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

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1 FROM CONFEDERATION TO FEDERATION: THE PROCESS

Having analyzed the substantive position of the EU between our confederal and federate waypoints this chapter looks at *process*. What factors drove the constitutional change in the US, who were involved, and how was such a dramatic shift realized?

A better grasp of this process not only sheds light on the nature of (con) federal systems and the European modifications. It also provides some concrete foundation for debates over whether Europe could or should 'federate', and if so how. No claim whatsoever is made, however, to completeness when it comes to explaining the origins of the American constitution.¹ Equally, considering the high context-dependence of political processes, all earlier caveats on the risks and limits of comparative research must again be stressed.² Fundamental shifts of this magnitude, however, are very rare. Carefully designed and well documented shifts are rarer still.³ Consequently we cannot be too picky in our choice of comparators.

Acknowledging these limitations, our focus is intentionally restricted to several elements that, even considered in relative isolation, provide relevant comparative insights for the EU. In addition it must be emphasized that on some points the reality in the US was not that far removed from the one in the EU. Most importantly the move to a federate system in the US was far from automatic. There was very strong opposition to such centralization, and this opposition was led by many prominent figures. Moreover, the major consequences of federation were known. The new constitution was openly described as nationalist, and there could be no doubt that the states and the peoples would be giving up their independent sovereign status. In other words, the stakes were clear and both sides were well represented. Any claim that the move to a more centralized system in the US was not contentious, and thus not comparable to the EU, is therefore simply incorrect.

1 Beard (1986), Beeman, Botein and Carter (1987), McDonald (1985), Rakove (1996) or Wood (2003).

2 See especially Introduction, section 4.2. and chapter 1, section 3.

3 Elazar (2006), 33.

Four process elements that are of particular relevance for the EU be discussed here. First, and most centrally, the *elite structure* in the US which, unlike in the EU, was geared towards federation. (section 2). Second, the anti-democratic nature of the US transition (section 3). Regarding the more practical aspects of constitutional change the confidentiality of the US drafting process and the use of attached amendments (sections 4 and 5) and the importance of *aemulatio* rather than *innovatio* will be discussed (section 6), before we end with a sub-conclusion on process in section 7 and continue to the overall conclusion of part I.

2 ELITES AND ELITE STRUCTURE: IF YOU CANT BEAT THEM MAKE THEM JOIN YOU

One of the most interesting comparative process points concerns the make-up and incentive structure of the relevant political elites. The relevance of this structure can be summarized by one question: who will lead further European integration? The term 'elite' is intended here as a descriptive and value neutral term, to the extent possible, and only as a shorthand to indicate those in relevant positions of (political) power.

2.1 *The federate path to power in the US*

The US experience is of great interest on this point. The new constitution was conceived, formulated, and intensely promoted by powerful elites. These groups, as usual, were motivated by a variety of interests, ranging from the idealistic to the downright selfish.⁴ One especially relevant incentive, however, united them: many of these elites had lost their hold on the state legislatures.⁵ They were threatened by the radical democratization of politics in their states.⁶

4 See for an account that very much stresses the personal interests of the Founding Fathers (yet has now been largely discredited), for instance Beard (1986).

5 See for instance the resolution that Sam Adams, one of the radical leaders, offered to Congress on 10 May 1776: those colonies which had not yet adopted governments 'sufficient to the exigencies of their affairs' should be encouraged to adopt such governments 'as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in General'. *De facto* this amounted to a general coup against conservatives who controlled the 'old' governments. (Jensen (1970), 98).

6 Jensen, (1970) intro p. xxiii. En p. 9 *et seq.* Jensen even describes these elites as the 'ruling aristocracy' and the 'political oligarchy.' In fact, the revolution was: 'as much a war against the colonial aristocracy as a war for independence' (p. 11). In which the aristocracy was in a tight spot: Once (grudgingly) in rebellion, it needed the ore radical and democratic party to succeed, but thereby empowered their own natural opponent. Where these elites had retained control of the executive, they also strongly supported federation. Jensen (1965), 336.

