Constitutional Nature
A Federation of States

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Introduction

The rise of the modern State system after the seventeenth century was a celebration of political pluralism. Each State was entitled to its own ‘autonomous’ existence. The rise of the absolute idea of State sovereignty led to an absolute denial of all supranational authority above the State. This way of thinking introduced a distinction that still structures our understanding of the legal world: the distinction between national and international law. The former was the sphere of subordination and compulsory law; while the latter constituted the sphere of coordination and voluntary contract. International law was thus not ‘real’ law – as it could not be enforced. From the perspective of classic international law, a ‘public law’ between sovereigns was thus a contradiction in terms since it required an authority above the States; but
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if sovereignty was the defining characteristic of the modern State, there could be no such higher authority. All relations between States must be voluntary and, as such, "beyond" any public legal force.1

From the very beginning, this traditional idea of State sovereignty blocked a proper understanding of the nature of the European Union. The latter was said to have been 'established on the most advanced frontiers of the [international] law of peaceful cooperation'; and its principles of solidarity and integration had even taken it 'to the boundaries of federalism'.2 But was the Union inside those federal boundaries or outside them? For while the European Union was not a Federal State, had it not assumed 'statist' features and combined - like a chemical compound - international and national elements? How should one conceptualise this 'middle ground' between international and national law? In the absence of a federal theory beyond the State, European thought invented a new word - supranationalism - and proudly announced the European Union to be sui generis. The Union was declared to be 'incomparable'; and the belief that Europe was incomparable ushered in the dark ages of European constitutional theory.3 Indeed, the sui generis idea is not a theory. It is an anti-theory, for it refuses to search for commonalities; yet, theory must search for what is common among different entities.4

How, then, should we view and analyse the nature and structure of the European Union? This chapter presents two answers to this question by looking at two different constitutional traditions. Section 1 begins by introducing the American tradition that understood a Union of States as a structure between international and national law. Section 2 moves to the European tradition, which has traditionally insisted on the indivisibility of sovereignty. This has led to a conceptual polarisation, according to which a 'Union of States' is either an international organisation - like the United Nations - or a Federal State - like Germany. Sections 3 and 4 then apply the two alternative theories to the European Union. Sufice to say that the American tradition is able to view the European Union as a Federation of States, whereas Europe's own constitutional tradition reduces it to a (special) international organisation. Which is the better theory? We shall see below that the second view runs into serious explanatory difficulties and should consequently be discarded. The European Union is best understood as a 'Federation of States'.

1. The American Tradition: Federalism as (Inter)national Law

The American federal tradition emerged with the 1787 Constitution of the United States of America. Having realised the weaknesses of the 1777 Constitution, deliberations on a 'more perfect union' were held by a Constitutional Convention meeting in Philadelphia. The Convention proposed a more 'consolidated' Union. The proposal triggered a heated debate on the nature of the new Union. Those advocating greater national consolidation thereby styled themselves as 'federalists'; and the papers that defended the new constitutional structure would become known as The Federalist.5 By contrast, those insisting on the 'international' legal nature of the American Union became known as 'anti-federalists'. They were opposed to the new constitution and complained that the Convention had been charged to 'preserve[e] the [international] form, which regards the Union as a confederacy of sovereign states'; 'instead of which, they have framed a national government, which regards the Unions as a consolidation of the States'.

It was the response to this accusation that would provide the starting point of a novel understanding of sovereignty and its place within a Union of States. This American tradition claimed that the 1787 Constitution had created a United States of America that was 'in between' an international and a national structure.

a. Madisonian Federalism: Three Dimensions

The view that the Union was an object that shared international and national elements is immortalised in The Federalist No. 39 - written by James Madison. This matter of constitutional analysis here explored the nature of the Union's legal order. Refusing to concentrate on the metaphysics of sovereignty, Madison singled out three analytical dimensions which - for convenience - may be called: the foundational, the institutional, and the functional dimension. The first relates to the origin and character of the 1787 Constitution; the second concerns the composition of its governmental institutions; while the third deals with the scope and nature of the federal government's powers.

As regards the foundational dimension, the 1787 Constitution was an international act. What did this mean? It meant that the Constitution would need to be ratified 'by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong'. The 'unanimous assent of the several States' that wished to become parties was required. The Constitution would thus result 'neither from the decision of a

1 In this context, see the famous opening remarks by E. de Vattel, The Law of Nations (translated: J. Chitty) (Johannes & Co., 1883), xiv: 'I acknowledge no other natural society between nations than that which nature has established between mankind in general. It is essential to every civil society (citizen) that each member have resigned a part of his right to the body of the society, and that there exist in it an authority capable of commanding all the members, of giving them laws, and of compelling those who should refuse to obey. Nothing of this kind can be conceived or supposed to subsist between nations. Each sovereign state claims, and actually possesses an absolute independence on all the others.'


3 While the 'classics' of European law had actively searched for comparisons with international and national phenomena (see E. Haas, The Uniting of Europe (Stanford University Press, 1969)), the legal comparative approach fell, with some exceptions, into a medieval muddle in the course of the 1960s.

4 K. Popper, The Logic of Scientific Discovery (Routledge, 2002).

majority of the people of the Union, nor from that of a majority of the States. The 1787 Constitution would therefore be an international, and not a national act.

However, the new legal order differed from an international organisation in an important respect. For while the latter is ordinarily ratified by the State legislatures, the proposed Constitution was to be validated by "the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves." Instead of the State governments — the delegations of the people — each State people itself would have to ratify the Constitution. This was the meaning behind the famous phrase: 'We, the people'. However, it was not the 'American people', but the people(s) of the several States that would ordain the 1787 Constitution. The direct authority from the (State) people(s) would set the Constitution above the State governments. And in having the peoples of each State ratify the Constitution, the 1787 document would be a 'constitutional' — and not a 'legislative' — treaty.

What authority could amend the new Constitution once it had been 'ordained'? The 1787 Constitution would not require unanimity for amendment. The new amendment procedure was set out in Article V of the 1787 Constitution.

have to be ratified by three-quarters of the States — represented by a State convention or by its State legislature. Once the Constitution would enter into force, the power of amending it was thus 'neither wholly national nor wholly international'.

Having analysed the origins and nature of the 1787 Constitution, Madison then moved to the second aspect of the 1787 constitutional structure. In relation to the institutional dimension, the following picture emerged. The legislature of the new Union was composed of two branches. The House of Representatives was elected by all the people of America as individuals and therefore was the 'national' branch of the central government. The Senate, on the other hand, would represent the States as 'political and coequal societies'. And in respecting their sovereign equality, the Senate was viewed as an international organ. Every law required the concurrence of a majority of the people and a majority of the States. Overall, the structure of the central government thus had a 'mixed character, presenting at least as many international as national features'.

Finally, The Federalist analysed a third dimension of the new constitutional order. In terms of substance, the powers of the central government showed both international and national characteristics. In relation to their scope, they were surely not national, since the idea of a national government implied competence

8 Ibid., 184. "To bring the point home, Madison continues (ibid., 185): '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 of the several States as evidence of the will of a majority of the people of the United States. Neither of these rules have been adopted.'"

9 Ibid., 185. "Ibid., 184 (emphasis added).

10 The phrase 'We, the people of the United States' simply referred to the idea that the people(s) in the States — not the State legislatures — had ratified the Constitution. Thus, the preamble of the 1780 Massachusetts Constitution, to offer an illustration, read: 'We, therefore, the people of Massachusetts'. The original 1787 draft preamble indeed read: 'We, the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following constitution for the government of ourselves and our posterity.' However, due to the uncertainty which of the 13 States would succeed in the ratification (according to Art. VII of the Constitution to be only once States were required for the document to enter into force), the enumeration of the individual States was dropped by the 'Committee of Style' (see M. Farrand, The Framing of the Constitution of the United States (Yale University Press, 1913), 190-1).

