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The Constitutionalisation of a Compound Democracy: Comparing the European Union with the American Experience

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Abstract

Based on an interpretation of the European Union (EU) as a compound democracy, this article argues that the constitutionalisation of the European Union is necessarily a contested process.. A compound democracy is defined as a union of states constituted by units of different demographic size, political history and geographical interests, and as such is necessarily characterized by different views on its constitutional identity. The EU experience is analyzed from the perspective of the United States (US), which is a compound democracy by design. In both cases, constitutionalisation has been an open and contested process. However, whereas the US process was based on a common constitutional framework, at least since the Civil War, and has been ordered by a super-majority procedure for settling disputes, the EU lacks a document that embodies a shared language and a procedure that is able to solve the disputes. As a result, the process of constitutionalisation in the EU, contrary to the one in the US, ends up periodically in stalemate.

Key words: constitutional change; constitution building; US constitution; Constitution for Europe; European Convention; USA

1 The Argument

The rejection of the Treaty on the Constitutional Future of Europe (henceforth Constitutional Treaty, CT) in the French and Dutch referenda of May 29 and June 1 2005, respectively, was considered a dramatic failure of the project to politically integrate the continent[1]. By contrast, the agreement prepared by the June 2007 European Council meeting in Berlin, concluded during the European Council held in Lisbon and signed on 13 December 2007 (the Lisbon Treaty), on transforming a large part of the CT into a set of amendments to the two existing treaties and on recognizing the Charter of Rights as a *de facto* third treaty, was considered evidence that the project of political integration was not dead after all[2]. Subsequently, the Irish "No" to the Lisbon Treaty in the referendum of June 12, 2008 gave renewed impetus to the view that the EU is incapable of advancing towards political integration. Which interpretation is the more appropriate one?

The constitutional odyssey of the first decade of the 21st century confirms both the EU's structural difficulty to find a definitive solution to the issue of its constitutional

[1] I am referring to the *Treaty establishing a Constitution for Europe*. It was signed on 29 October 2004, in Rome, by representatives of the then 25 member states of the EU and was subject to ratification by all member states. Most of them did so by parliamentary ratification or by referenda, but France and the Netherlands rejected it. Its main aims were to replace the overlapping set of existing treaties that compose the EU, to codify human rights throughout the EU and to rationalize its institutional system. The treaty's failure to win popular support in France and the Netherlands caused some other countries to postpone or put their ratification procedures on hold, and the European Council (of heads of government or states of the member states) to call for a "period of reflection".

[2] Formally the Lisbon Treaty refers to the *Treaty amending the Treaty on European Union* (TEU, Maastricht 1992) and the *Treaty establishing the European Community* (TEC, Rome 1957), the latter was renamed *Treaty on the Functioning of the European Union* (TFEU) (Council of the European Union, 2007). The two consolidated treaties would form the legal basis of the EU and contain most of the content of the abandoned *Treaty establishing a Constitution for Europe* or CT. Prominent changes in the Lisbon Treaty include the scrapping of the pillar system, reduced paralysis in the Council of Ministers due to the use of qualified majority voting for an increased number of policies, a more powerful European Parliament through extended co-decision with the EU Council, as well as new tools for greater coherence and continuity in external policies, such as a long-term President of the European Council and a High Representative for Foreign Affairs. The Lisbon Treaty is scheduled to be ratified by all twenty-seven member states by the end of 2008, in time for the 2009 European elections. As of November 2008, twenty-four member states have ratified the Treaty, one (Ireland) has rejected it and two (the Czech Republic and Sweden) have not started the process of ratification yet.

identity, as well as its structural need to look for such a solution. Because of the nature of the EU, its constitutionalisation is a contested process allowing for both centripetal and centrifugal outcomes, or more plausibly for periodical stalemates. The EU is a union of states which *de facto* has adopted a *compound democracy* model. As in other unions of states that have adopted this model, such as the United States (US) and Switzerland, also in the EU it is unlikely that a definitive solution to the dilemma of its constitutional identity will be found. Indeed, I will base this argument on a comparison of the EU with the first historical species of the genus of compound democracy, namely the US. I will proceed as follows: after defining the concept of compound democracy and constitutionalisation with reference to the EU (section 2), I will discuss the American (section 3) and European (section 4) experience with compoundness and constitutionalisation. Based on this comparison, the concluding section will analyse why the EU has ended up in a constitutional stalemate.

2 Compound Democracy and Constitution

Interpretations of the EU abound, although many of them are not helpful for understanding why its constitutional treaties (the CT and the Lisbon Treaty) are contested. The EU has faced contestation because it is much more than a regulatory system (Majone 2005), a governance system (Scharpf 1999) or a federalizing system (Elazar 2001). The constitutional difficulties of the EU are not simply characteristic of a political system (Hix 2005), but of a political system with democratic features.

A polity is democratic when it meets basic criteria of representation and accountability. Regarding the first criteria, those who take decisions in the EU were elected either by citizens in national elections (members of the Council of Ministers) or European elections (members of the European Parliament), or nominated by politicians elected in national and European elections (members of the European Commission). Moreover, EU decision-makers are compelled to act within a complex system of separation and balancing of powers, which was gradually defined by the various treaties and they are subject to the

control of national constitutional courts and the European Court of Justice (ECJ). Finally, they have to face the periodical evaluation of the voters, thus satisfying also the second criteria of inter-institutional and electoral accountability. Certainly defining the EU as a democratic polity does not mean shielding it from criticism. However, such criticism needs to be placed in the context of the democratic model adopted by the EU. A democratic model concerns the way in which systemic divisions are institutionally and politically translated into authoritative decisions applicable to all members of the polity. The EU, however, has come to be organized along a democratic model that is very different from the ones adopted by its member states.

