No 1173/2011, Article 6.

<sup>125</sup> ESM Treaty, Article 12.

<sup>126</sup> Marketou’s, “Greece: Constitutional Deconstruction and the Loss of National Sovereignty”, 190; LD Sanchez, “Spain: Dealing with the Economic Emergency”, 204-209; L Pierdominici, “Constitutional Change through Emergency Decrees”, 222-8; S Coutts, “Ireland: Traditional Procedures”, 233, 236 all in *Constitutional Change through Euro-Crisis Law*. See also D Tega, “Welfare Rights in Italy” in *Social Rights in Times of Crisis*, 53.

<sup>127</sup> Rossiter, *Constitutional Dictatorship*, 10.

legislative powers from parliaments to the European and Member State executives. The structure of the federal intervention furthermore allows a Member State government to repress internal opposition and enforce unpopular programmes<sup>128</sup>. Whereas the Princes in the German Federation could use the mechanism of the federal intervention to rely on the force of the collected armies of all the *Länder* to repress a national-liberal uprising in an individual *Land*, so has Eurozone crisis law been employed by some Member State governments to cut public finances and enforce labour law reforms that would have been difficult to get through Member State parliaments in ‘normal times’<sup>129</sup>.

### **C: ‘Whatever It Takes to Preserve the Euro’**

Before we turn to the contestation of the government of the Eurozone crisis, it seems important to discuss a significant manifestation of emergency rule that goes beyond both the federal intervention and the federal execution, namely, the ‘non-standard monetary policy instruments’ of the ECB such as the OMT and QE. These programmes have allowed the ECB to act as a lender of last resort to sovereigns and buy government securities in order to lower the interest rate and increase the money supply. These unconventional policy instruments were employed because the crisis measures already discussed proved insufficient to deal with the Eurozone crisis<sup>130</sup>. By 2012, the markets had started to seriously call into question the irreversibility of the euro within the crisis-ridden Member States and to price in the likelihood of sovereign defaults. On this background, it was deemed necessary for someone to step in to relieve the fiscal authorities of the Member States and guarantee the survival of the Eurozone as a whole. When no other actor appeared on the stage, the ECB took up the slack and provided, in the words of Waltraud Schelkle, relief for Member State fiscal authorities “through the monetary back door”<sup>131</sup>. With the OMT and QE programmes, the ECB acted in order to ensure the survival of the Eurozone as a whole.

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<sup>128</sup> See, e.g., Marketou’s (“Greece: Constitutional Deconstruction and the Loss of National Sovereignty”, 180-1) account of how the ‘anti-MoU forces’ were repressed in the Greek Parliament during the 2010 bailout.

<sup>129</sup> ML Rodríguez (“Labour Rights in Crisis in the Eurozone: The Spanish Case”), e.g., argues that “the anti-crisis decisions are a mix of EU recommendations and/or impositions and national policies. This is the case because European authorities and the current Spanish Government, whether they state it or not, share the same political vision, the same economic ideology, and the same strategy to overcome the crisis (...) This mix between EU demands and contributions from the Spanish Government has led to a more authoritarian labour relations model” in *Social Rights in Times of Crisis*, 111. For a similar analysis of Portugal, see M Nogueira de Brito, “Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis” in *Social Rights in Times of Crisis*, 68.

<sup>130</sup> Schelkle, *The Political Economy of Monetary Solidarity*, 214-5.

<sup>131</sup> Schelkle, “European Fiscal Union: From Monetary Backdoor to Parliamentary Main Entrance” (2012).

Neither the OMT nor QE fits the model of federal intervention and federal execution. In neither case does the ECB act (primarily) *on behalf* of an individual Member State or *against* a Member State. In contrast, these programmes are forms of emergency politics on behalf of the EU or the Eurozone as a whole and are motivated (solely) by a Union-wide state of exception. The announcement of the OMT-programme by Mario Draghi was prefaced by the so-called ‘whatever it takes’-speech that famously calmed the markets: “Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough”<sup>132</sup>. Both the OMT and the QE are highly controversial because the ECB arguably did not act within its mandate but went well beyond it in an attempt to safeguard the EU and the Eurozone as a whole (or so it seemed until the ECJ’s decision in *Gauweiler*<sup>133</sup>). The authority of these kinds of acts are wielded with reference to the need to safeguard the political community as whole<sup>134</sup>. The authority relied on tends to be derived from the very source of the law in popular will. Perhaps this is why the ECB in recent years has started to appeal directly to ‘the people of Europe’ in speeches and in its online self-descriptions<sup>135</sup>.

This form of emergency authority is one of the most profound manifestations of *raison d’état* and it resembles more the emergency politics of a state than a federation. Or rather, the emergency rule of the ECB is undertaken as if the EU was a unitary state and the Member States were mere regions. In a speech by a Member of the Executive Board of the ECB, Benoît Cœuré, the emerging ‘statist nature’ of the Eurozone as a governmental unit was openly stated in the following way: “the notion that the euro is a currency without a state is in my view misguided. The euro is a currency with a state—but it’s a state whose branches of government are not yet clearly defined”<sup>136</sup>. In this regard, the crisis government of the ECB resembles constitutionally (but not economically) that of President Roosevelt during the Great Depression. It is an arrogation of power in the

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<sup>132</sup> Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012, available via: <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> [last accessed 9 January 2018].

<sup>133</sup> Case C-62/14 - *Gauweiler and Others* [2015].

<sup>134</sup> In more material terms, however, the unconventional monetary policies of the ECB have, of course, benefitted some classes, groups, and states more than others. According to Blyth, the ‘rescue’ has in that sense been thought within a regime of ‘deflation, high profitability, and inequality’, and for that reason Blyth maintains that it has been ineffective, M Blyth, “Policies to Overcome Stagnation: The Crisis, and the Possible Futures, of All Things Euro” (2016) *European Journal of Economics and Economic Policies: Intervention* 13(2).

<sup>135</sup> H Lokdam, “Is the European Central Bank Becoming a Central Bank for the People of Europe?” (Verfassungsblog, 24 April 2016).

<sup>136</sup> Speech by Benoît Cœuré, Member of the Executive Board of the ECB: “Restoring Trust in Economic and Monetary Union” at the Forum Eco Libération ESCP (Paris, 1 December 2012). Available via: <https://www.ecb.europa.eu/press/key/date/2012/html/sp121201.en.html> [last accessed 10 January 2018].

name of *salus populi* that pushes the federal union in the direction of a state by introducing a strong element of *raison d'état*.

This is arguably more difficult to do in the EU than in the United States because of the ‘technical’ understanding of the mandates given to the governmental institutions of the EU (Chapter 3). In contrast to the US Presidency, the Commission and the ECB are not invested with a strong political mandate. The Commission and the ECB are primarily technical institutions; at least in relation to the Member States. Originally the US presidency was of course not meant to be the plebiscitarian office it is today<sup>137</sup> (Chapter 3). Nevertheless, despite still not being elected directly by the people of the United States but by the electoral committee, the US Presidency has through the leadership of Presidents such as Lincoln, Woodrow Wilson and Roosevelt unquestionably come to be invested with the authority of the nation.

The ECB is a non-representative and non-elected technocratic institution and it can therefore—at best—rely on an indirect representation of the people(s) of Europe. Besides, even if the ECB could do that and thereby to some extent strengthen its crisis authority, this would simultaneously threaten the foundation of its main technical authority that presupposes political independence. As a technical institution, the ECB has all the powers necessary to *execute* its constitutional mandate, but it has no authority to give itself a new mandate. For that reason, it is difficult for the ECB to rely on the deeply political logic of constitutional dictatorship. In some of its rhetoric, the main aim of the ECB’s emergency measures is therefore down-graded to a mere ‘precondition’<sup>138</sup> for the ECB to fulfil the legal mandate it has been given by Treaties and by “the people in its jurisdiction”—the people(s) of Europe—namely, securing *price stability*<sup>139</sup>. And it is on that ground that the ECJ defended the legality of the OMT programme in *Gauweiler*<sup>140</sup>. Nevertheless, while it in logical terms is correct that the continuous existence of the euro and a unitary monetary policy is a precondition for price stability in the Eurozone<sup>141</sup>, it is

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<sup>137</sup> Ackerman, *We the People I*, 67ff.

<sup>138</sup> The ECB thus argued that it was not capable of exercising its duties set out in the Treaties due to a disruption of the ‘monetary policy transmission mechanism’ because ‘unjustified fears of investors’ of a reversibility of the euro led to ‘unjustified interest spreads’. The purpose of the OMT, the ECB argued, was to ‘neutralise’ these unjustified spreads. See BVerfG – 2 BvR 2728/13a – *OMT Reference* [2014], §7.

<sup>139</sup> See, e.g., Cœuré: “Restoring Trust in Economic and Monetary Union”.

