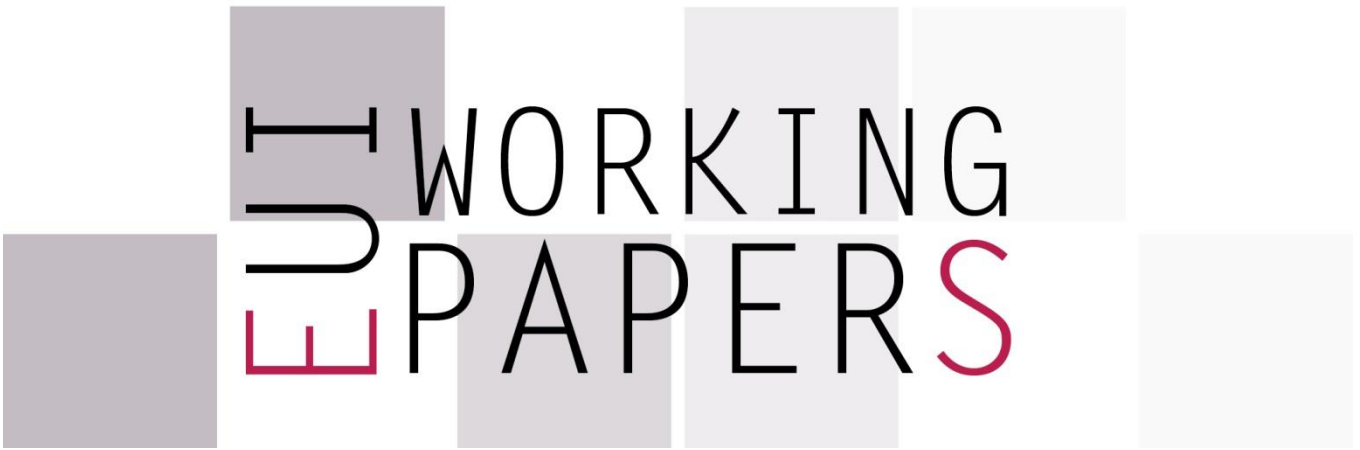
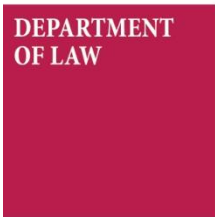




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## **Models of Democracy: Some Preliminary Thoughts**

Robert Schütze



European University Institute  
**Department of Law**

**MODELS OF DEMOCRACY: SOME PRELIMINARY THOUGHTS**

Robert Schütze

EUI Working Paper **LAW** 2020/08

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## **Abstract**

What does the neologism *demoicracy* mean? If democracy is the “government” of the “people”, can there be a government of *peoples*? Are international organisations, like the United Nations, democracies; or should the United Kingdom, as a multi-nation state, be viewed as such? Within the last decade, the idea of demoicracy has developed considerable traction, especially within the political science literature on the European Union. Yet what exactly is demoicracy supposed to mean in this context; and what models of demoicracy have developed to explain the “realities” of a plurality of peoples governing together? This Working Paper aims to explore the theoretical and historical expressions of the curious concept of demoicracy. Section 1 starts by clarifying two important philosophical distinctions, namely the difference between popular *sovereignty* and popular *government* and, equally, the distinction between an (international) Union of *States* and a (national) Union *State*. Section 2 offers a constitutional overview of the potentially demoicratic elements within the United States of America; while Section 3 analyses and compares the founding and government of the European Union in demoicratic terms. Section 4 critically presents the three main models of demoicracy that have developed in the contemporary literature on the European Union, with Section 5 introducing a – new – fourth model called “republican federalism”. A Conclusion makes a normative argument in favour of this fourth model from the point of view of the social and legal structure of the European Union.

## **Keywords**

Democracy, European Union, dual sovereignty, dual government, dual citizenship, mutual recognition, republican intergovernmentalism, republican federalism, globalisation

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## **Foreword**

This Working Paper presents some “preliminary thoughts” on the historical precursors and conceptual possibilities of a European democracy or demoiocracy. They are published, prematurely, today to honour the late David Held who, suddenly and sadly, passed away last year. David and I first met in 2012 when he arrived in Durham as the newly appointed Master of University College. Plans were swiftly made to co-direct a “Global Policy Institute” in which David was to concentrate on the international and cosmopolitan dimension of world “governance” (or gridlock thereof), whereas I – a (then) young Professor of European Law – was to explore the supranational and regional manifestations of “governments” above and beyond the State.

David was a prodigious source of warmth, wisdom and wit. The son of a German-Jewish émigré fleeing Nazism, educated in Britain and the United States, David’s academic interests were as broad as they were deep. Starting his career with an extraordinary “Introduction to Critical Theory” (1980), which familiarized a wider English-speaking world with the philosophy of the Frankfurt School, and especially the work of Jürgen Habermas, his subsequent intellectual rendezvous with “democracy” and “cosmopolitanism” not only made him famous but defined and structured two academic subfields for more than two decades. Interested in the “theory” as much as in the “practice” of both key concepts of political philosophy, he combined a profound sensitivity for the history of ideas with a deep commitment to sociological facts. David thereby believed in, and had an enormous respect for, the constructive potentiality of “law” as an agent of order and rationality; and conversations at the Institute would thus often range from Adorno and ASEAN to *Zambrano* and Zemin. One of his future retirement projects was to write a book entitled “How to Change the World” (he hardly seemed unnerved when told that Eric Hobsbawm had already published under that title), and while this book will never see the light of day, for many who knew him, he had already changed the world for the better. He will be much missed, and these preliminary thoughts are but a first tribute to a remarkable friend and colleague – and, in many ways, a master in life and death.

A preliminary version of this preliminary piece was presented in Zürich; and I am very grateful to Francis Cheneval for his kind invitation to the “Kolloquium Politische Philosophie” last year. Most special thanks go to Nicola Lupo who, over the years, has kindly encouraged me to put these ideas on paper (and a shortened Italian version of the second part of this essay is to be published in his collection “Parlamenti e democrazia in Europa: Federalismi asimmetrici e integrazione differenziata” next year). This EUI Working Paper forms part of my broader interest in “Neo-Federalism” and its implications for democracy in the twenty-first century in general, and the constitutional parameters of European democracy in particular. For an earlier academic collaboration (with David) on these issues, see David Held & Robert Schütze (eds.), *Democracy Beyond Borders* – Special Issue, (2017) 8 (6) Global Policy. The picture of David, on the next page, is taken from Paul Kelly’s thoughtful LSE obituary.



*In memory of David Held.*





## Introduction

“The history of the idea of democracy is curious; the history of democracies is puzzling.”<sup>1</sup> Beginning in the Greek world of city states, the composite word “democracy” combined *demos* (people) with *kratos* (rule) to refer to the “rule” or “government” of the “people”. The government of the people thereby meant the rule of the “many” – the majority of the people; and this model of democracy, as direct democracy, can still be found today. Yet with the spectacular rise of the territorial state, the idea of democracy underwent a major “translation”. For mass democracy to work, it had to rely on the idea of representation; and once this idea was applied to elected assemblies, the idea of parliamentary democracy was born. Within that new model of democracy, the people would no longer rule through a plebiscitary majority among themselves; they would, instead, delegate their powers to an elected “few” in parliament where a parliamentary majority now came to represent the will of the people. This new model of parliamentary democracy – a contradiction in terms for the ancients – has come to completely dominate the political imagination of us “moderns”.

With this definition of democracy in mind, what could the neologism democracy mean? If democracy is the “rule” of the “people” (via representative institutions), can there be a government of peoples? Are international organisations, like the United Nations, democracies;<sup>2</sup> or should the United Kingdom, as a multi-nation state, be viewed as such? Within the last decade, the idea of democracy has developed considerable traction, especially within the political science literature on the European Union.<sup>3</sup> Yet what exactly is democracy supposed to mean in this context; and what models of democracy have evolved to explain the “realities” of a plurality of peoples governing together?

This Working Paper aims to explore the theoretical and historical expressions of the curious concept of democracy. Section 1 starts by clarifying two important philosophical distinctions, namely the difference between popular sovereignty and popular government and, equally, the distinction between an (international) Union of States and a (national) Union State. Neither of these two forms can, as we shall see, be identified with the idea of democracy. What, then, could be historical illustrations of democracy? Section 2 offers a constitutional analysis of the potentially democratic credentials of the United States of America. We shall see there that the great American invention in the realm of political philosophy is the idea of dual democracy and dual citizenship in a “republic of republics”. Equipped with these comparative lessons, Section 3 aims to analyse the founding and government of the European Union in democratic terms, while Section 4 presents an overview of the three main models of democracy that were developed in the contemporary literature on the European Union. Section 5 introduces a – new – fourth model called “republican federalism” and compares and contrast it to the three alternative models of European democracy discussed earlier. A Conclusion finally offers arguments in favour of this fourth model from the point of view of the social and legal structure of the European Union.

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<sup>1</sup> This is how David Held started his masterpiece “Models of Democracy” (Polity, 2006), 1.

<sup>2</sup> The United Nations Charter was adopted on the authority of “*We the Peoples* of the United Nations” (Preamble, emphasis added). For a critique of the – wrong – use of “democracy” here, see: H. Kelsen, *The Preamble of the Charter – A Critical Analysis*, (1946) 8 Journal of Politics 134.

<sup>3</sup> For an overview of that literature, see Section 4 below.

## 1. Coming to Constitutional Terms: Two Philosophical Distinctions

### a. “Democracy”: Popular Sovereignty versus Popular Government

If democracy refers to a form of popular government, namely: representative government, how does it relate to the idea of popular sovereignty? The idea of popular sovereignty is not about how a polity is *governed* but refers to the prior question of how it is *founded*.<sup>4</sup> The distinction between popular sovereignty and popular government indeed maps onto the distinction between the people acting as *constituting* power(s) and the people acting through *constituted* powers. It is a crucial distinction for modern constitutionalism.<sup>5</sup>

Popular sovereignty stands for the idea that the people act as the *constituting* power; and, theoretically, popular sovereignty can here lie behind all forms of government – be they monarchic, aristocratic or democratic. Popular sovereignty simply means that the foundations of the polity stem from the authority of the people – not the authority of God(s) or kings; and once this is accepted, the people can offer legitimate resistance in the event “their” government violates “their” foundations. In the most extreme case, the people may even “dissolve” the present government and found a new one.<sup>6</sup> This idea of popular sovereignty stands behind the English “Glorious Revolution”; and, again, it simply means that “[t]he people are always there in reserve as the collective recipient of power when ordinary government has failed”.<sup>7</sup> This popular sovereignty however only awakes in exceptional situations – revolutionary ones; normally, the popular sovereign is fast asleep.

The distinction between popular sovereignty and popular government expresses itself most clearly in the social contract theories that emerge during the Enlightenment.<sup>8</sup> Building on an atomistic conception of the “people”, these theories locate the normative foundation of political societies in an – actual or hypothetical – contract between individuals. Each individual relinquishes its sovereign equality through his or her consent; and the resulting – unanimously agreed – foundational contract becomes the normative fountain of all political obligations.<sup>9</sup> Crucially, the government so created need not itself be democratic. But even where popular sovereignty leads to democratic government, the latter must clearly be distinguished from the former because, unlike the former, it is based on majority rule and not on unanimous consent.

In a well-known passage from Locke’s “Two Treatises of Government” (1689), we thus read:

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<sup>4</sup> A clear distinction ought to be made between how a polity really “is” founded and how it is “imagined” to be founded. This distinction is however often blurred because “dans une très large mesure, le pouvoir constituant n’existe que comme représentation, comme explication rationnelle, *a posteriori*” (C. Klein, *Théorie et pratique du pouvoir constituant* (Presses Universitaires de France, 1996), 4).

<sup>5</sup> R. Tuck, *The Sleeping Sovereign* (Cambridge University Press, 2018), 249: “[T]he appearance of a clear conceptual distinction between *sovereignty* and *government* was a necessary precondition for the emergence of a distinctly modern idea of democracy[.]”

<sup>6</sup> J. Locke, *Two Treatises of Government* (P. Laslett ed, Cambridge University Press, 1988), 367: “[T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still *in the People a Supreme Power* to remove or *alter the Legislative*, when they find the *Legislative* act contrary to the trust reposed in them.” For a discussion of this idea, see J. Franklin, *John Locke and the Theory of Sovereignty* (Cambridge University Press, 1978).

<sup>7</sup> M. Canovan, *The People* (Polity, 2005), 21.

<sup>8</sup> For an excellent overview here, see: J. W. Gough, *The Social Contract: A Critical Study of its Development* (Clarendon Press, 1957); as well as: W. Kersting, *Die Politische Philosophie des Gesellschaftsvertrages* (Wissenschaftliche Buchgesellschaft Darmstadt, 1994).

<sup>9</sup> Most famously, see: T. Hobbes, *Leviathan* (R. Tuck ed., Cambridge University Press, 1996), esp. 121: “A *Common-wealth* is said to be *Instituted*, when a *Multitude* of men do Agree, and *Covenant, every one, with every one*, that to whatever Man, or Assembly of Men, shall be given the major part, the *Right to Present* the Person of them all, (that is to say, to be their Representative)[.]”

“[W]hen any number of Men have, by the consent of every individual, made a *Community*, they have thereby made that *Community* one Body, with the Power to Act as one Body, which is only by the will and determination of the *majority*. For that which acts any Community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary the Body should move that way whither the greater force carries it, which is the *consent of the majority*: or else it is impossible it should act or continue one Body, *one Community*, which the consent of every individual that united into it, agreed that it should; and so everyone is bound by that consent to be concluded by the *majority*.”<sup>10</sup>

Within the social contract tradition, then, popular sovereignty is exercised through unanimous consent, whereas popular government, or democracy, is based on majority rule. For Locke, majoritarianism is indeed conceptually inherent in the very idea of *government*;<sup>11</sup> and he thus cannot even speak of a “government” where the unanimous agreement of all persons involved is needed. This is not democracy, as the rule of the many; this is the state of nature in which no government or polity yet exists.

