

## CHAPTER 2

# CONCEPTUALIZING THE EUROPEAN UNION LEGISLATIVE PROCESS: SOME INSIGHT FROM THE *FEDERALIST PAPERS*\*

### 2.1 Introduction: European Integration's Past and Present

This chapter links the discussions which are currently centering around the future design of the European Union legislative process to modern constitutional political theory as exemplified in *The Federalist Papers*. We argue that, to better understand the European Union policymaking process, analysts are well advised to consult the Federalist's *objectives* as well as its *method of reasoning*. Considering institutional design in general and legislative decision-making in particular, we show that Jean Monnet, one of the principal architects of modern-day Europe, perceived the early developments which lead to the Treaty that established the European Coal and Steel Community of 1952 as an unprecedented process. However, although the European Union is novel indeed and not a state in the traditional sense, the dialogue in Europe would benefit from a more constitutionally oriented assessment of the potential effects of the Union's institutional arrangements on legislative outcomes. Modern constitutional theory can provide the basis for this assessment. Without assuming the Constitution of the United States for itself, the European debate on legislative design would be enriched by looking back at the Federalist's reasoning.

There is a common saying that goes somewhat like this: Nowadays, most things get usually invented in the United States, time passes, and later on one will find every conceivable item, from fashion trends to consumer products, also in Europe. For more than fifty years now, a debate is taking place which, at first sight, appears to be genuinely European and without historical precedent. It is the debate on whether or to what extent political power is to be shifted from the level of the European nation states towards the level of a common polity, the European Union (EU).<sup>37</sup> In the history of Europe, there is no comparable incident of a voluntary loss of sovereign state power.<sup>38</sup>

Although constantly being reshaped for more than half a century, the European project is still in the making. In December 2000, the European Heads of State and Government negotiated the Nice Treaty which is envisioned to prepare the Union for institutional reform and for territorial enlargement, a process which is technically referred to as deepening and widening of the Union. Ten states from Central and Eastern Europe have joined the club in May 2004, and the EU is busying itself with extending its decision-making powers towards policy sectors that are not yet under its auspices.

To guarantee both future legitimacy as well as decision-making efficiency, institutional reform is once again under consideration (European Commission, 2002a). A European Convention under the chairmanship of the former French President Valéry Giscard d'Estaing was being held with the specific aim of considering possible changes to the Union's treaties and the working methods after enlargement (Financial Times, 2002). The result of these negotiations is the recently signed *Treaty Establishing a Constitution for Europe* (2004).

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<sup>37</sup> Note that the term *European Union* did not legally exist before the entering into force of the Maastricht Treaty in November 1993. However, for the purposes of this paper, we will also use the term when referring to the early period of the integration process.

<sup>38</sup> However, it should be pointed out that there have been earlier periods of joint economic policymaking. See e.g. the Belgo-Luxembourg Economic Union of 1922.

The declared objectives of modern European integration are both political as well as economic. In the beginning, there was the need to pacify the continent and avoid further bloodshed by controlling German industrial production and to more effectively organize the market for the coal and steel sectors of the French Republic and of the Federal Republic of Germany. Half a century later, policymakers reach out to integrate monetary and fiscal matters, defense policies, and domestic security and asylum. They have also territorially enlarged the Union by integrating ten countries of Central and Eastern Europe in 2004.<sup>39</sup> The regulatory framework of the Union is based on a body of legislation that currently stands at more than 80,000 pages.

How can these developments be analyzed in both analytical as well as in normative terms? In which way can we explain what happened and give advice on how to shape the structure of the Union for times to come? In the course of this chapter, we will argue that the classics of modern political philosophy, and especially *The Federalist Papers*, provide a solid starting point for the analysis. Both classical theories highlighting the causal mechanisms of decision-making as well as their methods of reasoning allow us to compare different institutional arrangements and can thus form the basis for departure.

Throughout the course of this chapter, we will limit ourselves by focusing on classics of modern political philosophy and refrain from citing the works of political theorists from ancient Greece and Rome.<sup>40</sup> The primary reason for doing so—apart from the necessity to historically limit the analysis—is that the modern classics can be conceived to be more conducive for this particular type of analysis. Whereas the moderns, such as Macciavelli, Hobbes, Locke, and Montesquieu, appear to focus on the formulation and aggregation of conflicting interests, theorists in ancient Greece and Rome were more concerned with finding ways to enhance society's 'virtue' (Cartledge, 2000: 11-2; Tsebelis and Money, 1997: 17).