<sup>140</sup> C-62/14 - *Gauweiler and Others* [2015], §50.

<sup>141</sup> The ECJ had to construct its version of this argument in a more convoluted manner because it in *Pringle* had defined the aim of safeguarding the Eurozone as ‘economic policy’ belonging to the reserved competence of the Member States (C-370/12 - *Pringle*, §56). To justify the OMT programme, the ECJ argued that the OMT programme was within the scope of the ECB’s competence of ‘monetary policy’ because the programme aimed to rectify the ‘disrupted monetary policy transmission mechanism’ (C-62/14 - *Gauweiler* §50). However, following the ECB, this ‘disruption’ was caused “by the demand for excessive risk premia for the bonds issued by certain Member States, such premia being intended to guard

less plausible that the right to act as constitutional guardian of the Eurozone is part of the ‘technical mandate’ of price stability. During the crisis, the ECB has acted as a ‘reluctant sovereign’ for the Eurozone and granted itself new powers—as governmental institutions often do in times of crisis<sup>142</sup>. Nonetheless, it is still much more difficult for the ECB or the Commission to speak in the name of the people(s) of Europe to justify extra-legal constitutional defence than it is for the President of the United States<sup>143</sup>.

### III: THE CONTESTATION OF EU EMERGENCY RULE

#### A: Authority and Austerity

If the EU earlier could maintain a strong degree of constitutional tolerance by allowing the Member States to control politically sensitive issues, this is no longer the case after the Eurozone crisis. During the crisis, the EU has significantly extended the scope of its powers and its capacity to intervene in the ‘internal affairs’ of its Member States. The Troika has intervened in most if not all core ‘politically sensitive’ Member State competences: taxation, healthcare, education, pensions, labour law, unemployment benefits and military spending. The demand for fiscal consolidation attached to the bailout programmes has led to *de facto* micro-management of deficit Member States and to significant cuts to the public sector, pensions and social benefits, and to a large degree dismantled collective bargaining.

The austerity measures imposed have led to drastic changes in the political and social fabric of the bailout Member States: record high long-term unemployment, homelessness, poverty, labour exploitation hereunder child labour and human trafficking and restricted access to basic needs such a clean and affordable water<sup>144</sup>. The effects of austerity have not been spread evenly within the bailout states but have disproportionately been borne by the low-income families who depend more on public services and spend a higher proportion of their income on basic services and food<sup>145</sup>. The effects of austerity have furthermore disproportionately hit the marginalised and disadvantaged groups of

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against the risk of a break-up of the euro area” (*Gauweiler* §72). Thus the ECB had to save the euro (i.e., to “dispel unjustified fears about the break-up of the euro area”, *Gauweiler* §76) in order to correct the disrupted ‘monetary policy transmission mechanism’ so it, in turn, could provide the constitutional mandate of price stability. Where there’s a will there’s a way.

<sup>142</sup> Rossiter, *Constitutional Dictatorship*, 7.

<sup>143</sup> *ibid* 219.

<sup>144</sup> “Safeguarding Human Rights in Times of Economic Crisis” (2013) *Issue Paper from Council of Europe Commissioner for Human Rights*, 15-20.

<sup>145</sup> *ibid* 16.

society, importantly ethnic minorities, women and the young<sup>146</sup>. The austerity programmes have had significant consequences not only for social rights and workers' rights, but also political rights and civil rights. The emergency government of the Eurozone crisis has bypassed the ordinary channels of government and has thereby enforced executive decisions without the usual scrutiny at the Member State level<sup>147</sup>. With regard to civil rights, the large-scale protests against austerity in Greece, Portugal and Spain have been repressed violently leading to concerns about the excessive use of force against demonstrators and infringements of the right to freedom of assembly and expression<sup>148</sup>. The austerity measures have furthermore led to a diminished access to justice, e.g., by cutting legal aid and increasing court fees<sup>149</sup>.

Whereas the theory of federal emergency politics can explain how authority can be wielded in a crisis, it cannot explain why the emergency government of the Eurozone came in the form of austerity and not more expansionist policies. Unless austerity is understood as the exclusive or preeminent identity of the constitution of the EU, there is no *legal reason* to prioritise fiscal consolidation over, e.g., the protection of social rights and full employment also protected by the EU constitution<sup>150</sup>. It is, however, outside the scope of this thesis to answer the question of why the emergency government of the Eurozone crisis came to favour fiscal consolidation and not more expansionist policies like the New Deal. The aim of this chapter is to understand in what ways the federation as a political form allows for the generation of governmental authority in times of crisis and how that applies to the EU. Importantly, we have seen how central features of the new apparatus created to govern the Eurozone crisis adheres to federal emergency politics. The increased

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<sup>146</sup> *ibid* 7, 22-5; C Kilpatrick, "Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law", 393-4; A Nolan, "Welfare Rights in the Eurozone: Ireland" in *Social Rights in Times of Crisis in the Eurozone*, 39-40; LD Sánchez "Deconstitutionalisation of Social Rights and the Quest for Efficiency", 117 in *Social Rights in Times of Crisis in the Eurozone*.

<sup>147</sup> "Safeguarding Human Rights in Times of Economic Crisis", 16.

<sup>148</sup> *ibid* 21.

<sup>149</sup> *ibid*.

<sup>150</sup> From a legal perspective, it is not clear why fiscal consolidation should be given priority over the protection of the constitutional values of the Union set out in Article 2: "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities" (C Kaupa, *The Pluralist Character of the European Economic Constitution* (London, Hart 2016); Kilpatrick, "Are the Bailouts Immune...?", 394). Whereas there is a political right to save the Union and thus a source of governmental authority for the executive branch of government to exercise extra-legal powers, it is in no way clear why saving the Eurozone and the EU should entail class-based austerity politics. Nonetheless, there is little doubt that the enforcement of class interests has played a role in the Eurozone crisis. And while it is true that constitutional dictatorship has often been used as a tool of class politics historically, this is not necessarily the case (Rossiter, *Constitutional Dictatorship*, 22, 173).

use of executive powers to govern the crisis relies on typical channels of authority of the federation in crisis, e.g., the federal intervention and the federal execution.

As we saw earlier in the chapter, federal emergency politics, however, is inherently contested. Following the ‘doctrine of Calhoun’, it is the Member States who are the rightful guardians of both their own constitutions and the boundary of federal law. Similarly, the emergency government of the Eurozone crisis has led to a wave of contestations and resistance of the authority of EU institutions and the new ‘Eurocrisis law’. These new manifestations of opposition have taken many different forms: an avalanche of court cases, formation of new social movements and the rise of parties whose core political programme includes the abolition of the euro or a significant reform of the EU. Compared to earlier EU history, the magnitude of this wave of contestation is unprecedented. That being said, in comparison to notably the early history of the United States, the actual resistance has been surprisingly modest. No Member State has yet nullified/voided any of the Euro crisis measures. The instances of direct contestation of EU emergency authority are relatively few and none of them have succeeded in their aim. In the following, I will look into some of the more significant manifestations of resistance to the emergency government of the Eurozone crisis and discuss some of the reasons why most contestations have been unsuccessful.

### **B: Judicial Contestation of Emergency Rule**

European courts—the ECJ and Member State courts acting in their dual capacity as national courts and European courts—have been an important site for the constitutional contestation of the emergency government of the Eurozone crisis. European courts are the main *legal route* available through which the constitutionality of ‘Eurocrisis law’ can be contested. Throughout the history of European integration, the authority of the EU has, as we have seen, not been significantly contested by its Member States when compared to, e.g., the early history of the United States. However, the contestation of EU authority that *has* taken place has to a large degree been manifest in the ‘judicial dialogues,’ famous amongst EU law scholars, between Member State courts and the ECJ.

On a fundamental level, these debates are about the question of ultimate authority, or *Kompetenz-Kompetenz*, claimed both by the ECJ and the Member State Supreme/Constitutional courts (Chapter 1). On the one hand, the ECJ has, with reference to the authority granted to it in the Treaties, asserted its right to decide on the validity of

EU law and the legality of all acts of the EU institutions. On the other hand, referring to the principles of conferral, Member State courts have claimed ultimate jurisdiction over the question of the constitutionality of EU law stating that only they can determine whether the EU acts *ultra vires*. These positions highlight different aspects of the nature of the foundation of the EU: whereas the Member State courts ultimately will understand the foundations as *treaty/contract*, the ECJ will ultimately insist on it as *constitution*. From the perspective of the theory of the federation, there is nothing new in the overall issue of these debates. They mirror similar debates in the German Federation and the United States—e.g., the debate between Webster and Calhoun<sup>151</sup>. On a fundamental level, they reflect the heterarchical relationship between the dual political existences of the federation as a political form.