A similar train of thought can be found in Rousseau’s “Social Contract” (1762). The great advocate of (direct) democracy here famously holds that each democracy first requires a “people”; and that the latter can only be “constituted” by means of an unanimously agreed social contract.<sup>12</sup> But once the people is constituted, the people must rule by majority:

“There is only one law which by its nature requires unanimous consent. That is the social pact: for the civil association is the most voluntary act in the world; every man being born free and master of himself, no one may on any pretext whatsoever subject him without his consent. (...) Except for this primitive contract, the vote of the majority always obliges all the rest; this is a consequence of the contract itself. Yet the question is raised how a man can be both free and forced to conform to wills which are not his own. How are the opponents both free and subject to laws to which they have not consented?”<sup>13</sup>

Rousseau famously answers this question through his “general will” that is distinguished from the “particular” will of each or all individual(s).<sup>14</sup> But the important point from the above quotation is, again, that in order to even speak of “democracy”, there must be a common or general will based on a *collective decision of a majority*. Democracy, as the rule of the people, means majority rule. Unanimity outside the founding contract, by contrast, leads to nothing but “un-rule” or anarchy.<sup>15</sup>

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<sup>10</sup> J. Locke, *Two Treatises of Government* (P. Laslett ed, Cambridge University Press, 1988), 331-2.

<sup>11</sup> Importantly, whenever I refer to “majoritarianism” or majority voting in the following pages, it always only means the opposite of unanimity. It consequently includes qualified or super-qualified majorities and even “consociational” forms of decision-making, as long as the latter do not result in unanimity. For the classic text on “consociational” democracy in pluralistic societies, see: A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (Yale University Press, 1977).

<sup>12</sup> J.J. Rousseau, *The Social Contract*, in: “The Social Contract and other later political writings” (V. Gourevitch ed., Cambridge University Press, 1997), 50-1: “At once, in place of the private person of each contracting party, this act of association produces a moral and collective body ... which receives by this same act its unity, its common *self*, its life and its will. (...) The public person thus formed by the union of all the others formerly assumed the name *City* and now assumes that of *Republic*... As for the associates, they collectively assume the name *people* and individually call themselves *Citizens*[.]”

<sup>13</sup> *Ibid.*, 123-4.

<sup>14</sup> *Ibid.*, 52: “Indeed each individual may, as a man, have a particular will contrary to or different from the general will he has as a Citizen. His particular interests may speak to him quite differently from the common interest[.]”

<sup>15</sup> For this link between unanimity and anarchy, in the historic context of the Polish “*liberum veto*”, see: J.J. Rousseau, “Specific Causes of Anarchy” in his “Government of Poland” (1772) (translation: W. Kendall, Hackett, 1985).

This link between democracy and majority rule resurfaces in Sieyès.<sup>16</sup> For in the words of the revolutionary theorist of the *pouvoir constituant*: “to require for the future that the common will should always be the exact sum of every individual will would amount to giving up the possibility of being able to will in common and would mean the *dissolution of the social union*.”<sup>17</sup> Yet – and this is a fundamental new point – each individual must only accept majority decisions as long as she wishes to remain bound by the social contract. Each individual ultimately reserves “the right to leave the association and to emigrate if the laws that it makes do not suit him”.<sup>18</sup> For Sieyès, as well as for other social contract theorists,<sup>19</sup> majoritarian democracy indeed remains embedded in a natural law philosophy that places the individual at the centre of the moral universe. The option to enter the social contract thus implies to right to leave; and this, in particular, means that each individual, ultimately, retains her inalienable “sovereignty” to withdraw from the political union in which she finds herself.

One of the best expositions of this “exit” right for individuals has been Vattel’s “Law of Nations” (1758). Here we read: “When a society has not been formed for a determinate time, it is allowable to quit it, when that separation can take place without detriment to the society.”<sup>20</sup> In some cases, there is even an “absolute right” to leave one’s society – regardless of whether damage is done to it. Such absolute rights are “founded on reasons derived from the very nature of the social compact”.<sup>21</sup> “If”, so Vattel argues, “the major part of the nation, or the sovereign who represents it, attempt to enact laws relative to matters in which the social compact cannot oblige every citizen to submission, those who are averse to these laws have a right to quit the society, and go settle elsewhere”.<sup>22</sup> This right to withdraw from the social contract is a “natural right”, which is “reserved to each individual in the very compact itself by which civil society is formed”.<sup>23</sup> The right of the free “citizen” to exit her political community directly derives from the *contractual* founding of the political community and it contrasts here sharply with the indissoluble *natural* community of which the royal “subject” forms part.

And with this thought, a first set of conceptual clarifications can be presented. First and foremost, from the point of view of social contract theory there exists a critical distinction between popular sovereignty and popular government. The latter refers to democracy as form of “government” in which a *constituted* legislature is in the electoral control of the “many”. Popular sovereignty, by contrast, refers to the idea that the *constituting* power behind all governmental institutions belongs to all individuals. In social contract theories, the “people” has thus two meanings (or “bodies”): it refers to an (unorganised) mass of individuals that come together to *unanimously* agree on acting together; and it also refers to an (organised) people acting through the institutions of government.<sup>24</sup> The shift from an unorganised

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<sup>16</sup> On the constitutional philosophy of Sieyès, see his “Selected Writings” (M. Sonenscher, Hackett, 2003); and more generally: P. Pasquino, *Sieyès et l’invention de la Constitution en France* (Jacob, 1998).

<sup>17</sup> E. Sieyès, *Views of the Executive Means Available to the Representatives of France in 1789*, in: “Selected Writings” (supra n.16), 11 (emphasis added).

<sup>18</sup> *Ibid.*

<sup>19</sup> For Rousseau each citizen has the permanent “right of renouncing his fatherland” (J.J. Rousseau, *Émile or On Education* (Basic Books, 1979), 455). Locke’s position is slightly more complex. For while each individual, once of the “age of discretion” “is a Free-man, at liberty what Government he will put himself under; what Body Politick he will unite himself to” (supra n.10 at 347), once express consent is given, it seems perpetual.

<sup>20</sup> E. de Vattel, *The Law of Nations* (J. Chitty ed., Johnson, 1883), Book I, §220.

<sup>21</sup> *Ibid.*, §223. Among the causes here listed are (1) “If the citizen cannot procure subsistence in his own country[.]”; and (2) “If the body of the society, or he who represents it, absolutely fail to discharge their obligations towards a citizen.”

<sup>22</sup> *Ibid.* §223.

<sup>23</sup> *Ibid.*, §225. For the modern expression of this idea see Article 13 (2) of the Universal Declaration of Human Rights: “Everyone has the right to leave any country, including his own, and to return to his country.” For an excellent discussion of the provision, see: F. G. Whelan, *Citizenship and the right to Leave*, (1981) 75 *American Political Science Review* 636.

<sup>24</sup> The – critical – first step distinguishes all social contract theories from the organicist theories of the nineteenth century according to which a “natural” people pre-exists. The people-as-person here immediately acts through a majority decision



multitude to an organised people takes place when unanimity voting is replaced by majority voting. Majoritarianism, and this is a second important point from the above discussion, is inherent in the very notion of government: without majority decisions, there is no government, or a “democracy” as a specific form of popular government. Finally, however, individuals do nonetheless retain a natural right to reject the majority will by exiting their political community as such. This right to withdrawal follows from the natural law individualism and the contractual foundation of the political community. In this sense the people – as individuals – always retain their individual “sovereignty”.

#### **b. “Democracy”: Federal Republic versus Unitary State**

Can social contract theory be applied to States as “collective” persons; and if so, what does this mean for popular sovereignty and popular government? The eighteenth century law of nations is a conceptual world centred on the idea of state sovereignty.<sup>25</sup> When sovereign states wish to govern together, only two forms of political union are thus envisaged: either a multitude of states combines into a “federal republic”; or, in the alternative, it forms a new state.

What is a “federal republic”? A federal republic is a union of states based on the sovereign equality of each and every member state. The respect for the independence and equality of each state distinguishes it from an “empire” in which imperial “domination” is exercised over “incorporated” regions or colonies. In Vattel’s classic international law textbook, the distinction is explained as follows:

“§ 10. Of States forming a Federal Republic

Finally, several sovereign and independent States may unite themselves together by a perpetual confederacy, *without ceasing to be, each individually, a perfect State*. They will together constitute a federal republic: *their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it*, in virtue of voluntary engagements. A person does not cease to be free and independent, when he is obliged to fulfil engagements which he has voluntarily contracted...

§ 11. Of a state that has passed under the dominion of another

But a people that has passed under the dominion of another is no longer a State, and can no longer avail itself directly of the law of nations. Such were the nations and kingdoms which the Romans rendered subject to their empire... The law of nations is the law of sovereigns; free and independent States are moral persons, whose rights and obligations we are to establish in this treatise.”

The federal republic is, accordingly, founded on the basis of an international treaty designed to set up a permanent diplomatic congress in which “joint deliberations” take place between the Member States. These joint deliberations do not impair their sovereignty, because all resulting obligations are “voluntary engagements” that allow each member to remain a “perfect state”. The federal republic is nonetheless seen, in the words of Montesquieu, as “an *agreement* by which many political bodies consent to become citizens of the larger [republic]”.<sup>26</sup> Yet even for Montesquieu, the associated States retain their full sovereignty – guaranteed through unanimous decision-making;<sup>27</sup> and, in the event of a disagreement, the confederation is automatically dissolved. Indeed, there is no question that the contractual origin of the

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to set up a government. This “collectivist” or “communitarian” version of popular sovereignty is often identified with Sieyès, but this is far too simplistic.

<sup>25</sup> E. de Vattel, *The Law of Nations* (supra n.20), Book I – §4: “To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it governs itself by its own authority and laws.”

<sup>26</sup> C. de Montesquieu, *The Spirit of the Laws* (A. M. Cohler *et al.* transl., Cambridge University Press, 1989), 131.

<sup>27</sup> C. de Montesquieu, *Œuvres Complètes* (R. Caillois ed., Gallimard, 1949), 1005: “[C]omme chaque partie a conservé la souveraineté, il peut être fort bien établi que toutes les résolutions, pour être exécutées, soient unanimes”.

federal republic implies a general and unilateral right to withdraw from the Union whenever a Member State so wishes.

This contractual reading is further developed by Kant for whom the federal republic is also an international treaty among “peoples” and thus not an “international state”.<sup>28</sup> There is no “legislature” nor an “executive” that could govern the federal republic; and yet it is meant to be governed “*in a civil way, as if by a lawsuit*”.<sup>29</sup> What does the “as if” formula here mean? Negatively, it might simply indicate that the federal republic not only lacks legislative and executive powers but also judicial powers. Yet behind the “as if” formula may also stand a positive idea, which finds a parallel in Kant’s treatment of “republicanism” under constitutional law (where Kant accepts that republicanism can operate outside a “republic”). The positive interpretation of the “as if” formula, then, is that even in the absence of a federal “government”, each member state must act *as if* such a government existed. Federal *governance* – as a regulatory ideal – is what needs to be striven for in the international relations between sovereign states; and this external governance is not enabled by federal force but is best guaranteed by the (internal) republican constitution of each Member State.<sup>30</sup>

What about situations where two states decide to govern as one? The historic paradigm case within the eighteenth century is, undoubtedly, the foundation of the United Kingdom. The latter is decidedly not a federal republic but a union state created out of England and Scotland (and, subsequently, Ireland).<sup>31</sup> The 1707 Union had been formed on the basis of an international treaty – the “Articles of Union”.<sup>32</sup> Through it, two peoples – the English and the Scottish people – expressed their mutual will to form a new state. This new state was to be a unitary state and a unitary democracy to “be represented by one and the same Parliament”.<sup>33</sup>

Did this institutional unification also unite the two nations into one “Union” people? Constitutionally, this was certainly the case. For the democratic principal behind the new Westminster Parliament was the newly constructed “British” people. Yet the Treaty of Union also recognised the continued existence of the English and Scottish nation by “grandfathering” their ancient rights and privileges; and most remarkably, Article IV of the Articles mutually extended all privileges and immunities from one nation to the other by guaranteeing a “communication of all other rights, privileges, and advantages which do or may belong to the subjects of either kingdom”. This horizontal principle has been interpreted to mean

<sup>28</sup> I. Kant, *Perpetual Peace*, in: “Kant: Political Writings” (H. Reiss ed., Cambridge University Press, 1991), 102 and 104. For a discussion of Kant’s idea of federalism and its parallels to Vattel, see R. Schütze, *The ‘Unsettled’ Eighteenth Century: Kant and his Predecessors*, in: “Globalisation and Governance: International Problems, European Solutions” (Cambridge University Press, 2018), Chapter 1.

<sup>29</sup> I. Kant, *Metaphysical First Principles of the Doctrine of Right*, in: “The Metaphysics of Morals” (edited: M. Gregor) (Cambridge University Press, 1996), § 61.

<sup>30</sup> On this point, see: R. Schütze, *The ‘Unsettled’ Eighteenth Century* (supra n.28).

<sup>31</sup> For a discussion of the creation of the United Kingdom and the constitutional ideas surrounding it, see: R. Schütze & S. Tierney (eds.), *The United Kingdom and the Federal Idea* (Hart, 2018), esp. 1-9. The following section will not look at the “colonial” structures within the British Empire, because imperial relations are not relations in which two or more people govern *together*. I will also not say much about Ireland but for a very good discussion here see: A. Carty, *Was Ireland Conquered? International Law and the Irish Question* (Pluto Press, 1996).

