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1
The Problem of Viability in a Compound Polity

The most unambiguous signs are now being overlooked, or arbitrarily and lyingly misinterpreted, which declare that Europe wants to become one.

Nietzsche (1990: 189)

1.1 Introduction
Viability, in its most basic sense, means the ability to exist or more specifically to survive in a particular place. As a theoretical concept it is more commonly used in economics, usually as a synonym for feasibility, than in political science. In the latter discipline it is applied to understand transition states, new political entities (such as the ‘Palestinian state’) or even putative states such as certain regions in Europe (Jolly, 2007), as well as for analyses of various public policies. In these types of studies, the concept is ordinarily used in a common sense way based on an analytical assessment of the effectiveness, efficiency and legitimacy of the state or policy under review. A far more specialized use of the concept exists in rational choice institutionalism, where it is applied to discover the supposed conditions for a ‘viable constitution’. According to this model, as David McKay (2004: 24) explains, it is assumed that viability ‘depends on the ways in which particular constitutional and institutional arrangements provide elites with incentives to stick to the rules of the game’. Finally, there exists a much grander approach that considers societal or civilization survival itself, interpreting the fate of disappeared civilizations as tragedies stemming, at least to some extent, from weaknesses of perception, action or responsibility (Diamond, 2004).
Not wanting to pursue a universalizing strategy, one that ‘aims to establish that every instance of a phenomenon follows essentially the same rule’ (Tilly, 1984: 82), this study does not seek to match the ambition of identifying the requirements for a viable society per se, valid throughout time. However, a common sense and unspecified understanding of viability – the blunt tool of what could be called the ‘unconscious thinker’ – is not appropriate for the present study either. In this book, therefore, the concept of viability is used as a Weberian ideal-type, that is, not a pure description of historical reality but ‘a limiting concept with which the real situation or action is compared and surveyed for the explanation of certain of its significant components’ (Davis, 2005: 79). This serves to underscore why a comparative perspective is used to evaluate the question of EU viability. Following James Davis, the heuristic interest of the ideal-typical approach is to explain ‘why a particular historical instance was so and not otherwise’ (ibid., p. 80). This means the analysis in the present study is firstly interested in how the antebellum US compound republic1 tried to manage its endogenous political tensions and why, ultimately, it failed. The viability of the EU will be discussed, secondly, in the light of this answer, namely, if and how the EU faces similar or contrasting problems and whether it has the same or alternative means of resolving them. First, however, it is necessary to define the concept of viability as used here in relation to the conflict over the rules of the game of politics. It is this conflict that is characteristic of the EU and the antebellum US compound polities.

1.2 Viability as defined in relation to the ‘Rules of the Game’ of politics

In political science it is conventional to define the state analytically in terms of territory, institutions and the monopoly of legitimate violence.2 These three facets are then used to explain the sovereign quality that is specific to the modern state: in the final analysis sovereignty equates to coercive power. But this is perhaps one of the least interesting ways of understanding the business of government; for the use of coercion is so slight in actual political practice.3 This is of course far truer of democracies than absolutist regimes. Nonetheless as Montesquieu realized, despotism relies on the principle of fear to govern and thus it can be sufficient to use only infrequent yet symbolic brutal coercion.4

The fact then that political authority, as the French nineteenth-century liberal François Guizot recognized,5 is not constituted by coercion alone means that we must look elsewhere to appreciate both why
states manage to govern with minimal coercion and why sometimes this arrangement breaks down. Essentially, this means understanding why the modern democratic state is not Hobbesian. The ‘beast of Malmesbury’ considered the existence of a supremely powerful sovereign ‘to be logically necessary in order to structure individual expectations so that contracts would be kept’ (Kratochwil, 1978: 50). Thus Hobbes clearly appreciated the structuring power of expectations, which enables the symbolic and well chosen use of force to generate prudential obedience. But his model of political order as something that stems from prudential compliance generated by legal sanctions containing the threat of physical consequences is inadequate for two reasons. Firstly, because law itself cannot be equated simply to a sanction that follows a command: ‘emphasis on the “legitimate” use of force, even on the part of convinced “command theorists”’, as a leading international relations theorist explains, ‘demonstrates that the instrumentalities of coercion cannot serve as the sole criterion of law’ (ibid., p. 17). Secondly, and this is David Hume’s argument, Hobbes overlooks the fact that there are other proxies for generating the expectation that contracts will be kept. As Kratochwil sums up the point, ‘conventions arising out of interactions that prove mutually beneficial can structure expectations and thus allow participants to overcome the posed dilemma’ (ibid.).

Discovering more about how expectations are generated without coercion is made much easier if the fetishism of sovereignty, which suggests that a limpid vertical organization of power is a precondition for successful political organization, is abandoned (see section 1.4). It is commonly assumed that sovereignty is indivisible and that in any polity there has to be an institution able to claim ultimate political authority. By implication, indivisibility also means that confederation (a compact between states, *Staatenbund*) and federation (one state with units of greater or lesser autonomy, *Bundestaat*) are mutually exclusive categories: ‘there can be nothing in between’ (N. Onuf, 1991: 432). Nevertheless the EU seems to be precisely the ‘in-between order’ (Wind, 2001: 103) that undermines such peremptory statements about the nature of sovereignty. This explains the inherent difficulties of comparing the EU with federal states that are clearly sovereign in international politics, hence the resort to neologisms such as ‘economic confederation’ (Forsyth, 1981), ‘confederal consociation’ (Chryssochoou, 1994) or ‘inter-state consociation’ (Costa and Magnette, 2003). Ultimately this vocabulary serves to reinforce the *sui generis* interpretation of the EU, which the analysis in this study seeks to avoid. As a third category between confederation and federation the EU also confounds traditional international relations theory, which posits
an antinomy between anarchy and hierarchy to explain the distinction between international and domestic politics (Waltz, 1979).

To avoid making viability dependent on the concept of a sovereign state and the associated binary opposition between confederation and federal state, therefore, in this book the notion of the “rules of the game” provides the parameters for understanding viability. This theoretical move accomplishes two objectives. On the one hand, it gainsays the assumption that polities are only viable if they have a fixed locus for the monopoly of coercion. On the other hand, it establishes that the issue of sovereignty, while a vital part of political contestation in a compound polity, is meaningful only in relation to the broader game of politics and thus not by itself a precondition of viability.