Nonetheless, the concrete issues contested are always unique to an actual federation. One of the most important ‘judicial dialogues’ in the EU has to do with the protection of fundamental rights that make up the core of ‘value order’ constitutionalism to which a majority of the EU Member States belong (Chapter 4). Following EU law doctrine, EU law takes primacy over Member State law<sup>152</sup>, even Member State constitutional law including constitutionally protected fundamental rights<sup>153</sup>. Several Member State courts, however, have contested the ECJ’s claim of the unequivocal primacy or supremacy of EU law over Member State law with reference to concerns relating to fundamental rights protected by Member State constitutions<sup>154</sup>. They have therefore insisted on their right to submit EU law to constitutional review and ultimately to void EU law in case it breaches the core fundamental rights that lie at the heart of many of the constitutions of the Member States. The ECJ has not accepted the Member State courts’ right to void EU law on this basis. However, the ECJ has pledged itself to review EU law on the basis of analogous rights at the EU level<sup>155</sup>.

As has been discussed extensively in this thesis, the EU has by most of its Member States—at least to some extent—been understood as an integral part of the realisation and consolidation of their own constitutional orders centred on fundamental rights and

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<sup>151</sup> Forsyth, *Union of States*, 119-32.

<sup>152</sup> C-6/64 - *Flaminio Costa v E.N.E.L.* [1964].

<sup>153</sup> C 11/70 - *Internationale Handelsgesellschaft/Solange I* [1970].

<sup>154</sup> And later also the protection of democratic legitimacy (BVerfG, *Maastricht Decision – Brunner v European Union* [1994] and BVerfG - BvE 2/08 *Lisbon Ruling* [2009]) and Member State constitutional identity (BVerfG - BvE 2/08 *Lisbon Ruling* [2009]; BVerfG - BvR 2735/14 - *EAW order* [2015]). For the contestation of EU authority with reference to fundamental rights, see the Solange cases of the German Constitutional Court (BVerfG, *IHT v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1974] and *Wünsche Handelsgesellschaft* [1987]).

<sup>155</sup> *Internationale Handelsgesellschaft/Solange I* [1970].

the notion of human dignity (Chapters 3-4). It is therefore in no way surprising that the protection of fundamental rights—part of the core or identity of most of the constitutions of the EU Member States—has been one of the important reasons for the delineation of EU authority by Member State courts. Following the theory of the federation, the EU Member States, after all, come together in a union to preserve their constitutional orders; not to destroy them.

Due to the prominent position of not only political and civil rights but also social rights in both the EU Charter of Fundamental Rights (EUCFR) and in the constitutional orders of many bailout Member States<sup>156</sup>, there is a clear possibility of judicial contestation of bailout conditionality with reference to fundamental rights breaches. And many cases have come in front of the Member State courts. However, despite the strong probability that the bailout conditionality actually breaches both the EUCFR and the social rights protected in many of the bailout Member States, surprisingly little contestation of EU authority has resulted from the Eurocrisis social rights jurisprudence. Despite the magnitude of cases lodged in front of Member State courts contesting the constitutionality of austerity measures, these cases have not led to any manifest contestation of the supremacy of EU law or the EU's authority to exercise emergency rule.

The primary reason for that is that the Member State courts and the European institutions tacitly have agreed to *treat bailout conditionality as a matter internal to the Member States* despite the obvious contradictory evidence. This has been done by treating the austerity conditionality attached to the bailouts as *non-EU law*<sup>157</sup>. For example, in a series of cases, the supreme administrative court in Greece, the Council of State, argued that pension cuts in Greece implemented as part of the bailout conditionality did not breach Article 34 EUCFR on social security and social assistance. The reason given by the Council of State was that the Charter only was binding on Member States when they are implementing EU law<sup>158</sup> and not in cases of purely domestic measures to which it

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<sup>156</sup> See the Portuguese Constitution (1976), especially Chapter III: 'Workers rights, freedoms and guarantees' and Title III: 'Economic, social and cultural rights and duties'; the Greek Constitution (1975) Articles 22-23, providing for especially workers' rights; the Romanian Constitution (1991) Articles 32, 34, 40, 43, 47 and 135; and the Constitution of Latvia (1922) Articles 106-122. See also Kilpatrick, "Constitutions, Social Rights and Sovereign Debt States in Europe", 5-6.

<sup>157</sup> Kilpatrick, "Constitutions, Social Rights and Sovereign Debt States in Europe", 22-3; E Psychogiopoulou, "Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges" in *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, 9-11.

<sup>158</sup> Article 51(1) EUCFR: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law".

considered the cases at hand to belong<sup>159</sup>. This formalistic argument allows the domestic courts not to make a preliminary reference to the ECJ on the question of whether the bailout conditionality is in conformity with the EUCFR. A few cases on the compatibility of bailout conditionality with the EUCFR, however, have been referred to the ECJ by the Portuguese courts<sup>160</sup> and Romanian courts<sup>161</sup>. However, in most of these cases, the ECJ maintained that it was without jurisdiction because it was not clear that the domestic laws in question in fact were implementing EU law<sup>162</sup>. In *Sindicato dos Bancários do Norte and Others*, the ECJ, e.g., argued that it clearly lacked jurisdiction because the request from the Portuguese Labour Court “did not contain any concrete element allowing to infer that the Portuguese law was aiming to apply Union law”<sup>163</sup>. Similar lines of arguments have been put forward by other EU institutions, including the Commission<sup>164</sup> and the ECB, leading the European Parliament’s Economic Committee to state that it “Regrets that the programmes are not bound by the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and the European Social Charter, due to the fact that they are not based on Union primary law”<sup>165</sup>.

As shown by Claire Kilpatrick, the argument that the bailouts are not subject to legal challenges within the EU legal order because they are not EU law, is not convincing. Since the crisis, seven EU Member States have been bailed out. Three of these Member States—Hungary, Latvia and Romania—are non-Eurozone states and they have all, from a formal perspective, received assistance purely under EU law<sup>166</sup>. The loan conditions for Portugal and Ireland relied partly on the EFSM (established under EU law<sup>167</sup>) and the EFSF (the precursor to the ESM established under international law)<sup>168</sup>. These bailouts

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<sup>159</sup> Psychogiopoulou, “Welfare Rights in Crisis in Greece”, 11.

<sup>160</sup> C-128/12 - *Sindicato dos Bancários do Norte and Others* [2013] and C-264/12: *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial* [2014].

<sup>161</sup> C-434/11 - *Corpul Național al Polițiștilor* [2011] and C-134/12 - *Corpul Național al Polițiștilor* [2012].

<sup>162</sup> In C-258/14 - *Florescu and Others* [2017], however, the ECJ *did* claim jurisdiction but ruled that there was no breach of EU law including the EUCFR (Kilpatrick, “The Challenges of Liminal Legality”, 9-11).

<sup>163</sup> J Gomes, “Social Rights in Crisis in the Eurozone. Work Rights in Portugal” in *Social Rights in Times of Crisis in the Eurozone*, 80. The same argument is put forward by the ECJ in *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial*, 17-22 and in the two Romanian cases C-434/11 - *Corpul Național al Polițiștilor* [2011], 16 and C-134/12 - *Corpul Național al Polițiștilor*, 13 [2012].

<sup>164</sup> In the case of Greece “whenever the Troika’s requirements were contested, the creditors have claimed that the particular measures were the Greek Government’s political choice under its exclusive competence for the implementation of obligations resulting from the economic adjustment programmes” (Marketou, “Greece: Constitutional Deconstruction and the Loss of National Sovereignty”, 185).

<sup>165</sup> EP Committee on Economic and Monetary Affairs: “Report on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries” (28 February 2014) as cited by Kilpatrick, “Are the Bailouts Immune...?”, 395.

<sup>166</sup> Kilpatrick, “Are the Bailouts Immune...?”, 400.

<sup>167</sup> The EFSM was created on the basis of Article 122(2) TFEU (Kilpatrick, “The Challenges of Liminal Legality”, 2).

<sup>168</sup> Kilpatrick, “Are the Bailouts Immune...?”, 400; Kilpatrick, “The Challenges of Liminal Legality”, 2.

are therefore of a ‘mixed legal parentage’<sup>169</sup> and as a consequence, even from a formal perspective, at least in part subject to EU law. Only the bailouts of Greece and Cyprus are based entirely on non-EU law sources: bilateral agreements, the ESFS and the ESM<sup>170</sup>. However, there is still in these cases an indirect link to EU law, e.g. the ‘Two Pack’ regulation<sup>171</sup>. As we saw earlier in this chapter, the ‘Two Pack’ allows the Commission and the ECB to subject a deficit Member State that receives external financial assistance under, e.g., the ESM, to ‘enhanced surveillance’ (linking the federal intervention with the federal execution). In this way, these bailouts are brought within the scope of EU law.