The national models of the EU member states fall into two polar categories: the majoritarian/competitive model and the consensual/consociational model, with some EU member states oscillating between the two (Lijphart 1999; Fabbrini 2008a). These two models reflect the different nature of the existing cleavages in European societies. The majoritarian/competitive model characterises countries such as the United Kingdom (UK) where material (economic, social) divisions are more salient than other divisions, and where the main political actors share a homogeneous political culture. The consensual/consociational model, in contrast, characterises countries such as Belgium where cultural (linguistic, ethnic, religious) divisions are the most salient, and where the political actors do not share a common political culture. In both models, however, parliament is the only institution expressing popular sovereignty. Or better, both democratic models are characterised by a government, *as a single institution,* that reflects the political majority of the parliament, regardless of whether it is formed through a bipolar electoral competition or through post-electoral negotiations among the main actors of a multi-party system.

The EU's model of democracy is quite different. I define this model as compound democracy (Fabbrini 2007)[3]. A compound democracy is a democracy *for a union of states,*

[3] The concept of compoundness derives from the American debate. James Madison used it for the first time in the Philadelphia constitutional convention (1787). Robert A. Dahl has investigated in 1956 (now Dahl 2006) the anti-majoritarian nature of Madisonian democracy. Vincent Ostrom (1987) has clarified the

whereas the democratic models of the EU member states are characteristic of *nation states*. The compound nature of the EU is due, not only to the aggregation of distinct states *and their* individual citizens, but above all, to the *asymmetric* nature of these unit*s*. In the EU, the main divisions are between territorial units, i.e. member states, rather than between social classes or cultural communities (Bartolini 2005). In asymmetric unions of states, ultimate authoritative decisions are reached through the cooperation of multiple separated institutions. Contrary to the fusion of power systems of all EU member states, separation of power systems do not dispose of *a government as a single institution*. In the EU sovereignty is fragmented, pooled and shared by several separated institutions. The Council of Ministers, the Commission and the Parliament represent different electoral constituencies, if not concurrent majorities, and operate on the basis of different temporal mandates. Nevertheless they are constrained to share decision-making power. Moreover, in the case of the Commission, a specific form of check and balance has been introduced, with the European Council nominating its members with the advice and consent of the Parliament.

In sum, the EU, together with the US (Ostrom 1987) and Switzerland (Blondel 1998, Zweifel 2002) represent different species of the genus of the compound democracy. The EU displays many more institutional similarities with the US and Switzerland than with its member states. Here, however, because of their comparable size and external influence I will focus on comparing the EU and the US only. In the US "the Constitution

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political theory of a compound republic. David C. Hendrickson (2003) has discussed the unionist paradigm of a republic of many republics which inspired (with the republican and liberal paradigms) the American founding fathers. However in Europe the concept of compoundness has been generally unknown. Recently, Vivien Schmidt (2006) has used it for addressing polities characterized by a low degree of institutional centralization (such as Germany and Italy, other than the EU). In my approach, compoundness is more than a generic property of non-centralized political systems. Indeed, it is the analytical property of a democratic model characterized by a basic institutional feature: multiple separations of powers. It is an ideal-type comparable to Lijphart's ideal-types of majoritarian democracy or consensual democracy, but distinguishable from them because of that institutional feature (and thus because of the properties of the political process structured by it). For this reason, in my parsimonious approach, the compound democracy model might be applicable only to those polities organized around multiple separations of powers (such as the US, Switzerland and the EU). It is interesting to notice that all three of them are unions of states, although with different degrees of integration. Of course, an analytical model, or ideal-type, cannot be confused with an historical case. In fact, it is a genus to which belong different species.

created a Republic of different republics and a nation of many nations (and) the resulting system was sui generis in establishing a continental order that partook of the character of both a state and a state system" (Hendrickson 2003: 258). The same might be said for the EU (Hendrickson 2006). Both the EU and the US are polities with a highly complex structure of multiple separations of powers in order to keep on board states of asymmetrical size (Fabbrini 2005).

Having defined the democratic model of the EU, it is now necessary to identify its constitutional basis. The concept of a constitution is not as unequivocal as it might seem (Menéndez 2004). From the perspective of Comparative Politics (Lijphart 1999), we can distinguish, at least, between a formal and material constitution. A *formal* constitution is a single written document that it is regarded (by governed and governors alike) as the supreme text of the legal order, it regulates matters that are more fundamental than others and it may be changed only through stringent amendment procedures (Elster 1997). Although all formal constitutions establish the set of fundamental rights, institutional arrangements, and functional procedures that must regulate the workings of a given political community (which constitutes itself through this founding document), one might argue (with Elazar 1985) that important differences are detectable among them. In fact, some formal constitutions (as the American one) are first a *frame of government* and then a protector of rights (indeed, the Bill of Rights is a set of ten amendments added to the formal document two years after its approval), while other formal constitutions (as the ones approved in post Second World War Europe) have the features of a *state code,* expression of a declared democratic ideology (indeed, the French or Italian constitutions start with a definition of fundamental rights and end with a specification of powers and procedures to preserve them).

On the contrary, a *material* constitution consists of the social practices, derived from political conventions, historical traditions, specific judiciary regulations or ad hoc fundamental laws (considered of an equivalent status of a constitution) recognized as the basic norms of a given society. It is the case of democratic countries like UK, Germany or Israel: in the first case the material constitution is constituted by an historical accumulation

of ordinary laws and judicial sentences considered of fundamental importance for the polity, in the other two cases by an ad-hoc basic law (called *Grundgesetz* in post Second World War Germany)[4]. Evidently the EU does not have a formal constitution, but it is indisputable that it does have a material constitution consisting of the juridical expression of high-order principles (such as supremacy of Community law or direct effect of Community law on individual citizens) established by the ECJ on the basis of the treaties and recognized as such by the member states and their citizens.