First, however, it is necessary to specify the nature of political conflict, which is usually conceptualized in a twofold fashion: internal and external, albeit with fuzzy boundaries between them. This study argues that the early US republic and the contemporary EU exist in very similar contexts both internally and externally. In terms of the relations between the units, the goal is to maintain a democratic union free from coercive centralization and avoid disintegration. To reprise the language of comparative federalism, the EU and the antebellum US are engaged in ‘holding together’ as much as ‘coming together’ (Stepan, 1999), or to employ the neologism coined by Deudney, the units constitute a ‘negarchy’, a system designed to ‘prevent simultaneously the emergence of hierarchy and anarchy’ (Deudney, 1995: 208). Furthermore, with the exception of their founding periods, they have both had to achieve this feat in the absence of a direct external security threat, which is generally considered the most effective and persuasive stimulus behind federation.

This is not to say that either polity is entirely disentangled from security issues. The US had both European states and Native American tribes as potentially hostile neighbours and even became a peripheral zone of hostilities (between 1812 and 1814) within the European conflagration engendered by the French revolution. In fact, the founding fathers were greatly preoccupied with America’s place in the international system. One of the principal reasons for embarking upon ‘a more perfect union’ was precisely to strengthen America’s role in international politics so as to hold more sway in matters of trade and to avoid the machinations of European monarchies (see 2.3). Modern Europe has also experienced the menace of a neighbouring hostile power and during the Cold War European Economic Community (hereafter, EEC) member states had to negotiate a position vis à vis the two superpowers when the conflict became ‘hot’ in the so-called proxy
The Problem of Viability in a Compound Polity

wars. While in the immediate post-war period mutual defence against the Soviet Union was a headache for European states seeking to integrate, this particular preoccupation quickly abated as responsibility for security was transferred to NATO. Imminent security dilemmas have, therefore, not played a permanent or even telling part in the politics of both these compound unions. This is because in both cases – and unlike in the examples of union in Switzerland or the Netherlands (Goldstein, 2001) – neither faced direct and sustained threats to political independence or territorial predation. Hence, in this study, the factors explaining viability are endogenous, that is they pertain to relations between the units and not to how the units relate to the international system.9

In this context, I argue that functioning democracies face at least three types of political conflict that they have to manage or surmount in order to be considered viable. The first conflict concerns the agreement among elites and between these elites and citizens over ‘the rules of the game’ according to which politics is conducted: without this there is no political interaction. The second arena of contestation is the debate over the role of the state, that is, the scope of public intervention in economic freedom and personal liberty (Hix, 1999). Finally, although a less precise category, conflicts arise for practical and personal reasons over such things as perceived government effectiveness, confidence in leaders, judgements about personalities and so on.

This study focuses exclusively on the first type of conflict because the problem of agreeing to the ‘rules of the game’ is the problem par excellence of the compound republic. This is not only because such political systems are characterized by a dual horizontal (between the executive, legislative and judicial branches of the centre) and vertical (between the union and its units) separation of powers (Fabbrini and Sicurelli, 2004; Kelemen, 2004).10 In addition, compound polities or states-unions are political projects for certain ends. Political conflict thus arises as a result of the complex interaction between levels of government and authority as well as over the ends of the political union itself – over what kind of polity it will become; the former is a feature of ordinary federal states but the latter is not.

A proper definition of the ‘rules of the game’ and the conflicts associated with them is a logical priority before specifying how and why certain disputes over the rules can or cannot be managed in a compound system. The game metaphor is popular among constructivist scholars in international relations because it reflects rather well the extent to which concepts do not correspond directly with
‘observational facts’ but are mutually constituted by reference to other concepts within the game-structure. In addition, this approach allows for a more nuanced understanding of rules in general than is possible if rules are taken to be synonymous only with commands or imperatives. What the game metaphor reveals then are the ‘institutional facts’; the other concepts used within the practice of the game to give meaning to action and which help make it explicable. ‘Threatening the king in a chess game by announcing “check”’, the game Kratochwil uses to illustrate this point, ‘means something only with reference to the underlying rules of the game. Thus, the meaning of the move and its explanation crucially depend upon the knowledge of the rule-structure’ (Kratochwil, 1991: 26).

The importance of recognizing institutional facts is equally necessary in domestic politics. This is borne out in Edward Lehman’s specification of the three elements taken to constitute the rules of political conduct: ‘(1) the actors who are the appropriate players in the political game, (2) the prerogatives of and limitations of officeholders, and (3) the rights “of one or more set of recognized leaders attempting to gain office”’ (1992: 141). None is directly observable or autonomously defined: the ‘appropriateness’ of actors reflects existing political shibboleths subject to flux; prerogatives will depend on constitutional interpretation and precedent; gaining office is clearly a singular practice with obvious written rules like secret ballot provisions, voting eligibility, balloting times and a myriad unspoken norms such as what candidates can promise during campaigns or which public servants they can remove once in office. The conditions constituting democracy, therefore, can only be understood intersubjectively with reference to other concepts making up the practice that is democracy – a practice whose very meaning may also evolve precisely as a consequence of this intersubjective element (Collier and Levitsky, 1997).

For the purposes of this study it is preferable to use a more inclusive definition of the rules of the political game because of the weak and often constitutionally ambiguous institutionalization characteristic of the EU and the antebellum US. More so than in its member states, politics at the EU level is constituted by institutional facts – the rules of the game – of a less visible, less sedimented nature, ones that are most evident only in the practice of politics itself. The same is true of the early American union, which Tocqueville described, in a sentence from the original manuscript for Democracy in America omitted from eventual publication, as ‘the Union is an almost perfect entity that is not easy to comprehend’ (1990, vol. 1: 279).
The absence of many conventional attributes of nation-statehood like a fixed territory or national identity discomfits many students of the integration process. The result is a tendency to exaggerate the difference and novelty of EU politics in comparison with the experience of Europe’s nation states. Indeed, the supposed discontinuity between the formation of nation states and the integration process is sometimes viewed as the EU’s most valuable asset because novelty and difference are thought to constitute a *Sonderweg* (peculiar path) allowing Europe to find innovative ways of overcoming crises and avoiding the traditional disputes dominant in its member states. The viability of the European polity is explained by virtue of this *Sonderweg*. Joseph Weiler argues that the principle of ‘constitutional tolerance’ characterizes Europe’s unique political identity, so different from a ‘normal’ democracy – as practised in nation states – where,

[a] majority demanding obedience from a minority which does not regard itself as belonging to the same people is usually regarded as subjection. And yet, in the [European] Community, we subject the European people to constitutional discipline even though the European polity is composed of distinct people. It is a remarkable instance of civic tolerance to accept to be bound by precepts articulated not by ‘my people’ but by a community composed of distinct political communities: a people, if you wish, of others. I compromise my self-determination in this fashion as an expression of this kind of internal – towards myself – and external – towards others – tolerance.