11 The structure of the amendments power led Dicey to conclude that 'the legal sovereignty of the United States resides in the States' governments as forming one aggregate body represented by three-fourths of the several States at any time belonging to the Union' (see A. V. Dicey, Introduction to the Study of the Law of the Constitution (Liberty Fund, 1982), 81).

12 Madison, The Federalist No. 39 (5. 5 above), 186-7: 'Were it wholly national, the supreme and ultimate authority would reside in the majority of the people of the Union; and the authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly [international], on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all.'

13 The 'international character of the House of Representatives would not be immediately created by the 1787 Constitution. Art. I, Section 4 stated: 'The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of choosing Senators.' To the words of H. Winchler (see: The Political Safeguards of Federalism. The Role of States in the Composition and Selection of the National Government] [1954], 15 Columbia Law Review 543 at 546): 'Although the House was meant to be the "grand repository of the democratic principle of the government," as distinguished from the Senate's function as the forum of the states, the people to be represented with due reference to their respective numbers were the people of the states.'

14 Madison, The Federalist No. 39 (5. 5 above), 186. In The Federalist No. 62, Madison adds (ibid., 301): 'In this spirit it may be remarked, that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residual sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.'
over all objects of government. Thus, ‘the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.’ 16 However, the nature of the powers of the central government was ‘national’ in character. For the distinction between an (international) confederacy and a national government was ‘that the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities.’ 17 The 1787 Constitution allowed the central government to operate directly on individuals and thus fell on the national side.

In light of these three constitutional dimensions, The Federalist concluded that the overall constitutional structure of the 1787 Constitution was “in strictness, neither a national nor [an international] Constitution, but a composition of both.” 18 The central government was a ‘mixed government.’ 19 It stood on ‘middle ground.’ 20

b. The ‘Mixed Constitution’ and the Sovereignty Question

It was this mixed format of the constitutional structure of the United States of America that would come to be identified with the federal principle. A famous account was thereby offered by Alexis de Tocqueville, who introduced the new idea to a broader European audience. 21 His influential account of the nature of the American Union also described it as a ‘middle ground’ between an international league and a national government.

For Tocqueville, the mixed nature of the American Union was particularly reflected in the composition of the central legislature. The Union was neither a pure international league, in which the States would have remained on a footing

16 ibid., 186. The Federalist No. 45 could justly claim that ‘[t]he powers delegated by the proposed Constitution to the federal government, are few and defined’, whereas ‘[t]hose which are to remain in the State governments are numerous and indefinite’ (ibid., 227).

17 ibid., 185. In The Federalist No. 13, we hear Hamilton say (ibid., 67): “The great and leading vice in the composition of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as centres distinguished from the INDIVIDUALS of which they consist. Though this principle does not run through all the powers delegated to the Union, yet it pervades and governs those on which the efficacy of the rest depends.” And in the words of the same author in The Federalist No. 16 (ibid., 74): “It must stand in need of no intermediate legislation; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majority of the national authority must be manifested through the medium of the courts of justice.”

18 ibid., 187. 19 The Federalist No. 40 – Title.

20 Letter of J. Madison to G. Washington of 16 April 1787: “Concerning that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty; and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for some middle ground, which may as once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful.”


of perfect – sovereign – equality, nor was it a national government; for if ‘the inhabitants of the United States were to be considered as belonging to one and the same nation, it would be natural that the majority of the citizens of the Union should make the law.’ The 1787 Constitution had chosen a ‘middle course’, ‘which brought together by force two systems theoretically irreconcilable.’ 22 This middle ground had also been reached in relation to the powers of government: ‘The sovereignty of the United States is shared between the Union and the States, while in France it is undivided and compact.’ ‘The Americans have a Federal and the French a national Government.’ 23 In fact, the unique aim of the 1787 Constitution was ‘to divide the sovereignty authority into two parts’: ‘in the one they placed the control of all the general interests of the Union, in the other the control of the special interests of its component States.’ 24 The cardinal quality of the Union’s powers was their direct effect: like a State government, the Union government could act directly on individuals.

Sovereignty – while ultimately residing somewhere – was thus seen as delegated and divided between two levels of government. Each State had given up part of its sovereignty, 25 while the national government remained incomplete. And because both governments enjoyed powers that were sovereign, the new federalism was identified with the idea that “[s]overeigns are necessarily in presence of each other.” 26 Federalism implied dual government, dual sovereignty and dual citizenship. 27

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22 ibid., 122-3 (emphasis added). 23 ibid., 128. 24 ibid., 151.

25 The Federalist No. 42 ridiculed the theory according to which the absolute sovereignty had remained in the States: “the articles of Confederation have inconsiderably endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain” (Hamilton, Madison and Jay, The Federalist (n. 5 above), 206).

26 De Tocqueville, Democracy in America (n. 21 above), 172.

2. The European Tradition: International versus National Law

A victim of the nineteenth century’s obsession with sovereignty, European constitutional thought came to reject the idea of a divided or dual sovereignty. Sovereignty was indivisible: in a Union of States, it could either lie with the States, in which case the Union was an international organization; or sovereignty would lie with the Union, in which case the Union was a Federal ‘State’. Federalism is here thought of in terms of a sovereign State. Within this European tradition, federalism came thus to refer to the constitutional devolution of power within a sovereign nation. A federation was a Federal ‘State’. This ‘national’ reduction of the federal principle censored the very idea of a ‘Federation of States’.

To explain the philosophical origins of the European tradition, this section will first analyse the conceptual polarisation between (international) Confederation and (national) Federation that occurred as a result of the idea of State sovereignty. Thereafter, we shall look at two early critics of the European constitutional tradition.

a. Conceptual Polarisation: ‘Confederation’ versus ‘Federation’

European constitutionalism insists on the indivisibility of sovereignty. This absolute idea of sovereignty came to operate as a prism that would ignore all relative nuances within a mixed or compound legal structure. The result is a conceptual polarisation expressed in a distinction between two idealised

28 M. Koskenranta, From Apology to Utopia (Cambridge University Press, 2005), Chapter 4.
29 D. J. Elazar, Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements (Rowman & Littlefield, 1998). 39: ‘Federation, indeed, is federalism applied to constitutionally delimit power within the political system of a single nation. Federation became synonymous with modern federalism because the modern epoch was the era of the nation-state when, in most of the modern world, the ideal was to establish a single centralized state with indivisible sovereignty to serve single nations or peoples.’
30 In the nineteenth century, Germany and Switzerland were Europe’s ‘federal’ entities. Austria and Belgium would be added in the twentieth century. On the constitutional history of German federal thought, see E. Deussen, Federation: Die historischen und philosophischen Grundlagen des federativen Prinzips (List, 1972). On the constitutional history of Swiss federalism, see A. Köle, Neue Schweizerische Verfassungsgechichte (Stimmpl., 1992 and 2004). The following section concentrates on German constitutional history.
31 One British, one French and one German "representative" will suffice to support this point: see Dicey, Introduction to the Study of the Law of the Constitution (n. 11 above), 3, ‘Parliament is, under the British Constitution, an absolutely sovereign legislature’; R. Carrère d’Aubert, Contribution à la Théorie Générale de l'État, ed. E. M'ullin (Dalloz, 2003), 139-40: ‘Le souverain est entière ou elle est cesse de se concevoir. Pardet de souveraineté estrange, relative ou divisée, s'est comme une contradiction en adjectiv ... Il n'est donc pas possible d'admettre dans l'État fédéral un parage de la souveraineté’; and P. Laband, Das Staatsrecht des Deutschen Reiches (Sectima, 1964), 73: ‘die Souveränität eine Eigenschaft absoluten Charakters ist, die keine Steigerung und keine Verminderung zuläßt’.

Since the Confederation was not a legal subject, it could not be the author of legal obligations; and it thus followed that the Member States themselves were the authors of the Union’s commands. The Union was thus regarded as possessing no powers of its own. It only ‘pooled’ and exercised State power. From this international law perspective, the Confederation was not an autonomous ‘entity’, but a mere ‘relation’ between sovereign States.