The issue of paper money provides an illustrative example. Most of the elites, including the founding fathers, were large creditors and traders. In those capacities they were alarmed by the introduction of paper money. Paper currency was printed in large quantities, yet did not have sufficient backing. As a result it soon lost any value. At the same time, however, state legislatures controlled by more radical factions decreed that paper money should continue to be accepted as valid payment of debts. Obviously these measures were highly popular with the increasing number of people in serious debt. For the creditors, however, paper money equalled writing off all outstanding loans. Multiple other comparable measures were taken, especially harming the interests of those with strong ties to the old tyrant.

Questions of social justice aside, these elites felt wronged and threatened. Yet they had lost their hold over the public bodies in the states, and hence were unable to protect their interests and their views on the proper social order of things at the statal level. These elites, therefore, repeatedly turned to Congress to protect their interests. As described above, they were consistently disappointed. Congress lacked the energy and authority to assist, and often also the will.

With no more hold over their states, and no help coming from the weak centre, further centralization, and ensuring control of the new central government to be created, was seen by a cross-state elite as the only way to regain political power.⁷ Centralization thus received the strong support of different elites, who jointly still controlled important political, economic and intellectual resources. A group, furthermore, that included individuals with enormous personal authority such as George Washington and Benjamin Franklin. It is safe to say that without these elites – who played a vital part in the entire process from getting Congress to appoint a Committee charged with amending the Articles, convincing this Committee to violate its orders and to draft a new federate constitution instead, ensuring the adoption of this Constitution by popular conventions and delivering the first presidents – federation would likely not have occurred.⁸

7 Although compared to current standards the respect and acceptance of 'ones betters' was still quite high. The story of one anti-federalist is almost endearing, 'he did not seek reelection because he had been too keenly made aware of 'the want of a proper Education I feel my Self So Small on many occasions that I all most Scrink into Nothing Besides I am often obliged to Borrow from Gentlemen had advantages which I have not.' Wood (1969), 487.

8 McDonald (1968), 11 et seq., Wood (1969), 485. Because, as Lee pointed out, 'we must recollect how disproportionately the democratic and aristocratic parts of the community were represented' not only in the Philadelphia Convention but also in the ratifying conventions, many of the real anti-federalists, those intimately involved in the democratic politics of the 1780's and consequently with an emotional as well as an intellectual commitment to Anti federalism, were never clearly heard in the formal debates of 1787-88.'

This important pro-federation role of ousted elites in the US points to an important difference with the EU. One that certainly applies to the Netherlands, but also seems to hold true for other Member States: there is no strong elite, and certainly no pan-European one, that requires federation to secure or increase its influence. Nor is there a central EU-elite with sufficient political power in the Member States to lead a federate charge. There is, in short, no critical mass of unified elites that stand to benefit from federation.

Obviously there are political parties that support further integration, even if they generally do so with an impressive lack of energy, and only as long as they are in government. Strongly championing Europe, or at least placing Europe centre stage, however, is not even an option. Hamilton captured this logical tendency in a confederation, and the converse importance of channelling ambitions via the central government:

‘He did not mean corruption, but a dispensation of those regular honors & emoluments which produce an attachment the Government. Almost all the weight of these is on the side of the States; and must continue so as long as the States continue to exist. All the passions then we see, of avarice, ambition, interest, which govern most individuals, and all public bodies, fall into the current of the States, and do not flow in the stream of the General Government. The former therefore will generally be an overmatch for the General Government and render any confederacy, in its very nature precarious.’⁹

Going through the Dutch election manifesto’s and party programs on the EU, for instance, this is immediately obvious: these are usually short, generally opportunistic and mostly lack vision and real European ambition. The ‘new elite’ furthermore, if we could label the new populist leaders as such for now, is strongly opposed to further integration: their power lies nationally. Equally there are of course many other elites, such as business leaders, that do support European integration. Yet these lack the political power that the US elites could mobilize, and may also not desire to surrender the influence they have established at the national levels. Equally the different circles of elites that might have a pro-European interest are not as aligned and unified by a common enemy as they were in the US.