<sup>32</sup> Parliamentary ratification was the constitutional route for both States. The idea of holding a referendum, albeit broached by the Scottish advocates of federal union, was rejected in the Scottish Parliament, see: W. Ferguson, *Scotland's Relations with England* (John Donald Publishers, 1977), 257.

<sup>33</sup> 1707 Union Treaty, Article III. How was this new parliament composed? England had originally preferred a representational division of 40:1, while Scotland had wished to simply merge the English and Scottish legislatures (M. Fry, *The Union: England and Scotland and the Treaty of 1707* (Birlinn, 2007), 216-7). Ultimately, a compromise was found in which the England-Scotland division within the Westminster Parliament followed a ratio of 12:1 – a ratio that overrepresented the English population by a factor of about 2:1. A similar situation occurred with regard to the union with Ireland, a century later, where the British-Irish relationship within the Westminster Parliament was roughly 5:1 despite the British population being only twice as big as that of Ireland.

that the United Kingdom was “the union of two states – not the union of two peoples”.<sup>34</sup> However, the better view here holds that constitutional unity gradually and greatly fostered the moral unity of the country.<sup>35</sup> For even if the “constitutional unity of the country was achieved a good deal earlier than the moral unity thereof”,<sup>36</sup> the latter became a social reality a century after its constitutional foundation.<sup>37</sup> This moral unity of the “British” people did not fully eradicate English and Scottish “nationalism”.<sup>38</sup> The new political identity of the British “people” indeed only complemented the diverse collective identities of the various nations within the Union.<sup>39</sup>

What about withdrawing from the United Kingdom? The 1707 Union Treaty was, as we saw above, based on the principle that its founding “members” had transferred their sovereignty by submitting themselves to the “domination” of a new state. But since that new state was founded on a Union *treaty*, would the contractual nature of the new political union not mean that a breach of its foundation implied a right to withdrawal? Blackstone still thought this to be the case in the middle of the eighteenth century;<sup>40</sup> yet by the end of the nineteenth century, this “international” view had been fully displaced by a “national” view according to which the foundation of the Union lay in the (English) parliamentary act ratifying the Union Treaty.<sup>41</sup> A unilateral withdrawal from the Union is henceforth conceived as an act of rebellion or “war”. Such a civil war of independence would eventually sever Ireland from the United Kingdom in the early twentieth century; yet a rebellious “withdrawal” had of course already occurred at the end of the eighteenth century when thirteen British colonies proclaimed their independence in North America.<sup>42</sup>

But before we come to this, a second set of conceptual clarifications may be presented. Most importantly: eighteenth-century public law offers two basic options to states wishing to “govern” together. They can either form a federal republic in which each state remains sovereign and equal and in which there is no “government”; or, they incorporate into a new “super-state” in which they lose their

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<sup>34</sup> B. P. Levack, *The Formation of the British State: England, Scotland and the Union, 1603-1707* (Clarendon Press, 1987), 198.

<sup>35</sup> A. V. Dicey and R.S. Rait, *Thoughts on the Union between England & Scotland* (Macmillan, 1920), especially Chapter IX. The authors here memorably distinguished between the “constitutional unity” and the “moral unity” of the county in the following way (*ibid.*, 295): “The acceptance of the constitutional unity of the country means the acceptance by the vast majority of the people of Great Britain of the political and constitutional arrangements created by the Act of Union, or, to express the same thing in other words, the dying out of any widespread wish on the part of the British people to repeal the Act of Union. The acceptance of moral unity by the British people means their acquiescence in the unity of the country and in the sentiment that the inhabitants of Great Britain formed one united people, at any rate as against foreigners.”

<sup>36</sup> *Ibid.*, 296. For Dicey (and Rait), constitutional unity was accepted between 1746-1760, that is fifty years after the Union Treaty (*ibid.*, 302).

<sup>37</sup> For Dicey (and Rait), moral unity is only fully accomplished by 1805 (*ibid.*, 303), that is a hundred years after the creation of the Union.

<sup>38</sup> *Ibid.*, 321.

<sup>39</sup> For the classic here, see: L. Colley, *Britons: Forging the Nation 1707-1837* (Pimlico, 1992).

<sup>40</sup> W. Blackstone, *Commentaries on the Laws of England* (1765) (editor: T. M. Cooley, Callaghan, 1899), 88 (emphasis added): “That the two kingdoms are now so inseparably united, that nothing can ever disunite them again, except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be “fundamental and essential conditions of the union.”

<sup>41</sup> For a brief historical overview of the remarkable “de-constitutionalisation” of the 1707 Union Treaty, see R. Schütze, *The United Kingdom and the Federal Idea* (*supra* n.31), 18-20.

<sup>42</sup> In what is a paradigm case of social contract thinking, the American “Declaration of Independence” employed the concept of popular sovereignty according to which each (colonial) people enjoyed the right to withdraw from the “motherland” when certain conditions were fulfilled. The famous passages here are: “Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”

sovereignty and equality. Both, the creation of a federal or an incorporating union may be an exercise in popular sovereignty between states – as juristic persons – when the union is based on the consent of each and every state people. Yet neither the federal republic nor the union state are manifestations of a government of peoples. For in the case of the federal republic, classic international law cannot envisage a *government*, since the diplomatic congress must always operate by unanimity and no majority will is thus formed. By contrast, were various states incorporate into a new (unitary) state with one single parliament, there is no government of *peoples*, because the result of such an incorporation is, constitutionally, a unitary democracy in which a plurality of “peoples” is not represented as such. In search for historical examples of democracy we must therefore look elsewhere; and a good starting point is surely the constitutional history of the United States of America.

Table 1. Summary: Federal Republic *versus* Unitary State

	<b>Federal Republic</b> <i>(Union of Democracies)</i>	<b>Unitary State</b> <i>(Union as Democracy)</i>
<b>Popular Sovereign</b>		
<i>Founding Authority</i>	Multiple State Peoples	One State People
<i>Founding Instrument</i>	International Treaty	National Decision
<i>Withdrawal Right</i>	Exit per State	Exit per Individual
<b>Popular Government</b>		
<i>Democratic Agent</i>	No Government	Parliamentary Government
<i>Legal Instrument</i>	International Treaty	National Legislation
<i>Decision-Making</i>	Unanimous Decision	Majoritarian Decision

## 2. The “United States”: Popular Sovereigns and Democracy in America

Can we find manifestations of a “government of peoples” in the history of the United States? The commonplace response often negatively gestures to the U.S. Constitution’s famous preambular opening: “We the People”. Yet who were the “people” here: the *peoples* of the *United States*, or the *people* of the *United States*? The We-the-People formula had left the identity of the popular sovereign in an indeterminate plural: “Americans did not conceive of a nation, or a people, or a state, in terms of a unitary entity, a collective individual”; but on the contrary, “[t]he location of sovereignty [was] within the “people” in the plural divided sovereignty.”<sup>43</sup> The reason for this plural indeterminacy lay in the core aim of the 1787 Constitution – “to divide the sovereign authority into two parts”.<sup>44</sup> The newly founded American Republic would, as this section hopes to show, profoundly differ from the “federal republic” discussed above. American federalism came to stand for *dual* sovereignty, *dual* democracy and *dual* citizenship. How would these dualities be expressed in terms of popular sovereignty and popular government?

Let us explore this question by examining the foundation of the American Republic in a first step and its “democratic” functioning in a second step.

<sup>43</sup> L. Greenfeld, *Nationalism: Five Roads to Modernity* (Harvard University Press, 1992), 426.

<sup>44</sup> A. de Tocqueville (P. Bradley ed), *Democracy in America* (New York, Vintage, 1954), 151.

### **a. Founding Government: We, the Peoples of the United States**

With the Declaration of Independence, each of the former British colonies had, individually and separately, become an independent state.<sup>45</sup> Many of these new states immediately chose to re-constitute themselves as republics. By means of the 1776 Virginia Constitution, for example, “the good people of Virginia” had “ordain[ed] and declare[d] the future form of government of Virginia”; and a bicameral legislature would here come to represent the people of Virginia.<sup>46</sup> The 1780 Massachusetts Constitution offers, in this context, the perhaps most famous illustration of social contract thinking: “The body-politic is formed by a *voluntary* association of individuals: It is a *social compact*, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”<sup>47</sup> The collective author behind the “Constitution of the Commonwealth of Massachusetts” was thus none other than the “We” of “the people of Massachusetts”.<sup>48</sup>

Yet from the very beginning, the newly constituted American “republics” realised that their individual freedom from British domination could only be secured *together*. And having read their Vattel and Montesquieu, they hastily entered into a “Confederacy” under the name of the “United States of America” through the “Articles of Confederation”. This first U.S. Constitution was decidedly not adopted by the “American people”. It was ratified by each individual State in accordance with its own constitutional requirements – Virginia being the first and Maryland the last state to ratify the Articles.<sup>49</sup> In terms of normative authority, the unanimous ratification by the state parliaments gave the Articles the status of an ordinary international treaty – the founding document of a “federal republic”. And indeed: in line with Vattellian doctrine, the federal union considered each member state sovereign and independent;<sup>50</sup> with each having only “*severally* enter[ed] into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare”.<sup>51</sup>

This federal republic quickly proved too weak and too defective;<sup>52</sup> and in order to create “a more perfect union”, a new federal arrangement was soon drafted at Philadelphia. Importantly, the latter was not designed as an amendment to the old union. It was a “re-foundation” of the union in which not all of the old Member States would also have to be members of the new union.<sup>53</sup> Most famously, the Philadelphia Convention aimed to give the new union a firmer “constitutional” status by going straight to “the people”

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<sup>45</sup> Independence had been declared for thirteen independent people – and this was the reason why the Declaration of Independence described itself as the “unanimous Declaration of the *thirteen* United States of America”.

<sup>46</sup> For the text of the Virginia Constitution, see: <https://www.law.gmu.edu/assets/files/academics/founders/VA-Constitution.pdf>.

<sup>47</sup> For the text of the Massachusetts Constitution, as well as its analysis, see: R. M. Peters, *The Massachusetts Constitution of 1780: A Social Compact* (The University of Massachusetts Press, 1978).

<sup>48</sup> *Ibid.*

<sup>49</sup> This rule of unanimous ratification by the state legislatures also applied to amendments, see: 1777 Articles of Confederation, Article XIII.

<sup>50</sup> *Ibid.*, Article II: “Each state retains its sovereignty, freedom, and independence[.]”

<sup>51</sup> *Ibid.*, Article III.

<sup>52</sup> For the classic analysis here, see: J. Madison, *Vices of the Political System of the United States* (1787), available here: <https://founders.archives.gov/documents/Madison/01-09-02-0187>.

<sup>53</sup> Article VII of the 1787 Constitution states: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” Was this article “illegal” in light of the “perpetual” nature of the 1777 Articles of Confederation? When American constitutional scholars, like Bruce Ackerman (“We The People – Volume II: Transformations” (Harvard University Press, 1998), 49) refer to the “illegality” of the Philadelphia Convention, they seem to forget that in line with Vattel (and Montesquieu), leaving the Union was a perfectly accepted right of sovereignty. The identification of “perpetual” with “indissoluble” is, in my view, a bad example of historical foreshortening in which the Supreme Court’s post-Civil War *Texas v. White* (1869) comes to overlay the classic “Vattellian” meaning.

– the popular sovereign – as its founding authority. Unlike the 1777 Articles of Confederation, the 1787 Constitution would thus be ratified not by the state parliaments – as constituted powers – but by “the supreme authority *in each State*, the authority of the people themselves”.<sup>54</sup> Yet importantly, the 1787 US Constitution was ratified “by the people, not as individuals composing one entire nation, *but as composing the distinct and independent States to which they respectively belong*”; and it was the “*unanimous* assent of the several States” that was thereby required. A multiplicity of popular sovereignties therefore stood behind the phrase: “We, the people”. For this was not the American “people”, but the “peoples” of the several States.<sup>55</sup>

The best theoretical conceptualization of this plural constituent power has come from Carl Schmitt. According to Schmitt’s “federal constitutionalism”,<sup>56</sup> every union of states will be founded by a “federal treaty” whose “conclusion is an act of the *pouvoir constituant*”.<sup>57</sup> From the perspective of democratic constitutionalism, its constituent power must be a plurality of state *demos*. For whenever a single *demos* is seen as the normative foundation of a political union, its federal character is destroyed.<sup>58</sup> Significantly, however, Schmitt did not deny the existence of a federal *demos* as such. On the contrary, and unlike the federal thought of Montesquieu, Vattel or Kant, every federal union is now seen as having “a common will and, thus, its own *political* existence”.<sup>59</sup> This political existence is formally created by the Union, and it therefore lies in its future. Or, in the words of Schmitt’s famous intellectual rival: “the people – from whom the constitution claims its origin – comes into existence first through the constitution”.<sup>60</sup> For Schmitt (as for Kelsen), the federal *demos* will consequently not produce the Union but, contrariwise, be a product of the Union; and once this new – common – political will exists, a union of states is henceforth characterized by the co-existence of *two* popular sovereigns. A federal union is indeed always a union of two sovereigns in which the question of sovereignty must remain undecided.<sup>61</sup>

Within a political order of dual sovereignty, the “people” – as a constitutional subject – must remain indeterminate. They/it simultaneously refer(s) to the *peoples* of the United States as well as to the people of the United States. The locus of popular sovereignty must remain in suspense so as to stabilise and guarantee the idea of divided or dual sovereignty. This stability is however threatened whenever existential constitutional conflicts arise, as regularly happened in the history of the United States.<sup>62</sup> The ultimate threat here is, of course, a unilateral withdrawal or secession from the Union; and this

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<sup>54</sup> A. Hamilton, J. Madison and J. Jay, *The Federalist* (T. Ball ed., Cambridge University Press, 2003), 184 (emphasis added).