Thus, the ECJ has interpreted the founding treaties as quasi-constitutional documents, and these rulings have gradually been integrated into the constitutional orders of the member states (Everson and Eisner 2007; Craig and De Burca 1999; De Witte 1999; Mancini 1998). Contrary to other international treaties, the EU treaties have thus given rise to a legal order which not only binds the governments that signed them (as it is typical of international treaties) but which is also of direct influence on the citizens of its member states (Curtin and Kellerman 2006; Weiler 1999). Accordingly, one might argue that this material constitution has sustained a process of *constitutionalisation,* where the latter has to be interpreted as "an exclusively descriptive concept (indicating) the recollection of constitutional norms, rules and decisions as outcomes of a process" (Wiener 2008: 26). However, stressing the empirical quality of the process of constitutionalisation, intended as the creation of a functional integrated legal order in a given political territory (Rittberger and Schimmelfennig 2007; Stone Sweet and Caporaso 1998), cannot imply to underestimate its normative implications (Maduro 2003), as it is recognised by several authors (O'Neil 2008; Longo 2006).

Indeed, the normative activity of the ECJ has arisen from the need to deal with the 'functional' problems emerging from increasing levels of trans-national exchange and cross-border cooperation (Stone Sweet 2005; Stone Sweet, Sandholtz and Fligstein 2001).

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[4] Both in (West) Germany and in Israel it was an explicit choice of the post Second World War ruling political elite to approve a fundamental law but not a constitution. Through that choice, that political elite wanted to underline the 'transitory' nature of the political regime, because of the still Jewish Diaspora (in the Israeli case) and the division between the west and east Germans (in the Germany case). It is interesting to notice that the 1990 *Deutsche Einheit* or 'German unity' was not based on (finally) a new formal constitution. Indeed, it has coincided with the inclusion of the five Eastern *Länder* into the West German federal state.

Increasing trans-national economic activity has exacerbated legal disputes among economic actors operating in different national jurisdictions, and this in turn has required the Community's judicial organ, the ECJ, to play an active role in settling them. The ECJ has used the opportunities afforded by the treaties to construct a new legal order for a supranational market, transforming those treaties into sources of law superior to those of the EU member states. This constitutionalisation has gradually transformed the European nation states (with few exceptions among the established democracies, such as Norway and Switzerland) into *member states* of the EU (Sbragia 1994). The traditional European nation states have had to redefine their sovereignty by sharing it with other nation states within the context of the EU institutional structure. If sovereignty coincides, at least empirically, with the power of taking ultimate decisions, the nation states of Europe, becoming EU member states, have come to share this ultimate decision-making power (on several policies affecting their own societies) with institutional actors 'external' to each of them (the other member states' representatives in the Council and the members of the Brussels Commission and the Parliament). Thus, empirically, each EU member state has remained sovereign in some policy fields (very few indeed) but not in others (quite a few indeed).

However, there is a crucial difference between the EU and the US. The US is based on a founding document and its amendments (the *constitutional text*), whereas the EU is based on successive inter-state treaties. Constitutionalisation based on inter-state treaties, originally addressed to create an economic union (a common market), is significantly different from constitutionalisation based on a constitutional, formally addressed to create a political union (Weiler and Haltern 1998; Ackerman 1991). In fact, my argument is that, whereas in the US the constitutional text has furnished a normative language for framing the divisions on the nature of the constitutional order (at least after the Civil War of 1861-65), in the EU the inter-state treaties' basis of the polity could not frame the normative discourse on its nature. Moreover, while the constitutional text of the US has allowed for the use of super-majority's criteria for emending it, on the contrary the inter-state treaties of the EU have imposed the unanimity's criteria for changing them, thus making the dispute on the future of EU constitutional order highly uncertain. Because the US provides

the first historical experience with compound democracy, it is necessary to start the comparison there in order to better identify the problems besetting the constitutionalisation of a compound democracy.

3 Compound democracy and constitutionalisation in the US

3.1 The American experience with compoundness

Whereas the EU is a compound democracy by necessity, the US is a compound democracy by design. Indeed Ostrom (1987), following James Madison, called it a compound republic. Although it is legitimately assumed that the American constitution celebrates a covenant among citizens ("in America…it is the People who are the source of rights", Ackerman 1991: 15), however it is important to recognize that it was a covenant among citizens *organized into distinct states* (Elazar 1988). As Forsyth (1981: 65) has explained, "neither the preamble, nor Madison's successful endeavour to provide the constitution with a deeper foundation than that of a normal treaty between governments, prevented it from being considered from the start as a species of contract or compact. Ratification was unequivocally a matter for each state individually; none could be bound without their assent". The US constitution is the first *peace pact* among republican (or democratic, we would say today) states of different demographic size, material capabilities and cultural values (e.g. slavery). As Hendrickson (2003: 7) has written, "it seems fair to denominate the federal Constitution as a peace pact, the most unusual specimen of this kind yet known to history". It is a pact designed to anticipate possible conflicts among independent states located on the same territory. In fact, had a conflict broken out, the independence of all states would have been jeopardized, because of the interests of the great European powers to play off one state or group of states against the other (Deudney 2007: Chapter 6). Thus, the US represents the first attempt to avoid a repetition of the experience already familiar from Europe at the end of 18th century, namely the inability of balance of powers systems to prevent war (Onuf and Onuf 1993).