Politically, the argument that the bailouts are not subject to any legal challenge within the EU legal order on grounds that they are not EU law is untenable. As was shown earlier in this chapter, ‘Eurocrisis law’ makes up a comprehensive emergency apparatus operating with the force of law. The different legal instruments of this apparatus are in their concrete use completely interrelated and it is therefore impossible to separate the obligations incurred by a bailout Member State under EU law and non-EU law<sup>172</sup>. Furthermore, the bailout conditionality is enforced by EU institutions, which also brings them within the scope of EU law<sup>173</sup>. As we have seen, the Commission and the ECB become *de facto* ‘protectors’ of deficit Member States and they can simultaneously enforce Eurocrisis law *against* and *on behalf* of a Member State with reference to a variety of legal sources; some of them EU law (e.g. the ‘Two Pack’) and some of them formally international law (e.g. the ESM).

The use of international law is therefore better understood as the creation of something vaguely similar in structure to Ernst Frankel’s theory of the ‘dual state’<sup>174</sup>: it is a system that allows for the ‘norm’ (e.g. the ‘no bailout clause’ and the EUCFR) and the ‘exception’ (e.g. bailouts and austerity) to coexist within the European constitutional order. Whereas the ‘normative state’ of EU law has never been (fully) suspended, by its side now exists the ‘prerogative state’ of ‘Eurocrisis law’ enabling the exercise of governmental power through measures and decrees not subject to the constraints of the

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<sup>169</sup> Kilpatrick, “Are the Bailouts Immune...?”, 400.

<sup>170</sup> Kilpatrick, “The Challenges of Liminal Legality”, 2-3.

<sup>171</sup> Kilpatrick, “Are the Bailouts Immune...?”, 400.

<sup>172</sup> For how this applies in the Portuguese case, see T Cisotta and D Gallo, “The Portuguese Constitutional Court Case Law and Austerity Measures: A Reappraisal” in *Social Rights in Times of Crisis in the Eurozone*, 87-8.

<sup>173</sup> As pointed out by Kilpatrick, in contrast to the Member States, there is no reason to believe that EU institutions are only bound by the EUCFR when they are implementing EU law. In the Joined Cases C-8/15 P and C-10/15 P *Ledra Advertising v Commission and ECB* [2016], the Court confirmed this view.

Kilpatrick, “Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law”, 405;

Kilpatrick, “The challenges of liminal legality”, 13.

<sup>174</sup> E Frankel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York, OUP, 1941).

Treaties. The severing of the ties between the bailout conditionality and EU law—as fanciful as it may be—has worked as a legal justification for the immunisation of emergency politics from fundamental rights challenges under EU law. It has allowed the European institutions not to take unwanted responsibility for the political and social implication of the emergency government of the Eurozone crisis and to maintain the logic, however illusory, of market discipline.

Whereas this might be understandable on grounds of political expediency, it is a little surprising, at least *prima facie*, that the tale of the non-EU law nature of the bailouts has generally also been adopted by Member State courts. Having disregarded the possibility that the Member State courts have accepted the tale because of a limited grasp of EU law<sup>175</sup>, Kilpatrick presents another theory for why that has been the case, namely “that not addressing the EU nature of the bailouts may have served to avoid what promised to be an open and highly charged conflict with the EU institutions and legal order, including the Court of Justice, by taking validity challenges against the EU components of bailout programmes”<sup>176</sup>. By not recognising bailout conditionality as EU law, the Member State courts have avoided an “*undesired EU judicialization* of the conflict between bailout sources and national constitutional rights”<sup>177</sup>.

Kilpatrick’s theory is highly interesting from the perspective of the theory of emergency government in the federation. It suggests that in the case of the EU, the Member State courts have gone out of their way to avoid challenging federal authority despite having ample opportunity and perhaps even a legal obligation to do so. The Member State courts have, following this narrative, done what they could to avoid adding a constitutional crisis to the economic crisis. Instead of triggering something akin to the US nullification crisis of the 1830s, Member State courts have, by treating bailout conditionality as the implementation of international agreements or purely domestic measures, tacitly agreed *to treat the question of the constitutionality of bailout conditionality as an ‘internal affair’*.

In reviewing the constitutionality of the bailouts against domestic constitutional standards, most Member State courts have upheld their constitutionality. Politically, this is understandable since declaring the bailout conditionality unconstitutional presumably would endanger the continuation of the bailout, hence creating the possibility of a

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<sup>175</sup> Kilpatrick, “Constitutions, Social Rights and Sovereign Debt States in Europe”, 23.

<sup>176</sup> Kilpatrick, “Constitutions, Social Rights and Sovereign Debt States in Europe”, 23.

<sup>177</sup> *ibid* 24. See also, Cisotta and Gallo, “The Portuguese Constitutional Court Case Law and Austerity Measures: A Reappraisal”, 89.

sovereign default. The emergency situation alone makes it difficult for Member State courts to strike down bailout conditionality. This has, e.g., come out in Greek cases in which the Council of State has upheld the constitutionality of austerity measures with reference to the doctrine of the state of exception<sup>178</sup>. Similarly, the Irish Supreme Court has justified domestic austerity measures with reference to the constitutional mandate of the government to protect the national interest in the face of the most serious economic crisis in Ireland's history<sup>179</sup>. Only the Portuguese Constitutional Court<sup>180</sup> has in any significant way contested the constitutionality of national bailout measures leading to Portugal's relatively swift exit from its bailout programme<sup>181</sup>. Nonetheless, even in this case, the Portuguese Court has not contested the necessity of austerity *per se* but only questioned the fairness of the distribution of the burden<sup>182</sup>. Notwithstanding the significant critique raised by EU institutions in response to the Portuguese cases, it would have been a qualitatively different problem if the Portuguese Constitutional Court had treated the bailout conditionality as EU law and thereby openly contested EU authority<sup>183</sup>.

The only Member State court that has openly contested EU authority and insisted on its ultimate right to void EU law as a means to constitutional defence is the German Constitutional Court. In the now famous OMT reference, the German Constitutional Court argued that, subject to the ECJ's interpretation, it considered the OMT programme to be *ultra vires* on the grounds that it was in breach of EU law<sup>184</sup> and on the grounds that it transgressed the 'principle of democracy' central to the constitutional identity of Germany<sup>185</sup>. The reason given by the German Constitutional Court for the possible violation of the German constitutional identity is that the OMT might constrain the budgetary autonomy of the German *Bundestag* so that it no longer would remain "master of its decisions" and no longer could "exercise its budgetary autonomy under its own

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<sup>178</sup> M Yannakourou, "Challenging Austerity Measures Affecting Work Rights at Domestic and International Level. The Case of Greece" in *Social Rights in Times of Crisis in the Eurozone*, 23.

<sup>179</sup> Nolan, "Welfare Rights in the Eurozone: Ireland" in *Social Rights in Times of Crisis in the Eurozone*, 3-37.

<sup>180</sup> M Nogueira de Brito, "Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis" 71, 73; Gomes, "Social Rights in Crisis in the Eurozone. Work Rights in Portugal", 79-84 both in *Social Rights in Times of Crisis*. Together with the more sustained resistance of the Portuguese Constitutional Court, a smaller number of austerity measures have been struck down by the Italian Constitutional Court and by the Romanian Constitutional Court. See AL Faro, "Fundamental Rights Challenges to Italian Labour Law Developments in the Time of Economic Crisis: An Overview" also in *Social Rights in Times of Crisis*, 61.

<sup>181</sup> Kilpatrick, "Constitutions, Social Rights and Sovereign Debt States in Europe", 8, 18.

<sup>182</sup> Nogueira de Brito, "Putting Social Rights in Brackets?", 75; Cisotta and Gallo, "The Portuguese Constitutional Court Case Law and Austerity Measures: A Reappraisal", 91.

<sup>183</sup> Kilpatrick, "Constitutions, Social Rights and Sovereign Debt States in Europe", 23-4.

<sup>184</sup> Specifically of Article 119 and 127(1)-(2) TFEU and Article 17-34 of the ESCB Statute and possibly also Article 123 TFEU, see BVerfG – 2 BvR 2728/13a – *OMT Reference* [2014] §55, §101

<sup>185</sup> BVerfGE – 2 BvR 2728/13a – *OMT Reference* [2014] §51-53.

responsibility”<sup>186</sup>. Following the reasoning of the German Constitutional Court, the possible implication of the OMT programme is not only an infringement of the constitutional and political autonomy of Germany but a deprivation of the right of the German people to elect their own representatives in a meaningful manner.