<sup>55</sup> The phrase “We, the people of the United States” simply referred to the idea that the people(s) in the States – not the State legislatures – had ratified the Constitution. The original 1787 draft preamble indeed read: “We, the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following constitution for the government of ourselves and our posterity.” However, due to the uncertainty which of the 13 States would succeed in the ratification (according to Art. VII of the Constitution-to-be only nine States were required for the document to enter into force, see supra n.53), the enumeration of the individual State peoples was dropped by the (Philadelphia Convention’s) “Committee of Style” (see M. Farrand, *The Framing of the Constitution of the United States* (Yale University Press, 1913), 190–1).

<sup>56</sup> C. Schmitt, *Verfassungslehre* (Duncker & Humblot, 2003), Part IV: ‘Verfassungslehre des Bundes’, 361–91.

<sup>57</sup> *Ibid.*, 367 and 368 (all translations are mine).

<sup>58</sup> *Ibid.*, 398: “*Durch den demokratischen Begriff der verfassungsgebenden Gewalt des ganzen Volkes wird die bündische Grundlage und damit der Bundescharakter aufgehoben.*”

<sup>59</sup> *Ibid.*, 371. On Schmitt’s definition of the “political”, see C. Schmitt, *Der Begriff des Politischen* (Duncker & Humblot, 1996).

<sup>60</sup> In this sense, see: H. Kelsen, *General Theory of Law and State* (Transaction Publishers, 2006), 261.

<sup>61</sup> Hannah Arendt even went so far as to claim that “the great and, in the long run, perhaps the greatest American innovation in politics as such was the consistent abolition of sovereignty within the body politic of the republic” (“On Revolution” (Penguin 1977), 153).

<sup>62</sup> R. Schütze, *Federalism as Constitutional Pluralism: “Letter from America”*, in: M. Avbelj & J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012), 185.

constitutional remedy indeed enjoyed strong philosophical credentials in the United States until the American Civil War.<sup>63</sup> Yet after the (Northern) Union's victory over the seceding southern states, the dramatic constitutional "reconstruction" that followed outlawed all secessions as illegal rebellions. The United States is, after the Civil War, seen as "indestructible" and "indissoluble";<sup>64</sup> and from this moment, the 1787 Constitution *becomes* perceived as "something more than a compact; it was the *incorporation* of a new member into the political body" like the incorporation of England and Scotland into the United Kingdom.<sup>65</sup>

This post-Civil-War "reconstruction" can be seen as a second "re-founding" of the United States.<sup>66</sup> It is accompanied by a fundamental shift in the conceptualisation of American citizenship. For in the wake of the Reconstruction Amendments, and especially the Fourteenth Amendment (1868), the relationship between member state and Union citizenship is inverted.<sup>67</sup> Indeed: whereas Union citizenship had, prior to the Civil War, been derived from and secondary to state citizenship; after the Civil War, the "people" of the United States primarily conceived themselves as "national" citizens whose primary "allegiance" was to the Union – and not to their individual states.

This change in the constitutional hierarchy of political identification had, however, surprisingly not triggered a corresponding constitutional change in relation to the formal amendment power.<sup>68</sup> From its inception, the 1787 Constitution had here entitled a mixed power, composed of Union institutions (federal Congress or federal Convention) and the States (state legislatures or state conventions), to amend and change the constitution by a qualified majority. Yet this compound constituent power conceded a strong dominance to the States – not the Union; and, unresponsive to the powerful "national" feelings arising in the course of the twentieth century,<sup>69</sup> the formal amendment procedure has increasingly been complemented by *informal* constitutional "amendments". These informal amendments have been dramatic;<sup>70</sup> and since they centred on the American "people" (and its

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<sup>63</sup> In the words of S. M. Lipset, *The First New Nation: The United States in Historical and Comparative Perspective* (Norton, 1979), 34: "[A]lmost every state and every major political faction and interest group attempted, at one time or other between 1790 and 1860, to weaken the power of the national government or to break up the Union directly". For the most infamous example here, see the 1860 "Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union".

<sup>64</sup> *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869), 725-6.

<sup>65</sup> *Ibid.*, 726.

<sup>66</sup> B. Ackerman, *We The People – Volume II* (supra n.53), 198: "Reconstruction as a Re-Founding".

<sup>67</sup> B. Ackerman, *We The People – Volume I: Foundations* (Harvard University Press, 1991), 81: "The Republicans' Fourteenth Amendment opens by proclaiming, for the first time in our history, that national citizenship is primary, state citizenship secondary in each American's political identity."

<sup>68</sup> The complex procedure is set out in Article V of the US Constitution, which states: "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress[.]" For the identification of the American (legal) sovereign with the US amendment power, see A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982), 81.

<sup>69</sup> B. Ackerman, *The Living Constitution*, (2007) 120 *Harvard Law Review* 1738, esp. at 1743: "[T]he amendment system was written for a people who thought of themselves primarily as New Yorkers or Georgians. We have become a nation-centred People stuck with a state-centred system of formal amendment."

<sup>70</sup> The impressive stability of the "text" of the written U.S. Constitution in the twentieth century is deeply deceptive; as, in the pithy words of one commentator, "the New Deal left no text". For Ernie Young, "[t]he great puzzle of American constitutionalism, then, is not 'how can a great nation survive with a rigid, nonadaptive written constitution?' It is rather, 'how can such dramatic institutional change be squared with a commitment to written constitutionalism?' (E.A. Young, *The Constitution Outside the Constitution*, (2007) 117 *Yale Law Journal* 408 at 452-455). On the "irrelevance" of formal

representatives) as agents of change, they ultimately transformed the United States, a union of states, into a Union State or Federal State.<sup>71</sup> Within that Federal State, the constitutional duality of the “people”, as state-peoples and union-people, is replaced and superseded by a singular national demos. This democratic “nationalisation” of the American constituent power is an essentially contemporary phenomenon. For the ideas of a *single* national sovereignty, of a *single* national demos, and of a *single* national citizenship are *un-federal* ideas that found very little resonance in the 150 years of American federalism prior to the New Deal.

## **b. Functioning Government: Dual Democracy, Dual Citizenship**

### *aa. Dual Democracy: Democracy within the Institutions of Government*

What are the democratic elements within the system of government of the United States? The 1777 Articles of Confederation had originally opted for a classic inter-state arrangement. It required each of the state legislatures to appoint “delegates” to the United States “Congress” within which each state had one vote.<sup>72</sup> This international or “inter-parliamentary” arrangement knew of some exceptions; yet because Congressional acts generally lacked the normative force of “laws” within the States, the Union did, in any case, not enjoy legislative powers over “its” citizens.

This quintessentially international “republic” was replaced by the 1787 US Constitution. For not only would the new – second – Union enjoy legislative powers allowing it to adopt directly effective and supreme laws;<sup>73</sup> a fundamentally re-structured “Congress” would henceforth reflect a compromise

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constitutional amendments in the USA, especially after the New Deal, see also famously: D.A. Strauss, *The Irrelevance of Constitutional Amendments*, (2001) 114 Harvard Law Review 1457.

<sup>71</sup> The most prominent contemporary advocate of a “nationalist” informal alternative to the mixed formal amendment power in Article V of the U.S. Constitution has been Bruce Ackerman. This view had, however, already been supported by Woodrow Wilson. For the professor-turned-President had come to argue that the American Union was a “Federal State” in which the Union had “competence-competence” (W. Wilson, *An Old Master and Other Political Essays* (Scribners, 1893), 93): “[I]n all federal states, even the amendment of the fundamental law becomes an organic act, depending practically without exception, upon the initiative of the chief originative organ of the federal state. (...) In the federal state self-determination with respect to their law as a whole has been lost by the member states. They cannot extend, they cannot even determine, their own powers conclusively without appeal to the federal authorities. They are unquestionably subject to a political superior. They are fused, subordinated, dominated.” It is this “Wilsonian” understanding that, arguably, stands behind Ackerman’s famous “We The People”; and Ackerman is therefore, in my view, not justified in contrasting his “American” theory with “European notions never designed to take [the United States] into account” (supra n.67 at 3). For a close reading of Wilson reveals the “European” inspiration behind the theory of the sovereign federal state; and, indeed, much of what Ackerman rediscovers for the United States had been fully developed by German constitutional theory in the nineteenth century. Ackerman’s famous addition and enrichment to that theory can nevertheless not be doubted. It relates to the idea that the “people” can act via “ordinary” and “higher law-making”; and it is this distinction that stands behind Ackerman’s conception of a “dualist democracy”. What, then, is his definition of the “people”? In ordinary law-making, the “people” simply stands for the ordinary private citizens, while the definition of the “people”, as regards higher-law making, is much more complex. Ackerman gives it in Volume II of “We The People” (supra n.53) at 187: “For me, “the People” is not the name of a superhuman being, but the name of an extended process of interaction between political elites and ordinary citizens. It is a special process because, during constitutional moments, most ordinary American are spending extraordinary amounts of time and energy on the project of citizenship[.]”

<sup>72</sup> 1777 Articles of Confederation, Article V. On the “international” law meaning of the word “Congress”, see A.R. Amar, *Of Federalism and Sovereignty* (1987) 96 Yale Law Journal 1425 at 1447: “The very word chosen to describe the central assembly, “Congress”, suggested its inter-sovereign character, and so did its organizational structure. Each state legislature would appoint a “delegation” of between two and seven members, with each delegation to vote as a bloc casting one vote, regardless of its size or its state’s population[.]”

<sup>73</sup> 1787 US Constitution, Article VI: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”



between an “international” and a “national” form of organisation. In the words of Article I, Section 1 of the new Constitution: “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.” The Senate, as the first branch mentioned within the – now – bicameral Congress, here represented the States as “political and coequal societies” and thus continued the international tradition of the Confederation Congress.<sup>74</sup> The House of Representatives, on the other hand, would henceforth be seen as the “national” branch of Congress. In the exercise of Congress’ legislative powers, both branches would thereby act through majority decisions; and the resulting Union legislation thus constituted a mixture of international and national elements.

Who was the democratic principal behind the House of Representatives? The 1787 Constitution had been “curiously silent on the nature and scope of the nascent American political community”.<sup>75</sup> An intuitive answer might, of course, metaphysically point to the American “nation” behind the “national” branch of Congress; yet a closer look reveals a much more nuanced picture. For the 1787 Constitution had not committed the House to be elected by all Union citizens *qua* Union citizens. The Union electorate, as the American political community, was composed of state citizens *as state citizens*; and the qualifications as to who belonged to these state electorates differed significantly in terms of property, tax and race.<sup>76</sup> These differences had, crucially, not been levelled by the Philadelphia Convention: “[t]o have reduced the different qualifications in the different States, to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the Convention.”<sup>77</sup> Article I of the 1787 Constitution therefore avoided the “nationalisation” of the electorate and instead stated: “The House of Representatives shall be composed of Members chosen every second Year by the *People of the several States*, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the *State Legislature*.”<sup>78</sup> The right to vote in “House” elections was thus, originally, fully in the hands of the states: it was them – not the Union – to decide on who their “people” were.<sup>79</sup> Behind the House, therefore, did not (yet) stand a “national” political community or American “people” but, rather, the *peoples* of the several states.

In the words of a magisterial study of the history and evolution of U.S. American democracy:

“By making the franchise in national elections dependent on state suffrage laws, the authors of the Constitution compromised their substantive disagreements to solve a potentially explosive political problem. The solution they devised, however, had a legacy – a long and sometimes problematic

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<sup>74</sup> Madison, *The Federalist No. 39* (supra n.54), 185. It may also be worth mentioning, again, that Article I of the U.S. Constitution lists the “Senate” before the “House of Representatives” within the (new) Congress.

<sup>75</sup> G.-U. E. Charles & L.E. Fuentes-Rohwer, *Slouching Toward Universality: A Brief History of Race, Voting and Political Participation*, (2019) 62 *Howard Law Journal* 809 at 815.

<sup>76</sup> For a comparative (and quantitative) analysis of the “property and taxpaying requirements”, as well as the “race exclusions” within the suffrage qualifications among the various States of the Union between 1790 to 1855, see: A. Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Basic Books, 2000), esp. 51 and 56.

<sup>77</sup> Madison, *The Federalist No. 52* (supra n. 54), 256.

<sup>78</sup> 1787 Constitution, Article I, Section 2 (emphasis added). Article I, Section 4 moreover stated: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of choosing Senators.” The first federal electoral law would only be adopted in 1842. For a detailed analysis of representation beforehand, see: R. Zagari, *The Politics of Size: Representation in the United States, 1776-1850* (Cornell University Press, 2010).