In Philadelphia, constitution makers decided to neutralize such a threat by constructing a polity that combines inter-states and supra-states features. This polity necessarily had to be open to different and changing policy outcomes. A union of asymmetric states can prosper only by hampering the formation of political and constitutional majorities (Kernell 2003). Such majorities should be able to emerge only when there is an overwhelming consensus in the country, something that historically has occurred only in the wake of major domestic or international crises or traumas. Finally, the Philadelphia constitution was approved by a large majority of the states, but not by all, through legislative decisions or ad hoc constitutional conventions. Indeed, the US constitution cannot be subjected to the exam of states' popular referendum.

Because the US aggregates previously independent states, it is not surprising that the constitution only defines the few competences of the federal centre, leaving all the rest to the federated states (Ostrom 1991). In order to assure all the would-be members of such a union, the delegates at Philadelphia devised an institutional system of vertical and horizontal separation of powers able to prevent the formation of factional majorities, with the Supreme Court as the guardian of that structure. All of the separated institutions, both at the centre (President, House of Representatives and Senate) and in the states (governors and bicameral legislatures[5]), were endowed with independent legitimacy: direct legitimacy in the case of the House of Representatives, indirect in the case of the President and the Senate until 1913. In addition, each institution has its distinct operational time-span. Accordingly, no institution depends on the others in order to function and none of them requires the confidence of the others in order to perform its tasks. As Neustadt (1990: 27) has written, in Philadelphia "a government of separated institutions sharing powers" was created. Moreover, the power of *judicial review* implies that every decision taken by the legislature and countersigned by the President can be annulled by any court that considers

[5] With the sole exception of Nebraska which adopted a unicameral system in 1934.

it to be unconstitutional (Shapiro 2002: 136-148). This has never been the case in the European nation states[6].

Hence, the American constitution introduced a hierarchy of norms without, however, introducing a corresponding hierarchy of institutions or organized powers. In particular, it did not solve the question of the relation between the federal state and the federated states, as became evident with the outbreak of the Civil War in 1861. To be sure, for the first century of the new republic, Congress played a much more relevant role than the President and the federated states were much more influential than the federal state (*congressional government)*. However, since the 1930s and especially since the end of the Second World War, the President has become pre-eminent vis-à-vis the legislature as has the federal centre *vis-à-vis* the states (*presidential government*) (Lowi 1985). However, the increasing role of the President has not diminished the power of Congress (Polsby 2004). Indeed, with the full institutionalisation of the presidency, the US has become a fully separated governmental system (Jones 1999), and the increasing role of Washington D.C. has not prevented the states from playing a more influential role in policy-making since the 1970s (Conlan 1998). The power pendulum has continued to swing back and forth (Beer 1993).

Defining a hierarchy of norms in Philadelphia was not a simple undertaking because of diverging state interests. The absence of a clear correspondence between norms and institutions does much to explain the failure of the first US constitution of 1781 (known as the Articles of Confederation), and the dramatic crisis of the second one (with the Civil War of 1861-65). However broad the consensus on a supreme legal text may have been at Philadelphia in 1787, it was much more limited with respect to fundamental issues

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[6] Of course, in these political regimes the governors are obliged to respect constitutional principles and procedures, but once they have done so they are constitutionally empowered to legislate. Such legislation may be subject to *constitutional review* exercised by a specific constitutional court and initiated by another public institution, but it is certainly not subject to a judicial review initiated by an individual citizen and exercised by ordinary courts (on the crucial difference between constitutional review and judicial review see Stone Sweet 2000: Chapters 2 and 5).

relating to the relations between the 'new' centre and the 'old' states and the separated institutions within them. Contrary to the interpretation that the US was a 'naturally' homogeneous country (as John Jay ideologically argued in the *Federalist no. 2,* when he stated "that 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…", now in Beard 1948: 39), the US was and has continued to be a highly divided country for all of its history. Periodic waves of immigrants, with their distinct 'manners and customs', have regularly fed the divided nature of the country.

Since the Philadelphia Convention, therefore, the US has gone through cyclical crises of constitutionalisation that generally pitted groups of states against each other on specific issues. This was so in the 1830s with regard to the role and independence of the federal bank; in the 1860s regarding the sovereignty of the states in imposing slavery; in the 1930s regarding the role of the federal Congress and the President in regulating the economy; in the 1960s regarding the recognition of civil rights in the southern states; and finally this was the case in the 2000s regarding the powers of the President and Congress to restrict the rights of citizens for reasons of national security. In all these conflicts have emerged cleavages between small-medium and larger size states; between states with solid democratic cultures and states with racial preferences; between states promoting a continental market and states with protectionist outlooks; between states favouring a stronger federal role and states defending their own prerogatives.

Constitutional cleavages between states not only triggered a dramatic Civil War, but have continued to structure the main political divisions of the country (Bensel 1987). More frequently the contrasts were between sections or regional groups of states, rather than between single states. In the US, these sections or group of states are distinguishable for their specific economic-productive basis (Sbragia 1996) or peculiar cultural identities. Indeed, utilizing the criteria of political culture, Elazar (1994: 284) has arrived to identify at least eight sections of the country: New England, Middle Atlantic, Near West, Northwest, Far West, Southwest, Upper South and Lower South. The political parties have

contributed to taming these territorially based constitutional divisions because they have been inclusive confederations of different state and local interests rather than tools for the exclusive ideological mobilization of the electorate as in Europe (Epstein 1986; Chambers and Burnham 1975).

Moreover, territorial conflicts have frequently overlapped with cleavages concerning the democratic nature of the political system. For a large part of the 19th century some defenders of the states' powers as well as critics of the federal centre's power had argued that, for obvious geographical reasons, only the states could ensure citizen participation in decisions. At the end of the 19th and the beginning of the 20th century, criticism of the federal centre's democratic deficit assumed very different features. Having been forced to acknowledge the process of nationalisation that had traversed American politics (e.g., decisions increasingly came to be taken in Washington DC, Lunch 1987), the critics of the democratic deficit set out to democratize the federal institutions. The Progressives and the Populists thus advocated reform of both national and local systems (Kazin 1995).