How did European federal thought define the concept of the ‘Federal State’? The Federal State was regarded as a ‘State’; and, as such, it was sovereign – even if national unification had remained ‘incomplete’. Because the Federal State was as sovereign as a unitary State, constitutional differences between the two States were downplayed to superficial ‘marks of sovereignty’. It indeed became the task of European scholarship to make the ‘Federal State’ look like its unitary sisters. This was achieved through ingenious feats of legal reasoning.

A first argument asserted that when forming the Union, the States had lost all their sovereignty. They had been ‘re-established’ as ‘Member States’ by the Federal Constitution. These Member States were non-sovereign States. But if the criterion of sovereignty could no longer be employed as the emblem of statehood, what justified calling these federated units ‘States’? The search for a criterion that distinguished ‘Member States’ from ‘administrative unions’ led European constitutional thought to insist on the existence of exclusive legislative powers. In the succinct words of one of the most celebrated legal minds of the nineteenth century: ‘To the extent that the supremacy of the Federal State reaches, the Member States lose their character as States.’ And conversely: ‘To
the extent that the Member States enjoy an exclusive sphere, but only to that extent, will they retain their character as States.\(^{37}\)

Let us look at a second argument that was developed to downplay the constitutional differences between a Federal State and a unitary State. In a Federal State powers are divided between the Federal State and its Member States. But if the characteristic element of a Member State was the possession of exclusive legislative power, how could the Federal State be said to be sovereign? The European answer to this question was that all powers were ultimately derived from the Federal State, since it enjoyed 'competence-competence' (Kompetenz-Kompetenz).\(^{38}\) This idea translated the unitary concept of sovereignty into a federal context: 'Whatever the actual distribution of competences, the Federal State retains its character as a sovereign State; and, as such, it potentially contains within itself all sovereign powers, even those whose autonomous exercise has been delegated to the Member States.'\(^{39}\) If the Federal State is sovereign, it must be empowered to unilaterally amend its constitution. '[T]he power to change its constitution follows from the very concept of the sovereign State.' \(^{40}\) A State, whose existence depends on the good will of its members, is not sovereign; for sovereignty means independence.\(^{41}\)

The Federal State was, consequently, deemed to be empowered to 'nationalise' competences that were exclusively reserved to the Member States under the Federal Constitution – even against the will of the federated States. Through this process of 'unitarisation', the Member States would gradually lose their 'stackhood', and since the power to unilaterally amend the constitution was unlimited,\(^{42}\) the Federal State was said to enjoy the magical power of 'competence-competence' with which it could legally transform itself into a unitary State.

The existence of the Member States in the Union is, as such, no absolute barrier to the federal will. Indeed, the option to transform the Member States into mere administrative units remains, in the purest way, the sovereign nature of the Federal State... The negation of this legal option to transform the Federal State into a unitary State by means of constitutional amendment entails with it the negation of the sovereign and, therefore, state character of the Federal State.\(^{43}\)


\(^{38}\) One of the best discussions of the concept of Kompetenz-Kompetenz can be found in Hänel, Deutsches Staatsrecht (n. 35 above), 771–806.

\(^{39}\) Jellinek, Die Lehre von den Staatsverbindungen (n. 33 above), 290–1 (translated R. Schütze).

\(^{40}\) Ibid., 295–6 (translated R. Schütze).

\(^{41}\) Hänel, Deutsches Staatsrecht (n. 35 above) 776.

\(^{42}\) Jellinek, Die Lehre von den Staatsverbindungen (n. 33 above) 304 and 306 (translated R. Schütze). This has never been accepted by American constitutionalists, see Tocque v. White (1868) 74 US 700 at 725: 'The Constitution, in all its provisions, looks to an indestacible Union composed of indestacible States.' The rejection of an autonomous Federal State can now also be found in the modern German Constitution. According to its Art. 79(3), constitutional amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process... shall be inadmissible'.

In the final analysis, the European tradition thus equated the Federal State with a decentralised unitary State.\(^{44}\) Federalism was a purely 'national' phenomenon.

\(^{43}\) H. Triepel, Unitarismus und Föderalismus im Deutschen Reiche (Mohr, 1907), 81.

\(^{44}\) Neither of these two brilliant critiques of traditional European constitutional thought enjoyed much influence outside Germany after the Second World War. This is perhaps not surprising, in the light of Schmitt's disgraceful post-Weimar biography. In Kelsen's case, the reason may lie in the lack of a translation of Das Problem der Souveränität und die Theorie des Volkerrechts and the disappointingly redactionless translation of the relevant chapter of his Allgemeine Staatslehre in The General Theory of Law and State.

\(^{45}\) H. Kelsen, Das Problem der Souveränität und die Theorie des Volkerrechts (Mohr, 1920).

\(^{46}\) Ibid., 64–6.

\(^{47}\) Ibid., 195: 'Eine Form kontinuierlich in die andere übergeht'.

\(^{48}\) Ibid.

\(^{49}\) This is, in my opinion, the very essence of Kelsen's theory of sovereignty and the 'basic' norm (ibid., 15).
The dual nature of each federation standing on the middle ground between international treaty and national constitution, was thus reflected in the dual nature of the constitutional foundations of the European Union. Each federation was thus seen as a creature of international treaty and a national constitution. The differences between the two lies in whether the national sovereignty is transferred to a federal authority or whether it remains a matter of domestic law. The federal authority then has the power to make international agreements that are binding on the states and that the states must ratify.

Each federation permanently lives in an "essential dualism," such that the political equilibrium in the union is determined by the interests of the member states and the federal authority. The federal authority can then negotiate with the states and make decisions that are binding on the states. The federal authority thus has the power to make international agreements that are binding on the states and that the states must ratify. These agreements are then binding on the states and the federal authority.

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3. The European Union in Light of the American Tradition

The American tradition identified the 1787 United States with a ‘mixed constitution’ that lay between international and national organisation. Within the classic period of European law, the European Union was also described as a hybrid that was placed ‘between international and municipal law’.59 ‘The [Union] is a new structure in the marches between internal and international law’.60 It is ‘neither an international Confederation, nor a Federal State’. It ‘simultaneously combines characteristics from both types of State relations and thus forms a mixtum compositum’.61

How did this mixed format express itself? What were its ‘international’ and ‘national’ features?62 American constitutionalism offered a potent analytical approach to these questions. Refusing to concentrate on the metaphysics of sovereignty, three analytical dimensions had been singled out: the foundational, the institutional, and the functional dimension. The first related to the origin and nature of the new legal order; the second concerned the composition of its ‘government’; while the third dealt with the scope and nature of the federation’s powers. This approach will now be applied to a legal analysis of the European Union.

a. Foundational Dimension: Europe’s ‘Constitutional Treaties’

The European Union was conceived as an international organisation. Its birth certificate was an international treaty. Its formation had been ‘international’ – just like the American Union. However, unlike the American Union, the European Treaties have been ratified by the national legislatures – not the national peoples – of its Member States. Genetically, they are ‘legislative’ – not constitutional – treaties.63 Would this (legislative) ‘treaty’ origin categorically rule out the idea of a

60 The contribution of the Communities for legal science is the breaking-up of the rigid dichotomy of national and international law.
61 E. Van Raalte, ‘The Treaty Constituting the European Coal and Steel Community’ (1952) 1 CLQ 73 at 74.
63 In the following section, the terms ‘international’ and ‘national’ will be used as analytic terms. The former refers to a voluntary and horizontal structure recognising the sovereign equality of the States; the latter stands for the hierarchical and vertical structure within a unitary State. Even if the notion of unitary is less charged with symbolic connotations than the national, we shall use the latter term to facilitate a comparison with Madison’s discussion of the mixed structure of the American Union.
64 It is difficult – if not impossible – to accept that ‘the founding treaties as well as each amendment agreed upon by the governments appear as the direct expression of the common will of the [national] peoples of the Union’ (J. Permeke, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?’ (1999) 36 CML Rev 703 at 717 (emphasis added)). National ratifications are – with the exception of a few Member States – only indirect expressions of the common will of the peoples of the Union. National consent is typically expressed through national legislatures. It is equally difficult to agree that these national ratifications should be regarded as a common exercise of constitution-making power by the peoples of the participating State’ (ibid., 717 (emphasis added)). This theory does not explain how each national ratification actually transforms itself into a collective act.
65 The latter was to be expressly acknowledged with the official introduction of a ‘citizenship of the Union’ in the Maastricht Treaty. According to Article 9 TEU ‘[e]very national of a Member State shall be a citizen of the Union’. And in accord with federal theory, every European will thus be a citizen of two political orders.