(2001: 67–8)

By defining the central problem of EU politics as one of finding an agreement over the rules of the game and by understanding how this is affected by the compound structure of the political system it is possible to analyse viability as well as to set aside these Panglossian assumptions. To do this, the rules of the game, as illustrated in Table 1.1, are taken in a broad sense to refer to an agreement to be bound by certain decision-making institutions as well as less tangible norms that cannot be so readily institutionalized. These latter norms include the shared understanding over where competency over competences stands; expectations about the project of union; and finally, the agreed relationship between the two competing principles of representation, the (federal) representation of individuals *qua* citizens of the union and the (confederal) representation of individuals *qua* citizens of a territorial unit. Hence rules of the game such as expectations about the union and the
 agreed relationship between antagonistic systems of representation may well remain tacit in run-of-the-mill European or early-American politics and yet frame the discourse of political contestation in more fraught moments. The game metaphor thus takes seriously the problem of arguments and identities in political life, especially the self-description of polities, rather than reducing politics to a technical question of distributing scarce resources, effective policymaking or managing the conflict between rational yet divergent interests. (see Table 1.1)

Conflict arises when one of the above four elements constituting the rules of the game is in dispute. Three examples will suffice to illustrate how these conflicts arise and the form they take. Firstly, the US sovereignty debate that preceded the Civil War was a classic example of the struggle to identify who had the ultimate authority to determine competency over competences as well as to define the nature of the political bond between the states. Was the union indissoluble or was it a compact? If only a compact, who had the right to judge whether its terms had been broken? An instructive example, secondly, of how an institutional crisis can create new expectations is the infamous ‘empty chair crisis’. This took the form of an institutional conflict – France’s refusal to participate in Council meetings and the wrangle over farm subsidies – but was largely a debate over norms and expectations as de Gaulle refused to accept EEC competency except through unanimity. The solution was not to redesign institutions or put in place a new policy but the establishment of a new norm, which became known as the Luxembourg Compromise: ‘when very important issues are at stake, discussions must be continued until unanimous agreement is reached’. This cannot be found in the parchment of the treaties and yet it is still

<table>
<thead>
<tr>
<th>Rules of the game of politics</th>
<th>Subject of contestation</th>
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<tbody>
<tr>
<td>Institutional competences</td>
<td>What are the respective decision-making powers of the union’s legislative, executive and judicial branches?</td>
</tr>
<tr>
<td>Expectations about the Union</td>
<td>What is the nature of the union and the project that unites its members?</td>
</tr>
<tr>
<td>Competency over competences</td>
<td>Where does the power to determine competency over competences reside?</td>
</tr>
<tr>
<td>Representation</td>
<td>What is the relationship between the representation of individuals qua citizens of the union and the representation of individuals qua citizens of a territorial unit?</td>
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a rule that guides the way actors play the game, notably by creating new expectations about the process of future decision making. Finally, perhaps the best recent example of the clash between competing principles of representation is the debacle of the defunct Constitutional Treaty and its successor the Lisbon Treaty. The failed referendums on both treaties posed, as never before, the problem of whether the arduous process of treaty revision, to which a vast majority of member states is favourable, could be unravelled by citizens in only one or two countries. Indeed, similar disputes, discussed in detail in chapters 3 and 5, arose in the antebellum US when states attempted to invoke popular sovereignty at the state level to nullify federal legislation.

1.3 Scenarios of viability in a compound polity

If it is not to disintegrate, therefore, a compound political system faced with this inherent conflict over the rules of the game has to respond in one of three ways. Firstly, the response can be coercive centralization through the threat or actual use of force against a member state to enforce the primacy of the union and/or to prevent secession and the use of economic or political sanctions to do likewise. Secondly, the response can be non-coercive or voluntary centralization through one or more of the following systemic changes: the explicit transfer of competences to the union, an agreement to allow the union to exercise competency over competences, the redefinition of the nature of the union and its objectives to extend its purview and the strengthening of the principle of the representation of individuals qua citizens of the union at the expense of territorial representation. Thirdly, and finally, conflict can be resolved through a dynamic equilibrium that tries to reinvent the rules of the game in a sufficiently ambiguous fashion so as to create new anti-majoritarian safeguards when delegating more competences to the union, avoid specifying where competency over competences lies, leave the objectives of union unchanged by keeping certain questions off the table and maintain the balance between confederal and federal principles of representation.

The very purpose of founding a compound system in the early US and the EU is to prevent coercive centralization. This means the definition of viability in a compound system needs further refinement: it is conditional on having the ability to overcome, or manage, without recourse to coercion, its inevitable tensions. Alexander Hamilton began The Federalist by asking whether mankind was ‘forever destined to depend for [its] political constitutions on accident and force’ (Hamilton et al., 2003: 1).
In the same vein, this study wants to analyse the EU’s viability in terms of the possibilities for sustaining itself or centralizing through compromise and consensus rather than the largely unknowable variables of accident (external shocks) and force (coercive centralization). For as the great nineteenth-century British liberal Walter Bagehot remarked, ‘in politics we must not trouble ourselves with exceedingly exceptional accidents; it is quite difficult enough to count on and provide for the regular and plain possibilities’ (1963: 285). Moreover, in the history of European integration significant steps in the process, such as the creation of monetary union or a common foreign policy, have not been the product of extreme catastrophes; there is no place here for an apocalyptic vision of conditions necessary for a viable European polity.

As discussed earlier, this study incorporates both institutional and non-institutional factors in the analysis of viability, which explains the choice of a detailed contextual examination of two similar cases. This kind of approach thus requires a more detailed ex ante outline of how and why scenarios of viability for compound systems differ.