3.2 The American experience with constitutionalisation

Although different views and interests of the states have characterized the political development of the US, nevertheless the constitution has furnished a procedure for solving them, albeit temporarily, without jeopardizing the compound nature of the polity. Certainly, the translation of a political majority into a constitutional one has been effectively constrained by the principle of the *double super majority* required for passing amendments. Article V stipulates that "whenever two thirds of both Houses shall […] propose amendments to this Constitution (the proposal) will be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of the three-fourth of the several States, or by conventions in three-fourth thereof, as one or the other mode of ratification may be proposed by the Congress". However, the principle of a double

majority does not equate with unanimity. In fact, it has not proven insurmountable, as shown by the twenty-six amendments approved so far at the federal level.

Indeed, the ink on the constitution was not yet dry when the Americans began to discuss the need to amend it (Levinson 1995). The ten amendments known as the *Bill of Rights,* introduced as we know two years after the Philadelphia Convention, have ushered in a permanent discussion on the constitution. If twenty-six amendments have been approved so far, however thousands were proposed. However, no amendment has called into question the structure of multiple separation of powers characteristic of the US compound polity, nor has any political leader ever called into question the legitimacy of the principle of a double super-majority for changing the constitution. In fact, some of the amendments have changed specific properties of single institutions (like Amendment XVII of 1913 on the direct election of federal senators, or Amendment XXII of 1951 which states that "No person shall be elected to the office of President more than twice"); others have introduced a new interpretation of the fundamental rights (implicit or explicit) to be protected (like Amendment XIII of 1865 which abolished slavery, Amendment XIV which imposed the respect of basic rights to the states, or Amendment XV which recognizes that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, colour, or previous condition of servitude").

When reforms did aim to alter the compound nature of the republic, such as the proposal to substitute the Electoral College (an institution which over-represent the small states because of the un-representativeness of the Senate, Dahl 2001)[7] with the direct election of the President, the stringent amendment rules have enabled the opposing coalition (of small states' representatives and electors) to thwart those proposals. Notwithstanding events in Florida during the presidential elections of 2000, the abolition

[7] The American President is elected indirectly by ad-hoc presidential electors organized in the Electoral College of each state. Each state is entitled to a number of presidential electors equal to the number of representatives plus senators that state has in Congress (thus there is no a national college of presidential electors). This method of apportionment of the presidential electors obviously favours the small states over the big ones. In fact, whereas the number of representatives is proportional to the size of the population, the number of senators is not. Indeed, every state is entitled to two senators irrespective of its demographic size. Thus, through the states' Electoral College, the smaller states carry a political weight disproportionate to their population in the election of the President (Fabbrini 2008: 28).

of the Electoral College is still considered impracticable today. Moreover, when the process for amending the constitution became politically rigid, owing to either the formation of conservative majorities able to control both chambers of Congress, or to the formation of veto minorities in one of the two federal chambers, or in the state legislatures, major constitutional changes were introduced via other channels, such as rulings by the Supreme Court (Ackerman 1991: Chapter Five), the latter now being considered an integral part of the constitution.

Although constitutional disputes have been a constant feature of the US, these conflicts have been waged through a shared constitutional discourse. At least after the Civil War, and probably because of the trauma it generated (Greenstone 1993) those conflicts have been waged through a common constitutional language, or better, through the mobilization of some interpretations of the constitution in regard to issues of the day. The constitution's language has delimited and defined what should be considered the legitimate political discourse. However, although Americans have come to recognize the constitution as the basis of their staying together, this coming together has not been based on a common interpretation of the constitution but on the effort to justify the divergent interests with reference to the same constitutional text. Ackerman (1991: 36) has written that "because Americans differ so radically…our constitutional narrative constitutes us a people". The amendment procedure, although stringent, has furnished the 'safety valve' allowing the constitution to be adapted to a changing environment, if considered necessary by a large (super) majority of federal and states' representatives.

In concluding, one may thus answer the question raised by Bernstein (1995) in the sub-title of his book, 'if (the Americans) love the Constitution so much, why do (they) keep trying to change it?', by saying that it could not have been otherwise. The Americans could not, and cannot, achieve a definitive consensus on their constitutional identity. This is why the process of constitutionalisation continues to be highly contested in the US.

4 Compound democracy and constitutionalisation in the EU

4.1 The European experience with compoundness

The EU is a different species of compound democracy than the US in terms of its 'systemic foundations' (see Table 1). Nonetheless, the logic of functioning and the institutional structure of the EU and the US seem to be quite similar (Fabbrini 2007: Chapter 8).

Table 1 – *The US and the EU: systemic foundations*

	United States	**European Union**
Aim	to avoid possible wars	to close an era of wars
Perspective	through a political union	through an economic community
Logic	based on fragmented sovereignty	based on pooled sovereignty
Structure	organized around formal separation of powers	organized around multilevel separation of powers
Justification	to prevent the tyranny of majorities	to create a common market

Certainly, the EU started (with the Rome Treaty of 1957) as a project for building an integrated continental market. Indeed, after the 1954 rejection of the European Defence Community's project by the French Parliament, the main European political leaders of the time decided to promote the integration of the continent through economic means rather than political principles. However, it was clear to the founding fathers of the (then) European Economic Community established by the Rome Treaty that Europe had to find a way to permanently close a long era of intestine civil wars (Judt 2005). Thus, also the EU may be considered as the outcome of a *pact* for promoting peace among traditionally warring states. a pact based on an economic cooperation through a common market regulated by a complex institutional framework. Moreover, although the purpose of the treaties, especially of the 1957 Rome Treaty, was to create the conditions for a civil pact among traditional enemies, the latter had already established a military pact, tutored by the US, through the NATO (which was established in 1949 and thus strengthened in 1955 with the integration of West Germany) (Calleo 2001; Ikenberry 2000).