Based on the parallel with the US it is suggested this relative lack of a strong pro-integration elite, let alone a pro-federation elite, is partially due to the fact that *there is no critical mass of (political) elites that derive their power from Europe, or ultimately aim to derive such power from Europe within the time span of their (political) future.*¹⁰ What is more, this elite structure is consolidated

9 The only option Hamilton saw was to put ‘complete sovereignty’ in the centre, so that all these powers start to work for the central government. Gouverneur Morris supports this sentiment: ‘loaves & fishes must bribe the demagogues. They must be made to expect higher offices under the general than the State governments.’ (July 2nd 1787, McDonald (1968), 140, 158).

10 Cf Wood (1969), 361 and F. McDonald, *E Pluribus Unum* (Houghton Mifflin 1965), 30 and 56.

rather than challenged by the confederal organization of political power in the EU.¹¹ Two conclusions that need some unpacking.

2.2 *The national path to (EU) power*

Even though Europe clearly enhances the power of some elites, especially those in government, the road to European political power runs through national political power. Nor can Europe assist much in getting to power in a Member State.¹² Consequently the EU is predominantly controlled by individuals whose primary authority, and therefore political interest, lies at the national level.

One consequence of this national basis of political power is that the current confederal structure of the EU *maintains* an elite structure that actually opposes more far-reaching political integration, at least along federate lines.¹³ One can simply not hold it against politicians that they listen to, and prioritise, the demands of their national power base. Nor can they be expected to dismantle that power base in favour of a stronger centre where they will not hold equal power or status. At the same time, the EU itself does not have sufficient venues, means or legitimacy to bypass these statal or infra-statal elites and influence the people directly.

As long as principal political power lies nationally, therefore, it is contended that politicians will use Europe to get national power, and not the other way around.¹⁴ Although anecdotal the many examples of politicians preferring (a shot at) national power over high EU office are significant in this

11 In the terms of neo-functionalism one might say that the predicted 'political spill over', has not occurred, or at least not to the critical level required to actually create spill over effects. See for instance S. George, *Politics and Policy in the European Union* (3rd edition, OUP 1996) p. 38-43.

12 Even though limited to its circumstances, the 2012 loss of former French President Sarkozy, despite open support from German Chancellor Merkel and a leading role in the EU, provides one illustration, as do the repeated electoral bills footed by German Chancellor Merkel herself.

13 This not to deny that other elites, especially business and financial elites, have (at times) strongly promoted European integration, for instance being directly involved in the Single Market Program though organs such as the European Round Table. See N. Fligstein and P. Brantley, 'The Single Market Program and the Interests of Business' in: B. Eichen-green and J. Frieden (eds), *Politics and Institutions in an Integrated Europe* (Springer 1995) or Sandholz and Zysman (1989), 95.

14 Compare in this regard the interesting parallel with the US confederation where it was also complained, including by George Washington, that 'the strong men preferred to serve in state governments rather than to serve in Congress.' And Hamilton stated: 'Each State in order to promote its own internal government and prosperity, has selected its best members to fill the offices within itself, and conduct its own affairs.' Van Tyne (1907), 543.

regard.¹⁵ As they are the professionals in the arena of political power, we would be wise to follow their instinct as to where ultimate power still lies: in the Member States. Almost none of them think they are capable of achieving more political power by leading the charge for European federation, be it by merely proclaiming that cause nationally or actually achieving it.¹⁶