We particularly focus on Madison, Hamilton, and Jay's *Federalist Papers* (1987 [1788]) as 'the theory behind the American Constitution', since this work can be regarded as a landmark of modern constitutional theory. The question of how appropriate it is to link the American experience to the current European development has been debated before by, amongst others, Weiler (1999), Siedentop (2001), Habermas (2001), and Howse and Nicolaidis (2002). Much scholarly work has been devoted to comparing differences and similarities concerning the historical conditions and the political context, while a comparison of the legislative process in the light of constitutional theory has not yet received much attention. Moser (1999) and Tsebelis (2002) compare the effects of different institutional arrangements, such as the ones used in the EU and in the US, on policy outcomes. They use a certain class of game-theoretic models, so-called spatial models, to highlight differences in the effects of a range of legislative procedures. A comparison of the distinct legislative processes of the two systems in the light of classical political theory, however, is largely absent. It is precisely such a comparison which is important. Legislating is one of the most central domains of the European Union—as it is for any polity. An analysis of the legislative process with the help of constitutional theory will therefore further our understanding of what the European Union currently represents. This again will contribute to sharpening our understanding of how—if at all—it might be reformed.

We will proceed as follows. First, we will briefly recall the history of the Treaty establishing the European Coal and Steel Community, which represents the first one of a series of treaties and treaty amendments in the history of modern European integration. This will demonstrate why, at large, the EU legal process has shown some resistance to being analyzed with the help of theoretical notions and methodological tools which were invented to track down and to improve upon the workings of the constitutions of nation-

<sup>39</sup> These countries are Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, the Czech Republic, and Slovenia. Bulgaria and Romania, and possibly Turkey are supposed to join at a later stage. See *Financial Times* (2001, 2004).

<sup>40</sup> *Modern* indicates theorists who wrote after the beginning of the Italian Renaissance, i.e. about the early 1400s.

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states. Second, we will report on the Federalist Papers as the authoritative theory on the Constitution of the United States. We show that it is not so much the political context around the negotiation and the ratification of the American Constitution but rather the method of reasoning as conducted by the Federalist which can be applied to a better understanding of the European Union legislative process. We outline certain constitutional features and their hypothesized effects as elaborated by the Federalist and show how they apply both to the United States as well as to the European Union. We conclude that the design of a future European Union should not only be based on the ideas and knowledge gained from the organization's workings during the past fifty years, but that policymakers and policy analysts should reflect on the canon of ideas and experience accumulated by earlier political theorists to successfully shape the future of Europe.

## 2.2 Legislative Design in the European Union

There were attempts to politically integrate the European continent even before the end of World War Two. The English Quaker William Penn (1693) appears to have been one of the first to state the case for a European Parliament and for the end of the 'state mosaic' in Europe (Craig and De Búrca, 1998: 7). The modern process of European integration, however, only gained momentum in the early 1950s with a declaration that was issued by the French foreign secretary Robert Schuman which aimed at integrating the coal and steel production of France and Germany. The declaration, which was drafted by Jean Monnet, led to the negotiation of the Treaty establishing the European Coal and Steel Community (ECSC), which was signed in April 1951 in Paris. The participants—not only France and Germany but also Italy and the three Benelux countries—agreed to establish a common market in coal and steel and provided for institutions to administer production and distribution. At first, four institutions were set up. These were a High Authority, made up of nine independent appointees of the six Member State governments, to be the main executive institution with decision-making power and responsibility for implementing the objectives of the Treaty; an Assembly consisting of national Parliaments' delegates with predominantly supervisory powers; a Council made up of one representative of each of the national governments, with both a consultative role and a limited range of decision-making powers and the task of harmonizing the activities of the Member States and the High Authority; and finally a Court of Justice, to interpret and apply the different Treaty provisions. Since the High Authority could adopt binding decisions by a majority, it was effectively already a supranational authority. However, its influence was countered by the Council in some areas.