Indeed, the balance of power logic of the traditional Westphalian system of states had shown to be the source of permanent inter-states insecurity, thus triggering periodic attempts by individual states (the strongest ones at the moment) to impose an imperial order on the continent. Thus, the European nation states had to recognize that their best chance of avoiding war was to build a *novus ordo seclorum*, although they decided to start from an economic cooperation in order to mature the conditions for a more advanced integration. Thus, what we now call the EU is an attempt to steal out from the Westphalian solution to inter-states rivalry *without however giving a political justification* to that attempt. Whereas the founding of the US was based on the formidable justification furnished by the Madisonian theory of the need to protect the union from the formation of tyrannical majorities (of states and/or citizens) that might jeopardize its very existence (Kernell 2003; Dahl 2006), the EU lacked any political justification of its institutional compoundness since its inception. It was probably a necessary choice to do that. However, some of the problems the EU is facing today are the inheritance of that choice.

With the EU, for the first time in history, the European nation states have tried to build an institutional order which combines intergovernmental as well as supranational features through negotiation over economic issues of common concern. In fact, as historical experience had amply shown, the peace pact couldn't be guaranteed solely by an intergovernmental agreement, but it needed to be protected by supranational Community institutions. Without authorities institutionally separated from the states that had created them (such as the Commission, the Parliament and the ECJ), there could be no guarantee that the signatories to the intergovernmental agreement would abide by their own rules. In the EU, Community features are thus necessary in order to protect the union from inter-state rivalries and instability. In this sense, the EU has been an attempt to domesticate the external relations of the European nation states, creating an international regime with domestic features.

However, if the foundations of the peace pact resided in trans-national cooperation on a growing number of economic matters (Lindberg 1963), this cooperation has led nevertheless to the progressive institutionalisation of the close network of Community

institutions envisaged by the original treaties – the Council of Ministers, the Commission and the Parliament, the Court – but also institutions not originally envisaged, such as the European Council. The institutionalisation of the structure of multiple separations of powers between the Brussels' institutions and between them and the institutions of the member states has strengthened the compound nature of the EU. Since the 1986 Single European Act (SEA), the 1992 Maastricht Treaty (which introduced a three pillar structure) and the 1997 Amsterdam Treaty, the EU has progressively become a system in which several institutions separately but jointly contribute to numerous public policy decisions. This structure primarily concerns the first pillar, whereas the other two have tried to preserve the nature of an intergovernmental agreement, although the process of cross-pillarisation has also led these two pillars to be affected by the logic of the former (Stetter 2007; von Bogdandy 2000).

Thus, the originally pre-eminent institution in the system, i.e. the Council of Ministers has been forced to acknowledge the considerable influence acquired by the Commission. In addition, it has been obliged to recognize the co-determination and co-decisional power acquired by the Parliament since its direct election in 1979, and especially since the SEA and the two fundamental treaties of the 1990s. Whereas the formation of an hegemonic coalition was possible within an institutionally dominant Council of Ministers (as shown by the so-called Franco-German axis leading the Community decision-making process till the 1980s, Hendricks and Morgan 2001), this has become much more difficult after the treaties of the 1980s and 1990s (and thus the 2001 Nice Treaty). These treaties have, in fact, contributed to a deeper institutionalisation of the separated decision-making structure of the EU. To be predominant in the Council has become no longer a condition for being predominant in the other Community institutions (Fabbrini and Piattoni 2007). Moreover, the several waves of enlargement, which have brought the EU to be constituted by now 27 member states, have made the outcomes of the policy-making process highly uncertain. Thus, the institutionalisation of a structure of multiple separations of powers has gradually nested an anti-majoritarian logic within the

EU. In a multilateral system such as the EU, even the big states have to exercise their leadership within institutional and political constraints.

In sum, like the US, the EU has come to function *without a government acting as a single institution*. In Brussels decisions are taken and values are authoritatively allocated, but this is the outcome of a process of negotiation and deliberation involving a plurality of actors and taking place within the loose confines of a system of separated institutions. It is interesting to notice that the growing influence of the Community institutions representing supranational interests has not reduced the influence of the Council of Ministers and the European Council, that represent the member states and therefore the intergovernmental side of the EU (Dinan 2005). The EU institutionalisation has gradually strengthened the powers and competences of the various institutions in a positive sum game.

As a result of the progressive deepening of European integration, i.e. the proliferation of public policies decided in Brussels, the role of the EU has become increasingly more political and less economic. Indeed, with the end of the Cold War and the prospect of the political reunification of the continent, the dispute on the *finalité* of European integration has acquired a constitutional character. The necessity to give a constitutional identity to the EU emerged during (and after) the Intergovernmental Conference (IGC) held in Nice in December 2000 and whose treaty was signed in 2001 (European Council 2000). Recognition of a Charter of Rights (though not its inclusion) in the 2001 Treaty of Nice has further stoked the debate on the constitutional nature of the EU. Given the unsatisfactory outcome of that treaty, the European Council held in Laeken (Belgium) on 15 December 2001 adopted a Declaration on the Future of the Europe that committed the EU to defining its constitutional basis (European Council 2001). Indeed, the Laeken Council convened a Convention in Brussels bringing together the representatives of both the member states' governments and parliaments and Community institutions with the task of preparing a draft treaty establishing a constitution for Europe for the 2004 IGC. The Brussels Convention lasted from February 2002 to June 2003, concluding its activities with a unanimous agreement on the proposed Constitutional Treaty or CT (Norman 2003; De Witte 2003). On 18 June 2004 the heads of state and government of the member states

reached a compromise on a slightly revised form of this draft. Because that treaty is the closest approximation to a formal constitution ever agreed by member states' governments, it has been rightly said that the outcome of the Brussels Convention has transformed the EU from a *constitutional project* (Walker 2004) into a *constitutional process* (Shaw 2005), the so-called 'Laeken process'.