The resilience and self-maintaining effect of this elite structure also helps to explain the mistake in one of the assumptions of Neo-functionalism: the expectation that elites, including national political elites, would shift their loyalties to the European centre, and would from there promote further integration.¹⁷ Although repeated contact and prolonged activity on the European level does have an effect, this effect is not as significant or fundamental as seems to have been expected. Considering the implicit anti-democratic streak in such functional transfers of authority and loyalty this might also not be a bad thing.¹⁸ In any event such functional accounts did not take into account, or at least underestimated, the pull of democratic and party systems in the Member States through which national elites gain power. A reality which forces them to cater primarily to their national audience,¹⁹ including to their sentiments of nationalism and identity that only seem to increase where integration deepens.²⁰ A mechanism, however, that does not deny the real authority and influence wielded in Brussels, or the many actors that compete for this authority and influence, but only emphasizes the relative primacy of the national process.

Federate ideals for the EU, therefore, have to deal with two related challenges. Firstly the lack of *national elite push factors*; there are no national elites that are either threatened or systematically out of power and that seek their

15 See for example David Milliband preferring a shot at UK political power over becoming the first High Representative or Franco Frattini who had little doubt in giving up his seat in the Commission to join the Government of Berlusconi as foreign minister.

16 For a further discussion on the related question how to better integrate and relate the national democratic legitimacy and power base with the EU obligations that come with it see chapter 10 section 6 and chapter 12.

17 Cf Haas (1958), 312-13 or Wiener and Diez (2009), 49. Cf also the notion of political spill over which suffers from the same problem: J. Transholm-Mikkelsen, 'Neofunctionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the European Community', 20(1) *Millennium: Journal of International Studies* (1991), 5.

18 Craig (1999), 7: 'Democracy was, by way of contrast, a secondary consideration in a double sense. This was in part because it was felt that the best, or perhaps only, way of securing the desired peace and prosperity was by technocratic, elite-led guidance.'

19 Moravcsik (1993), 473.

20 A. Niemann and P.C. Schmitter 'Neofunctionalism', in: A. Wiener and T. Diez (eds), *European Integration Theory* (2nd edition, OUP 2009), 52 'More orthodox theorists of international relations have long protested that neo-functionalist systematically (and naively) underestimated the continued impact of sovereignty consciousness and nationalism as barriers to the integration process.'

salvation in empowering the Union.²¹ Why, after all, create a political rival, where now one can have the best of both worlds: representing the ultimate national legitimacy at the EU level, and representing or blaming the EU where it helps to increase power nationally.²² The US situation was also rather unique in this regard, linked as it was to its colonial past and recent independence from Great Britain.

Second, the EU not only lacks this specific push factor, but would even need to *overcome* the existing confederal elite structure, and the elites that depend on it, in order to achieve a federate level of integration. Where elites were a push factor for federation in the US they form a hurdle to federation in the EU.

National democratic mechanisms themselves, therefore, seem to restrict federate integration, which creates an interesting tension between further integration and democracy. A tension that can also be seen at work in our second process element. One that is not often emphasized in American discussions of the Constitution, as it does not fully fit with the mythical image of the founding fathers as the white knights of pure democracy.

3 THE ANTI-DEMOCRATIC REVOLUTION²³

Many proposals for a federate Europe rely on the necessity of federating to 'increase democracy'.²⁴ Often the US Constitution thereby acts as a shining example: was Philadelphia not one of the birthplaces of modern democracy, of a government by the People and for the People? Yet here actual history and mythology must be separated, for the reality behind the process of American federation was not as simple.

21 A situation that forms a problem for effectiveness and EU legitimacy more generally because such push factors are equally lacking to inspire national political elites to enhance, or even defend, the authority and legitimacy of the confederal system already in place. See, reinforcing this tendency, also the comments above on the dependence of the rule by law, and the way this takes some of the responsibility of the shoulders of the political actors.

22 Moravcsik (1993), 514-17.

23 Wood (1969), 485 'Both the proponents and opponents of the Constitution focused throughout the debates on an essential point of political sociology that ultimately must be used to distinguish a Federalist from an Antifederalist. The quarrel was fundamentally one between aristocracy and democracy' and p. 493: 'those beliefs in elitism that lay at the heart of their conception of politics and of their constitutional program.', and p. 496 'That the people were represented better by one of the natural aristocracy (...) was the defining element of the Federalist philosophy.'