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66 On this point, see the analysis by Eichen, Allgemeine Staatslehre (n. 50 above).
70 On this point, see Chapters 3 and 4 below.
71 On this dual perspective on the supremacy question, see Chapter 4, sections 1 and 2 below.
72 For the opposite view, see H. P. Ipisa, Europäisches Gemeinschaftsrecht (Mohr, 1972), 281.
To conclude: in the eyes of the European Court of Justice and the majority of European scholars, the normative force of European law derives no longer from the normative foundations of international law. The ultimate normative base within Europe – its 'originality hypothesis' or 'Grundnorm' – are the European Treaties as such. [The EU] Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a [Union] based on a rule of law.]72

Would this 'national' semi-nature not be put into question by the 'international' nature of the amendment process or the States' ability voluntarily to leave the Union? Indeed, Treaty amendment continues to (ordinarily) require the ratification of all the Member States according to their respective national constitutional requirements.72 But whereas the Member States – in the collective plural – remain the 'Masters of the Treaties', individual Member States have lost their 'competence-competence'.73 Legally, Member States are no longer competent to determine unilaterally the limits of their own competences themselves.74 And as regards the right to withdrawal from the Union,75 it is not an argument against the federal nature of the European Union, but merely an argument against the Union being a Federal State. For it is sovereign States that typically prohibit secession on the ground that it violates their sovereign integrity.76 By contrast, federal unions determine the beginning and end of membership by means of an international treaty with 'constitutional' effects.

72 On the amendment provisions, see Chapter I, Conclusion. The introduction of simplified revision procedures by the Lisbon Treaty has recently been associated with a Union Kompetenz-Kompetenz (see G. Barret, 'Creation's Final Laws: The Impact of the Treaty of Lisbon on the "Final Provisions" of the Earlier Treaties' (2009) 27 YEARL 13: 'from the theoretical standpoint, all of these are of interest in that they confer a form of Kompetenz-Kompetenz on the European Union in that, for the first time they empower an institution of the Union itself—viz, the European Council—to amend the Treaties'.)
74 A. von Bogdandy and J. Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform' (2002) 39 CML REV 227 at 230: 'The individual Member States have forfeited its right to determine its own competences (Kompetenz-Kompetenz) insofar as it is not permitted to extend its powers unilaterally to the detriment of the Union. While the Member States acting jointly as the Contracting Parties may amend the Treaties, transferring powers back to the Member States, they are bound by the procedures provided for in Article 48 TFEU. The right to withdraw is now expressly enshrined in Art. 50(1) TFEU: 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.'
75 On ascension in (international) law, see L. C. Buchheit, Section: The Legitimacy of Self-Determination (Yale University Press, 1978).
78 Art. 138 EEC. On this point, see Chapter 5, section 26b below.
79 To this day, the European Treaties allocate a – neither equal nor proportional – number of parliamentary mandates to the Member States and there is still no uniform European electoral procedure. On the details, see ibid.
80 In the words of Habermas: 'The ethical-political self-understanding of citizens in a democratic community must not be seen as an historical-cultural event that makes democratic will-formination possible, but rather as flowing contents of a circularary progress that is generated through the legal institutionalization of citizens' communication. This is precisely how national identities were formed in modern Europe. Therefore it is to be expected that the political institutions to be created by a European constitution would have an inducing effect.' See J. Habermas, 'Remarks on Dieter Grimm's 'Does Europe Need a Constitution?' (1995) 1 ELR 303 at 306.
81 Art. 231 TFEU: 'Save as otherwise provided in the Treaties, the European Parliament shall act by a majority of the votes cast.'
82 Art. 16(2) TFEU.
where decision-making is by unanimity, the sovereign equality of the Member States is respected. Yet, the European Treaties also envisage procedures that would break with the international idea of sovereign equality. From the very beginning, they permitted the Union to act by a qualified majority of States; and where a qualified majority sufficed, the Member States had weighed votes depending – roughly – on the size of their populations.84 (Strictly speaking, the Council here will not represent the Member States – a notion that implies their equality – but it represents the national peoples.85) To act by qualified majority, the Council traditionally needs a ‘majority’: a majority of the States must obtain a majority of the votes from the national peoples; and the vote must also represent a majority of the European people.86 Formally then, decision-making within the Council is neither completely international nor completely national, but a combination of both. It stands on federal middle ground.

The composition and operating mode of the European Parliament and the Council having been analysed, what – then – is the nature of the European legislature? According to the ‘ordinary’ legislative procedure, the Council decides by a qualified majority and the European Parliament acts as ‘co-legislator’.87 The European legislator is here ‘bicameral’ and this constitutional structure reflects a subtle federal balance:

Legislation comes into being through majority voting in the two houses of the legislature and only after the approval by both of them. One house represents the people in their capacity as citizens of the Union, the other house represents the component entities of the federation, the Member States, and – through them – the people in their capacity as citizens of the Member States.88

Europe’s prevailing legislator is consequently a combination of ‘national’ and ‘international’ elements. While the Parliament represents a – constitutionally posted – European people, the Council represents the Member States and their

84 On this point, see Chapter 5, section 4(c) below.
85 For a similar conclusion albeit from a different perspective, see A. Petro, Elemente einer Theorie der Verfassung der Europäischen Union (Deutcher & Hamblet, 2001), 563 and 566.
86 On the traditional voting roles in the Council and the Lisbon amendments, see Chapter 5, section 4(c) below.
87 A. Dashwood, 'Community Legislative Procedures in the Era of the Treaty on European Union' (1994) 19 EL Rev 343 at 362–3. "The ‘product’ of the procedure is an act adopted jointly by the European Parliament and the Council – in contrast to that of the consultation or cooperation-procedures, which is simply an act of the Council... the acts in question shall be signed by both the President of the European Parliament and the President of the Council, symbolising in the most concrete way possible the joint character of such acts."

c. Functional Dimension: The Division of Powers in Europe

What about the allocation of the functions of government? What kind of powers does the European Union enjoy? Within the internal sphere, Europe clearly enjoys significant legislative powers.89 This is equally the case in the external sphere.90 However, the European Union’s powers remain enumerated powers. Its scope of government is ‘imperfect’. The reach of Europe’s powers is thus not ‘national’ – that is sovereign – in scope.

But what is the nature of Europe’s powers? When the European Union was born, the Treaties envisaged two instruments with direct effect on individuals. Regulations were to have direct and general application in all Member States.91 Decisions allowed the Union to adopt directly applicable measures addressed to particular persons. As in making regulations and decisions directly applicable in domestic legal orders, the European Treaties thus recognised two ‘national’ instruments – one legislative, the other executive. The European Union also possessed an ‘international’ instrument: the directive. In order to operate on individuals, the European command would need to be incorporated by the States. However, through a series of courageous rulings, the European Court of Justice partly transformed the directive’s format by injecting ‘national’ elements. (As we shall see in Chapter 3, directives thus combine ‘international’ and ‘national’ features.92 They are a form of ‘incomplete legislation’ and thus symbolically represent Europe’s ‘federal’ middle ground.)