The scenario of voluntary centralization is more difficult to identify than that relying on coercion. Increasing centralization is most visible in the realm of constitutional politics, where it is the product of three factors: constitutional interpretation by legal as well as political actors, statute law and a certain discretionary element in the form of the conventional understanding of competences and procedures or, in pithier terms, amendment, interpretation and usage (Bryce, 1995; vol. 1: 322–3). Beyond constitutional politics, centralization may also take place through the establishment of new political institutions, such as political parties or voting procedures, which favour the representation of individuals at the expense of the representation of the constituent units.

Gauging or measuring centralization in both a compound and a federal system is eminently possible (McKay, 2001). Various options include measuring the proportion of the budget spent by different levels of government (Pollack, 1994), legal resistance among the units to competences exercised by the centre (Goldstein, 2001) or evolution in the allocation of competences (Donahue and Pollack, 2001). What this kind of approach does not reveal, however, is the nature of the political debate that surrounds this change in the relationship between units and union: how they were justified and interpreted and what consequences this had for expectations about the future. Thus Leslie Goldstein’s (2001) study of legal resistance to central authority in the antebellum US and in the European integration process revealed that the US states proved more obstreperous in their defiance of federal legal authority than the
The Problem of Viability in a Compound Polity

six founding EEC states did in relation to the European Court of Justice (hereafter, ECJ). But the principal weakness of this so-called member-state resistance paradox argument is that it fails to include the alternative methods whereby member states can constrict and discipline integrationist ambitions; as the analysis in Chapter 4 of disputes over the rules of the game will show, overt resistance by constitutional courts is only a small part of the rapport de forces between pro- and anti-integrationists.

Similarly, a constitution by itself is not a straightforward list of rules to govern, a moral textbook setting out how decisions ought to be made or a compilation of objectives to pursue. It is difficult to measure what constitutions ‘do’ for even their political objectives are not self-evident because sometimes they are framed not simply to achieve some goal but to prevent something happening or being discussed (Holmes, 1988). In the latter instance this is only meaningful in context. Historical experience suggests that constitutions are a genre of political writing or speech acts that are often intended to function negatively (to prevent something happening) as much as positively. Thus the American constitution was obsessed with finding a way of neutralizing conflict over the slave issue as well as avoiding all mention of who or what is to be sovereign – it is implicitly the constitution itself that is sovereign – to deny any one actor the right to make a claim against this settlement. More recently, the German Grundgesetz (‘Basic Law’) was framed to avoid any possible return to fascism while the French Fifth Republic sought to put an end to political instability by reinforcing the office of president.

To circumvent these problems, voluntary centralization will be understood in this study as changes to the rules of the game – due to formal amendment, convention, usage or institutional innovation – that allow the union to preponderate over the units either through an expansion of competences, the ability to adjudicate ultimately all competence clashes, increased expectations about the purview of political union or an enhanced ability to represent citizens at the expense of territorial representation. These changes will be considered voluntary to the extent that the democratic constituent units have in some way acquiesced – or at least not objected to them – through their participation in constitutional politics.

Conversely, sustaining a dynamic equilibrium between the union and its units is a process of ‘muddling on’, whereby acute contestation over the rules of the game leads to a redefinition of the relationship between units and centre with only a minimalist transference to or creation of power at the compound centre, as illustrated in Table 1.2. It is a dynamic process precisely because it does not sanctify and seek to preserve the
status quo, favouring instead a recalibration of the rules of the game. Redefining or reinventing the equilibrium as opposed to centralizing is less the case of the union being unable to create new competences per se. Rather, it is taken to mean primarily a process whereby the compound union can only grant itself new competences or takeover the prerogatives of its members by appeasing the constituent units. This is achieved by granting new safeguards to frustrate action by the centre or by more integrationist constituent units (veto power), by allowing exemptions from certain areas of legislation (opt-outs, opt-ins, abstentions) or else by keeping intractable problems off the reform agenda. Perhaps the most obvious difference, therefore, when comparing dynamic equilibrium with voluntary centralization is that in the former case the union will continue to struggle to claim and exercise competency over competences. In fact, the very locus of sovereignty will remain undefined. Moreover, in a logic of dynamic equilibrium, the delicate act of balancing the representation of states and citizens will continue whereas under voluntary centralization the representation of citizens qua citizens of the union will prevail over territorial representation.

The use of a theoretical framework that explains how compound political systems follow one of two scenarios of viability is intended to show how these systems can cope with changes in the rules of the game. Hence

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**Table 1.2** Defining voluntary centralization and dynamic equilibrium in relation to changes in the rules of the game

<table>
<thead>
<tr>
<th>Rules of the game</th>
<th>Changes amounting to voluntary centralization</th>
<th>Changes amounting to dynamic equilibrium</th>
</tr>
</thead>
<tbody>
<tr>
<td>Institutional competences</td>
<td>Explicit transfer of competences to the union’s branches of government.</td>
<td>Creating new anti-majoritarian safeguards each time new competences are delegated.</td>
</tr>
<tr>
<td>Expectations about the union</td>
<td>Redefining the nature and objectives of the union to extend its purview.</td>
<td>Leaving the objectives of the union ambiguous by keeping certain policy questions off the table.</td>
</tr>
<tr>
<td>Competency over competences</td>
<td>Agreement to allow the union to exercise competency over competences.</td>
<td>Leaving the location of competency over competences unspecified.</td>
</tr>
<tr>
<td>Representation</td>
<td>Strengthening the representation of individuals qua citizens of the union at the expense of territorial representation.</td>
<td>Maintaining the balance between confederal and federal principles of representation.</td>
</tr>
</tbody>
</table>
this approach departs from the traditional fashion in which the future evolution of the EU polity is understood in political theory. For nearly 30 years the fundamental political problem of European integration has been understood in terms of a ‘democratic deficit’ (Marquand, 1979). The EU is said to lack a meaningful element of democratic participation by citizens, poor accountability given the feebleness of the parliament and the absence of a pan-European public sphere. Thus the basic argument is that a more integrated EU will survive or fail according to whether or not democratic legitimacy can be established beyond the boundaries of the nation state. Consequently, the three most widespread answers to this question are concerned with whether it is conceptually plausible for democracy to transcend the nation state or whether non-electoral proxies for democratic legitimacy can legitimate a polity in the eyes of its citizens. The ‘no-demos’ position suggests the political bond is derived from a cultural-linguistic bond that by definition cannot be pan-European (Preuss, 1995; Miller, 2000), making the notion of a more integrated and democratic EU a very moot point. ‘Post-national’ theory claims that an abstract ‘constitutional patriotism’ can replace shared nationality in the creation of a political community, which in this case will span national boundaries (Lacroix, 2002; C. Cronin, 2003). Finally, the theory of ‘output legitimacy’ argues that a European polity can be constituted by the positive results of its governance regime (Scharpf, 1999).