<sup>79</sup> The insistence of Article I, Section 2 that “the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature” was designed to constitutionally prevent states from adopting a different state people/electorate for parliamentary elections at the state and federal level. In the words of Madison, *The Federalist No. 52* (supra n. 54), 256: “[The solution in Section 2] must be satisfactory to every State, because it is comfortable to the standard already established, or which may be established by the State itself. It will be safe to the United States; because, being fixed by the State Constitutions, it is not alterable by the State Governments[.]”

legacy. *The Constitution adopted in 1787 left the federal government without any clear power or mechanism, other than through constitutional amendment, to institute a national conception of voting rights, to express a national vision of democracy.* Although the Constitution was promulgated in the name of ‘We, the people of the United States’, the individual states retained the power to define just who ‘the people’ were. Stated somewhat differently, citizenship in the new nation – controlled by the federal government – was divorced from the right to vote, a fact that was to have significant repercussions for almost two centuries.”<sup>80</sup>

Far from existing as a “natural” community, the American nation or political demos did, therefore, not simply exist as such when the Union was founded. On the contrary, it had to be “invented”;<sup>81</sup> and this invention was an act of political imagination.<sup>82</sup> Behind that act of political imagination lay the principle of representation: the political existence of the Union was the result of an act of representation! Or, to quote the French historian Éliane Marienstras here:

“[T]he American nation was not really created by the Declaration of Independence or the Articles of Confederation. The former consecrates the withdrawal of the settlers as subjects of the British Crown; the second urges the citizens to act in common. But the national community has no reality except as its members, in offering their allegiance to it, consecrate a part of their identity to it by conceiving its specific characteristics and by imbuing it with symbols that give it life. In the same movement that leads them to forge collective institutions, Americans create their national community[.]”<sup>83</sup>

The abstract philosophical point behind the concrete historical one is this: it is only *through the process of collective government* that political communities are created. Only through common political institutions will a social multitude organize and perceive itself as a political *demos*. This insight stands

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<sup>80</sup> A. Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (supra n.76), 24 (emphasis added). After the Civil War, the Fifteenth Amendment (1870) would, a century after the founding of the United States, formally limit the power of the states to maintain race exclusions by categorically confirming that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race [or] colour”. However, it took almost another hundred years before this constitutional principle was properly enforced through the 1965 Voting Rights Act. On the U.S. civil rights “revolution” in the twentieth century generally, see: B. Ackerman, *We The People – Volume III: The Civil Rights Revolution* (Belknap, 2018).

<sup>81</sup> For a wonderful discussion of this point, see E. S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (Norton, 1989), Chapter 11: “Inventing an American People”; as well as J.R. Pole, *Political Representation in England & the Origins of the American Republic* (University of California Press, 1971), Part III. For Jefferson, Virginia was “my country”, whereas for Adams, Massachusetts was “our country”. Until the Civil War, the United States was “commonly described in the plural, which unwittingly expressed an emotional fact” (D. J. Boorstin, *The Americans: The National Experience* (Phoenix, 1965), 402).

Doubts about the existence of a national demos persisted during much of the nineteenth century. For the nineteenth-century (Southern) view that there was no “American people”, see: H.S. Tucker, *Lectures on Constitutional Law* (Richmond, Shepherd & Colin, 1843), 95: “For as there is *no people of the United States*, considered aggregately, the sovereignty must be in the people of *each State*”; as well as A.P. Upshur, *A Brief Enquiry into the True Nature and Character of Our Federal Government: Being a Review of Judge Story’s Commentaries on the Constitution of the United States* (Philadelphia, Campbell, 1863), 92: “In the States the sovereign power is in the people of the States respectively; and the sovereign power of the United States would, for the same reason, be in ‘the people of the United States’, if there were any such people, known as a single nation, and the framers of the Federal Government. We have already seen, however, that there are no such people, in a strict political sense, and that no such people had any agency in the formation of our Constitution, but that it was formed by the States, emphatically as such”.

<sup>82</sup> For the general classic here, see: B. Anderson, *Imagined Communities* (Verso, 2016); and, specifically, for the United States, see D. Waldstreicher, *In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776-1820* (University of North Carolina Press, 1997).

<sup>83</sup> E. Marienstras, *Nous, Le Peuple: Les origines du nationalisme américain* (Gallimard, 1988), 337 (my translation).

behind Hobbes' famous paradox;<sup>84</sup> and it has also been endorsed by Sieyès.<sup>85</sup> Yet unlike Hobbes' idea of absolute representation,<sup>86</sup> the process of demos-creation should not be seen as consecrated in a single and singular "constitutional moment". The political "demos" is formed and transformed through a continuous *process* of parliamentary re-representation.<sup>87</sup> For the *demos* and the *kratos* are linked in a dialectical process of co-constitution: "'We, the people' who agree to bind ourselves by these laws, are also defining ourselves as a 'we' in the very act of self-legislation."<sup>88</sup> In other words: a multitude of individuals not only gains "agency" through its agent (parliament), the very "principal" (the people as a collective person) is itself co-constructed in the process of collective representation.<sup>89</sup>

What about the state peoples in the United States? Each state people was and is – of course – primarily represented in and by its own state legislature. Yet within the 1787 U.S. Constitution, the state peoples were also represented in the Senate. Its existence was memorably justified as follows:

"If indeed it be right, that among a people thoroughly incorporated into one nation, every district ought to have a proportional share in the government, and that among independent and sovereign States, bound together by a simple league, the parties however unequal in size, ought to have an equal share in the common councils, it does not appear to be without some reason, that in a compound republic partaking both of the national and [international] character, the government ought to be founded on a mixture of the principles of proportional and equal representation. (...) *In this spirit it may be remarked, that the equal vote allowed to each State [in the Senate] is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty.*"<sup>90</sup>

In this sense, then, the democratic legitimacy behind all U.S. federal legislation is always dually democratic: "No law or resolution can now be passed without the concurrence first of a *majority of the people*, and then, of a *majority of the States*."<sup>91</sup> The Senate had thereby started out as a diplomatic "congress" in which the US senators represented "their" State legislatures; yet by subsequently allowing each Senator a "per capita" vote, the 1787 Constitution had already attempted "to minimize the chances that senators would act simply as mouthpieces for state legislatures".<sup>92</sup> Senatorial independence was further and significantly increased by the Seventeenth Amendment (1913). Through this

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<sup>84</sup> T. Hobbes, *Leviathan* (supra n.9, at 114): "A Multitude of men, are made One Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the Unity of the Representer, not the Unity of the Represented, that Maketh the Person One." I will always be very grateful to Quentin Skinner for having shed much light on these passages.

<sup>85</sup> "The integrity of the nation is not anterior to the will of the reunited people, which is only available through representation. Unity begins in it. Nothing, therefore, is above representation, and it is the only organised body. Dispersed, the people is not an organized body, and has neither a singular *will* nor a singular *mind* – indeed, nothing singular at all". The passage is quoted in P. Rosanvallon, *Democracy: Past and Future* (Columbia University Press, 2006), 89.

<sup>86</sup> On Hobbes' idea of "absolute representation", see: B. Manin, *The Principles of Representative Government* (Cambridge University Press, 1997), 174.

<sup>87</sup> This idea was probably first expressed by the German Weimar scholar Rudolf Smend in his „Staatsrechtliche Abhandlungen und andere Aufsätze“ (Duncker & Humblot, 2010), 155: "Im parlamentarischen Staat ist das Volk nicht schon an sich politisch vorhanden ... sondern es hat sein Dasein als politisches Volk, als souveräner Willensverband in erster Linie vermöge der jeweiligen politischen Synthese, in der es immer von neuem überhaupt als staatliche Wirklichkeit existent wird."

<sup>88</sup> S. Benhabib, *Another Cosmopolitanism* (Oxford University Press, 2008), 33.

<sup>89</sup> This process of demos creation is not automatic and often depends on sociological pre-conditions and post-conditions, see especially K.W. Deutsch, *Nationalism and Social Communication: Inquiry into the Foundations of Nationality* (MIT Press, 1966).

<sup>90</sup> A. Hamilton, J. Madison and J. Jay, *The Federalist* (supra n.54), 300-301 (emphasis added).

<sup>91</sup> *Ibid.*, 301 (emphasis added).

<sup>92</sup> D. Wirls and S. Wirls, *The Invention of the United States Senate* (John Hopkins University Press, 2004), 113.

“democratization of the Senate”,<sup>93</sup> US Senators today directly represent their state *peoples*. The Senate could therefore, theoretically, be described as a *peoples* chamber; and, in practice, the constitutional equality of state peoples here means that less than 17% of Americans (in the 25 least populous states) can veto all Union legislation.<sup>94</sup>

Alas, and in sum, democracy in America always means dual democracy that takes place within two parliamentary arenas: federal democracy takes place at the Union level, while state democracy takes place at the state level. Federalism, as dual government, here naturally translates into dual democracy in which the United States is both a “Union as democracy” (*qua* Union) and a “union of democracies” (*qua* states). This American idea of dual democracy finds an individualized corollary in the idea of dual citizenship to which we must now turn.

Table 2. United States: Dual Sovereignty, Dual Democracy

	Member State	Federal Union
<b>Popular Sovereign</b>		
<i>Founding Authority</i>	One State People	Multiple State Peoples
<i>Founding Instrument</i>	National Decision	Constitutional Treaty
<i>Withdrawal Right</i>	Exit per Individual	(No) Exit Per State
<b>Popular Government</b>		
<i>Democratic Principal</i>	State People	(Future) Federal People
<i>Democratic Agent</i>	State Parliament	House of Representatives
<i>Legal Instrument</i>	State Legislation	Federal Legislation
<i>Decision-Making</i>	Majoritarian Decision	Majoritarian Decision

*bb. Dual Citizenship: Fundamental Rights and Mutual Recognition*

The classic principle behind the United States has traditionally been that each citizen of one of the United States is also a citizen of the United States. Dual citizenship within the United States thereby meant from the start that “[t]here are two loyalties, two patriotisms” because “[t]here are two governments, covering the same ground, commanding, with equally direct authority, the obedience of the same citizen”.<sup>95</sup> The relationship between these two loyalties has however changed over time. State citizenship was originally primary and implied federal citizenship; but this conception of Union citizenship as derivate and secondary came to a constitutional end after the Civil War.

What is the core feature of dual citizenship? Dual citizenship implies a dual set of political and liberal rights. *State* constitutions would guarantee rights that *state* citizens could invoke against their *state*

<sup>93</sup> Ibid., 211.

<sup>94</sup> Ibid., 217. According to the authors the voting differential between Wyoming and California is 70:1.

<sup>95</sup> J. Bryce, *The American Commonwealth – Volume I* (Cosimo Classics, 2007), 18. And see also: J.S. Mill, *Considerations on Representative Government*, in: J.M. Robson (ed.), *The Collected Works of John Stuart Mill, Volume XIX* (University of Toronto Press, 1977), 556: “Under the more perfect mode of federation, where every citizen of each particular State owes obedience to two Governments, that of his own State, and that of the federation[.]”

government;<sup>96</sup> while the federal Bill of Rights could be invoked against the federal government. This clear division into a dual rights regime was confirmed in *Barron v Baltimore*.<sup>97</sup> The case concerned the owner of a wharf in Baltimore, who claimed compensation from the mayor of the city on the ground that the decision of the city to divert the flow of streams had ruined his property. And since the city had acted under powers granted by the State of Maryland, the question arose whether the *federal* right to property – protected under Fifth Amendment to the U.S. Constitution – could also apply to State actions. The Supreme Court held as follows:

“The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, *and we think necessarily, applicable to the government created by the instrument*. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes.”<sup>98</sup>

The argument advanced by Chief Justice Marshall was as simple as it was persuasive. There were *two* constitutional orders over each “American” citizen – a federal and a State constitutional order; and each order provided for its own limitations on public power. The – older – *State* constitutions protected *State* fundamental rights, while the – younger – *federal* constitution protected *Union* fundamental rights. The fundamental rights that limited the federal government could thereby not – not even indirectly – apply to the State governments. For “[h]ad the people of the several States, or any of them, required changes in their [State] Constitutions, had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands, and could have been applied by themselves”.<sup>99</sup> The dual constitutional structure of the United States thus required a dual fundamental rights standard.

There existed however at least one – quintessential – connection between federal citizenship and the States. For part and parcel of being a citizen of the United States was a horizontal right that was seen as the substantial core of federal citizenship: the “Privileges and Immunities Clause” in Article IV (2). Accordingly, “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>100</sup> The clause not only covered free movement rights;<sup>101</sup> it generally prohibited all discriminatory treatment that citizens from one State would encounter in the other. And by not treating

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<sup>96</sup> For an early example of a state bill of rights, see the 1776 Virginia Constitution.

<sup>97</sup> *Barron v Mayor & City of Baltimore*, 32 US 243 (1833).

<sup>98</sup> *Ibid.*, 247 (emphasis added).

<sup>99</sup> *Ibid.*, 249.

<sup>100</sup> The clause had been taken over from the 1777 Articles of Confederation, where Article IV stated: “The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States... shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.”

<sup>101</sup> Free movement rights are implicit in Article IV US Constitution, see only: *Zobel v. Williams*, 457 U.S. 55 (1982).

citizens of the other states as “aliens”, “[t]he intention of this clause was to confer on them, if one may so say, a general citizenship”.<sup>102</sup>

In *Paul v Virginia* (1869),<sup>103</sup> the US Supreme Court described the function of the “Privileges and Immunities Clause” as follows:

“It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. ... *Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.*”<sup>104</sup>

The core of federal citizenship thus lay in the horizontal coordination of state *demoi* in which a citizen of one state could move to a sister state and, even if not a citizen of that state, would still enjoyed the privileges and immunities of the host republic *as if* she was its citizens. This principle of non-discrimination has known some limits,<sup>105</sup> yet it was famously characterised as “the basis of the union”.<sup>106</sup> Article IV (2) is thereby centred on the principle that the “host” state and not the “home” state controls the case: “Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States.”<sup>107</sup> The Privileges and Immunities Clause therefore envisages, at least not as such, any “mutual recognition”; it only demands the state treatment of non-state citizens.

And yet this does not mean that the principle of mutual recognition is unknown to U.S. constitutionalism. Leaving the obvious Commerce Clause analogies aside,<sup>108</sup> a recent and excellent illustration of such a principle can be found in *Obergefell v Hodges*.<sup>109</sup> The case concerned the constitutionality of allowing each state within the Union to determine itself what counted as a “marriage”. Would this autonomy imply that each State could also for itself decide whether or not to recognise same-sex marriage; and what would happen if one state allowed gay marriage while another did not? Article IV (1) of the US Constitution here offers a federal solution in that “[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State”;<sup>110</sup> yet the provision also allows Congress to create legislative exceptions from its constitutional automaticity. In the present case, Congress had created such an exception though the “Defense of Marriage Act” expressly exempting the

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<sup>102</sup> J. Story, *Commentaries on the Constitution of the United States* (Hilliard and Gray, 1833), 674.