Monnet's original plan was for decision-making power to solely rest within the High Authority, which was the forerunner of the European Commission. In his plan, there was no room provided for other institutions which would contribute to shaping joint policies. The inclusion of other bodies to be added into the decision process was in essence a political compromise between the negotiating parties and not something desired by Monnet, the architect. Both the structure of the ECSC as well as the powers that were exercised by its institutions entail many compromises and ambiguities. Monnet's original plan was for a sovereign High Authority, but the Benelux countries, drawing on their experience with a customs union, insisted that this body should be overseen by the governments acting through a Council of Ministers. The Common Assembly's powers of monitoring and control were to be exercised over the High Authority, not over the Council. It was the French government that had made acceptance of a High Authority a condition of taking part in the discussions on the plan to set up the ECSC. In the Consultative Assembly in the Council of Europe, Conservatives had put forward an alternative proposal that would have brought the institutions of what became the ECSC under the auspices of the Council and to a large extent reduced their supranational character. This idea, however, attracted

little support, and the six founding Member States of the Treaty signed the Paris Treaty in April 1951.

The ECSC was the first of three European Communities that were to come. The Paris Treaty of 1951 was followed by the Treaties of 1958 which established the European Economic Community (EEC) (Treaty of Rome) and the European Atomic Energy Community (which was also signed in Rome): “The balance of power between the High Authority (later named the Commission after the 1965 Merger Treaty) and the Council was different under the ECSC Treaty from the later EEC Treaty, with a stronger supranational element, and a weaker intergovernmental element, given the dominant position of the High Authority. The greater level of detailed policy in the ECSC Treaty as compared with the EEC Treaty was another possible reason for the enhanced role of the executive High Authority. The self-financing capacity of the ECSC through levies on coal and steel production added to its independence and autonomy. The assembly had relatively few powers, being mainly advisory and supervisory, although it could in extreme circumstances require the resignation of the High Authority”... (Craig and De Búrca, 1998: 9).

The first European Community started off with an institutional setting that already included the legislative organs which also coexist within today’s Union. However, in 1952, the High Authority enjoyed considerably more power than the Commission does today—and Monnet himself did not even provide for other institutions. The reason why he disregarded the possibility for other political bodies to take part in the policy-process is that he did not perceive the development in the light of building a polity, but rather as a process of administration and a strive for efficiency, a development that is not so much political but more technical in nature.<sup>41</sup> Political representation was therefore not an issue for Monnet. Also, he regarded the development leading to the ECSC as an unprecedented process which could not be compared with earlier developments in Europe or in the United States.<sup>42</sup>

Throughout the second half of the last century, there have been a series of treaty revisions and amendments which were designed to alter and to improve on the original legal framework of the ECSC.<sup>43</sup> It was the Maastricht Treaty of 1992 which established the formal notion of European Union and by doing so departed from the notion of European Community. The new treaty with its call for “ever closer Union” almost institutionalized the idea of constantly integrating more political powers of the European states. Since the ratification of the Treaty establishing the ECSC in 1952, the organization has been in a continuous process of institutional reengineering.<sup>44</sup>

<sup>41</sup> “Monnet, who drew up the original plans on which the ECSC was based and who subsequently served as the first President of the ECSC High Authority, has been categorized as a functionalist, whose preferred approach to European integration was to proceed sector by sector, and who favored elite supranational institutions over more political bodies such as the Assembly or the Council” (Craig and De Búrca, 1998: 10).

<sup>42</sup> Monnet argued that in order to establish a “...new method of common action, we adopted to our situation the methods which have allowed individuals to live together in society: common rules which each member state is committed to respect, and common institutions to watch over the application of these rules. Nations have applied this method within their frontiers for centuries, but they have *never yet been applied between them*” (italics provided by this author). After a period of trial and error, this method has become a permanent dialogue between a single European body [the European Commission] responsible for expressing the view of the general interest of the Community and the national governments expressing the national view [in the Council of Ministers]. The resulting procedure for collective decisions is something quite new and, as far as we know, *has no analogy in any traditional system*. It is not federal because there is no central government; the nations take their decisions together in the Council of Ministers. On the other hand, the independent European body proposes policies, and the common element is further underlined by the European Parliament and the European Court of Justice” (Monnet, 1963). For a discussion of Monnet’s ideas in the light of democratic theory, see Featherstone (1994).

<sup>43</sup> Apart from the Treaty of Rome and the Treaty establishing the European Atomic Energy Community, these were the Merger Treaty of 1965, the Treaty of Luxembourg of 1970, the Treaty of 1975, the European Elections Act of 1976, the Single European Act of 1986, the Treaty on European Union of 1992 (Maastricht Treaty), the Treaty of Amsterdam of 1997, and the Treaty of Nice, which entered into force on 1 February 2003.