It is in itself ironic that the only direct judicial challenge to the EU institutions’ exercise of emergency powers has been sustained by one of the Member States *least* affected by the Eurozone crisis or the emergency rule. Whatever the merits of the argument of the German Constitutional Court, it is certainly the case that the parliaments of bailout Member States to a much more significant degree have been deprived of the possibility of ‘exercising their budgetary autonomy under their own responsibility’. For the Member States governed by emergency measures, the only real question for the electorate has been who should implement the predefined austerity measures<sup>187</sup>. That is, if the people even were granted the right to elect their own representatives<sup>188</sup>. The implications of the emergency government of the Eurozone for the political autonomy and democratic rights of ‘deficit’ Member States and their peoples are much graver than they are for Germany. Whereas the constitutional courts of the bailout Member States—where almost all political autonomy was lost *de facto* if *not de jure*—have gone out of their way to avoid a constitutional conflict, only the constitutional court of a relatively unscathed surplus Member State has dared to contest the authority of the emergency powers employed by EU institutions.

There are several possible explanations for why this is the case. First, in contrast to the bailout Member States it was possible for the German Constitutional Court to contest EU emergency authority because the political consequence of voiding the OMT programme would (arguably) not be a collapse of the German economy. Second, the German economy is by far the most important of the Eurozone and without Germany’s support the OMT programme would not be credible. The purpose of the OMT reference can therefore be interpreted as a way for Germany to exercise its influence over the shape of the OMT programme<sup>189</sup>. When compared with the situations of the Constitutional and Supreme Courts of the bailout Member States, an open contestation of EU emergency

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<sup>186</sup> BVerfG – 2 BvR 2728/13a – *OMT Reference* [2014] §102.

<sup>187</sup> Marketou, “Greece: Constitutional Deconstruction and the Loss of National Sovereignty”, 194

<sup>188</sup> Both Italy and Greece have had non-elected technocratic governments.

<sup>189</sup> MA Wilkinson, “The Euro Is Irreversible! ... Or is it?: On OMT, Austerity and the Threat of “Grexit”” (2015) *GLJ* 16(4); MA Wilkinson, “Constitutional pluralism: Chronicle of a death foretold?” (2017) *ELJ* 23(3).

politics must have appeared to be a politically viable possibility for the German Constitutional Court.

Be that as it may, the German Constitutional Court did not nullify the OMT programme. Following its own doctrine of only conducting *ultra vires* review of EU law on the basis of the principle of ‘openness towards European law’<sup>190</sup>, instead of simply voiding the OMT programme and forbidding the German Bundesbank to partake, the German Constitutional Court sent a reference to the ECJ in January 2014 on the question of whether the OMT programme is compatible with EU law<sup>191</sup> if it complied with the ‘implementation framework’ set out by the German Constitutional Court<sup>192</sup>. In contrast to the Portuguese and Romanian cases discussed above, the ECJ did not declare itself to be without jurisdiction on grounds of ‘liminal legality’ (non-law/non-EU law) of the crisis measures<sup>193</sup>. The reason for that might be that the German Court insisted on the possibility of taking preventive measures independently of an ECJ preliminary ruling<sup>194</sup>—measures that might have endangered the OMT programme and hence the stability of the Eurozone. As is well known, the ECJ ruled that the OMT programme was not in breach of EU law and that it did not have to live up to the ‘implementation framework’ set out by the German Constitutional Court.

In the end, the most direct judicial contestation of EU governmental authority came to nothing. The German Court accepted the interpretation of the ECJ and accepted the legality of the OMT. A nullification crisis was avoided; at least for a while. On 18 July 2017 the German Constitutional Court announced<sup>195</sup> that it was referring a very similar case to the ECJ on the constitutionality of the ECB’s deployment of QE during the crisis<sup>196</sup>. This case is still pending.

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<sup>190</sup> BVerfG – *Honeywell* - §303-304; BVerfGE – 2 BvE 2/08 – *Lisbon Ruling*.

<sup>191</sup> BVerfG – 2 BvR 2728/13a – *OMT Reference* [2014] §101.

<sup>192</sup> Following the German Constitutional Court, “This requires, in light of Art. 123 TFEU, that the possibility of a debt cut must be excluded (cf. n. 86 and 87), that government bonds of selected Member States are not purchased up to unlimited amounts (cf. n. 81), and that interferences with price formation on the market are to be avoided where possible (cf. n. 88 et seq.). Statements by the representatives of the European Central Bank in the proceedings before the Constitutional Court concerning the framework for the implementation of the OMT Decision (limited volume of a possible purchase of government bonds; no participation in a debt cut; observance of certain time lags between the emission of a government bond and its purchase; no holding of the bonds to maturity) suggest that such an interpretation in conformity with Union law would also most likely be compatible with the meaning and purpose of the OMT Decision”, BVerfG – 2 BvR 2728/13a – *OMT Reference* [2014] §100.

<sup>193</sup> Despite challenges of admissibility from the EP, the Commission, the ECB and eight Member States, see C-62/14 - *Gauweiler and Others* [2015] §11-31.

<sup>194</sup> BVerfG – 2 BvR 2728/13a – *OMT Reference* [2014] §103; M Wilkinson, “The Euro is Irreversible! Or is It?” (2015) *GLJ* 16(4), 1051 n12.

<sup>195</sup> German Constitutional Court Press Release No. 70/2017 [15 August 2017].

<sup>196</sup> Joined Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

## C: Political Contestation of the Emergency Government of the Eurozone

By treating bailout conditionality as an ‘internal affair’, almost all judicial contestation of ‘Eurocrisis law’ and the EU’s emergency government of the Eurozone crisis has been neutralised or defeated; particularly the contestation of austerity in bailout Member States. However, the contestation of the emergency government of the Eurozone crisis has not merely been dealt with by courts. Austerity and emergency politics have been widely contested in bailout Member States in a more ‘political manner’—by political parties, labour unions and social movements<sup>197</sup>.

This broader contestation of the emergency government of the Eurozone crisis has been united around being not merely against austerity but also the ‘post-political’ and ‘post-democratic’<sup>198</sup> manner through which the Eurozone crisis has been governed in the eyes of the protestors<sup>199</sup>. These movements have primarily understood the crisis as a *political crisis* manifest in the erosion of the legitimacy of the current democratic regimes<sup>200</sup>. The outrage has been directed against both domestic elites<sup>201</sup> and European elites<sup>202</sup>. The central demand of these protestors has been to *reclaim* ‘real democracy’<sup>203</sup> primarily on a domestic level<sup>204</sup> but also to some extent on a European scale<sup>205</sup>. The language of these

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<sup>197</sup> CF Fominaya, “European Anti-Austerity and Pro-Democracy Protests in the Wake of the Global Financial Crisis” (2017) *Social Movement Studies* 16(1), 3-4.

<sup>198</sup> C Crouch, *Post-Democracy*, (Cambridge, Polity, 2004); P Mair, “Ruling the Void? The Hollowing of Western Democracy” (2006) *New Left Review* 42.

<sup>199</sup> Fominaya, “European Anti-Austerity and Pro-Democracy Protests in the Wake of the Global Financial Crisis”, 3-4; Scholl and Freyberg-Inan, “Imagining Another Europe: Building a pan-European Counter-Hegemonic Bloc around an Anti-Austerity Master Frame”, 118; D Della Porta, “Mobilizing Against the Crisis, Mobilizing for ‘Another Democracy’: Comparing Two Global Waves of Protest” (2012) *Interface* 4, 276.

<sup>200</sup> Kaldor and Selchow, “The ‘Bubbling Up’ of Subterranean Politics in Europe”, 84-9; G Hayes, “Regimes of Austerity” (2017) *Social Movement Studies* 16(1), 28.

<sup>201</sup> M Kaldor and S Selchow, “The ‘Bubbling Up’ of Subterranean Politics in Europe” (2013) *Journal of Civil Society* (9)1, 85. Both Podemos and the 5 Star Movement famously describe the national elites as ‘*La Casta*’.

<sup>202</sup> E.g. the umbrella organisation Blockupy that directly contests EU imposed austerity and emergency politics in Frankfurt in front of the ECB and the Alter-Summit. See C Scholl and A Freyberg-Inan, “Imagining Another Europe: Building a Pan-European Counter-Hegemonic Bloc Around an Anti-Austerity Master Frame” (2018) *Comparative European Politics* 16. Alter Summit’s 2013 Manifesto: “Roll Back Austerity and Claim Real Democracy!” is available via: <http://www.altersummit.eu/manifeste/article/the-manifesto> [last accessed 1 February 2018].

<sup>203</sup> The slogan of the massive 2011 demonstrations (estimated participation 0.8-1.5 million) was ‘Real Democracy Now’ (*¡Democracia Real YA!*) (Kaldor and Selchow, “The ‘Bubbling Up’ of Subterranean Politics in Europe”, 79).

<sup>204</sup> Fominaya, “European Anti-Austerity and Pro-Democracy Protests in the Wake of the Global Financial Crisis”, 4-7; Kaldor and Selchow, “The ‘Bubbling Up’ of Subterranean Politics in Europe”, 91-5.