<sup>103</sup> *Paul v. Virginia*, 75 U.S. 168 (1869).

<sup>104</sup> *Ibid.*, 180 (emphasis added).

<sup>105</sup> In the past, there existed some limits to this horizontal citizenship, especially as regards the horizontal extension of state welfare rights but they have mostly disappeared today, see *Saenz v Roe*, 526 US 489 (1999). For a more general discussion here see: G. J. Simson, *Discrimination against Non-Residents and the Privileges and Immunities Clause of Article IV*, (1979) 128 *University of Pennsylvania Law Review* 379.

<sup>106</sup> A. Hamilton, J. Madison and J. Jay, *The Federalist* (supra n.54), 388.

<sup>107</sup> *Paul v Virginia* (supra n.103), 180.

<sup>108</sup> For an analysis here, see: R. Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford University Press, 2017), Chapter 2.

<sup>109</sup> *Obergefell v. Hodges*, 576 U.S. \_ (2015).

<sup>110</sup> For doctrinal discussions of the provision, see only: E. Corwin, *The “Full Faith and Credit” Clause*, (1933) 81 *University of Pennsylvania Law Review* 371; W. Reynolds, *The Iron Law of Full Faith and Credit*, (1994) 53 *Maryland Law Review* 412; and D. Engdahl, *The Classic Rule of Faith and Credit*, (2009) 118 *Yale Law Journal* 1584.

mutual recognition of same-sex marriage.<sup>111</sup> In *Obergefell v Hodges*, the Supreme Court however found this legislative restriction to the principle of mutual recognition unconstitutional and held “that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State”.<sup>112</sup> The “home state” consequently controls the law; and the principle of mutual recognition thus indeed forms part of the US – federal – legal order.

### 3. Democracy and Democracy in “Europe”: A Preliminary Exploration

In the Flaubertian dictionary of received ideas two such ideas have become, ever since its creation, associated with the European Union. First, the Union is – of course! – a *sui generis* object that eschews all (inter)national comparisons; and secondly, the Union suffers – who can doubt it? – from a “democratic deficit” that is rooted in its very “DNA”.<sup>113</sup> It often escapes the fashionable conversationalist, that these two commonplaces can hardly co-exist together;<sup>114</sup> and without wishing to mock the *sui generis* idea once more here,<sup>115</sup> this third section aims to investigate the democratic credentials of the European Union. Following our division between popular sovereignty and popular government, we shall begin with an examination of the normative foundations of the Union in a first step, and then move to its institutional system of government in a second step. Who is/are the popular sovereign(s) behind the European Union; and who is/are the democratic principal(s) behind Union legislation?

Let us explore these philosophical questions in turn.

#### a. Founding Government: We, the European People(s)?

Skipping over the 1951 European Coal and Steel Community and the (failed) 1953 European Political Community, let us choose the 1957 European Economic Community as the formal starting point of today’s European Union. The latter’s birth certificate was an international treaty, unanimously ratified by its founding States, that was designed “to lay the foundations of an ever closer union among the peoples of Europe”.<sup>116</sup> Behind the EU Treaties stood a plurality of peoples – organized as states; and only the ratification by all national parliaments, as representatives of their state peoples, did bring the European Union to life.<sup>117</sup> Genetically, therefore, the EEC Treaty as well as all subsequent EU Treaties

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<sup>111</sup> Section 2 of the Act entitled “Powers reserved to the States” read: “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”

<sup>112</sup> *Obergefell v. Hodges* (supra n.109), 28.

<sup>113</sup> J.H.H. Weiler, *Deciphering the Political and Legal DNA of European Integration*, in: J. Dickson & P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012), 137. For a historical challenge to this claim, see: B. Rittberger, *Building Europe’s Parliament: Democratic Representation Beyond the Nation State* (Oxford University Press, 2005), esp. 98-107.

<sup>114</sup> This point has also been made by V. Schmitt, *Democracy in Europe: The EU and National Policies* (Oxford University Press, 2006), 8. What we both mean is this: you can only identify a “deficit” when compared to how something should “normally” operate; and for this you need a “norm” that the Union can be compared to – which contradicts the *sui generis* idea.

<sup>115</sup> For my thoughts here, see: R. Schütze, *European Union Law* (Cambridge University Press, 2018), Chapter 2.

<sup>116</sup> 1957 EEC Treaty, Preamble (emphasis added).

<sup>117</sup> It is difficult – if not impossible – to accept that “the founding treaties as well as each amendment agreed upon by the governments appear as the *direct expression* of the common will of the [national] peoples of the Union” (I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, (1999) 36 *Common Market Law Review* 703 at 717 (emphasis added)).

were not constitutional treaties that were ratified by the (state) peoples acting directly. They were, like the 1777 Articles of Confederation, international treaties that had been concluded by a plurality of peoples acting indirectly through their (state) parliaments. The democratic authority and legitimacy behind the founding moment of the EU Treaties was, generally, only indirect – a characteristic that, following democratic constitutional logic, should place them below the Member State constitutions.<sup>118</sup>

And yet: their international origins have not prevented the EU Treaties from *becoming* constitutional treaties. How did this constitutional transformation come about? It came about through informal “amendments” of the EU Treaties.<sup>119</sup> First and crucially, the European Court of Justice categorically insisted on the *non-reciprocal* and *non-contractual* status of European law: a violation of European Union law by one State could not justify its infringement by another.<sup>120</sup> Secondly, by creating a direct link between the Union and individuals (through the doctrine of direct effect), the Union legal order did – increasingly – acknowledge a passive form of Union citizenship. This passive status was, twenty years later, “activated” by offering Europeans direct political rights through which an independent democratic will was created within the Union. Thirdly, the Union has come to insist on the supremacy of all Union law over all national law;<sup>121</sup> and with the rise of (qualified) majority voting in the Union legislature, this supreme European law could also be adopted against the “sovereign” will of a single Member State.

The question thus arises: if much European law no longer derives its validity from the individual consent of each State, what stands behind its – constitutional – legitimacy? Who, in other words, is or are its popular sovereign(s)? For some Member States, all validity and legitimacy continue to be seen as deriving from their own national decision to join the Union. Each state (people) has remained a “master” of the EU Treaties by retaining its “competence-competence”.<sup>122</sup> This view is, however, hard to square with the empirical and normative reality of the European Union today. For as long as a *Member State* voluntarily stays within the Union, it simply is not legally competent to *unilaterally* determine the limits of its own competences. True, the Union also cannot formally appropriate new competences without the consent of the *collectivity* of its Member States, yet even this admission does not mean that each and every Member State can individually act as a “master” – in the singular – of the EU Treaties. The EU Treaties can only be formally amended through the unanimous consent of *all* the Member States;<sup>123</sup> and it is therefore only the Member States *in the collective plural* that are the formal “masters” – in the plural – of the EU Treaties.<sup>124</sup> It is for this reason that, constitutionally, the EU Treaties stand above each Member State *individually* yet below all Member States *collectively*.

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<sup>118</sup> Democratic constitutionalism ranks legal norms according to their democratic credentials: the more directly democratic a norm is, the hierarchically higher it ought to be. The point made in the text therefore assumes that the Member State constitutions are a more direct expressions of popular sovereignty/democracy than a parliamentary act.

<sup>119</sup> On formal versus informal constitutional amendments, see Section 5 (a) below.

<sup>120</sup> See Case 90–1/63, *Commission v. Luxembourg and Belgium* [1963] ECR 625. For a discussion of this important case, see my “The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers” (2006) 25 Yearbook of European Law 91.

<sup>121</sup> See Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>122</sup> Let me only mention the German (and British) conceptions here, see: R. Schütze, *European Union Law* (supra n.115), Chapter 4, section 2.

<sup>123</sup> For a discussion of the unanimity rule for EU Treaty amendments, see: Section 5 (a) below.

<sup>124</sup> After *Van Gend en Loos*, a critical distinction must be made between the individual national decision to ratify the (amendment to the) EU Treaties, and their coming into effect once all (!) the Member States have ratified them. For it is, importantly, solely the *collective* decision of all the Member States in favour of a Treaty (amendment) that establishes the validity of the EU Treaties. Not the individual (national) ratification act but the *collectivity* of the Member States ratifying the EU Treaties underpins the validity of EU primary law; and, once that primary law exists, it is directly applicable in all the national legal orders.



The *founding* authority behind the Union is, however, not the whole picture. For with the acceptance of majority decisions within the Union, a “general will” has also been created via European institutions and, especially, through the European Parliament (to be discussed below). This European political will has, just as in the case of the United States, developed alongside the particular political wills of the Member States; and, as a result of this development, constitutional conflicts over the question of sovereignty and supremacy have arisen in the past 50 years.<sup>125</sup> The co-existence of a plurality of (popular) sovereigns within the Union has, in the past two decades, found indirect expression in the school of “constitutional pluralism”; yet a better historical and comparative analysis here directly leads to the (American) tradition of federalism.<sup>126</sup>

Such a federal conceptualisation has recently led to arguments for a “*pouvoir constituant mixte*” for the Union.<sup>127</sup> This Habermasian proposal appears, at first sight, to suggest that the authority behind the EU Treaties lies in a compound power mixing national and Union elements; yet following the methodological individualism inherent in classic social contract theories, his conception, on the contrary, hypostasizes the popular sovereign behind the Union to be each and every individual.<sup>128</sup> Unhappily, therefore, the reference to the mixed nature of Europe’s constituent power is highly misleading, because it is not a mixture of national “peoples” (or States) and the European citizen (or their representatives) that combine into a single *pouvoir constituant*. Habermas’ “pluralist constitutional subject” is rather conceived as the “totality of individual persons” even if each person is divided into two *personae*.<sup>129</sup> There is much to disagree with his ideal-theoretical conception, yet this cannot be the place to do so in any detail.<sup>130</sup>

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<sup>125</sup> For a discussion of some of these conflicts, see supra n.122. For the most recent conflict here, see the German Constitutional Court’s “Weiss Judgment”: [www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505\\_2bvr085915en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html).

<sup>126</sup> For this point, see: R. Schütze, *Federalism as Constitutional Pluralism: “Letter from America”* (supra.62).

<sup>127</sup> For early expressions of this philosophical idea, see: J. Habermas, *Zur Verfassung Europas* (Suhkamp, 2011), 62-74; and more recently: “Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How it is Possible”, (2015) 21 *European Law Journal* 546; as well as: “Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the *Pouvoir Constituant Mixte*” (2017) 55 *Journal of Common Market Studies* 171.

<sup>128</sup> J. Habermas, *Zur Verfassung Europas* (supra n.127), 67. The important point for Habermas is that, like in classic social contract theories, the primary subjects of the constituting power are individuals – not (national) collectivities.

<sup>129</sup> J. Habermas, *Citizen and State Equality in a Supranational Political Community* (supra n. 127), 176.

<sup>130</sup> Let me voice one major and one minor objection here. First, the extension of Habermas’ “rational reconstruction” approach to the concept of the *pouvoir constituant* seems bound to fail if the latter is to refer to a founding “moment” – whether real or imagined. For the process of rational reconstruction appears to be dynamic in that normative principles are *recursively* re-constructed from existing (and changing) social practices (J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity, 1997)), whereas the classic function of the concept of the constituent power has been to offer a constitutional account of a singular and fixed expression of sovereignty at a particular historical time. The relationship between sovereignty and constituent power is thus analogous to the distinction between “language” and “speech”: the former is recursively and dynamically reconstructed, whereas a particular utterance is, as an event and “act”, connected to its historic time. The concept of constituent power, when contradistinguished to sovereignty, should indeed refer to *concrete* speech acts establishing a *concrete* form of government. There is no recursive or retrospective constituent power – there are only historically situated and disjunctive expressions(!) of it. Second, and much less importantly: it is all very well to use “thought experiments” but it would have helped, certainly me!, if Habermas had methodologically enriched his model by some more concrete constitutional comparisons, for example with Switzerland. According to Articles 140 and 142 of the Swiss Constitution, each constitutional amendment or total revision requires a referendum in which a double majority of citizens needs to agree. Not only must the referendum thus be won in a majority of cantons (peoples), it must also be supported by the numerical majority of all Swiss citizens. The citizens of Switzerland here act both, and simultaneously, as plebiscitary actors for their canton (people) as well as federal citizens of the Swiss union – which seems to be close to what Habermas may have in mind, or not; and if not, why not? Oh, you philosophers...