<sup>44</sup> One controversial idea, produced jointly by the German chancellor Gerhard Schröder and the French President Jacques Chirac, is to have an elected President of the Council for a time period of five years and thereby to depart from the mechanism of a Presidency which rotates every six months amongst the Member States (Financial Times, 2003).

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One of the latest of a series of Intergovernmental Conferences of European Heads of State and Government was concluded in December 2000 with the signing of the Treaty of Nice which is aimed at paving the way towards widening the EU to countries of Central and Eastern Europe (See European Commission, 2002b). In order to prepare the Union's institutional structure for enlargement, one of the Treaty's main objectives was to reweigh the Member States' votes in the Council of the European Union.<sup>45</sup> The Nice Treaty was barely two months old, and there were plans for another Intergovernmental Conference:

“[T]he White Paper on Governance which the Commission will present in 2001... will seek to bring together various proposals in a coherent manner with a view to ensuring that our institutions... function more clearly, more responsibly, and in a more decentralized way... Certain elements of the White Paper could help clarify the responsibilities and contribute to the wide debate launched by the Nice European Council prior to the next revision of the Treaties in 2004” (European Commission, 2002).

The debate on how to shape the Union's future design does not usually receive the level of attention which one could expect when analyzing the formal decision-making powers which the organization has at its disposal. One of the less frequent instances which created more than the usually rather limited amount of attention by both committed 'Europhiles' as well as declared opponents of further integration was a speech which was given by the German foreign secretary Joschka Fischer in May 2000. In his speech, Fischer laid down his vision of a future European Union. He advocated a more “federalist” structure than the currently existing one, possibly with a directly elected President of the European Commission.<sup>46</sup> He also proposed giving the European Parliament two chambers—one representing the European nation states, and one representing the Union's population as a whole:

“Question upon question, but there is a very simple answer: the transition from a union of states to full parliamentarization as a European Federation, something Robert Schuman demanded 50 years ago. And that means nothing less than a European Parliament and a European government which really do exercise legislative and executive power within the Federation. This federation will have to be based on a constituent treaty... I am fully aware of the procedural and substantive problems that will have to be resolved before this goal can be attained. For me, however, it is entirely clear that Europe will only be able to play its due role in global economic and political competition if we move forward courageously. The problems of the 21st century cannot be solved with the fears and formulae of the 19th and 20th centuries... In my opinion, this can be done if the European parliament has two chambers. One will be for elected members who are also members of their national parliaments. Thus there will be no clash between national parliaments and the European parliament, between the nation-state and Europe. For the second chamber a decision will have to be made between the Senate model, with directly-elected senators from the Member States, and a chamber of states along the lines of Germany's Bundesrat [upper house]. In the United States, every state elects two senators; in our Bundesrat, in contrast, there are different numbers of votes” (Fischer, 2000).

This “federalist” view of how to shape the EU infuriated particularly the French, but other countries, like the United Kingdom, were uneasy as well (Védrine, 2000). The German foreign secretary later backed off and declared that he was merely stating his personal views.

The question arises how one is to conceptualize the European development in order to navigate the future course for integration and institutional change—or for consolidation of the present state of affairs. The early developments and particularly the views held by Monnet show that Europe's principal architect did not perceive the original

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<sup>45</sup> The Nice Treaty requires a ‘triple majority’ of 258 votes in the Council, plus a majority of the Member States, plus 62% of the EU population.

<sup>46</sup> The President of the Commission is currently appointed by the Heads of State and Government of the Member States.

blueprint as one which belongs in the tradition of state-building. Fischer's idea of giving Parliament a second chamber, on the other hand, seems to indicate a radical departure from current institutional arrangements in order to make the Union more state-like.

It has been argued that some of the most influential figures which surround the political integration of Europe see this process as without precedent. Note, however, that there were theorists and practitioners of integration which were inspired by and who compared the early stages of the European venture to the developments which led to the ratification of the American Constitution. One of the most influential thinkers, Altiero Spinelli, who served as Commissioner and later as a Member of the European Parliament, felt inspired by Madison's federalist ideas. Spinelli vigorously campaigned for far-reaching reforms of the Union's early institutional arrangements.