24 See especially the discussion of statism, including federate aspirations for the EU in chapter 8, section 4.

In fact one could describe American federation as an *anti-democratic revolution*.²⁵ Jensen even goes as far as to call it an 'anti-democratic crusade'.²⁶ The opponents of the federate constitution also attacked it as such. In the words of Richard Henry Lee, one of the anti-federalists' most impressive champions: 'every man of reflection must see that the change now proposed is a transfer of power from the many to the few.'²⁷

Many drafters and supporters of the new constitution were openly opposed to the 'radical' democracy of the revolution.²⁸ As discussed the shift towards direct democracy had cost most of them their political power. But it also conflicted with their deeper beliefs on social justice and the proper organisation of a polity. Finding ways to control the will of the people became crucially important, so as to ensure that this will could be rationalized and checked by 'the purest and noblest characters'²⁹ the nation could offer. As Edmund Randolph put it at the beginning of the Philadelphia convention,

'our chief dangers arise from the democratic parts of our constitutions. (...) None of the constitutions have provided sufficient checks against the democracy'.³⁰

25 Wood (1969), 562 even states that there is 'something disingenuous' about the emphasis on democracy in the federal defence of the constitution: 'They appropriated and exploited the language that more rightfully belonged to their opponents.' To illustrate, John Adams, for example, literally quoted Aristotle on aristocracy in defending the Constitution (John Adams, Notes for an Oration at Braintree, 1772, in: L.H. Butterfield, L.C. Faber and W. D. Garrett, *Diary and autobiography of John Adams vol. 2* (Belknap Press 1962), 57-60. Many federalist leaders saw aristocracy as a necessary element of government (Wood (1969), 200 et seq.): 'The Americans were thoroughly familiar with the theory [of mixed constitutions-AC] and this knowledge was even 'Axiomatic'. 'The republicanism of the Revolution was not for most Americans directed at aristocracy per se, but only at an artificial Crown-created aristocracy which owed its position not to merit but to connections and influence. That some sort of aristocracy 'consisting of a small number of the ablest men in the nation', was necessary for the stability of their mixed republics few Whigs denied.'

26 Jensen (1970), XV: 'therefore they are unwilling to accept the idea that the articles of Confederation were an expression of the democratic philosophy of the eighteenth century and that the Constitution of 1787 was the culmination of an anti-democratic crusade'

27 See 'Letters from the Federal Farmer', no. 4 of 12 October 1787, from either Richard Henry Lee or Melancton Smith. Available online via: <http://www.constitution.org/afp/fed-far00.htm>.

28 The failures and dangers of democracy were a commonplace in the Philadelphia convention. As Madison notes (July 2) 'Every man of observation had seen in the democratic branches of the State Legislatures, precipitation-in Congress changeableness, in every department excesses agst. personal liberty private property & personal safety. What qualities are necessary to constitute a check in this case? Abilities and virtue, are equally necessary in both branches. Something more then is now wanted.' This second branch (the Senate) must therefore have the 'aristocratic spirit'.

29 Federalist Paper no. 10.

30 Cf Jensen (1970), XX.

If possible Gouverneur Morris, another leading figure, was even more explicit:

'the mob begins to think and reason. Poor reptiles! It is with hem a vernal morning; they are struggling to cast of their winter's slough, they bask in the sunshine, and ere noon they will bite!'³¹

And that same Morris on if this would come to pass:

'farewell aristocracy. I see, and I see with fear and trembling that if the disputes with *Great Britain* continue, we shall be under the worst of all possible dominions; we shall be under the domination of a riotous mob. It is to the interest of all men, therefore, to seek for reunion with the parent state.'³²

It is true that, despite this sentiment, the Constitution eventually adopted still left the US as one of the most democratic nations of the time. So much so that ironically the mixed system created has almost come to define democracy. The shift to a federation was, however, emphatically not intended to increase democracy, but to decrease it.