<sup>205</sup> See DiEM25’s Manifesto: “The European Union will be democratised. Or it will disintegrate!”, available via: <https://diem25.org/manifesto-long/> [last accessed 1 February 2018]. See also, Scholl and Freyberg-Inan, “Imagining Another Europe: Building a Pan-European Counter-Hegemonic Bloc Around an Anti-Austerity Master Frame”, 118-9.

movements is that of ‘popular sovereignty’ and the primacy of the political (democracy) over the economy demanding an end to ‘necessity’ politics<sup>206</sup>.

To begin with, the anti-austerity movement was primarily manifest in the ‘indignant citizens’-movements such as the Spanish *Indignados* and the Greek *Aganaktismenoi* who adopted classical anarchist anti-statist tactics manifest in ‘horizontal’ politics of occupations and public assemblies<sup>207</sup>. However, over time the anti-austerity movements have mostly broken with the anti-statist view and adopted a more ‘radical reformist strategy’ combining electoral politics and referenda aiming for a radical political change through the ballot box and the recuperation of state democracy<sup>208</sup>. The European pro-democracy and anti-austerity movements have had a significant electoral impact in several Member States. The rise of Podemos, e.g., brought an end to the traditional two-party system in Spain when the not even two years old party won 21% of the vote in the 2015 election making it Spain’s third largest party<sup>209</sup>.

Notwithstanding the significance of Podemos, the only case of a Member State government formed by an anti-austerity party during the Eurozone crisis is the Greek Syriza-led government elected in January 2015. Like Podemos, the election of Syriza into government also defied the bipartisan system that had prevailed since the transition to democracy<sup>210</sup>. The Syriza-led government—and the ‘Greek crisis’ of 2015—is of special interest because it is the only Member State government that has attempted to openly and directly contest the authority of the emergency government of the Eurozone on ‘state rights’ grounds. Whereas the OMT case is the main manifestation of a Member State court claiming the right to judicial constitutional defence against the EU, the Syriza-led government is the main case of a Member State government contesting the EU’s authority to govern the Eurozone crisis. The Syriza government is the only government that has put the bailout conditionality to a vote with the so-called referendum on austerity on 5 July 2015.

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<sup>206</sup> See the DiEM25 manifesto and Podemos’ 2014 Manifesto *Mover Ficha*, [Eng. *Making a Move*] available in unofficial English translation via: <https://hiredknaves.wordpress.com/2014/01/20/podemos-translated-manifesto/> [last accessed 1 February 2018].

<sup>207</sup> M Sitrin and D Azzellin, *They Can’t Represent Us! Reinventing Democracy from Greece to Occupy* (London, Verso, 2014), 5-7.

<sup>208</sup> P Gerbaudo, “The Indignant Citizen: Anti-Austerity Movements in Southern Europe and the Anti-Oligarchic Reclaiming of Citizenship” (2017) *Social Movement Studies* 16(1), 37-8, 45-8; CF Fominaya, “European Anti-Austerity and Pro-Democracy Protests in the Wake of the Global Financial Crisis”, 5.

<sup>209</sup> Hayes, “Regimes of Austerity”, 27.

<sup>210</sup> E Tsatsanis and E Teperoglou, “Realignment under Stress: The July 2015 Referendum and the September Parliamentary Election in Greece” (2016) *South European Society and Politics* (21)4, 431.

In a structurally similar manner to the OMT case, the Syriza government contested EU authority with a reference to a breach of EU constitutional values and with reference to Greece as a sovereign democratic state. In the address Prime Minister Tsipras gave when the referendum was called<sup>211</sup>, he argued that the deal presented by the Eurogroup took “aim at Greek democracy and the Greek people” and contravened “Europe’s founding principles and values. The values of our common European project”. The proposals, Tsipras continued, “directly violate the European social acquis” and proved that the Eurogroup was not interested “in reaching a viable and beneficial agreement for all parties, but rather the humiliation of the Greek people”. The referendum was thus called on the basis of both Greece’s “Constitution and Europe’s democratic tradition” and clearly aimed at guarding both.

In response to Tsipras’ announcement that a referendum on the bailout conditions was to be held, the EU employed a different kind of force to Greece than earlier economic sanctions. In what was widely interpreted as a deeply political move, the ECB decided to freeze the Emergency Liquidity Assistance (ELA) to the Greek banking sector on which it had relied since 11 February 2015 resulting in the necessity for the Greek government to declare a bank holiday and impose capital controls<sup>212</sup>. Had the ECB cut ELA off completely, it would have had enormous political consequences for Greece, effectively forcing it to adopt its own currency and exit the Eurozone<sup>213</sup>. The ECB acting as a ‘federal executioner’ was in the Greek crisis in the possession of means that could have destroyed the Greek economy and forced it out of the Eurozone.

As is well-known, the Greek people voted an overwhelming ‘no’ to the bailout conditionality—something that was not well received by European leaders and institutions. However, in a desperate attempt to keep Greece in the Eurozone, the Syriza government acceded to the Eurogroup’s demands. On 13 July 2015, Syriza committed to the harshest austerity programme Greece has yet seen<sup>214</sup>. That the bailout measures were even harsher than the one decided on in the referendum has widely been interpreted as a ‘punishment’ of Greece for daring to contest the emergency government of the Eurozone

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<sup>211</sup> Prime Minister Alexis Tsipras’ address concerning the referendum to be held on the 5th of July June 27, 2015 at: <http://www.primeminister.gov.gr/english/2015/06/27/prime-minister-alexis-tsipras-address-concerning-the-referendum-to-be-held-on-the-5th-of-july/> [last accessed 23 April 2018].

<sup>212</sup> P Tokarski, “Die Europäische Zentralbank als politischer Akteur in der Eurokrise: Mandat, Stellung und Handeln der EZB in einer unvollständigen Währungsunion” (2016) *SWP-Studie* 14, 27.

<sup>213</sup> *ibid.*

<sup>214</sup> “Greek Debt Crisis: Deal Reached after Marathon All-Night Summit - As It Happened” (The Guardian, 13 July 2015).

crisis or an attempt to force Greece to leave the Eurozone, something the Syriza government was not willing to let happen.

In this way, the only direct political contestation of the emergency government of the Eurozone crisis was defeated. The Greek crisis is perhaps the clearest example of the contradictory nature of constitutional defence and the fragility of authority in a federal union of states. In the contest between the political rights of the European institutions and Greece to act as the guardian of the constitution, Greece lost and submitted itself to the will of the Eurogroup. That being said, this vindication of the rights of European institutions is incredibly fragile. To protect the stability and order of the Eurozone as a whole, the EU's emergency government crushed the most important foundational principle that the EU as a federal union of states was meant to protect, namely, the political and constitutional autonomy of its Member States. This is a threat to the federation as a political form and hence the current constitutional character of the European Union.

# Conclusion

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What type of political association is the European Union (EU)? From the start of the European integration process, this question has puzzled scholars. Because of its lack of a monopoly of violence and its limited competences, the EU is clearly not a new state. However, the EU has gone far beyond what was considered normal for organisations of international law by making laws that are directly binding in and on its Member States. Many different answers have been offered, but in the absence of an agreed response, most scholars implicitly avoid the issue by suggesting that the EU is ‘sui generis’. Because the EU cannot be made sense of either on the basis of international law or on the basis of domestic public law they conclude that it must be something new and unique. This thesis demonstrates that this conclusion is mistaken. It argues that, in contrast to what is commonly maintained, the EU is not an association ‘sui generis’. Rather, the EU belongs to the political form of the *federation*: a discrete form of political association on a par with, though differentiated from, the two other forms of political modernity, namely, the *state* and the *empire*. *The federation is a political union of states founded on a federal treaty-constitution that does not absorb the Member States into a new federal state*. The argument of the thesis is advanced in five chapters that each deal with a central aspect of the constitutional theory of the federation of importance to a proper understanding of the contemporary constitutional order of the EU.

Chapter 1 identifies a number reasons why the federal constitutional nature of the EU has generally been overlooked in the literature. The main reason is that the EU is arguably the only federal union of states since the late-1800s. Constitutional debates about the federation have consequently been overlooked by constitutional theorists and the theory of the federation forgotten. The federation as a concept has consequentially taken on the new meaning of the federal state. For that reason, the federation as a political form is mistakenly identified with the federal state and the EU is wrongly conceptualised as an ‘incomplete federation’. In contrast with the federal state, the federation is a political union of states that on a free basis constitute a common governmental structure and a common public law but who do not unite to the degree that they form a fully-fledged federal state.

The conflation of the federation and the federal state leads to a misunderstanding of the constitutional foundations of the federation. In contrast to a state constitution, the

federation is not based on a unilateral act of a sovereign people but on a federal contract of international law (*Bundesvertrag*) between its Member States. This treaty is however also a constitution because it leads to a political change in the constitution of its Members by giving them the new status of ‘member-statehood’. The federal treaty is therefore always a constitutional treaty (*Verfassungsvertrag*) independently of whether it is conceptualised as such. The federal contract is legally a treaty but politically a constitution. Chapter 1 is thus concerned with the enigma of the EU, namely that it does not conform to the model of the state, and demonstrates how the theory of the federation can solve the mystery of its legal and political form. Central to this chapter is the problem of sovereignty, that is, the question of where and whether sovereignty persists in a federation and specifically in the EU.