To prepare the ground for comparing between the American and the European experience, we will proceed by briefly recalling the developments in the United States which led to the signing of the Constitution. Special attention will be paid towards outlining the functions of the institutional arrangements for legislative decision-making in the United States Congress. This will serve the purpose of clarifying in what ways a comparison of the reasoning in the US with the one which is currently taking place in Europe can be useful.

### 2.3 Legislative Design in the United States

The ratification of the Constitution of the United States between 1787 and 1790 appears to be one of the few incidents in modern history in which existing political entities—in this case the thirteen states that subsequently united—voluntarily transferred substantial parts of their decision-making power to a superior political level. The negotiation and ratification process was by no means easy (Grofman and Wittman, 1989: 173-4; Cahn, 1989: 620-3). The purpose of the Federalist Papers, which today are considered to be one of the most authoritative interpretations of the American Constitution and the 'theory behind the Constitution', was to convince the people of the state of New York to vote for the unification of the American states and for the signing of the constitutional treaty. Written between October 1787 to May 1788 under the pseudonym 'Publius' by James Madison, Alexander Hamilton, and John Jay, the Federalist Papers provide a discussion about why the thirteen American states should unite and form a union, and how the decision-making and administrative processes of the new polity should be structured.

Many of the people who—prior to establishing the US—lived in the thirteen states during the second half of the 18th century realized that there were sound reasons for political unification. In addition to sharing a common language, many of the American colonists shared a common British heritage and had fought for their political independence from Great Britain. There were also convincing political and economic arguments for integrating. The main problem was how to engineer a common polity which was characterized by stability of the commonwealth itself, by both a high level of representativeness of not only the people as a whole but also of the individual states itself, and by efficiency and durability of the policies that were to be introduced on the new federal level. The existing political structure, represented by the Articles of Confederation, proved for the Federalist and for many other Americans to be inefficient and inherently unstable.

Publius' method of reasoning is characterized by a clear elaboration of the distinct effects of the future Constitution on legislative and administrative outcomes. For comparative purposes, the Federalist does not only take into account the inductively derived effects of the institutional features of the existing constitutional arrangements of the thirteen American states. Broadening the basis for empirical analysis, Publius also considers the workings of constitutions that range from modern European nation-states back to the polities of ancient Greece, Carthage, and Rome. But the authors of the

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Federalist did not only work with this inductive method by comparing a large number of constitutions with each other and then trying to identify the institutional arrangements which supposedly lead to some desired result in terms of the average legislative outcome.<sup>47</sup> After establishing the necessity of unification, Publius provides a detailed outline of the deductively derived potential effects of the envisaged constitutional mechanisms of policymaking.<sup>48</sup>

Having argued for political unification, the Federalist turns towards specific constitutional arrangements. Concerning the procedural mechanisms for legislating, the two most salient and novel features which were proposed by Madison, Hamilton, and Jay are (a) a territorially-based two-chamber system and (b) the inclusion of the executive power into the process of law-making. The founding fathers' principal concern was not to provide the argument for government where no state existed before, since each of the thirteen States already had its own legislature.<sup>49</sup> Neither did they have to put much effort into stating the original case for a separation of powers, since this point had been made before and the necessity to do so was well understood by their contemporaries. If nothing else, the proponents as well as the opponents of the new constitution were united in their wish to effectively control government.<sup>50</sup>

The political philosopher who is lauded extensively by the Federalist is Montesquieu. This is grounded in the fact that the Federalist copies from him the idea of a two-chamber legislature. However, Madison, Hamilton, and Jay do so on grounds which are different from the ones that were advanced in Montesquieu's seminal work on constitutional theory, *The Spirit of the Laws* (1997 [1748]). His reasoning was inspired by the wish to give to the nobility of the French ancien régime an over-proportionally high share of the decision-making power. Montesquieu wanted to prevent the nobility being outvoted by the higher number of citizens, which would have eroded their power base.<sup>51</sup>

Publius adopts Montesquieu's idea of bicameralism, albeit with a different reasoning.<sup>52</sup> Whereas Montesquieu's argument is essentially class-based and principally concerns actors' voting share, Hamilton, Madison, and Jay put forward a territorially oriented, federalist reasoning: in paper number 39, Madison outlines:

"The House of Representatives, like that of one branch at least of all the State legislatures, is elected immediately by the great body of the people. The Senate, like the present Congress, and the Senate of Maryland, derives its appointment indirectly from the people... The proposed Constitution, therefore,... is, in its strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national;

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<sup>47</sup> The method is *inductive* insofar as it draws heavily on empirical information in order to find regularities. It does not so much recur towards axiomatic assumptions about human behavior or about fictitious or real *states of nature*, as earlier political theorists such as Thomas Hobbes (1651) and Baruch Spinoza (1670) did.