In other words, these three responses to democratic deficit anxiety do not provide much guidance for understanding what effect institutional reforms typically discussed at times of treaty revision – chiefly greater EU competences and more supranational representation – will have upon the EU system. In addition, democracy itself remains a contested concept liable to be stretched and distorted (Collier and Levitsky, 1997), making it an unreliable yardstick for judging the viability of further integration. This explains why this book proposes to shift the understanding of whether more EU integration is possible away from the argument, which will remain unresolved as long as the ontology of democracy is questioned, of whether the EU can overcome its democratic deficit. Instead, the argument developed here conceptualizes the EU as a compound polity where the rules of the game are contested by elites and institutions at the union level as well as at the unit level and, more rarely, by citizens exercising popular sovereignty. In this way, the analysis, drawing on a comparison with the US antebellum experience of this same kind of political contestation, can demonstrate the extent to which the EU can respond to the struggle over the rules of the game either through dynamic equilibrium or else voluntary centralization.
However, this book does not merely go against the grain of contemporary political theory’s engagement with the EU. The treatment of the EU as a compound polity subject to acute contestation over the rules of the game also differs significantly from the way in which the EU is analysed in comparative federalism. The task of the following section, therefore, is to specify in more detail the concept of the compound polity and to justify the analogy with the antebellum in relation to certain shortcomings of the comparative study of federal systems. In particular, it is the way that the rules-of-the-game framework enables a deeper probing of the problem sovereignty poses in such a polity that vindicates this conceptual gambit. This is because sovereignty claims on the part of the units and the union alike are not just a matter of the institutional allocation of competences or of determining where Kompetenz-Kompetenz lies. The issue of fragmented political authority – imperium in imperio – is only part of the reason why the rules of the game are so contested. Sovereignty also constitutes an expectation about the nature of the political union as well as being, in the form of popular sovereignty, a crucial factor affecting the nature of political representation. It is precisely, as explained in the final section of the chapter, the two latter elements that comparative federalism struggles to take account of when analysing the EU, thereby compromising its ability to understand what makes the EU viable.

1.4 The theory of the compound polity and the issue of the units’ sovereign status

In the history of political thought, the term ‘compound republic’ was first used by James Madison to describe the novel political structure that was intended to replace the grossly deficient Articles of Confederation (1781–9), which had hitherto bound the 13 former British colonies in America. According to Madison, the new constitution established a compound republic because it alloyed ‘national’ (that is central) government with ‘federal’ (state) government. As he explained in Federalist 39, ‘the proposed constitution therefore is in strictness neither a national nor a federal constitution; but a composition of both’ (Hamilton et al., 2003: 187). The union was also a compound of two different forms of political representation as both the state and the union had a claim to represent citizens; in addition, the bicameral legislature of the federal government combined both representation of the states and of the aggregate people. Thus the double vertical and horizontal system of separation of powers was precisely a product of establishing political institutions on the basis of a dual system of representation. The
new admixture, however, was not fancied to be naturally harmonious, as Madison clearly saw that the states would often have a key political advantage that could frustrate the wishes of the national government:

The State government will have the advantage of the Federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other. The State governments may be regarded as constituent and essential parts of the federal government; while the latter is nowise essential to the operation or organization of the former.

(ibid., p. 225)

His fellow Federalist author Alexander Hamilton expressed even graver misgivings during the debates on the constitution at the Philadelphia convention. At the conclusion of the convention, he conjectured that in the absence of a strong and visionary administration, which could ‘triumph over the state governments and reduce them to an entire subordination … it is probable that the contests about the boundaries of power between the particular governments and the general government and the momentum of the larger states in such contests will produce a dissolution of the Union’ (Hamilton, 1993: 11). These fears were a testimony to the fact that the compound mixture was not the product of the search for a perfect system but born of a skilful compromise designed to reconcile the more extreme proponents of national government with the intransigent advocates of states’ rights: mater artium necessitas.

Indeed, even before the Constitutional Convention had met, in a letter to his friend Edmund Randolph dated 8 April 1787, Madison had explained the inevitability of such a compromise:

I hold it for a fundamental point that an individual independence of the States is utterly irreconcilable with the idea of an aggregate sovereignty. I think, at the same time, that a consolidation of the States into one simple republic is not less unattainable than it would be inexpedient. Let it be tried then, whether any middle ground can be taken, which will at once support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful.

(Madison, 1840, vol. 2: 631–2)
Yet Tocqueville realized that in the resulting constitutional middle ground there was an inherent political tension that ought not to be misconstrued as the relatively simple task of settling the boundaries between the union and the states. The divergent pull of competing identities, the protracted arguments over the locus of sovereignty and the expectations about the taboo areas beyond the pale of federal authority explained why the early republic was convulsed by vivacious and permanent political dispute. Tocqueville insisted that it was necessary to think of the American union as founded on an abstract idea (Maletz, 1998). He sensed that even if the US constitution had effectively sidestepped the thorny issue of settling the boundaries of a divided sovereignty and spelling out the highest authority by introducing constitutional ambiguity – what Bruce Ackerman (2005) calls the ‘grand abstractions and cryptic formulae’ – over which branch of government could do what, there remained a serious tension within the unified body politic.

The deliberately ambiguous constitutional allocation of powers thus gave rise to a protracted political struggle over the balance between state and national government. Tocqueville took this to be symptomatic of ‘the great struggle which is going on in America between the states and the central power, between the spirit of democratic independence and that of a proper distribution and subordination of power’ (Tocqueville, 1994: 410). The antagonism between the two fundamental principles for allocating powers – the states’ retention of all non-enumerated powers (the tenth amendment) and the federal government’s supremacy (article six) and right to make all laws necessary for the preservation of the union – was at the heart of the union’s politics until the North’s victory in the Civil War. As the comparative scholar of federalism David McKay has put it, ‘this tension between nationalism and state sovereignty dominated political discourse’ (2001: 27).