In contrast to the state, the federation and the structure of federal public law is not organised around the concept of sovereignty. As Chapter 1 demonstrates, there is an antinomy between the concept of sovereignty and the concept of the federation. This antinomy means that scholars tend either to trivialise or to deny the existence of sovereignty or the federation.

On the one hand, the ‘sovereignty hunters’ will attempt to make sense of the concrete political associations of the federation by reducing them to the political form of the state: either one federal state (*Bundesstaat*) or the composite states (*Staatenbund*). The problem with this approach is that in protecting the distinction between public law and international law on which the theory of the state relies, it fails to account for the actual workings of concrete political associations. In order to preserve the public law theory of the state, two categories—*Staatenbund* (‘state federation’ or ‘confederation’) and *Bundesstaat* (‘federal state’)—are created that cannot account for the public law of any historical examples of federations. The desire for jurisprudential clarity leads to the oversimplification of reality. This way of thinking dominates the debate on the constitutional nature of the EU and contributes to the widespread idea of its uniqueness.

On the other hand, there are scholars whose point of departure is the intricate governmental structure that regulates the exercise of public power in the EU, both by the Union institutions and its Member States, and on that basis conclude either that sovereignty is a myth conjured up in the minds of 19<sup>th</sup> century lawyers or that sovereignty can be reduced to the question of a bundle of competences. The latter approach has resulted in the widespread use of meaningless categories (from the perspective of public law at least) such as ‘monetary sovereignty’ and ‘fiscal sovereignty’. For these scholars,

sovereignty no longer has the connotation of legal and political autonomy and final authority (*postestas*) but is reduced to the question of capacity (*potentia*). In order to account for the day-to-day workings of the EU, these scholars have to deny or trivialise the concept of sovereignty.

In Chapter 1, I argue that rather than taking either of these two unsatisfactory routes, the federation—and the EU as a manifestation thereof—must be recognized as a discrete political form. It is so precisely because it cannot be made sense of on the basis of sovereignty. In order to comprehend the federation and the EU we have to conceptualise political and public law orders without sovereignty. This means that we should treat the federation—and thus the EU—as an autonomous political form characterised by its own vices and virtues without having recourse to the prejudices of the state.

The argument presented in Chapter 2 is that as actual constitutional projects, federations come into existence because of the impotence and instabilities of the state as a political form. States decide to come together in a federation because they for one reason or another are incapable of maintaining their own political autonomy and existence. The medieval and early modern federations were constituted between smaller states and free cities who pledged themselves to common and mutual defence against a strong (neighbouring) empire. They were, therefore, ‘defence federations’. Common military defence, however, is not the only reason why states decide to come together and constitute among themselves a federal union. To ensure their autonomy and survival, states in the post-industrial revolution era needed to be able to govern and control larger internal markets. By allowing for the creation and expansion of internal markets, the federation evolved historically as an alternative to the empire. Whereas the empire relies on imperial conquest for the expansion of internal markets, the federation creates an internal market by mutual promises and pledges and not by acts of domination. The federations that emerged after the industrial revolution, which had the creation and government of internal markets and general mutual welfare as a central if not primary aim, are referred to as ‘economic federations’ or ‘welfare federations’.

Chapter 2 demonstrates that the project of European integration—as with other federations—originates in the impotence of the state as a form of political association in the post-WWII era. The project of European Union was born out of a shared understanding among the political elites of the Original Six—with De Gaulle as the main if not only exception—that the nation-state was an unviable political form associated with

past atrocities. After WWII, projects of both ‘defence federation’ and ‘welfare federation’ were launched. However, only the latter was successfully established with the Treaty of Rome. The European Economic Community (EEC) therefore emerged as an ‘economic federation’ with defence later added as a subordinate aim. That the EEC/EU emerged as an almost ‘pure’ economic federation is arguably an important reason why the federal constitutional nature of the EU has generally not been recognised in the literature. Despite the importance of the government of welfare for most if not all historical federations, the aim of welfare is not widely discussed in the literature and the ‘economic federation’ is not commonly recognised as a federal ‘sub-species’.

Having discussed the origins of federal unions of states—the question of why states decide to come together in a federation—Chapter 3 lays out the main principles of federal public law: a public law structure which is not organised around the concept of sovereignty. In contrast to the state, the federation has a dual governmental structure consisting of the institutional structures of both the Union and the Member States and a dual source of authority: the political existence of the Union and the political existence of the Member States. Because of this duality, the federation is fundamentally different from the unity of the state that always has the relationship between people and government as the foundation for its authority. Moreover, the dual structure of the federation—the Union and the Member States—are not parallel and fully autonomous orders vis-à-vis one another. Rather, they are characterised by a ‘mixed autonomy’ or the principles of independence and interdependence. When states come together in a federation, they give birth to a new legal and political order (the Union) that is independent from the constitutional orders of the Member States. This new legal and political order, however, encompasses the Member States in their entirety at the same time as it is a component of the constitutional orders of the Member States. The constitutional order of the federation is in this way a new legal order and yet it is internal to its Member States. The internal multiplicity of the federation characterised by mixed autonomy relativizes the relationship between people and government that lies at the heart of the theory of the state.

Neither of the component parts of the public law structure of the federation—the institutional structures of the Union and the Member States—exercises public power in accordance with the classical theory of the state. Union institutions are, importantly, not indicative of a new ‘super state’. In contrast to a state, the federation is constituted to achieve the enumerated aims that the Member States came together to secure. The powers of the Union institutions are therefore always limited to these pre-given constitutional

aims. Union authority is in this way governed by the principles of teleology and specialisation. Becoming a Member State at the same time signals a radical transformation of the constitution of the Member State. The constitutional change of the Member States is not necessarily manifest in the change of any constitutional laws but rather in the transformation of the Member States' constitutions in the positive sense, that is, the fundamental characteristics of how they govern themselves as political associations. The federal contract between the Member States on which all federations rely is a status contract that, like marriage, transforms the contracting parties by giving them a fundamental new status. Member-statehood, Chapter 3 explains, is in this way a distinct form of statehood which means that the Member States cannot be conceptualised as 'states' in the classical sense of the term. In the context of the EU, member-statehood signals a form of 'constrained statehood' that should be understood as an integral part of the post-WWII constitutional imaginary of 'constrained democracy'. The Original Six—Germany, France, Italy and the BENELUX countries—albeit to different degrees, all wanted to protect themselves from 'political extremism,' manifest in fascism and communism, and European integration became an important means of doing that. For these states, with France being somewhat of an outlier, the constitutional internalisation of the demands pertaining to member-statehood have therefore been relatively unproblematic.

A similar argument of a relatively unproblematic constitutional internalisation, Chapter 4 argues, can be advanced with regard to the acceding Member States of the 1980s 'Mediterranean Enlargements' (Spain, Portugal and Greece). For these states, member-statehood in the EU has been understood as an important protection against the return of fascism and authoritarianism. It provides a means of realising their own understanding of constitutional autonomy by protecting themselves, via membership of the EU, from the return of dictatorship. This, however, is less the case for the other states that have acceded to the EU.

For the 'continuous democracies' of the UK and Scandinavia (Denmark and Sweden), the constitutional imaginary of constrained democracy was never entrenched to any significant extent. In contrast to the Member States of both the 'Original Six' and the 'Mediterranean Enlargements', the 'continuous democracies' neither experienced the collapse of their constitutional orders in the interwar period nor saw WWII as the watershed in their constitutional imaginaries. Not being marked by a fear of the political power of the people, these Member States retained parliamentary sovereignty as the

bedrock of their constitutional orders. The internalisation of the demands of member-statehood—e.g. judicial review of parliamentary legislation to ensure conformity with EU law—has therefore to a large extent taken place via a process of ‘modernisation by stealth’ that brought these three states broadly, but not unproblematically, in line with the original Member States of the EU. The ‘continuous democracies’, however, are not the only states for whom the demands of member-statehood have not been easily internalised.

Despite constituting themselves as liberal democracies after the collapse of Communism, the post-Communist countries are also not heavily influenced by the doctrine of ‘constrained democracy’. The watershed for the constitutional imaginary of these Member States is not the internal collapse of their constitutional orders but the collapse of the foreign empire or super power—the Soviet Union—they were ruled by for decades. These states are therefore not afraid of their own people and accordingly gave themselves constitutions with a strong accentuation of sovereignty. The constitutional internalisation of the demands of EU member-statehood for these states was achieved through the employment of the idea of ‘the return to Europe’ as a political myth allowing the Member States to give themselves radically new constitutional orders in the guise of a return to their—albeit fictitious—proud pre-imperial, democratic past. For these states, European integration was therefore perceived simultaneously as a path and a threat to democracy.