<sup>48</sup> For example, in order to demonstrate that the states would be externally stronger if they united, Hamilton writes in paper no. 15: "Are we entitled by nature and compact to a free participation in the navigation of the Mississippi? Spain excludes us from it."

<sup>49</sup> The theoretical argument *for the state* had earlier been advanced in works such as Hobbes' *Leviathan* (1997 [1651]) and Spinoza's *Theologico-Political Treatise* (1997 [1670]).

<sup>50</sup> It is supposedly for this reason that writers such as John Locke, who emphasized the need for separating the executive from the legislative branch of the state, do not occupy a central position in the Federalist Papers.

<sup>51</sup> "In a state there are always persons distinguished by their birth, riches, or honors: but were they to be confounded with the common people, and to have only the weight of a single vote like the rest, the common liberty would be their slavery, and they would have no interest in supporting it, as most of the popular resolutions would be against them. The share they have therefore in the legislature ought to be proportioned to the other advantages they have in the state; which happens only when they form a body that has a right to put a stop to the enterprises of the people, as the people have a right to oppose any encroachment of theirs.

The legislative power is therefore committed to the body of the nobles, and to the body chosen to represent the people, which have each their assemblies and deliberations apart, each their separate view and interests" (Montesquieu, 1997 [1748], Book XI, ch.6; *Of the Constitution of England*).

<sup>52</sup> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives" (Constitution of the United States, Art. I, Sec. 1).

in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national.”

The remainder of this chapter will present the principal legislative mechanisms of the US Congress and their functions as discussed by the Federalist. We will then show in which ways some of these mechanisms can be considered to apply to the existing procedural mechanisms of today’s European Union as well.

## 2.4 Decision-Making in the US and in the EU

In the Federalist Papers, there is a distinction between the national and the federal levels of government, and, in the American Constitution, the units representing both levels, i.e. the individual States as well as the Union as a whole, are political actors in the legislative process (paper no. 39). The reasons for distinction are twofold. On the one hand, in order to secure the votes of the States in the ratification process, the Constitution had to provide for sufficient representation of the smaller with regard to the more populous States in the envisaged decision-making processes.<sup>53</sup> On the other hand, The Federalist argues in favor of stability of the legislative measures which are to be passed, i.e. resistance to rapid change over time. Therefore, the Constitution draws upon the stability-inducing as well as the representational properties of a two chamber-system by increasing the number of veto players (Selck, 2005a; Tsebelis and Money, 1997).<sup>54</sup> In paper no. 63, Madison talks of the “necessity of some institution that will blend stability with liberty” and argues that, in order to balance the two, the “concurrence of separate and dissimilar bodies is required in every public act”.

All legislative bills in the US political system originate in Congress.<sup>55</sup> However, in order to pass a law, not only both chambers of the legislature, but also the executive power of the government, i.e. the President, is involved:

“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his objections to the House in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider it” (Constitution of the United States, Art. I, Sec. 7.).

The primary reason for involving the executive in the legislative process appears to be its stability-inducing character. In paper no. 73, Publius considers “the mischiefs of inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments”.

Another vital element in the legislative decision-making mechanisms in the United States is the possibility of overruling the executive. Legislative bills which command majorities in both Houses of Congress but get vetoed by the President return to the legislature for reconsideration:

“If after... reconsideration two thirds of that house shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment shall be presented to the President of the United States; and before the Same shall take Effect, shall

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<sup>53</sup> Recall that the American Constitution represents a *contract between the states*. For a detailed analysis of the ratification process (Grofman and Wittman, 1989: 173-4).

<sup>54</sup> Interestingly, when considering the American Constitution, Alexis de Tocqueville does not seem to attribute much weight to the separation of chambers. He writes: “The members of both houses [of Congress] have been chosen from the same class and appointed in the same way, so that the activity of the legislative body is almost as quick and as irresistible as that of a single assembly” (Tocqueville, 1997: 723 [1835]).