But it would be misleading to interpret the political cleavage in a compound republic as merely that of competing sovereignties – the imperium in imperio the ‘anti-federalists’ had railed against – because this model of political contestation suggests the possibility of a simple legal or constitutional settlement to the question of who is sovereign. From the outset, the US constitution was notorious for not specifying a single locus of sovereignty in the classic sense of ultimate and indivisible political authority. As Walter Bagehot put it, the American founding fathers purposefully ‘shrank from placing the sovereign power anywhere’ (1963: 218). The resulting ‘dual federalism’ (Corwin, 1934), establishing two distinct and in theory autonomous levels of political authority, created plenty of scope for jurisdictional conflict.
Comparative federalism has traditionally interpreted conflict concerning competences claimed by both the states and the federal government as a clash over demarcating the boundaries of the vertical separation of powers, a clash supposed to continue unchanged to this day (Goldstein, 2001; Kelemen, 2004). Yet a more recent strand of republican scholarship on the antebellum period presents the tussle over state sovereignty in the antebellum as a republican debate about the appropriate relationship of the people to their various governments (Deudney, 1995; Fritz, 2008). Thus whereas studies of federalism concentrate on the issue of divided sovereignty, republican theory is concerned with the problematic exercise of popular sovereignty – or the sovereignty of the people (Fritz, 2008). Given that a compound polity is ‘a union of states and their citizens’ (Fabbrini, 2007b: 3), the clash over the level at which popular sovereignty should be exercised is a fundamental cleavage affecting viability.

Until recently, comparisons with the US or other mature federal systems were not considered particularly apposite in EU studies. This initial reluctance has now receded because the EU is taken to be a sufficiently consolidated political system and so can be examined alongside other federal states (Howse and Nicolaïdis, 2001; Parsons, 2003; Kelemen, 2004; Menon and Schain, 2006). However, such comparisons highlight the common absence of an indivisible locus of sovereignty but neglect the issue of the sovereign status of the units in the EU and the antebellum US, an issue that ultimately relates to the question of the exercise of popular sovereignty. It is precisely this notion of sovereign status and its effect on viability that can be captured thanks to the framework provided by the rules of the game.

Instead of starting from the assumption that sovereignty is an indivisible whole, certain contemporary IR scholars claim that that sovereignty is better understood as ‘a status, i.e., a legal standing, and thus a right to participate and engage in relations and to make agreements with other sovereign states’ (Jackson, 1999: 453). More accurately, sovereignty is a claimed status, which serves ‘to legitimize certain rights, duties and competences’ (Werner and de Wilde, 2001: 297). Hence this conceptual move shifts the problematic state of sovereignty away from the preoccupation with the antinomy between indivisibility and fragmentation by suggesting that it is more important to appreciate what it means to make (and uphold) a successful claim to sovereign status. By definition, therefore, the successful status claim that constitutes sovereignty is above all relational: it depends on negotiating the claim to sovereign status in the face of ‘audiences external and internal to the state’ (ibid., p. 290).
From this perspective, what matters most for the politics of sovereignty in a non-unitary system is less dealing with competence clashes between levels of government than understanding the extent to which political units can ‘rely on their sovereign status and whether relevant audiences accept their claims to sovereignty’ (ibid., p. 304). In the republican tradition, the domestic audience is understood in terms of popular sovereignty (Morgan, 1988; Yack, 2001). But this same power or audience can be conceived as engaged (active) or recessed (passive), depending on whether the actual exercise of political authority is delegated or not (Deudney, 1995: 197–200). Only in the latter case, therefore, can popular sovereignty be represented by actors or institutions. Hence in anything besides a small democratic polity the politics of sovereignty is closely bound up with the mechanism of political representation, which negotiates a state’s claim to sovereign status in the context of different audiences.

But in a compound polity, or states-union such as the one created at the Philadelphia convention, there is no single recessed popular sovereign to be represented (Fritz, 2008; cf. Schmitt, 1992) thereby allowing institutions and actors at both the unit and union level to invoke popular sovereignty to buttress their claims to sovereign status. Moreover, unlike in most federal states, the units in the original US federal union had a highly credible claim to the status of sovereignty both prior to and after the ratification of the US constitution (Van Tyne, 1907; McDonald, 2000). After all, the Treaty of Paris (1783) that ended hostilities with Britain recognized the former colonies as ‘free, sovereign and independent states’. In terms of the rules of the game, therefore, sovereign status affects expectations about the nature of the political union and the structure of political representation, given the competing attempts to invoke popular sovereignty as both units and the union try to determine their respective sovereign status. Yet comparative federalism finds it difficult to incorporate these aspects of political contestation, as can be seen from attempts to conceptualize what the EU is by virtue of systematic comparisons with other polities exhibiting fragmented authority, whether confederations or federal systems.

1.5 Comparing the EU with other political systems

Although more than two decades ago the EEC was described as an ‘economic confederation’ (Forysth, 1981), the theory of confederalism has seldom been used effectively to understand the EU. The contemporary preference, when using the traditional language of the state, has been...
The Problem of Viability in a Compound Polity

to interpret the EU as a species of federalism in order to conduct comparisons with other federal systems. Recently, however, Giandomenico Majone has argued that the EU is best understood as a confederation, which is ‘simply the extension of mixed government to the international level’ (2006: 122). This implies that the EU is best understood in terms of its mixture and balance of different corporate bodies, whereby ‘the overarching goal of this mode of governance is the defence and promotion of the interests of the component units rather than the protection of the rights and liberties of individuals’ (ibid., p. 121).

Two important consequences flow from this mixture of corporate interests. Firstly, a differentiated mode of decision making according to policy field, as ‘each subject matter has its own decision-making procedure according to the nature of the interest receiving special protection’ (ibid., p. 128). Secondly, there is an immanent flaw in the policymaking process since previous experience of mixed government suggests that ‘the corporate bodies constituting the mixed polity were less interested in making policy for the entire polity than in questions of privileges and rights’ (ibid., p. 127).