The fundamental shift towards a single American people also dovetailed with this aristocratic goal of checking the democratic element: it pacified radical factions that might hold a majority in one state by merging them into a more amorphous whole.³³ Put more bluntly, besides an honest reliance on popular sovereignty the famous 'We the People' also had as its aim to pacify the actual citizens by locking them into a semi-abstract notion that empowered the central government yet was too vast for any faction to animate directly.³⁴ A move anti-federalists aptly perceived as one *radically reducing democracy*.³⁵

31 Gouverneur Morris to Mr. Penn, New York, May 30, 1774, in Force, American Archives, 4th series, 1: 342.

32 Idem, p. 342-343. For the aristocratic elements already present in radical republicanism itself via the notion of virtue, see Wood, (1969), 71 et seq. This existing thread of republicanism provided an important basis for the convention. Also see Madison declaring that government had fallen 'into the Hands of those whose ability or situation in Life does not entitle them to it', that is 'men without reading, experience or principle' (Federalist Paper no. 62, notably a public defence of the Constitution). Wood ((1969), 503) even states that 'by the 1780's the most common conception used to describe the society was the dichotomy between aristocracy and democracy, the few and the many.' On this dichotomy see further Cuyvers (2007).

33 Jensen (1970), 28, 91, 95, Wood (1969), 411.

34 Of course this was before the arrival of mass media. In any event the opponents of the constitution did heatedly point out its aristocratic nature as well: See for instance Lee: 'the government, in which the great body of the people, in the nature of things, will be only nominally represented.' (McDonald (1968), 201 et. seq.)

35 Jensen (1970), 117.

Now obviously these aristocratic objectives only form one of the many elements that were driving American federation. Equally the federate constitution that resulted can still be seen as democratic, depending on the yardstick used. Nevertheless the anti-democratic objectives behind the American process should be taken into account when contemplating a federate Europe, especially when the objective is to democratize the EU. For *federation is not the same as democratization*. Just as confederalism does not equate with inter-governmental or undemocratic, federation cannot be equated with democratic. Although the founding fathers have done a truly impressive PR-job in linking the federation and democracy, there simply is no necessary or automatic link. Federation can equally be used, as in the US, to reduce democracy, or at least to dampen the direct democratic influence of member peoples or factions.

The democratic level of any federate polity will, therefore, depend on *how* the federate system is developed, as well as on the prior issue of how one includes the scale, level and directness of representation in one's definition of democracy. In one imaginary configuration, for instance, it could be imagined that after an explosive rise of populist parties we would indeed have a similar situation of ousted former elites in the EU who would turn to the EU to regain control. Here suggestions of federation would again aim to restrain the more direct strands of democracy rather than trying to increase them. Even leaving fictitious scenarios aside, however, it in any event becomes harder to push federation as the solution for democracy where it has to be honestly acknowledged that such federation carries an inherent aristocratic tendency.

It should be stressed, therefore, that the federate move in the US was not intended to increase democracy but to check it. Nor should federation simplistically be equated with democratization. A point that will be further developed in part II of this thesis where, based on a confederal notion of sovereignty, it will be explored to what extent the confederal form, instead of the federate form, might hold part of the key to realign the democratic process with the reality of far-reaching integration and the multiple centres of public authority it creates. A confederal solution that, unlike federation, would not require disassembling the Member States, and with them the entire foundation for the current organization of public authority in Europe.