<sup>55</sup> Note that every bill for raising revenue has to originate in the House of Representatives (Art. I, Sec. 7).

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be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill” (Constitution of the United States, Art. I, Sec. 7.). The reason behind introducing the option of a veto to be overruled by an increased vote share is outlined by Alexander Hamilton in paper no. 73:

“It is to be hoped that it will not often happen that improper views will govern so large a proportion as two thirds of both branches of the legislature at the same time; and this, too, in defiance of the counterpoising weight of the executive. It is at any rate far less probable that this should be the case than that such views should taint the resolutions and conduct of a bare majority.”

The American Constitution provides for a number of mechanisms which were in principal designed to not only produce good laws but also to render the majority of the people incapable of too rapidly changing existing policies and of dominating the minority. In paper no. 10 Madison writes that the “mischiefs of faction” have to be controlled.<sup>56</sup> Therefore, the architects of American ‘integration’ copied Montesquieu’s thoughts on bicameralism and adapted them by stressing the territorial rather than the class-based character to fit it to their respective needs. They further fine-tuned legislative decision-making by including the executive into the process, equipping it with veto power, and allowing for it to be overruled by increasing the threshold for Congress to pass legislation.

The European Union, unlike the American political system, has, from its early beginnings in the 1950s until the negotiation of the Nice Treaty in 2000, witnessed a series of dramatic institutional changes. Most of these changes were intended to redesign the structure of legislative decision-making and to change the inter-institutional balance of power in the Union. The role of the European Commission in the legislative process of the EU has gradually been diminished over time, while the role of the Council, and later on the role of the European Parliament, has been strengthened.<sup>57</sup> The legislative procedures in the EU are, primarily as a result of the several treaty changes and amendments, much more numerous than they are in the United States or in any other nation state.<sup>58</sup> However, this phenomenon should not obscure the fact that there are many functional similarities between the United States and the European Union which facilitate a comparison of the two political systems.

For a legislative measure to be passed in the European Union, it needs the support of at least the Council, which represents the interests of the Member States of the Union. With regard to its legislative and representational function, the Council can be compared to the American Senate, which represents the interests of the territorially differentiated units of the United States.<sup>59</sup> Increasingly, in order to pass new legislative measures in the EU, the support of Parliament is also required. The European Parliament of today, which is directly elected by the citizens of the European Union, represents the territorial equivalent of the House of Representatives in the United States.

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<sup>56</sup> In marked contrast to the Federalist, Jean-Jacques Rousseau’s *Social Contract* tries to seek a remedy for societal faction-building not by controlling its effects but rather by fighting its origins: “[W]hen factions are formed, partial associations at the expense of the whole, the will of each of these associations becomes general with regard to its members, and particular with regard to the State... It matters... that there be no partial societies in the state” (Rousseau, 1997: 431 [1762]).

<sup>57</sup> A strengthening of the Council of the European Union took place as a result of the Treaties establishing the European Economic Community and the European Atomic Energy Community. A strengthening of the European Parliament had principally been achieved by the Single European Act, the Treaty on European Union, and the Treaty of Amsterdam. For a detailed discussion of the EU legislative process, see Hix (2005: 72-110) and Craig and De Búrca (1998: 129-43).

<sup>58</sup> Depending on they are categorized, the number of procedures can range from six (Craig and De Búrca, 1998: 129-42) to twenty-two (European Commission, 1995).

<sup>59</sup> Note, however, that in the American Senate, the members are elected by the people of each state, while the Council members, just like in the German political system, represent the governments of each particular Member State.

As to the process of legislating itself, there also exist common features between the two systems. A discussion of the possible effects of these features on legislative measures in the United States can be found in the Federalist Papers. Just as in the American political system, the European Union also knows the principle of overruling the executive with an elevated voting threshold. In the American case, it is the Presidential veto which can be overruled by two-thirds majorities in both chambers each, the House and the Senate. In the European Union, a legislative proposal issued by the European Commission and representing the Union's executive power may only be amended by a unanimous vote in the Council during what is called the consultation procedure. Likewise, under the cooperation procedure, a veto issued by the European Parliament can only be overruled by Council unanimity. Under the codecision procedure, which is the most recently introduced of the three procedures, the necessity of a higher voting threshold that has to be reached to overcome a veto ceased to exist. However, under this legislative procedure, the European Parliament and the Council of the European Union, the two 'chambers' of the Union, each have veto power over legislative bills. The power of the Commission only consists of presenting the initial proposal to the two chambers.