Despite offering a nuanced and seductive interpretation of the integration process, Majone’s theory of confederalism nonetheless overlooks the importance of sovereignty as a status and thus cannot account for certain fundamental features of conflict over the rules of the game in the EU. First of all, the identification of ‘interests’ as lying at the core of the EU political system neither explains how such interests are constituted in the first place nor how they come to be represented and hence protected and promoted. Ultimately, the principle of sovereignty as a negotiated status offers the best explanation for the configuration of EU architecture: the member states have an exclusive standing and right to participate in the EU system that derives from their sovereign status, notably a seat in the two principal decision-making bodies, the European Council and the Council of Ministers. In addition, they exclusively possess a set of rights, derived from the same source, notably veto powers in specific policy areas, for instance taxation, enlargement and treaty renegotiation, as well as ad hoc opt-outs from certain policies. This status thus clearly distinguishes the member states from mere regions, which are only offered a seat at the purely consultative Committee of the Regions. Indeed, the aim of regional separatism in Scotland or the Basque Country is precisely to accede to the sovereign status of member states.21

At the same time, however, the ECJ has effectively curtailed the set of rights that member states derive from their sovereign status, although
obviously not the right to participate in decision making. Consequently, the EU is unquestionably no longer a pure confederation. As Majone recognizes, confederalism is premised on the fact that the unit of political representation is solely a collective one (i.e. a state, people, territory) and as such legal acts fall on those units in their ‘corporate or collective capacities’ (Hamilton et al., 2003: 67). This arrangement means that in a confederation individual citizens do not acquire rights against states. Yet by developing the doctrine of direct effect, which rules that European legislation creates legally binding obligations that are justiciable in member state courts, the ECJ has changed the rights associated with sovereign status (Stone Sweet, 2005). Hence it is the direct effect principle, rather than the ‘supremacy’ doctrine, that constitutes the revolution in the politics of sovereignty in the course of European integration because confederalism already presupposes the maxim *pacta sunt servanda*. Moreover, member states have lost their monopoly to represent their citizens in the EU political system. This right, formerly an exclusive component of sovereign status, is now shared with the European Parliament ever since the holding of direct elections in 1979 and its transformation into a co-legislator in an increasing number of policy areas following the 1992 Maastricht Treaty. This distinguishes the EU polity from historical confederations such as the US (1781–9) or the *Deutscher Bund* (1815–48) founded on indirect representation via territorial units.

Majone’s confederal theory thus misses the way in which two particular aspects of the conflict over the rules of the game suggest that the EU is above all a failed confederation (Parsons, 2003). Firstly, there is the attempt, discussed in Chapter 4, to prevent the ECJ from creating more rights derived from the treaties and subsequent secondary legislation that individuals can wield against member states. Secondly, EU member states have had to defend their right to participate in authoritative decision making against the claim of the European Parliament, which seeks to become an equal co-legislator. As a result, member states have consistently refused to transform the Council of Ministers into an upper legislative chamber, which would leave the directly-elected Parliament responsible for the bulk of policymaking.

Although a previous generation of EU scholars ‘eschewed comparative analysis’ (Kelemen, 2003: 184), further economic and political integration, combined with the greater legislative power of the European Parliament, now makes comparison a favourite method for studying the EU (Rosamond, 2007). This holds true not only for the study of regulation and policymaking but also for the whole gamut of executive, legislative
and judicial politics (Pollack, 2005). Increasingly, these comparative studies choose the language of federalism, emphasizing the similarity of institutions and policy programmes and their ability to deal with common problems of government (Sbragia, 1992; Zweifel, 2002; Kelemen, 2004; Menon and Schain, 2006; Mendez, 2007). Yet for all comparative federalism’s contribution to understanding the nature of EU policymaking, this approach rests on a conceptualization of the EU that fundamentally fails to problematize the question of sovereign status within the EU system as compared with other contemporary federal systems. This is all the more surprising since federalism is understood to ‘change the political status of every member of the federation … it establishes a new status for every member’ (Schmitt, 1992: 29). In the language of the rules of the game adopted here, the comparative federal approach fails to provide much guidance for understanding contestation over the principles of political representation as well as expectations about the nature of the union.

Certain federations with which the EU is sometimes compared are parliamentary regimes (Austria, Germany, Australia and Canada) that presuppose the existence of single people, a united popular sovereign. This feature is perhaps best reflected by the presence of cross-unit political parties in these federal systems – with the exception of the secessionist Parti Québécois in Canada. Moreover, in these same systems the government depends on the support of the directly elected lower houses, representing citizens qua citizens of the federation rather than as citizens of a particular territorial unit as in the upper houses. Thus comparisons between the above federal systems and the EU err in not addressing the implications the patent absence of a united popular sovereign has for the integration process. It is this absence that gives rise to manifold thorny quandaries of integration: bickering over the move to qualified majority voting, the continued insistence on unanimous ratification of treaty reform and attempts to prevent the extension of co-decision with the European Parliament. Such conflicts illustrate the manner in which EU member states rely on their sovereign status to dispute change in the system of political representation at the EU level.

Hence the most recent wave of comparative federalist approaches to European integration has deliberately sought to construct more pertinent comparisons with the two federal systems that differ most from the parliamentary norm: the modern US and Switzerland. As Fabbri and Sicurelli explain, comparison with the US is attractive because ‘there is no European equivalent of a political system defined by this multiple separation of powers, at once vertical and horizontal’
(2004: 232). Of course, Switzerland in fact does meet this criterion of a dual system of separation of powers – a point stressed by certain comparative scholars interested in EU politics (Blondel, 1998; Zweifel, 2002; Mendez, 2007) – but tends to be excluded for reasons of size (Fabbrini and Sicurelli, 2004).

However, both Switzerland and the modern US can be distinguished from the EU by virtue of their having a single popular sovereign that is ordinarily ‘recessed’, to reprise Deudney’s terminology, but which periodically becomes very active indeed. In Switzerland, this is evidently the direct democracy device, the referendum, that allows Swiss citizens to collectively challenge both a law passed in parliament as well as propose constitutional amendments. Whereas the US constitution does not allow for national referendums, there the institution that mobilizes popular sovereignty is the presidency. The nature of that institution changed fundamentally in the course of the nineteenth century, transforming the contest for the executive into a competition for the popular vote rather than an indirect election of the most suitable candidate by those who should know best (Aldrich, 1995; Glencross, 2008). As a result, the legitimacy furnished by this unique connection between the presidency and the united sovereign US people has enabled various presidents to reform the modern US body politic (Ackerman, 1991, 1998) as well as overcome certain policy impasses within the legislature by mobilizing citizens directly (Schain, 2006).