4 THE BENEFITS OF SECRECY: INVERTING THE CONVENTION SCHEME AND ATTACHED AMENDMENTS

A more limited, practical element of process concerns the complete secrecy during the drafting of the Constitution in Philadelphia. Obviously, there was no twitter to violate such secrecy, but it was still an achievement that all delegates respected the agreement not to divulge anything about their deliberations until work had been completed. This had one marvellous ben-

efit, as is evident from the notes published later: open debate and compromise seeking were possible, and no loss of face occurred when a point had to be 'surrendered'.³⁶ In fact, it is highly doubtful if agreement could have been reached otherwise. After an agreement had been reached during the Convention, however, a full public debate was initiated to discuss the resulting proposal. A debate that was not concerned with what should ideally be included in a draft constitution, but on whether the proposed system, inevitably a compromise but still defended as a consistent whole, was desirable.

The EU, and especially the new 'convention system' now enshrined in the Treaties despite the failure of the Constitutional treaty, follows a reversed procedure.³⁷ Transparency and open debate are primarily sought during the drafting, infusing any and all political rivalries directly into the debates. The subsequent ratification in the Member States, however, was less rigorous, although large differences exist in the rigour of the public debate in different Member States. Even more sadly, where direct public support was asked via a referendum it was far too often refused. Without implying that there were many realistic alternatives, it only needs to be remarked here that this reverse order of events, at least as compared to the US, has so far only seems to have increased distrust and resentment in many Member States.

It should be asked, therefore, if the reverse US order does not make better sense:³⁸ to first, in relative seclusion, draft a proposal, which after real debate can then receive a proper democratic seal of approval.³⁹ Such a process, which comes closer to the Treaty amendments of old, save the thorough and open debate afterwards, would seem superior in general, but is especially crucial if the step towards full federation is seriously contemplated. Such a fundamental shift, after all, requires higher political support than parliamentary ratification, and better drafting than public conventions seem capable of. Such a reverse process could perhaps also benefit from one other mechanism without which ratification of the US constitution would have failed: *attached amendments*.

36 Cf more generally on this point Tushnet (2006), 1236.

37 Art. 48 TFEU. This EU system in fact has very little to do with the reality of the US conventions after which it is named. As discussed above, furthermore, political leaders tried hard to avoid a convention in the amendment of art. 136 TFEU.

38 Somewhat cynically, when it was time to stop reflecting and adopt Lisbon, the very same Treaty that prescribes the conventions, a very closed approach was taken. First, political agreement was reached in closed discussions between ministries (Sherpa's). Only then was a point 'opened' for an IGC. See Chalmers, Davies and Monti (2010), 39.

39 Watts (1998), 128: 'an important aspect of the establishment of federal systems is the degree of elite accommodation and public involvement in the process. In the contemporary era, when the importance of democratic processes is increasingly emphasized, elite accommodation by itself may no longer be sufficient for legitimizing new political systems; this has complicated the patterns of negotiation for the establishment of federal systems, as the development of the European Union has demonstrated.'

5 ATTACHED AMENDMENTS

Many states were facing majority opposition to the Constitution. Several state conventions were even debating a second national Convention in which states could propose amendments. Something which, if allowed, would have enormously delayed, and probably sunk the entire Constitution. It would certainly have undermined its coherence. Starting on a proposal from Madison in New York, it was then suggested to allow ratification to be accompanied by a set of proposed amendments to the constitution. Instead of demanding amendments or attaching reservations up front, all of these proposed amendments would then be dealt with *under the mechanism of the new Constitution*. This method was adopted by most states, who did indeed add proposed amendments to their act of ratification. Without this outlet, if simply forced to say yes or no, the nine state majority required would not have been achieved. Also, most of the commonly proposed amendments were indeed adopted afterwards: the first ten amendments, including the bill of rights, closely follow the attached state amendments, especially the Pennsylvania one.⁴⁰

The flexibility that this mechanism allowed was vital, but even more important was what it indicated: the states accepted, and had faith in, the *political process* that was to develop under the new constitution. They did not need to legally determine everything up front, but trusted that their proposals would be properly dealt with under that new system.

A similar process could be envisioned for the EU, also at the level of secondary law: ratification could be accompanied by further amendments or proposed secondary legislation. Suggestions which should then receive careful attention at the EU level, and perhaps could even be the subject of a special amendment procedure.