Be that as it may, once we accept the idea that the European Union is characterised by the co-existence of two popular sovereigns (in the form of two political wills), what should this mean for the question of withdrawing from the Union? The Union legal order expressly and unconditionally recognizes such an exit right in Article 50 TEU: “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.”<sup>131</sup> How can this right be justified from a philosophical point of view? We saw in Section 1, above, that secession rights are inherent in international unions, while they are often denied in nation states. But what about mixed constitutional phenomena, like the European Union? Habermas’ conception of the *pouvoir constituant mixte* here affirms, albeit in mysterious ways, a unilateral exit right as “an expression of the partially retained sovereignty of the Member States”.<sup>132</sup> A much clearer justification of such an exit right however comes from the federal idea of the European Union founded on a constitutional *treaty* between peoples (organised as States). For the very idea of a *constitutional treaty* as a *social contract* normatively implies that each Member State may exit from the Union as a last resort – just as individuals enjoy the right to withdraw from the social contract.<sup>133</sup>

## **b. Functioning Government: Dual Democracy, Dual Citizenship**

### *aa. Dual Democracy: Democracy within the Institutions of Government*

What are the democratic elements in the Union’s system of government? The 1957 Rome Treaty had originally charged the Council with the task of governing the Union.<sup>134</sup> In terms of its composition, the Council was – and remains – a State organ. It “shall consist of a *representative of each Member State* at ministerial level, who may commit the government of the Member State in question and cast its vote”.<sup>135</sup> Each ministerial member here represents his or her State; and where decision-making is by unanimity, the sovereign equality of the Member States is respected in line with classic international law. Yet from the very beginning, the EU Treaties already envisaged procedures that broke with the idea of sovereign equality. They permitted the Union to act by a (qualified) majority of States – even if a constitutional convention superimposed unanimity in the first decades of the life of the Union.<sup>136</sup>

With regard to majority voting, the Council originally followed a system of weighted votes.<sup>137</sup> All votes had to be cast *per Member State*; and a (qualified) majority was deemed achieved once a certain threshold of votes had been reached.<sup>138</sup> At the outset, these votes ranged from 4 to 1 and thus followed an – extremely – crude (degressive) proportionality as regards a Member State’s share in the Union’s

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<sup>131</sup> Article 50(1) TEU. For a “constitutional” interpretation of the provision, see: P. Eeckhout & E. Frantziou, *Brexit and Article 50 TEU: A Constitutionalist Reading*, (2017) 54 *Common Market Law Review* 695.

<sup>132</sup> J. Habermas, *Zur Verfassung Europas* (supra n.127), 71. The difficulty, in my view, with Habermas’ position is this: how can his “individualist” account of the *pouvoir constituant* ever arrive at this conclusion if secession rights are “collective” rights of a group that also bind those citizens that voted against leaving the European Union? So if Habermas were serious about dividing sovereign power “at its root”, namely at the level of the individual natural person and if he accepts, as I think he does, changing political identity configurations, then, I am at a loss how a majority decision within a group of a seceding “people” can bind those outvoted citizens whose preference configuration has come to shift – in an existential manner – to the other side.

<sup>133</sup> For a discussion of an individual’s exit right with regard to its political community, see Section 1(a) above.

<sup>134</sup> Ex-Article 145 EEC.

<sup>135</sup> Article 16(2) TEU (emphasis added).

<sup>136</sup> For a well-known celebration of the Luxembourg Compromise, see: Weiler, *The Transformation of Europe*, (1990–1) 100 *Yale Law Journal* 2403.

<sup>137</sup> J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press, 2010), 215: “In the original E[EU]C of six member States in 1957, the system of weighted votes in the Council was based implicitly on a rough balance of demographic, economic and political elements.”

<sup>138</sup> Over the course of the last sixty years, this threshold lay somewhere between 70-75% of the votes cast (ibid., 219).

overall population. Over the course of time, this representational system got more refined in that the most populous States would enjoy 29 votes, while the smallest Member States had 3 votes; yet the discrepancy between the votes given to larger States and the proportion of the EU population they represented grew ever further apart.<sup>139</sup> To counteract this development, the idea of a direct EU population threshold was introduced. Accordingly, each vote in the Council needed to be backed up by 62% of the total Union population. Yet this now unsettled the smaller Member States and they consequently insisted that a majority of votes within the Council must also be cast by a majority of the States *as States*. The traditional voting arrangement in the Council was thus based on a triple majority: a majority of States, representing a majority of the Union population, had to cast a majority of weighted votes.

This triple majority requirement was replaced and simplified after 2014, when the Lisbon reforms abolished the weighted votes system. The latter's degressive proportionality had always been only an indirect compromise between State *equality* and population *inequality*; and by henceforth building on these two dimensions directly, the Lisbon Treaty today demands a dual majority of 55% of the States comprising 65% of the Union population for the Council to decide.<sup>140</sup> What is the political authority standing behind this – mixed – formula? The Council does not, strictly speaking, represent the collectivity of the Member States – a notion that would imply their *equality*. Nor does it represent the European citizens directly. The best way to conceptualize the dual majority requirement within the Council is therefore, in my view, to see the Council as representing the state *peoples*, with the latter acting in their dual capacity as autonomous collectivities and as part of the overall Union demos.

Within the contemporary Union, the Council – of course – only constitutes one of two branches of the bicameral Union legislature. For while the European Parliament only played a minimal role under the 1957 Rome Treaty, under the Union's ordinary legislative procedure, the European Parliament today enjoys symmetric and equal powers within the Council.

But what political authority stands behind the European Parliament? The composition of the Parliament has changed over time. At the outset, it was an assembly of “representatives of the *peoples of the States* brought together in the [Union]”.<sup>141</sup> This semantic formula had initially been chosen because Parliament consisted of “delegates who shall be designated *by the respective Parliaments from among their members* in accordance with the procedure laid down by each Member State”.<sup>142</sup> With the introduction of direct elections in 1979, the European Parliament's composition has however radically changed. For ever since, the Parliament is meant to *directly* represents the European citizens; and the EU Treaties have belatedly recognized this in Article 10(2) TEU: “Citizens are directly represented at Union level in the European Parliament.” It is therefore mistaken to still claim that the European Parliament represents the national *peoples* in their collective capacity. The European Parliament is *not* a *demoicratic* institution in that sense; on the contrary, it represents a – constitutionally posited – European people that gradually emerges through a dialectic process of collective self-constitution.<sup>143</sup>

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<sup>139</sup> *Ibid.*, 217.

<sup>140</sup> There are a number of additional requirements (*ibid.*, 221-225) that will not be discussed here.

<sup>141</sup> Ex-Article 137 EEC (emphasis added). France preferred this symbolic formulation; and to further safeguard the indivisibility of the French Republic guaranteed under Article 1 of the 1958 Constitution, the idea of a “representative mandate” was also rejected by the Constitutional Council in its 1977 decision on the 1976 European Parliament Election Act (J. P. Jacqué, *La Souveraineté française et l'élection du Parlement Européen au suffrage universel direct*, in: A. Bleckmann and G. Ress (eds.), *Souveränitätsverständnis in den Europäischen Gemeinschaften* (Nomos, 1980), 71).

<sup>142</sup> Ex-Article 138 EEC (emphasis added). For a celebration of this method, see: A. Shonfield, *Europe: Journey to an Unknown Destination* (Penguin, 1973), 72.

<sup>143</sup> See especially: J. Habermas, *Remarks on Dieter Grimm's "Does Europe Need a Constitution?"*, (1995) 1 *European Law Journal* 303 at 306: “The ethical-political self-understanding of citizens in a democratic community must not be taken as an historical-cultural *a priori* that makes democratic will-formation possible, but rather as flowing contents of a circulatory progress that is generated through the legal institutionalization of citizens' communication.”

This “constructivist” argument has been famously rejected by the “no-demos” thesis.<sup>144</sup> In its most assertive variety, this is not an empirical-sociological but a normative-conceptual thesis.<sup>145</sup> Accordingly, the Union cannot have a “people” that could ever legitimize European democracy so long as there are national peoples. This either-or logic can especially be found in the work of Dieter Grimm – whose anachronistic-romantic conception of the “state”, “constitutionalism” and “democracy” have, in the past two decades, very unhelpfully revived the “nationalist” understanding of these concepts as defined by the nineteenth-century *Staatsrechtlehre*.<sup>146</sup> Yet by insisting on a pre-existing people, as popular sovereign, before a democratic system of government can operate, the political cart is put before the historical horse. For sociologically and culturally, national communities were not pre-existing “natural” entities but the result of an arduous and lengthy process of political construction and imagination;<sup>147</sup> and, as the history of the United States has shown, there can even be conceptions of *dual* “peoplehood” and *dual* citizenship in which a federal demos co-exists in parallel with state *demoi* in a “republic of republics”.

This constitutional reading of the European Parliament as an “agent” of a European people has, equally, been contested from a second perspective: its composition.<sup>148</sup> For according to Article 14 TEU, the seats within the European Parliament are not allocated in a purely proportional manner; instead, the European electorate is refracted via a representational method known as degressive proportionality. Each State will have a minimum number of six parliamentarians, while the maximum number of seats is limited to 96.<sup>149</sup> But does this mean that there can never be a European *people*? This has been the infamous conclusion reached by the German Constitutional Court’s Lisbon decision: due to the breach in the “one person, one vote” logic, “the European Parliament is not a representative body of a sovereign European people” but continues to represent the peoples of the Member States.<sup>150</sup> This reasoning is however prisoner to a number of misunderstandings and mistakes.<sup>151</sup> Indeed: the degressive distortions within its

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<sup>144</sup> This is a central premise of (almost) all “demoicrats” in European Union scholarship, see: Section 4 below.

<sup>145</sup> On the empirical credentials for and against an emerging European identity and demos, see only: M. Jolly, *The European Union and the People* (Oxford University Press, 2007) as well as K. McNamara, *The Politics of Everyday Europe: Constructing authority in the European Union* (Oxford University Press, 2017).

<sup>146</sup> D. Grimm, *Does Europe Need a Constitution?*, (1995) 1 *European Law Journal* 282. In a similar vein: C. Offe, *Democracy and Trust*, (2000) 96 *Theoria* 1 at 4: “The only precondition worth keeping in mind is that in order to have a democracy, one needs a state first.”

<sup>147</sup> In this sense, “Italy” preceded the “Italians”; as much as republican France had to “create” its citizens (E. Weber, *Peasants into Frenchmen: Modernization of Rural France, 1870-1914* (Stanford University Press, 1976)). For Germany, see: J. Heinzen, *Making Prussians, Raising Germans: A Cultural History of Prussian State-Building after Civil War, 1866-1935* (Cambridge University Press, 2017). For a generalisation, see: R. Dahl, *Democracy and its Critics* (Yale University Press, 1989), 3-4: “Advocates of democracy – including political philosophers – characteristically presuppose that “a people” already exists. Its existence is assumed as a fact, a creation of history. Yet the facticity of the fact is questionable ... The assumption that “a people” exists, and the further presuppositions of that assumption, thus become a part of the shadow theory of democracy.”

<sup>148</sup> A third critical perspective shall not be discussed in any detail here: the size of EU parliamentary constituencies. Bellamy, for example, criticises their magnitude of about 675.000 voters, which he unfavourably compares to the much smaller Westminster constituencies of about 70.000 voters. (Bellamy’s “A Republican Europe of States” (Cambridge University Press, 2019), 84 mentions the figure of 10.000 voters per British MP but that must be a printing mistake; and a truly unfortunate one too.) Yet it is worth recalling that the average US House constituency is over 700.000 voters; and, so: even if one accepts that there is a European democratic dilution in terms of formal voter power, it is certainly not a *sui generis* feature of the Union.

<sup>149</sup> Article 14(2) TEU. This means that the voting power of a Maltese citizen is twelve times that of a German citizen. The average German constituency for the European Parliament is about 860.000 citizens, whereas a Maltese constituency has about 70.000 citizens.

<sup>150</sup> BVerfGE 123, 267 (*Lisbon Decision*), para 280.

<sup>151</sup> My main problem with the German Court’s thinking is this: if its line of reasoning is followed, who does a “German” national elected in, say, a “French” (or “Italian”) constituency of the European Parliament represent? His German people,

composition, while not ideal,<sup>152</sup> hardly destabilize an – empirical – reality in which MEPs simply do not vote in national blocks representing their “people”, and in which European citizens are also allowed to vote and stand for a seat in *another* Member State than their own.

What about the state-peoples within the European Union and its system of government? They are, it goes without saying, primarily represented by and in their respective state parliaments. For the European Union is, like the United States, built on the idea of a *dual* democracy in which legislative powers are divided between two levels of government: Union democracy takes place at the European level and, principally, through the European Parliament; while state democracy takes place at the state level and, primarily, through national parliaments. The two levels may sometimes even cooperate under a “composite” parliamentary procedure; and an interesting illustration of such vertical cooperation can be found in the context of the principle of subsidiarity which asks national parliaments to be institutionally involved in the legislative process of the European Union.<sup>153</sup> The most remarkable horizontal cooperation, however, takes place through the principle of mutual recognition – a fundamental principle of European Union law that will be discussed, together with the idea of dual citizenship, in the next subsection.

#### *bb. Dual Citizenship: Fundamental Rights and Mutual Recognition*

The idea of dual democracy has, as we saw in Section 2, an individualized corollary in the form of dual citizenship: every citizen of a Member State is also a citizen of the European Union. State citizenship implies Union citizenship – with Union citizenship being derivative of State citizenship.<sup>154</sup> And, like in the US American example, the two citizenships are distinct and different in what fundamental rights and freedoms they offer. State fundamental rights apply within and against the State, whereas EU fundamental rights will, in principle, only apply vis-à-vis the Union.<sup>155</sup>

This vertical separation into two distinct citizenship statuses is nonetheless complemented (once more following the American model) by a federal dimension connecting the two. Indeed, the most important EU fundamental right demands that each Member State must collaterally open its national rights to

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the French people; or both? For an insightful general critique of the judgment, see C. Schönberger, *Lisbon in Karlsruhe: Maastricht's Epigones At Sea*, (2009) 10 German Law Journal 1201.