What about Europe’s executive powers? While the Union has established its own enforcement machinery in some sectors, the direct administration of European legislation has remained an exception – even if Europe has enlarged its executive presence in recent years.93 Indirect administration still characterises the Union legal order which continues to largely rely on its Member States to apply and implement European law.94 The decentralised application of European law is effected through the supremacy principle: all organs of a Member State’s administration – executive and judicial – must disapply conflicting national law in every individual case before them. Supremacy, in fact, primarily concerns the executive application of European law.95 Unlike contemporary American federal doctrine,96 European

89 On this point, see Chapter 7, section 1 below.
90 On this point, see Chapter 8, section 1 below.
91 See Art. 220(2) EC, and now: Art. 288(2) TFEU.
92 See Art. 249(4) EC, and now: Art. 288(4) TFEU.
93 On the instrumental form of directives, see Chapter 3, section 3 below.
94 On this point, see Chapter 9, sections 3 and 4 below.95 Ibid.
95 On this point, see Chapter 4, section 2 below.
federalism even imposes a positive obligation on national administrations to implement European law. Thus, although national administrations are—from an institutional perspective—not integrated into the European administrative machinery, national administrations operate—from a functional perspective—as a decentralised European administration.

However, there is an important caveat. The obligation to execute European law is on the Member States as ‘corporate’ entities. Where a national administration refuses to give effect to European law, the only road open for the European Union to enforce its laws is to bring an action before the European Court of Justice. In the execution of its legislative choices, European law thus still ‘largely follows the logic of state responsibility in public international law’.98

d. Overall Classification: The European Union on Federal ‘Middle Ground’

In light of these three dimensions, how should we classify the European Union? Its formation was clearly international and its amendment still is. However, its international birth should not preclude against the ‘federal’ or ‘constitutional’ status of the European Treaties. Was not the 1787 American Federation the result of an international act? And has not the 1949 German Constitution been ratified by the State legislatures?99 The fact remains that the European legal order has adopted the ‘originality hypothesis’ and cut the umbilical cord with the international legal order. The Treaties as such—national law are not international law—are rooted at the origin of European law. Functionally, then, the European Union is based on a ‘constitutional treaty’ that stands on federal middle ground. The same conclusion was reached when analysing Europe’s ‘government’. The European Union’s dominant legislative procedure strikes a federal balance between ‘international’ and ‘national’ elements. And while the scope of its powers is limited, the nature of the Union’s powers is predominantly ‘national’.

Overall then, the legal structure of the European Union is ‘in strictures, neither a national nor an international Constitution, but a composition of both’.100

4. The European Union in Light of the European Tradition

European constitutionalism has historically insisted on the indivisibility of sovereignty. It focuses on the locus of sovereignty. The absolute idea of sovereignty operates as a prism that ignores all relative nuances within a mixed or dual legal structure. Where States form a union but retain their sovereignty, the object


99 Art. 144(1) of the German Constitution states: ‘This Basic Law shall require ratification by the parliaments of two thirds of the German Länder in which it is initially to apply’ (emphasis added).

100 Hamilton, Madison and Jay, The Federalist (n. 5 above), 187.

thereby created is an international organisation (confederation) regulated by international law. By contrast, where States transfer sovereignty to the centre, a new State emerges. Within this State—a Federal State if powers are territorially divided—the centre is solely sovereign and (potentially) omnipotent.

What does this mean for an analysis of the legal nature of the European Union? When European thought began to apply its conceptual apparatus to the European Union, it noted that its theoretical categories could not explain the legal reality of European law. In the absence of a federal theory beyond the State, European thought invented a new word—supranationalism—and proudly announced the European Union to be sui generis. But in times of constitutional conflict, Europe’s philosophical heritage returned to the fore. The ‘international law theory’ thereby received its classic expression in the debate surrounding the ratification of the Maastricht Treaty.101 The identification of the European Union with an international organisation led to three constitutional denials: the European Union could have no people, no constitution, and no constitutionalism.

a. The Sui Generis ‘Theory’: The ‘incomparable’ European Union

Europe’s quest for a new word to describe the middle ground between international and national law would—at first—be answered by a novel concept: supranationalism. The European Union was said to be a sui generis legal phenomenon. It was incomparable for ‘it cannot be fitted into traditional categories of international or constitutional law’.102

Was the European Union really a species without a genus? There are serious problems with the sui generis argument. First of all, it lacks explanatory value for it is based on a conceptual taxonology.103 Worse, the sui generis theory ‘not only fails to analyze but in fact asserts that no analysis is possible or worthwhile, it is in fact an “unsatisfying shuck”’.104 Secondly, it only views the Union in negative terms—it is neither international organisation nor Federal State—and thus indissolubly perpetuates the conceptual foundations of the European tradition.105 Thirdly, in not providing any external standard, the sui generis formula cannot detect, let alone measure, the European Union’s evolution. Thus, even where the European


103 P. Hay, Federation and Supranational Organisations (University of Illinois Press, 1966), 37: ‘It should be clear, however, that the term has neither analytic value of its own nor does it add in analytic: the characterization of the Communities as supranational and of their law as “supra national law” still says nothing about the nature of that law in relation either to national legal systems or to international law.’

104 Ibid., 44.

Community lost some of its 'supranational' features as occurred in the transition from the ECSC to the EEC - both would be described as sui generis. But worse of all: the sui generis 'theory' is historically unfounded. All previously existing Unions of States lay between international and national law. More concretely, the power to adopt legislative norms binding on individuals - this acclaimed sui generis feature of Europe - cannot be the basis of its claim to specificity. The same lack of 'uniqueness' holds true for other normative or institutional features of the European Union. And even if one sees Europe's Sonderweg - yet another way of celebrating the sui generis idea - in the combination of a 'confederal' institutional arrangement and a "federal" legal arrangement, this may not be too special after all.

The sui generis 'theory' is an intertwined and unhistorical 'theory' that is tacitly based on the idea of undivided sovereignty. This poses - unsolvable - problems for an analysis of the political and constitutional dilemma that characterizes the European Union. For a tradition that (tacitly or expressly) relies on the -- unitary -- concept of sovereignty, the constitutional pluralism within the Union must be seen as a 'novelty' or 'aberration'. The absence of an 'Archimedean point' from which all legal authority can be explained has thus been - wrongly - hailed as a sui generis quality of the European Union. Why not see the normative ambivalence surrounding sovereignty as part and parcel of Europe's federal nature?

106 J. B. Weizsärke, Staatsbund und Bundestakt: Untersuchungen über die Praxis und die Recht der modernen Bünde (Bruchsal, 1892).
107 Schönberger, 'Die Europäische Union als Bund' (n. 105 above), 93.
108 To give but one more illustration: European supremacy principle is, in its structure, not unique. The Canadian doctrine of federal paramountcy also requires only the 'disapplication' and not the 'invalidation' of conflicting provincial laws.
110 On this point, see P. Petracca, The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities (Stiphoff, 1974), 58.
111 See N. Waller, 'The Idea of Constitutional Pluralism' [2002] 65 MLR 317 at 338. This is how Waller, a leading figure of the 'constitutional pluralities', describes the origins of this new constitutional philosophy: It is no coincidence that this literature has emerged out of the constitutional dimension of EU law, for it is EU law which poses the most pressing paradigm-challenging test to what we might call constitutionalism. Constitutional monism merely grants a label to the defining assumption of constitutionalism in the Westphalian age - namely the idea that the sole centres or units of constitutional authorities are states. Constitutional pluralism, by contrast, recognizes that the European legal order inaugurated by the Treaty of Rome has developed beyond the traditional confines of inter-national law and now makes its own independent constitutional claims exist alongside the continuing claims of states (ibid., 337). This - 'Eurocentric' - view mistakenly ignores the American experience, in which the United States were seen to have 'constitutional' claims and in which the 'Union' was traditionally - not (!) conceived in state terms (see L. Zollner, 'Aspects inter-state and international right constitutional. Contribution à la théorie de la fédération d'Etat' (2003) 104 Revue des Courses de l'Académie de la Haye 43).

The sui generis 'theory' and the theory of constitutional pluralism indeed speak federal prose; without - like Molière's Monsieur Jourdain - being aware of it.