6 AEMULATIO, NOT INNOVATIO

The popular myth has it that a group of demi-gods, in an historically unrivalled concentration of intellect and virtue, gathered at Philadelphia. Managing to capture truth and democracy itself on Parchment, they brought forth the completely unique federate constitution of the US. As a myth, this story has been quite helpful in generating support for the constitution, and building an American nation. It certainly has been more effective than the EU attempt at symbolism in the Constitutional Treaty, which backfired with impressive and almost comical force. It is also just that: a myth.⁴¹

40 Beeman (2010), 386 et seq.

41 'When a great question is first started, there are very few, even of the greatest minds, which suddenly and intuitively comprehend it, in all its consequences' (Wood (1969), 44.

To a very large extent, the new American constitution built on, and even copy pasted, existing materials.⁴² First, many of the innovations were direct responses to the failures of the Confederation.⁴³ Second, a wealth of recent constitutional experiments in the states was at hand: many of the delegates at Philadelphia had the benefit of first hand experience in drafting these state constitutions.⁴⁴ Of these recent examples especially the Virginia constitution served as an important model.⁴⁵ Third, many elements of the Constitution were based on traditional British constitutional theory, and on the colonial bond that the US had enjoyed with Great Britain.⁴⁶

Naturally, important innovations were made as well, for instance in the way that such existing elements were combined. In addition, some of the enlightenment political theory relied on was put into practice for the first time.⁴⁷ Yet understanding the US constitution as complete innovation, instead of impressive *aemulatio* may lead to the dangerous conclusion that new constitutions can be devised in abstraction and completely anew, if only one just has enough smart people.⁴⁸ What the US process learns, in fact, is that the best change lies in practical yet well thought through and informed, emulation.⁴⁹

7 PROCESS CONCLUSIONS

The process elements outlined above provide some specific insights for the future process of developing the EU constitutional order. Their overarching trend, though based on a selective sample, points to several key process elements underlying US federation that are lacking in the EU. Most importantly the national democratic and elite structure prevents rather than propels a

42 Cf. Wood (Creation), 564.

43 McLaughlin (1918), 239.

44 This experience had brought both practical constitutional ideas and a deeper change in the understanding of, and approach to, politics. Wood, (1969), xvii, 127.

45 In addition the New York constitution of 1777 and the Massachusetts one of 1780 also paved the way for some of the 'innovations'. New York, for instance, had a very strong senate and a more powerful executive in the governor. Massachusetts had the strongest governor of them all, whose authority included the power to veto all legislation, unless the house repassed it by a 2/3 majority.

46 See in this regard also the earlier plan by Benjamin Franklin that had proposed a further American Union but still under the aegis of the Empire.

47 For a similar argument about how most of the 'remarkable institutional features' of the EU 'came out of the existing toolbox of international law' but were combined in a 'unprecedented' manner see: De Witte (2012), 19 et seq.

48 For a thorough overview of the underlying experiences and theories see McDonald (1985) as well as Beeman (2006).

49 Jensen (1970), 162 notes on the location of sovereignty in the Articles: 'it was a matter of practical politics, arrived at by the political manoeuvring of two opposing parties having quite different political aims and ideals.'. On the EU also see Habermas (2001a), 4.

fundamental shift in political authority. In addition, one of the key normative argument that seems to support European federation – making the EU more democratic – is largely based on a confusion between having a central normative authority and how this authority is represented, or between federation and democracy. Even aside from any desire to federate, furthermore, the process via which the EU establishes its own basic rules might benefit from the US experience in the Philadelphia Convention.

Consequently these process elements only confirm the necessity of finding confederal solutions to the woes and weaknesses of the EU, at least for the foreseeable future. In addition, as will be developed further in the part II, they may point the way to some methods of actually strengthening the confederal basis of the EU, without having to fully federate.