The Member States of the EU are therefore characterised by a strong degree of heterogeneity with regard to their constitutional imaginaries. This constitutional heterogeneity, Chapter 4 argues, constitutes a significant challenge for the EU because all federations rely on the capacity to strike a balance between the two contradictory aims and forces that characterise all federations. These contradictory aims and forces are born of the curious sentiment that lies at the origin of all federal unions of states. On the one hand, the states come together in a federation because they want to preserve their own political identity and autonomy, that is, they want to remain who they are. On the other hand, the states come together in a federation as a rejection of the status quo and out of a desire to form an ‘ever-closer union’ with their future fellow Member States. This double telos of the federation is inherently contradictory and pulls the federation in two opposing directions. The federation is simultaneously directed towards unity and diversity, transformation and conservation, the past and the future. The only way the federation can balance these contradictory forces is via the persistence of a fundamental political homogeneity among Member States. This homogeneity among Member States is relative

to their own legal and political orders and self-perception. Member States need to be homogenous with regard to what they perceive to be politically salient and for that reason the content of the political homogeneity of the Member States will be specific to any given federation. In case of the EU, the political homogeneity professed by the constitutional order of the Union are the principles of ‘value order constitutionalism’ and ‘constrained democracy’.

The EU, Chapter 4 explains, has attempted to govern this homogeneity by allowing Member States to accede to the Union only via the application of accession criteria. The purpose of accession criteria for a federation is to mould the acceding states in accordance with the self-image and aspirations—in short, the ideology—of the Union. It is a highly intrusive set of legal and political mechanisms that for the duration of the accession period reduce the acceding state to a dependency of the Union. Nevertheless, this process is not imperial because it is instigated on the basis of the free decision of the acceding state to join the Union with the promise of political equality after accession. Despite the intrusiveness of the EU accession process—especially in the case of the post-Communist countries—it is not clear that the constitutional order of the Union and the values it claims to promote have been genuinely internalised by the post-Communist Member States.

Another way in which the EU attempts to govern the constitutional homogeneity of its Member States is by a mechanism of constitutional defence manifest in the Article 7 TEU procedure. This procedure is meant to allow the Union to sanction Member States in which there is a fundamental threat to the values enshrined in Article 2 TEU on which the Union professes to be founded. The limited scope of Article 7 TEU together with the high political threshold for its triggering, however, means that it does not provide the EU with any legal possibility of intervening in the internal constitutional affairs of its Member States in order to prevent the rise of authoritarian constitutionalism. The EU therefore has limited legal possibilities of intervening in the internal constitutional affairs of Poland and Hungary, who in recent years have undergone radical constitutional changes that arguably put them at odds with the constitutional identity of the EU as defined by Article 2 TEU. But Chapter 4 concludes that the legal limitations cannot be the only reason for the lack of exercise of constitutional defence by the Union. In response to the Eurozone crisis, the EU has to a large degree made use of extra-legal instruments of emergency politics that have allowed the Union—*de facto* if not *de jure*—to take more or less full control over the state apparatus of deficit Member States.

The problem of constitutional defence in the EU is further discussed in the context of the emergency government of the Eurozone in Chapter 5. The argument presented is that the government of the Eurozone crisis is a manifestation of a particular kind of emergency rule, namely, federal emergency politics or federal constitutional defence. In contrast to the state, the federation is a double political existence. This means that emergency politics can be exercised by a variety of different constitutional actors (Union institutional actors and Member State institutional actors) and wielded on behalf of different units (the Union and the Member States). In this way, the federation allows for a contest not merely between different institutions but also between the Union and its Member States. Although this contest can lead to intense conflicts, more often than not, federal emergency politics is a collaboration of the executive branches of government at the Union and at the Member State level. Federal emergency politics is a form of ‘mixed emergency rule’ that generally involves multiple actors and multiple claims to emergency authority. Chapter 5 lays out two theories of federal emergency politics and demonstrates in what ways they apply to the government of the Eurozone crisis. On the one hand, the doctrine of ‘federal intervention’ and ‘federal execution’ based on the theory and constitutional praxis of the 1815 German Federation and, on the other hand, the ‘doctrine of states rights’ that was influential in the early history of the United States and was most clearly expressed in the writings of John Calhoun.

In the German Federation, the ‘federal execution’ authorised the use of executive measures *against* a non-complying Member State whereas the ‘federal intervention’ authorised the use of executive measures *on behalf* of a Member State incapable of dealing with an internal crisis. These constitutional mechanisms provided the possibility for German princes to rely not merely on their own military capacity but also on that of all their fellow Member States to repress the national liberal uprisings characterising the history of the German Federation. In this way, they were an important means for the preservation of the monarchical constitutional order in the German Federation and the power and authority of the German princes. Nevertheless, these mechanisms simultaneously gave the Union the authority to take over the complete control of the administration of the crisis-ridden Member State in question and *de facto* if not *de jure* reduce it to a mere administrative dependency. Chapter 5 demonstrates that central legal instruments employed by the EU in order to govern the Eurozone crisis conform to the theory of ‘federal intervention’ and ‘federal execution’. The emergency politics of the Eurozone crisis, and federal emergency politics in general, has provided the possibility for

Member State elites to rely not only on their own executive apparatus but also that of the Union at large to enforce unpopular decisions that would have been difficult to get through parliaments in ordinary times. As was the case in the German Federation, the employment of this kind of emergency politics tends to have the consequence that the Member State in which federal emergency politics is employed—*de facto* if not *de jure*—is reduced to an administrative dependency. ‘Federal execution’ and ‘federal intervention’ as instruments of federal constitutional defence are in this way a consolidation of the Union’s right to act as the guardian of the constitution and a significant source of federal power against the Member States.

The doctrine of states’ rights, in contrast, maintains that it is not the Union but the Member States that have the ultimate right to act as the guardian of the constitution. If a Member State deems that there has been a breach of the constitution, it has a right to nullify federal law on its territory and ultimately to secede as a means of constitutional defence. This doctrine provides strong ammunition for Member States who wish to contest federal authority. It was widely used in the early history of the United States, e.g., in the ‘nullification crisis’ of the 1830s and later in the Civil War. Despite the ample opportunity of EU Member State courts to rely on a version of this doctrine in order to contest the legality of ‘Eurocrisis law’—either with reference to a breach of the EU Charter of Fundamental Rights or a breach of the fundamental rights protected by the constitutions of many ‘deficit Member States’—very little judicial contestation has taken place. Instead, both the European Court of Justice (ECJ) and Member State courts have to a large degree attempted to avoid an open constitutional conflict in the EU and the question of who ultimately decides, that is, the question of sovereignty. This has been done, for instance, by treating bailout conditionality as non-EU law. The only direct judicial challenge to the EU’s authority to govern the Eurozone crisis was launched by the German Constitutional Court in the OMT reference but in the end that Court—arguably the most powerful and vocal court of the Union—submitted itself to will of the ECJ instead of triggering a potential constitutional crisis in the EU.

Whereas the judicial contestation of the emergency government is conspicuous mostly for its absence, there has been a much broader political contestation of EU authority by social movements and political parties in the deficit Member States. Nevertheless, only one of these political parties, Syriza, having won the 2015 election in Greece, mounted a challenge to the emergency government of the Eurozone crisis with reference both to the constitutional and political values of Greece and the EU at large. At

the height of the Greek crisis, the Greek people voted overwhelmingly ‘no’ to the bailout conditionality in the so-called referendum on austerity. However, before a direct conflict between the will of the Greek people and EU could manifest itself, Syriza conceded to the Eurogroup’s demands and committed to the harshest austerity programme Greece has yet seen. The question of ultimate authority was in the end not raised, preserving, at least formally, the idea of the federal balance between the Union and the Member States on which the EU, as all federal unions of states, relies.

In material terms, however, it is clear that the political autonomy of especially the deficit Member States has been eroded. Even in cases where emergency politics can be successfully employed without major contestation of Union authority on the part of the Member States, it nevertheless presents a threat to the survival of the federation as a political form. Emergency politics introduces a strong element of *raison d’état* that *de facto* if not *de jure* erodes the political autonomy of its Member States by reducing them to administrative dependencies. This is a highly centralising force that brings the EU closer to statehood—something that is recognised by officials of the European Central Bank.

Finally, if previous federal unions of states can be invoked for the purpose of seeking to understand the future of the EU, the transformation from federal union to federal state—if it comes about—will not be a peaceful and unproblematic process. Switzerland, Germany and the United States all had civil wars on the path to statehood. Civil war is never a promising route to ensure the survival of a political association. And in the case of the EU it would be a direct betrayal of its founding promise of ‘peace and prosperity’ in Europe.

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