As in the United States, the executive power of the European Union is playing its part in the legislative process; however, the roles regarding legislative initiatives are effectively being reversed. Whereas the American President has the power to stop the process (Constitution of the United States, Art. 1(7)), the European Commission commences it (e.g. Art. 37(2) EC for consultation, e.g. Art. 105(6) EC for assent, Art. 251 EC for codecision, Art. 252 EC for cooperation; Craig and De Búrca, 1998: 53-4). As demonstrated earlier, the fact that the Commission is initiating the process can historically be derived from the institution's assumed technical expertise as well as from Monnet's original desire to 'keep politics out' of the decision-making process.

Using the Federalist's terminology, a comparison of the legislative system of the European Union with that of the United States shows that the former can be conceptualized as a highly federalized political entity, in the sense that considerable decision-making powers rest within the Union's federal upper chamber, the Council of the European Union. For both polities, in order for the legislature to overrule the executive, elevated thresholds can apply. In the United States, the percentage switches from a simple majority in both chambers to two thirds in both chambers. In the European Union, for the Council to amend a Commission proposal, the majority requirement changes from roughly five sevenths of the total vote to unanimity. Since the threshold is much higher than in the United States, it more strongly reinforces legislative stability on the one hand, and the federal dimension on the other hand.<sup>60</sup>

## 2.5 Conclusion: Understanding the European Union Legislative Process

The creation of a European polity which assumes vital parts of the sovereign powers of a fair share of the continent's nation states is a process which can be considered to be novel indeed. In Europe, there has never been a similar voluntary shift of sovereign power to a supra-political level. However, this does not imply that analyzing institutional arrangements and contemplating constitutional reform have to start from scratch.

Entering the discussion on the European Union's future from the classical angle of how legislative arrangements affect common policies, the EU can be considered to be a highly federalized polity, with a strong bias for the legislative status quo and with considerable decision-making power resting within the Council. This upper legislative chamber represents the Member States as the Union's distinct territorial units, a level to

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<sup>60</sup> Note that, under *qualified majority voting* in the Council of the European Union, the Member States have different voting shares (Art. 205(2) EC), whereas in the American Senate, every state has two Senators with one vote each (Constitution of the United States, Art. 1(3)).

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which Madison, Hamilton, and Jay would refer as the federal level. Considering this perspective, the legislative arrangements of today's European Union can be compared with any other present and past institutional arrangement. The distinction between territorially differentiated units allows the application of classical political theory equally well to the decision-making structures of the Constitution of the United States as well as to the treaties governing the European Union. More than that, it might also help by providing a frame of reference for European institutional reform.

The European Union possesses a set of working institutions which are experienced in the process of negotiating binding legislative measures for the Union's Member States. Applying the Federalist Papers, we argued that the European Union might be conceived as a highly federalized entity in the sense that the territorial units have a major say in the legislative process. This might indicate that a future European constitution does not have to create new legislative institutions by abolishing the Council and by creating a second parliamentary chamber in its place, as has been envisaged by the German foreign secretary Fischer (2000). Instead, the Council of the European Union can be regarded as representing the first chamber of the European Union's bicameral legislature, with the European Parliament representing the second chamber at the national level. A lessening of the power of the Council in this reading would lead to diminishing the influence of the federal dimension and to a strengthening of what Madison, Hamilton, and Jay referred to as the national dimension, i.e. the European Parliament.

The European Union, for the first time in its history, is embarking on the process of ratifying a formal constitution. In terms of institutional analysis that might give advice on how to frame a new constitutional founding treaty for the Union, political leaders and academic scholars can access a large array of theoretical and methodological tools about the workings of political bodies. The point might seem rather obvious, but its implications are not merely about semantics. They are about a clear recognition of the European Union's current state of affairs. An important implication is that a mere lessening of the power of the Council and a strengthening of the European Parliament, while leading to a new inter-institutional power distribution, does not automatically result in a more democratic and more legitimate European Union. A tentative response to Siedentop's (2002) question "Where are our Madisons?" might be, before looking out for new ones, to not forget about the Federalist's original reasoning. While the European and the American experiences clearly differ in important aspects from one another, there are similarities which facilitate comparison and which can help in framing the debate for the European Union.