4.2 Constitutional divisions in Europe

This constitutional process has been characterized by deep divisions or *constitutional cleavages* concerning the organizational form the EU should assume, the strategies that should be pursued to organize the power of the Community actors participating in authoritative decisions, and the guarantees that should be introduced to promote and protect individual and social rights (Sbragia et al. 2006). The various cleavages that had remained submerged during the long period of material constitutionalisation of the EU have thus surfaced. Some of the conflicts that emerged during the Laeken process were of a temporary nature as the position of some member states on specific issues changed in relation to the government of the day. However, other divisions had a more permanent character, reflecting stable differences of views and interests among member states (and their citizens), due to their different size, history and political expectations.

The first of these structural cleavages concerns the division between large and medium-small member states. This conflict is an effect of asymmetries between EU member states. It has surfaced regularly during the history of the EU: as e.g. in the 2000 Nice Treaty's negotiations, when a medium member state such as Spain was able to obtain very favourable conditions for the weighting of its votes within the Council of Ministers, thus benefiting future candidate states of equivalent size, such as Poland. The same has happened during the debate on the CT where Spain and Poland tried to maintain their favourable condition (which over-represented them) in the newly designed Council of Ministers. The compromise found in the Rome European Council of October 2004

(European Union 2004), namely that a decision of the Council of Ministers will be effective if supported by a majority of 55 per cent of the member states representing at least 65 per cent of the population, was subsequently challenged by Poland at the Berlin European Council of June 2007. In the Lisbon Treaty the Polish government obtained a deferral of the introduction of this rule to November 2014 with an additional transition period until March 2017, during which a member state can ask for a qualified majority on a specific issue if considered of national importance (Council of the European Union 2007). The same cleavage also emerged on the issue of the Commission's composition during and after the Brussels Convention (Magnette and Nicolaïdis 2004). The small and medium member states obtained that each member state be allocated one commissioner whereas the large member states advocated setting the number of the commissioners to two thirds of the member states. The Lisbon Treaty (article 17) establishes that the number of Commissioners be reduced, in the sense that only two out of three member states would have the right to representation on a rotating basis, but the introduction of this rule has been postponed to 2014 (European Union 2008).

The second structural cleavage has been the traditional one between the countries of western continental Europe and the countries of northern insular Europe. For years this cleavage has accompanied the process of European integration, in particular since 1973 when the UK, Denmark and Ireland joined the EU (Gilbert 2003). This cleavage reflects the different historical experiences of the 'islands' and the 'continent' in the formation of the nation state and its international extensions. The former consider the deepening of the integration process a threat to their national sovereignty, which is to be countered by pressing for further enlargement (Geddes 2004). Although the process of Europeanisation has curtailed the sovereignty of the member states on many public policies, this has not impeded some of them from defending their founding myths. In these countries, the defence of sovereignty springs from the distinct historical phenomenon of democratic nationalism: it is nationalism which has enabled them, and especially the UK, to preserve democracy (MacCormick 1996). Indeed, the UK, Ireland, Denmark and Sweden have obtained several opt-outs from parts of the treaties in question. In exchange for signing the

Lisbon Treaty, the UK government has obtained the right to opt-out even from the Charter of Fundamental Rights and together with the Irish government it has also opted out from the change from unanimous decisions to qualified majority voting in the sector of Police and Judicial Co-operation in criminal matters. Yet, these and other opt-outs were not sufficient to assure the Irish voters on the occasion of the 2007 referendum on that treaty.

The historical experience of the continental countries of Europe has been very different. Here, nationalism had erased democracy, owing to a set of cultural and ecological factors. The development of the democratic state encountered much more unfavourable conditions in the 'land-bound' European countries than in the 'sea-bound' ones (Tilly 1975). In the former, nationalism was frequently anti-democratic (Smith 1991), bending to (or sustaining) the centralizing ambitions of dominant authoritarian groups. For the EU member states that inherited this historical experience and memory, integration represented the antidote to the virus of authoritarian nationalism, whereas those that have inherited the 'island' experience view political integration as a threat to their democratic identity. It must be added, however, that important sections of the French elites regard integration also as an opportunity to promote a larger role for France (Guyomarch, Machin and Richtie 1998). In this sense, the cleavage between these two Europe is also an effect of the competition between two traditional European powers, with the UK traditionally in favour of a Europe firmly allied with the US, and France favouring a Europe independent from, if not competing with, the US (Garton Ash 2004).

The third structural cleavage has opposed many citizens and significant sections of the political elites of the new member states of Eastern Europe to the old ones of Western Europe. In particular, the nationalistic governments of some new member states such as the Polish government of the period 2005-2007 and the Czech government after the elections of 2007 have been preoccupied with defending their regained national sovereignty after almost half a century of domination by the Soviet super-power. These governments seem to view the EU mainly as a customs union, i.e. an open market in which they can remedy their economic backwardness without constraints on their political sovereignty. However, their views did not necessarily coincide with those of the northern 'islands' who tend to

adopt a regulatory stance concerning the European market, whereas the former seem much more disinclined to do so (Zielonka 2006). The confederalism of the northern islands does recognize the importance of the Community institutions and rules in the first pillar of the common market. The customs union view of some of the eastern member states, instead, has a purely commercial outlook. Certainly, these territorial cleavages are only indicative of the constitutional divisions existing within the EU. In fact, in the northern islands as well in the eastern member states there are those in favour of greater political or federal integration, just as there are influential groups pushing for economic or confederal integration in western continental Europe. Yet, these cleavages express relatively stable divisions concerning the constitutional future of the EU.