Thus both modern Switzerland and the post-Civil War US have a mechanism for the direct cross-unit mobilization of citizens, which allows the federal level to represent popular sovereignty. This move denies the territorial units the ability to claim the sole right to represent popular sovereignty as an integral part of their sovereign status. Hence the struggle over the rules of the game of politics is very different in the EU because there the member states have been able to use their sovereign status to preserve their monopolistic claim over the representation of popular sovereignty within the EU architecture. In this way, EU member states have purposefully sought to counteract attempts to mimic both the Swiss and the US mechanisms for activating a single recessed popular sovereign at the EU level. This explains the hollowness of the new-fangled ‘popular initiative’, which would allow a million EU citizens to invite the Commission to consider legislating in a certain policy area already within the framework of its powers. The same explanation lies behind the Lisbon Treaty’s introduction of a president of the European Council elected by the member states rather than directly by EU citizens. In this context it is perhaps important to remember
that Belgium, the European federation that is neither parliamentary nor has mechanisms for empowering a cross-unit display of popular sovereignty, is slowly imploding.22

The second feature of the contestation over the rules of the game that comparative federalism does not dwell upon concerns expectations about the nature of the EU. The presence of a unilateral exit procedure in the Lisbon Treaty (Article 49A)23 for member states wishing to leave the EU, owes its existence to member states seeking to underscore – especially to their domestic audiences – the fact that membership of the EU is fully compatible with an unaltered sovereign status. The result puts the EU at odds with virtually all historical examples of federalism since only the USSR (in theory) permitted voluntary withdrawal of a territorial unit (McKay, 1999: 126). Yet the withdrawal option is a vital part of contestation over the rules of the game in a compound polity. The possibility of exit from the EU treaty framework contrasts starkly with the US constitution, which – unlike the Articles of Confederation – was ambiguous regarding whether the union was perpetual. It was precisely this ambiguity that allowed southern secessionists to argue that since the American states retained sovereign status the unilateral right of withdrawal was by definition an integral element of this status. Without this right, the states could no longer plausibly be said to possess a sovereign status.

In other words, sovereign status affects conflict over the rules of the game – and a fortiori whether this can be managed through dynamic equilibrium or voluntary centralization – in a way that cannot be grasped if the focus of analysis falls solely upon institutions and the evolving boundaries between the units and the centre. What matters as far as understanding viability is concerned is to discover how the rules of the game are contested and how they are settled or not. Hence a tabularization of the transfer of competences in the course of European integration (Börzel, 2005: 221–3; cf. Donahue and Pollack, 2001: 107) only indicates a change in one aspect of integration but not whether this reflects an evolution in the nature of the project, whether it generates new expectations, settles the competency over competences question or affects the tension between principles of representation. A comparative narrative of transferred competences, therefore, is not by itself sufficient for understanding how conflict over the rules of the game can be managed.

Similarly, an examination of how institutional disputes over allocated powers are adjudicated (that is, who exercises Kompetenz-Kompetenz) is not sufficient to grasp where a compound polity like the antebellum US or EU
stands in the spectrum between dynamic equilibrium and voluntary centralization. This is because the settlement of a particular competence issue does not necessarily entail any further consequences for the rules of the game. After all, in such situations, which arise frequently in compound political systems, the emphasis may be on ‘conflict settlement, not the vindication of rights’ (Kratochwil, 1978: 47). One scholar, whose pioneering contrast of antebellum contestation of federal sovereignty by state courts with similar struggles against the ECJ by national courts in Europe, thus provided a very partial account of the contestation over the rules of the game. The failure to capture the wider gamut of political contestation led Goldstein to claim that there is an ‘evident paradox’:

That the nominally sovereign government of the United States of America experienced several decades of overt and even violent official defiance of its authority by the member states of the American union, while the nominally sovereign member states of the European Union virtually from the start obeyed as a legitimate higher authority the dictates of their federal union.

(2001: 15)

Unfortunately, by concentrating purely on legal resistance within the respective polities, Goldstein fails to question whether member-state compliance with the EU legal regime relates to how especially thorny issues of sovereignty (such as the budget, enlargement, treaty reform) are deliberately prevented from becoming subject to resolution through judicial arbitration and hence dealt with by other means. Indeed sometimes, as in the case of the Stability and Growth Pact, the legal procedures for compliance are more or less ignored.24 Thus a purely institutional or competence-focused study is blind to other dimensions of political life that have a crucial bearing on contestation and (re)construction of the rules of the game in a compound polity. Here there is an obvious parallel with the US political system, whose functioning cannot be summed up by the provisions of the constitution and subsequent legislation. As Nichols observes:

American democracy ... was never completely planned nor projected, and even in the laws and constitutions which have been its charters, it was never fully described. Certain of its chief elements were neither designed nor authorised, while some of its most effective instruments of operation have been unspecified improvisations.

(1972: xi)
Nichols is referring here, among other things, to the populist innovations of Jacksonian democracy, the rise of nationally organized parties and the reconstruction settlement. These extra-constitutional innovations condition the way in which political arguments arise and how they can be settled and it is myopic to neglect them. It is exactly this kind of oversight that the present study seeks to avoid by paying attention to the broader context in which political contestation takes place in a compound polity.

1.6 Conclusion

Rather than invoking the notion of a compound system as characterized by a set of institutional features (Fabbrini, 2003, 2005a, 2007b; Mendez, 2007) therefore, this study prefers to define a compound political system as one experiencing a form of political contestation not present in other forms of state. It is precisely this experience of contestation over the four dimensions conceptualized as ‘the rules of the game of politics’ that provides the subject matter for the analytical comparison between the antebellum US and the contemporary EU pursued in the following chapters. The analysis identifies and explains the crucial differences in both how conflict over the rules of the game occurred and how it was managed (or not). As a result, the transatlantic analogy demonstrates the extent to which changes in the rules of the game in the EU and the antebellum US underwent dynamic equilibrium or voluntary centralization. Only once this is known does it become possible to determine what effect proposed institutional changes to the EU compound architecture will have on the viability of this unusual polity.
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