In any event, the sui generis 'theory' of the European Union had always been a pragmatic tranquilliser. But it could not prevent classification wars in times of constitutional conflict. Wherever the sovereignty question was posed, Europe's statist tradition would brush this pseudo-theory aside and insist on the international law nature of the Union.

b. The International Law Theory: The 'Maastricht Decision'

The ratification of the Maastricht Treaty was the 'constitutional moment' when the symbolic weight of European integration entered into the collective consciousness of European society. The ensuing legal debate crystallised into national constitutional reviews of the nature of the European Union. The most controversial and celebrated review was the 'Maastricht Decision' of the German Constitutional Court.

The Maastricht battle has structured the European constitutional debate for two decades. The German Supreme Court here posed the sovereignty question. Its central contentation was this: Europe's present institutional structure would set limits to the constitutional structure of the European Union. As long as there was no European equivalent to national peoples, there would be a legal limit to European integration. And in this moment of constitutional conflict, European federal thought was forced to reveal its deeper intellectual structure.

How did the German Constitutional Court derive national limits to European integration? The Court based its reasoning on the democratic principle - the material principle of modern constitutional thought. How could European laws be legitimised from a democratic point of view? Two options existed. First, European laws could be regarded as legitimised - directly or indirectly - through national democracy. Secondly, they could be legitimised by the existence of European democracy. As regards the first option, national democracy could only be directly safeguarded through unanimous voting in the Council. However, the rise of majority voting in the Council increasingly allowed the European Union to adopt legislation against the will of national peoples. European integration imposed formidable limits on the effectiveness of national democracy. Yet, majority voting was necessary for European
and this had been recognised by Germany's choice to transfer sovereign powers to Europe. The situation in which a Member State was outvoted in the Council could thus still be indirectly legitimised by reference to the national decision to open up to European integration. (That argument works only where the national decision is of a constitutional nature – as in the case of Article 23 of the German Constitution.) But even this decision was subject to the fundamental boundaries set by the national Constitution. How did the German Constitutional Court assess the second option – legitimation through a European democratic structure? The Court readily admitted that 'with the building-up of the functions and powers of the Union, it becomes increasingly necessary to allow the democratic legitimation and influence provided by way of national parliaments to be accompanied by a representation of the peoples of the Member States through a European Parliament as the source of a supplementary democratic support for the policies of the European Union'. Formal progress in this direction was made by the establishment of European citizenship. This citizenship created a legal bond between Europe and its subjects, which 'although it does not have a tightness comparable to the common nationality of a single State, provides a legally binding expression of the degree of de facto community already in existence'. But would this constitutional structure correspond to Europe's social structure? The existing democratic structure of the European Union would only work under certain social or "prelegal" conditions. And, according to the Court, these social preconditions for constitutional democracy did not (yet) exist in Europe.

The very purpose behind the European Union was to realise a "Union of States" as "an ever closer union of the peoples of Europe (organised as States) and not a State based on the people of one European nation." The European Union was never to become a (federal) State. And from this negation, the German Constitutional Court drew its dramatic and (in)famous conclusions. First, the Union would need to recognise that the primary source of democratic legitimacy for European laws had remained the national peoples. Secondly, all legal authority of the European Union derived thus from the Member States. Thirdly, European laws could consequently "only have effects within the German sovereign sphere by virtue of the German instruction that its law is applied". European norms required a national "bridge" over which to enter into the domestic legal order. Fourthly, where a European law went beyond this national scope, it could have no effects in the national legal order. Fifthly, the ultimate arbiter of that question would be national Supreme Courts.

In conclusion, each Member State had remained a master of the Treaties. Each of them had preserved "the quality as a sovereign State in its own right and the status of sovereign equality with other States within the meaning of Article 21(1) of the United Nations Charter". European law was international law.

c. Europe's Statist Tradition Unearthed: Three Constitutional Denials

The constitutional conflict over the Maastricht Treaty on European Union had woken old spirits: Europe's statist tradition. The reactions to the Maastricht challenge were manifold and ranged from the placid and guided to the aggressive.

of parliamentarism (see H. P. IJzere, 'Zehn Glosen zum Maastricht Urteil' (1994) 29 Europarecht 1 at 6). There is no trace in the judgment of an insistence on racial or ethnic homogeneity. Suggestors to the contrary, describing the German Court's position as one of "organische ethno-culturalism" and as a "worldview which ultimately informs ethnic cleansing' (see J. Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 11 ELJ 219 at 251–72) are unenlightened and unfair. Ironically, much of what Weiler pronounces to be "his" civic theory of social and political commitment to shared values (ibid., 253) is what we read in the German Constitutional Court's judgment.

Maastricht Decision (n. 113 above), 89 (emphasis added). The Court continues the theme a little later: "In any event the establishment of a 'United States of Europe', in a way comparable to that in which the United States of America became a State, is not at present envisaged". Incidentally, the German Supreme Court did, superficially, acknowledge the "gemeinsame" characteristics of the European Union by inventing a new term for the European Union – the "Staatverbund".


Maastricht Decision (n. 113 above), 91.

See Perrin, 'Multilevel Constitutionalism' (n. 63 above), 711: 'internationalist' view of the Court that treats European law as any other rule of international law.
and misguided. 124 But underneath superficial differences, much of the ensuing constitutional debate would not escape the conceptual heritage of Europe’s ‘states’ tradition.

The latent presence of this ‘statist’ tradition manifested itself in three constitutional denials: Europe was said to have no people, no constitution, and no constitutionalism. These denials derived from a deep-seated belief in the indivisibility of sovereignty. Because sovereignty could not be divided, it had to be in the possession of either the Union or the Member States; that is, either a European people or the national peoples. Depending on the locus of sovereignty, the European Union would be either based on a (national) constitution or an (international) treaty. And even if Europe had a constitutional treaty, the lack of a ‘constitutional demos’ denied it a constitutionalism of its own.

Let us look at the underlying philosophical rationale for each of these denials, before subjecting each to constructive criticism.

Will a people – the ‘constituency’ for constitutional politics – precede in polity, or be a product of? This question has received different philosophical and constitutional answers. To some, the ‘people’ will emerge only through the subjection to a common sovereign. 125 To others, the ‘people’ will precede the State for it is they who invest the government with its powers. 126 Most only modern European States were ‘supra-national’ in character in that they housed multiple ‘nations’ under one governmental roof. 127 However, with the rise of nationalism in the nineteenth century some would come to be identified by their nation. 128 Multiple nations within one State came to be seen as an anomaly. The


126 A Multitude of Peoples, are not Persons, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the Unity of the Representative, not the Unity of the Representatives, that makes the Person One … This done, the Multitude so united as one Person, is called a COMMONWEALTH, or in Latin CIVITAS. This is the generation of that great Leviathan, or rather (to speak more reverently) of that Mortal God, to which we owe under the Imperial God, our peace and defence. I am grateful to Q. Skinner for shedding much light on these passages.

127 The theory of popular sovereignty will typically distinguish between a ‘people’ (noun), on the one hand, and a ‘subject’ (citizen) on the other. The former refers to a community characterized by an emotion of solidarity that gives the group consciousness and identity. The latter refers to an individual’s legal relations to his or her State. On these issues, see J. W. Salmon, ‘Citizenship and Allegiance’ (1901) 17 Law Quarterly Review 270.

128 Before the 1799 French Revolution, French kings would refer to the ‘peoples’ of ‘France’ (see B. Veyne, ‘Histoire de l’Idée Féodélistes: les Sources’ (Prens d’Europe, 1972), 165). The United Kingdom is still a multi-ethnic State that comprises the English, Scottish, Welsh and a part of the Irish nation (see M. Keating, Pluralism and Democracy: sanden Nation in a Post-Sovereign Age (Oxford University Press, 2001), 120: ‘one of the most explicitly constitutional States in the world’.