These geographical divisions, in turn, have been overlapped by a territorial cleavage of a political kind. As shown by the French referendum of 2005 in particular, popular criticism has emerged that views the EU as taking too many decisions while being insufficiently democratic (Taggart 2006). For a long time some observers have argued that the EU suffers from a *democratic deficit* (Marquand 1979). Unlike the cabinet in parliamentary systems, the EU indeed does not have a political decision-making body that voters can judge politically. Given the separation among the institutions that structures the decision-making process and the number of actors involved, it is highly implausible to establish 'who has to be considered responsible for what' in the EU. However, if one takes into consideration the systemic constraints of a union of asymmetrical states, then this criticism would seem misplaced. Even in its federal form, a union of asymmetrical states cannot be organized along the vertical lines of a parliamentary model. Parliamentary federalism is possible only where the territorial units are relatively alike in terms of demographic size and economic capability, as e.g. in post Second World War Germany whose *Länder* were designed by the Allied authorities (Jeffrey and Savigner 1991) in order to prevent the more populous ones from gaining control over the legislature on a permanent basis.

Finally, one should note that these various cleavages have not found (nor could they) party-based representation, coherent with the left/right division across the EU

governmental institutions. The left/right division has emerged in the Parliament when dealing with ordinary issues, but it has had a very limited political salience in the Council and the Commission. Moreover, when extraordinary issues such as constitutional questions were at stake, the left/right division did not hold even in the Parliament, where pro- and anti-integration positions are represented within the same political groupings, such as the Party of European Socialist (PES) and the European People's Party-European Democrats (EPP-ED).

In conclusion, the constitutional conflicts reflected in the French and Dutch referenda on the CT and in the Irish referendum on the Lisbon Treaty have produced a constitutional stalemate in the EU because they were not framed by a constitutional discourse shared by the majority of Europeans and because they were not ordered by a procedure (although stringent) for solving them. In fact, the unanimity procedure required for adopting new treaties or amending existing ones (European Union 2008: article 48) has precluded the formation of even a super-majority coalition supporting change. Although the EU is not an international organization (as it is shown by its constitutionalisation), it has kept an 'amendment procedure' which is proper of that organization. Probably, this unanimity procedure, which was acceptable when the Community was established in 1957 by six nation states, is an example of institutional path-dependency. Once introduced, a rule (or an institution) tends to remain in place because of a political 'increasing return' (Pierson 2000), although it no longer serves the reason which brought to its original introduction. Moreover, the constitutional requirement of some EU member states to hold a popular referendum before ratifying any new treaty has introduced a further hurdle to this procedural context. It is not surprising that stalemate has become a regular outcome of the EU constitutional debate. Thus, although the EU and the US have been both characterized by a contested process of constitutionalisation, they have however registered different constitutional outcomes due to their different 'constitutional foundations' (see Table 2).

Table 2 – *The US and the EU: constitutional foundations*

	United States	European Union
Constitutional basis	constitutional text (founding document with amendments)	inter-states treaties
Constitutional change	double super-majority no states' popular referendum	unanimity states' popular referendum (some)
Constitutional language	shared, integrative, inclusive	unshared, differentiated, idiosyncratic
Constitutional divisions	sectional and political	national and political
Constitutional outcomes	centripetal (after the Civil war)	stalemate

5 Conclusion

Looking at the EU with the US experience in mind, one might argue that compound democracies consolidate themselves *only* when they are able to keep the disputes on the nature of the polity within a shared constitutional language and when they dispose of a procedure for solving such disputes unconstrained by the unanimity's criteria. A common constitutional language and super-majoritarian amendment procedures are the necessary conditions for neutralizing the centrifugal impetus of the divisions between states and between citizens. The US experience also shows that a centripetal outcome cannot be taken for granted if the contenders speak a different constitutional language as happened before the Civil War, and if some of them do not accept some viable criteria (in that case, the double super majority) for solving the disputes. In light of the US experience after 1865, one might thus argue that the opposition to an EU constitution or constitutional treaty should not be in itself a cause for concern. Rather a cause for concern should be the difficulty of the contenders to develop a constitutional discourse inclusive of their different visions of the appropriate organization of the EU's compound democracy and to rely on an amendment procedure which guarantees minorities without giving them an absolute veto

power. For this reason, in order to develop, the EU would need to be based on a basic document which celebrates both the political reasons of the compound polity and the necessary institutional conditions for preserving it. It is not necessary to call it a 'constitution' (as a similar document is not called in some democratic countries) if this term should provoke resistance in some member states. What matters is the recognition that the EU, like the US, needs both an accepted normative frame and a viable procedural mechanism for dealing with its internal divisions. Indeed, the EU and the US are op-ed polities that should be held together more by a *method* to handle disagreement than by a *model* for its resolution (Fabbrini 2008b).

In conclusion, the debate that has finally begun at the European level thanks to the 'Laeken process' has provided an opportunity to discuss the reasons for, and the nature of, integration with the only inclusive language available – constitutional language (Walker 2007; Eriksen, Fossum and Menéndez 2004; De Witte 2002). The outcome of the debate is as important as the debate itself. Here, however, resides the paradox. That debate should be conducted with a shared constitutional language able to frame the differences among Europeans and should be regulated by an agreed constitutional procedure that would allow super-majority' solutions of the constitutional divisions. Yet, all this appears implausible if Europeans can only refer to generic European constitutional traditions instead of a basic and common founding document. At the same time, the inevitable divisions among Europeans are precluding the approval of such a document. How to solve this paradox remains an open question.

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