129 On these issues generally, see E. Gellner, Nations and Nationalism (Wiley Blackwell, 2006).

130 The anomalous status was equally attached to the idea of ‘dual citizenship’: an individual should only be part of one political body. 129 (National) peoples thus came to be seen as mutually exclusive. Transposed to the context of the European Union, this meant that a European people could not exist alongside national peoples. (And European citizenship could not exist alongside national citizenship.) Both peoples would exclude – not complement – each other; and as long as national peoples exist – as they do – a European people could not.

This brings us to the second denial: the absence of a European constitution. Under the doctrine of popular sovereignty, only a ‘people’ can formally ‘constitute’ itself into a legal sovereign. A constitution is regarded as a unilateral act of the ‘pouvoir constituant’. 130 Thus, ‘it is inherent in a constitution in the full sense of the term that it goes back to an act taken by or at least attributed to the people, in which they attribute political capacity to themselves’. 131 This normative – or, better: democratic – notion of constitutionalism is said to have emerged with the American and French Revolutions and, since then, to have become the exclusive meaning of the concept. ‘There is no such source for primary Union law. It goes back not to a European people but to the individual Member States, and remains dependent on them even after its entry into force. While nations give themselves a constitution, the European Union is given a constitution by third parties.’ 132

And assuming, hypothetically, that a European people would in the future give the Union a constitution? Then, ‘the Union would acquire competence to decide about competences (Kompetenzkompetenz). It would have the power to unilaterally change its constitution and would thus have turned itself from a confederation of States into a Federal State. 133 However, for the state being, the Union is no State. 134 And failing that, the European Union has no constitution.

Let us finally look at a third – milder – denial: ‘The condition of Europe is not, as is often implied, that of constitutionalism without a constitution, but of a constitution without constitutionalism.’ 135 (Paradoxically, this very same denial had been made in relation to the American Union in the eighteenth century. 136) ‘In federations, whether American or Canadian, German or Canadian, the institutions of a federal state are situated in a constitutional framework which presupposes the existence of a “constitutional demos”, a single pouvoir constituant made of the citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority the specific constitutional arrangement is rooted.’ ‘In Europe, that precondition does not exist. Simply put, Europe’s
constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos."[138] And in the absence of a unitary constitutional demos, Europe could have no constitutionalism.

What is common to these three denials? Each is rooted in Europe's state tradition and based on the idea of indivisible sovereignty; a unitary people forms a unitary State on the basis of a unitary constitution. The inability to accept a federal or divided sovereignty thus blinds the European tradition to the possibility of federal arrangements or a duplex resipien between peoples, States and constitutions. It is unable to envisage two peoples living in the same territory - yet, this is generally the case in federal unions. It is unable to envisage two constitutional orders existing within the same territory - yet, this is generally the case in federal unions. It is unable to envisage a compound pouvoir constituant of multiple demos - yet, this is generally the case in federal unions. The black and white logic of unitary constitutionalism is simply unable to capture the federal 'blue' on the international versus national spectrum.

The European Union's constitutionalism therefore must, in the future, be (re)constructed in federal terms. It is half-hearted to - egomatically - claim that Europe has a constitution, but no constitutionalism. For once we admit that Europe has a constitution, who tells us so? National legal theory? International legal theory? Since neither affirms the statement that 'Europe has a constitution', the proposition presupposes a system of thought that allows us to 'recognise' or 'verify' that statement as true. Logically, the affirmation of a 'constitution' presumes the existence of a 'constitutionalism'.

But more importantly: the misguided insistence on a 'constitutional demos' shows that 'constitutionalism' is still identified with the legitimising theory

137 Weller, 'Federalism without Constitutionalism: Europe's Sonderweg' (n 109 above), 56-7.
138 See Deedell, 'The Question of Dualism' (n 27 above). 330. ‘Dual citizenship, essential to federations, is thus nothing but the duplication of the fundamental law of duality of political entities constituting them. In contrast to the State, the federation here is characterized by a “political dualism”’.
139 Both American and German constitutionalism accept the idea of ‘State Constitutions’ in addition to the federal Constitution.
140 When Professor Weller confesses that ‘I am unaware of any federal state, old or new, which does not presuppose the supreme authority and sovereignty of its federal demos’ (Weller, ‘Federalism without Constitutionalism: Europe’s Sonderweg’ (n 109 above), 57), we may draw his attention to the United States of America. Neither of the two Constitutions of the United States was ratified by a ‘federal demos’ in the form of the American people. The Articles of Confederation were ratified by the State legislatures, while the 1787 Constitution was ratified by the State peoples. And as regards constitutional amendment, Art. V of the US Constitution still requires the concurrence of the federal demos – acting indirectly through its representatives – and three-fourths of the State demos – acting either through their representatives or in conventions. More generally, in all (democratic) Federal Unions the pouvoir constituant should be a compound of the federal and the State demos. Where the ‘constitutional demos’ is conceived in unitary terms, the federal Union loses its federal base (see Schmitt, Verfassungslehre (n 51 above), 389).

underlying a - unitary - Nation State. But Europe's mixed constitutional system cannot be conceived in purely unitary - or 'national' - terms. Only a federal constitutionalism can explain and give meaning to normative problems that arise in compound systems like the European Union. And once we apply a federal constitutionalism to the European Union, the above 'denials' are shown for what they are: false problems. They are created by a wrong constitutional theory. National constitutionalism simply cannot explain the 'dual nature' of federations as classical physics was unable to explain the dual nature of light. By insisting that the European Union is either international or national, it denies its status as an (inter)national phenomenon.

d. Excursus: Europe's 'Democratic Deficit' as a 'False Problem'?
The classic illustration of the distorted European constitutional discourse is the debate on the European Union's 'democratic deficit'. It is not difficult to find such a deficit if one measures decision-making in the Union against the unitary standard of a Nation State. There, all legislative decisions are theoretically legitimised by one source - the people as represented in the national parliament. But is this - unitary - standard the appropriate yardstick for a compound body politic?

In a federal polity there are two arenas of democracy: the 'State demos' and the 'federal demos'. Both offer independent sources of democratic legitimacy; and a federal constitutionalism will need to take account of this dual legitimacy. One functional expression of this dualism is the division of legislative powers between the State demos and the federal demos. One institutional expression of this dual legitimacy is the compound nature of the central legislature. It is typically made up of two chambers; and thus, every federal law is - ideally - legitimised by reference to two sources: the consent of the State peoples and the consent of the federal people. It is thus mistaken to argue that '[true] federalism is fundamentally non-majoritarian, or even anti-majoritarian, form of government since the component units often owe their autonomous existence to institutional arrangements that prevent the domination of minorities by majorities'. While federal systems may have a somewhat ambiguous standing in democratic
Federalism, one foundational expression of this dual legitimacy is the—typically—compound nature of the federation’s constituent power. The point has been well made in relation to the United States of America:

Half a century ago J. Allen Smith wrote a book in which he bitterly criticized the undemocratic spirit of the American Scheme of government. In it he argued that a true democracy had to embrace the principle of majority rule: His criticism was justified, but only within his own frame of reference. It was phrased in the wrong terms. He was in fact criticizing a federal system for serving the ends it was intended to serve...What he ignored was that even in 1907 the United States was still composed of States. The amending clause was an excellent spot for his attack and the criticism he made of it would have been equally applicable to any federation. Nearly all governments that are called federal employ some device in the amending process to prevent a mere majority from changing the constitution...Does this prove federalism is undemocratic? Certainly it does, if democracy be defined in terms of majority rule...They argue that the will of the majority is being thwarted and suggest by implication at least that this is ethically wrong; the term ‘will of the majority’ carries with it certain moral overtones in these days of enlightened democracy. But what the apocryphal majoritarian forget is that a federal [union] is a different thing, that it is not intended to operate according to a majority principle. We cannot apply the standard of unitary government to a federal [union]. If the opinion of a majority is a sufficient guide for public policy in a community then it is unlikely that a federal system will have been established in that community.

144 R. A. Dahl, ‘Federalism and the Democratic Process’ in J. R. Pennock and J. W. Chapman (eds.), Novus XV: Liberal Democracy (New York University Press, 1983), 95 at 96. Dahl continues (ibid, 96 and 101): ‘If one requirement of a fully democratic process is that the demos exercises final control over the agenda, and if in federal systems no single body of citizens can exercise final control, is it then the case that in federal systems the processes by which people govern themselves cannot even in principle ever be fully democratic?’ Some critics have so contended. But if this is so, then a transnational federal system like the European Union is necessarily undemocratic. Are we to conclude that however desirable it might be on other grounds, when a people who govern themselves under a unitary constitution enter into a larger federal order they must necessarily suffer some loss of democracy?

145 K. Nicolaides, ‘The Peoples of Europe...’ (2004) 83 Foreign Affairs 97 at 102. An example of such mainstream constitutional thinking is the idea that the most legitimate element (from a ‘social’ point of view) of the Union was the Luxembourg Accord and the veto power as ‘this device enabled the [Union] to legitimate its program and its legislation’ (J. Weiler, ‘The Transformation of Europe’ (1999–2000) 160 Yale Law Journal 2463 at 2473). This is mistaken in two ways. First, how can a unanimous decision of national ministers legitimate directly effective European law? If European legislation affects European citizens directly, how can an indirect legitimisation through national executive be sufficient? To solve this dilemma, Weiler refers to the underlying formal legitimancy of the founding Treaties that received national parliamentary consent and to the claim that national parliaments control their governments’ ministers in the Council. However, the former argument cannot explain how an earlier parliament can bind its successors. (This normative problem may only be solved through the insertion of a clause into the national constitutions that would legitimate European integration.) And even if we were to assume absolute control of national ministers by their national parliaments, social legitimacy is in any event co-dependent on ‘system capacity’. Dahl explains this point as follows: (‘Federalism’, in 146 above) at 105—emphasis added): ‘As Rousseau suggested long ago, it is necessarily the case that the greater the number of citizens, the smaller the weight of each citizen in determining the outcome...On the other hand, if a system is more democratic to the extent that it permits citizens to govern themselves on matters that are important to them, then in many circumstances a larger system would be more democratic than a smaller one, since its capacity to cope with certain matters—defense and pollution, for example—would be greater.’

146 How enlightening comparative constitutionalism can be! The discussion of the European Union’s ‘democratic deficit’ indeed reveals a deficit in democratic theory. The description of crisis reflects a crisis of description. Indeed, ‘the question about which standards should be employed to assess the democratic credentials of the EU crucially hinges on how the EU is conceptualized.’

147 The search for normative criteria to describe and evaluate the European Union will—eventually—lead to a federal constitutional theory. The European Union is ‘based on a dual structure of legitimacy: the totality of the Union’s citizens, and the peoples of the European Union’. Elections provide two lines of democratic legitimacy for the Union’s organizational structure. The European Parliament, which is based on elections by the totality of the Union’s citizens, and the European Council as well as the Council, whose legitimacy is based on the Member States’ democratically organized peoples.

Conclusion

What is the nature of the European Union? Can the Union be described as a federal Union? We saw above that the American tradition easily classifies the...
European Union as a federal Union. The European Union has a mixed or compound structure; and in combining international and national elements, it stands on federal 'middle ground'.

The federal label is — ironically — denied by Europe's own intellectual tradition. In pressing the federal principle into a national (State) format, the concept of federation is reduced to that of a Federal State. And while the creation of a Federal State may have been a long-term aim of a few idealists in the early years of European integration, the failure of the European Political Community in the 1950s caused the demise of federal 'ideology'. The fall of federalism gave rise to the 'philosophy' of (neo-)functionalism. The latter celebrated the Union as a process - a 'journey to an unknown destination'. But this agnosticism could not forever postpone the fundamental question: What is the European Union?

Early commentators were nonetheless aware that the new European construct had moved onto the 'middle ground' between international and national law. Yet, Europe's conceptual tradition blocked the identification of that middle ground with the federal idea. Europe was celebrated as sui generis. But how common exceptions are! The sui generis 'theory' was, in any event, but a veneer. In times of constitutional conflict, Europe's old federal tradition returned from the depths and imposed its two polarised ideal types: Europe was either an international organisation or a Federal State. And since it was not the latter, it was — by definition — the former.

What is the explanatory power of the international law thesis? Can it satisfactorily explain the legal and social reality within the European Union? In the last half a century, 'Little Europe' has emancipated herself from her humble birth and has grown into a mature woman: the European Union. The international law thesis thus runs into a great many explanatory difficulties. Unlike international doctrine predicts, the obligations imposed on the Member States are not interpreted restrictively. Unlike international doctrine predicts, the Member States are not allowed a free hand in exercising their obligations. Unlike international doctrine predicts, the Member States cannot modify their obligations after it through the conclusion of subsequent international treaties. In order to defend the international law hypothesis, its adherents must denounce these legal

155 The functionalist classic is D. Minnery, A Working Peace System: An Argument for the Functional Development of International Organization (National Peace Council, 1946). Neofunctionalism discards the belief in the automaticity of the integration process and emphasises the need to build new loyalties with strategic elites. The classic here is: E. Han, The Uniting of Europe (c. 3 above).
157 J. Calhoun described the 1787 American legal order as 'new, peculiar, and unprecedented' (see J. C. Calhoun, 'A Discourse on the Constitution and Government of the United States', in Union and Liberty (Liberty Fund, 1992), 117). The legal structure of the British Commonwealth has been described as sui generis.

characteristics as non-essential 'marks' of sovereignty. And in relegating the social reality of European law to a false appearance, European thought refuses comparing the ideal with the real. But facts are stubborn things!

The sui generis thesis and the international law thesis had both caused the Union to disappear from the federal map. How did the federal idea return? Its revival in discussions of the structure of the European Union was slow. As a first step, it was accepted that the Union had borrowed the federal principle from the public law of federal States. The European Union was said to be the 'classic case of federalism without federation'. It had 'federal' features, but it was no 'federation'. Federation thus still meant Federal State. The word 'federal', by contrast, attached to a function and not to the essence of the organisation. The adjective was allowed — adjectives refer to attributes, not to essences — but the noun was not.

In order for European constitutionalism to accept the idea of 'A Federation of States' a second step was required. Europe needed to abandon its obsession with the idea of undivided sovereignty. It needed to accept that '[t]he law of integration rests on a premise quite unknown to so-called "classical" international law: that is the divisibility of sovereignty'. The Union enjoys 'real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the [Union] through which, in turn, 'the Member States have limited their sovereignty rights, albeit within limited fields'.

The European Union is indeed based on a conception of divided sovereignty and in strictness neither international nor national, 'but a composition of both'. It represents an (inter)national phenomenon that stands on — federal — middle ground. The best way to characterise the nature of the European Union is thus as a Federation of States.

158 Hans separated the idea of 'federation' from the notion of 'State' (Hans, The Uniting of Europe (p. 3 above), 37) and could, consequently, speak of the 'federal attributes' (ibid., 42) of the ECSC. The ECSC was, overall, described as a 'hybrid form, about of federation' (ibid., 51), for it did not satisfy all the federal attributes believed by the author to be necessary for a federation to exist (ibid., 59). While almost all the criteria point positively to federation, the remaining limits on the ability to implement decisions and to expand the scope of the system independently still suggest that the characteristics of international organisations.

160 Pescatore, The Law of Integration (n. 110 above), 30. This corresponds to J. Fisher's vision: 'The completion of European integration can only be successfully conceived if it is done on the basis of a division of sovereignty between Europe and the nation-state. Precisely this is the idea underlying the concept of "subsidarity," a subject that is currently being discussed by everyone and understood by virtually no one'; From Confederacy to Federation: Thoughts on the Finality of European Integration, Speech at the Humboldt University in Berlin (12 May 2000).
161 Case 684/64, Costa v. ENEL [1964] ECR 585, 593 (emphasis added).
FURTHER READING

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