<sup>152</sup> For a recent “idealisation” of degressive proportionality within the European Parliament, see: J. Habermas who has tried to legitimise the status quo by reference to his idea of a *pouvoir constituant mixte*. His general EU law thinking is subject to a number of objections; but, due to space, I shall only mention one here. Alas: how can his *individualist* and *constructivist* conception of the constituent power lead to the proposition that degressive proportionality “can be justified democratically on the grounds that each of the national peoples [!] involved in the constitution-building process wishes to keep open the possibility of lending its national interests greater [!] weight if need be” (J. Habermas, *Citizen and State Equality in a Supranational Political Community* (supra n.127), 179). Does this mean that the dually sovereign individual is split not in half, but in 2/3 national citizen and 1/3 European citizen; and even if we accept this as empirically correct today, why should that division remain stable over time? Would it not follow from Habermas’ own premises that this balance may dynamically evolve as loyalty intensities and political allegiances may shift from one level to the other? Habermas’ celebration of the present system seems to me deeply arbitrary and apologetic. For similar criticisms, see already: J. von Achenbach, *The European Parliament as a Forum of National Interest? A Transnationalist Critique of Jürgen Habermas’ Reconstruction of Degressive Proportionality*, (2017) 55 Journal of Common Market Studies 193 as well as V. Perju, *The asymmetries of pouvoir constituant mixte*, (2019) 25 European Law Journal 515.

<sup>153</sup> For a comprehensive analysis, see: K. Granat, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order* (Hart, 2018).

<sup>154</sup> Article 20 (1) TEU: “Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”

<sup>155</sup> This general principle has however become qualified, both in the US and the EU, by a doctrine of fundamental rights “incorporation”. For a comparison between the US and the EU here, see: R. Schütze, *European Fundamental Rights and the Member States: From ‘Selective’ to ‘Total’ Incorporation?*, (2012) 14 Cambridge Yearbook of European Legal Studies 337.

citizens from other European States moving to its territory. This right of non-discrimination on grounds of nationality constitutes, emphatically, the substantive heart of European citizenship;<sup>156</sup> and the European Court of Justice has rightly underlined that point.<sup>157</sup>

In the European Union, this horizontal dimension of Union citizenship has gone far beyond non-discrimination. Indeed, those EU citizens moving to another Member State may not merely claim to be treated *as if they were citizens of the host state*; under the principle of mutual recognition, they may even be entitled to be treated *as if they continued to live under the regime of their home state*. We have already encountered this idea in the context of the United States,<sup>158</sup> and within the European Union, the principle of mutual recognition is typically discussed within the context of the EU internal market.<sup>159</sup> The principle might here, for example, demand that producers of foreign goods be entitled to sell their merchandise within a state that historically prohibits them;<sup>160</sup> or they may be entitled to practice as lawyers or academics in a State in which they are technically not qualified.<sup>161</sup>

An excellent illustration of the principle of mutual recognition can be found in *Coman*.<sup>162</sup> The case concerned the question whether each State had retained the power to determine, within its territory, the meaning of “marriage”; and, in particular, whether its definition of the concept of “spouse” could exclude same-sex couples. In the past, the answer to this question depended on the particular state a couple lived in.<sup>163</sup> But did this imply that a marriage legally concluded in one state might not be recognized in another? Concretely: could the Romanian authorities deny the validity of a Belgian same-sex marriage within Romania; or, would the refusal to give “full faith and credit” to Belgian law violate EU citizens’ fundamental right to move without hindrances in the European Union? The European Court of Justice recently thought so. For while Romania remained, under European Union law, entitled to not recognise gay marriage for its own citizens, it was still under “the obligation to recognize such marriages, concluded in another Member State *in accordance with the law of that state*”.<sup>164</sup> A Belgian right could here be invoked against the Rumanian authorities; and this horizontal extension was, importantly, the result of the vertical – federal – status of EU citizens.

#### 4. Theorizing EU Democracy I: The Standard Model and its Two Rivals

How can we conceptualise the exploratory picture that emerged in Section 3 for the European Union; and can it be associated with the idea of “democracy”? The European Union has, since its beginning,

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<sup>156</sup> See only: M. van den Brink, *EU Citizenship and (fundamental) rights: Empirical, normative, and conceptual problems*, (2018) 25 *European Law Journal* 21 at 33: “EU citizenship may indeed look rather meagre when considering solely its vertical dimension, but it is the horizontal dimension which provides it with real substance[.]”

<sup>157</sup> Case C-184/99, *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para.31: “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality”.

<sup>158</sup> For a discussion of the *Obergefell v Hodges* judgment, see accompanying text to supra ns.109-112.

<sup>159</sup> For a discussion of the “federal” principle of mutual recognition in the EU internal market, see: R. Schütze, *From International to Federal Market* (supra n.108).

<sup>160</sup> The iconic case for the free movement of goods is, of course, “Cassis de Dijon”, Case 120/78, [1979] ECR 649.

<sup>161</sup> For the free movement of lawyers within the Union, see especially *Gebhard*, Case C-55/94, [1995] ECR I-4165.

<sup>162</sup> *Coman and others*, Case C-673/16, EU:C:2018:385. For excellent discussions of the case, see: A. Tryfonidou, *The EU Top Court Rules that Married Same-Sex Couples Can Move Freely Between EU Member States as “Spouses”*, (2019) 27 *Feminist Legal Studies* 211.

<sup>163</sup> For the Union legal order, consider Article 9 of the EU Charter: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”

<sup>164</sup> *Coman and others* (supra n.162), para.45 (emphasis added).

been committed to laying “the foundations of an ever closer union among the *peoples* of Europe”;<sup>165</sup> and the EU Treaties make, bar one soft exception,<sup>166</sup> no symbolic reference to a “We, the European people”.<sup>167</sup> Yet with the formal introduction of EU citizenship by the 1992 Maastricht Treaty, the spectre of “a change in the very telos of European integration from a union among the peoples of Europe to a people of Europe” had emerged.<sup>168</sup> For many constitutional traditionalists, this was a serious mistake: there was no European people; and in its absence, the European Union was, by definition, structurally un-*demos*-cratic.

Starting out from this “no-demos” thesis, and heeding the call “to reinvent the key institutions of modern political democracy”,<sup>169</sup> the term *demoicracy* was coined to conceptualize the democratic potentialities (and limits) of the European Union as a union of multiple *demoi*.<sup>170</sup> Most prominently, certainly in terms of quantity,<sup>171</sup> has here been Kalypso Nicolaïdis’ attempt to stake semantic dominance over the concept. Her normative model of *demoicracy* has today become the “standard model” in political science discussions on the democratic “ontology” of the European Union. In the last decade, however, two alternative models of *demoicracy* have also emerged. This section aims to critically present these three existing models by analysing their normative definitions of *demoicracy* as well as the EU processes or institutions that are seen as concrete manifestations of *demoicracy* within the European Union.

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<sup>165</sup> 1957 Rome Treaty, Preamble; and see Article 1 TEU: “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe”; as well as the Preamble to the EU Charter: “The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.”

<sup>166</sup> Declaration 52 “On Symbols of the European Union” – speaking of a “sense of community of the people in the European Union and their allegiance to it”.

<sup>167</sup> This was even true for the two most “political” and “constitutional” projects of European integration in the past – both of which failed. The 1953 European Political Community began its preamble with “We, the peoples of the Federal Republic of Germany, the Kingdom of Belgium...”; and its founding treaty described the EPC as a “union of peoples and States” (ibid., Article 1) and its Parliament-to-be as the “Peoples’ Chamber” (ibid., Article 11). The 2004 Constitutional Treaty also identified the political will behind it with the “peoples of Europe” (preamble); yet its Article I-1 CT signalled a subtle shift by referring to “the will of the citizens and States of Europe”.

<sup>168</sup> J.H.H. Weiler, *European Models: Polity, People and System*, in P. Craig and C. Harlow (eds.), *Lawmaking in the European Union* (London: Kluwer Law International, 1998), 3 at 23.

<sup>169</sup> P. C. Schmitter, *How to Democratize the European Union... and Why Bother?* (Rowman & Littlefield, 2000), 1.

<sup>170</sup> The term “*demoicracy*” seems to have first entered the constitutional vocabulary of European integration in 1997 when Philippe van Parijs advocated a shift from “*demoi*-cracy to *demos*-cracy” in light of the post-Maastricht Union’s increased involvement in questions of social justice. See: P. van Parijs, *Should the European Union Become More Democratic*, in: A. Føllesdal & P. Koslowski (eds), *Democracy and the European Union* (Springer, 1997), 287, esp. 298-9.

<sup>171</sup> There are several dozens of articles on *demoicracy* that Nicolaïdis has published since 2003. The following seemed to me the most relevant: K. Nicolaïdis, *Our European Democracy: Is this Constitution a Third Way for Europe?*, in: K. Nicolaïdis & S. Weatherill, *Whose Europe? National Models and the Constitution of the European Union* (Oxford University Press, 2003); K. Nicolaïdis, “*We, the Peoples of Europe...*”, (2004) 83 *Foreign Affairs* 97; K. Nicolaïdis, *The Idea of European Democracy*, in: J. Dickson & P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012); K. Nicolaïdis, *European Democracy and Its Crisis*, (2013) 51 *Journal of Common Market Studies* 351; K. Nicolaïdis, *Epilogue: the challenge of European demoi-cratization*, (2015) 22 *Journal of European Public Policy* 145; F. Cheneval & K. Nicolaïdis, *The social construction of demoicracy in the European Union*, (2017) 16 *European Journal of Political Theory* 135; K. Nicolaïdis and M. Watson, *Sharing the Eurocrats’ dream: a demoicratic approach to EMU governance in the post-crisis era*, in: D. Chalmers et al. (eds.), *The End of the Eurocrats’ Dream* (Cambridge University Press, 2016), 50; K. Nicolaïdis and J. Viehoff, *Just Boundaries for demoicrats* (2017) 39 *Journal of European Integration* 591; and K. Nicolaïdis, *Sustainable Integration in a Demoicratic Polity: A New (or not so new) Ambition For the European Union after Brexit*, in: U. Staiger (ed.), *Brexit and Beyond: Rethinking the Futures of Europe* (UCL Press, 2018), 212.

### a. The Standard Model: Demoicracy as the Non-Majoritarian “Third Way”

The standard definition of demoicracy, offered by Nicolaïdis, is this: “*European demoicracy is a Union of peoples, understood both as states and as citizens, who govern together but not as one*”.<sup>172</sup> Sadly, each of the three key elements of this definition (“Union of peoples”, “govern together”, and “not as one”) remain ambiguous and are never suitably defined.<sup>173</sup> Leaving her abstract definition therefore in vital need of further concretisation, what are the concrete manifestations and normative commitments behind Nicolaïdis’ conception of demoicracy? Examining her numerous articles on the subject, stronger contours vaguely emerge; yet the task of the critical analyst is emphatically not an easy one.<sup>174</sup>

Nicolaïdis’ core thesis is this: wishing to break away from the “Cartesian tyranny of dichotomies”,<sup>175</sup> a third way between “intergovernmentalism” and “supranationalism” must be found. And contending that the two classic EU integration philosophies are “state-centric”, they are, in turn, claimed to represent “two sides of the same coin”. For both, apparently, rely on the “sovereigntist notion [of] a single demos”: intergovernmentalism insists on the (exclusive) existence of a sovereign demos within each state, whilst supranationalism is charged with aiming to create a single European demos replacing the national demoi within the Union.<sup>176</sup> For Nicolaïdis, neither is capturing the European Union: “The EU is neither a *union of democracies* nor a *union as democracy*; it is a union of states and of peoples – a “*demoicracy*”[.]”<sup>177</sup> Importantly, and paying tribute to pluralism and cosmopolitanism,<sup>178</sup> this third-way solution ought nevertheless not be seen as “something ‘in between’”; demoicracy is, on the contrary, said to be “ontologically” distinct from both intergovernmentalism and supranationalism.<sup>179</sup>

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<sup>172</sup> K. Nicolaïdis, *The Idea of European Demoicracy* (supra n.171), 254.

<sup>173</sup> What distinguishes a “union of *peoples*” from a “union of *states*”? As we shall see later on, for Nicolaïdis it cannot be that in the former, the peoples act as populations of different sizes, as opposed to peoples acting as sovereign and equal states, because this would contradict her preference for the equality of peoples; and it may be for that reason that her later definitions of demoicracy silently drop the reference to peoples “*understood both as states and as citizens*” (K. Nicolaïdis, *European Demoicracy and Its Crisis* (supra n.171), 351. Be that as it may, does a union of peoples, understood as equal peoples, then mean that the “people” themselves ought to adopt the Union? This would make the United States a demoicracy but not the European Union; and it therefore cannot be the meaning she has in mind. Secondly, what institutional arrangements are envisaged behind the elusive phrase “govern together”; and is the principle of mutual recognition a form of governance? The absence of any serious discussion of institutional arrangements, which ought to define who and what governs the Union of peoples is, in my view, the mortal academic sin within Nicolaïdis’ model; and Miriam Ronzoni in “The European Union as democracy: Really a third way?”, (2017) 16 *European Journal of Political Theory* 210 is absolutely right to call out Nicolaïdis as a mistress of ambiguity here (ibid., esp. 226 and 229). Finally, what does “not as one” mean? Does it refer to the “no-demos” thesis implying that the Union does not have a “people”? But, then, on what grounds is there no European people if one rejects identarian definitions, as Nicolaïdis, so fervently does?

<sup>174</sup> There are, in my view, so many normative ambivalences, if not outright philosophical contradictions, within and between each of Nicolaïdis’ articles (supra n.171) that it is hard to condense them into a “rational” and “coherent” set of analytical propositions, let alone a philosophical programme.

<sup>175</sup> K. Nicolaïdis, *Our European Democracy* (supra n.171), 140.

<sup>176</sup> This characterisation of supranationalism is seriously mistaken and only serves Nicolaïdis to claim third-way status for her own theory. However, it is simply historically incorrect to claim that “supranationalists” have insisted that the Union ought to be “merging into a single polity that expresses its will through traditional state-like institutions”, as she does (K. Nicolaïdis, “*We, the Peoples of Europe...*” (supra n.171), 101). This is not “supranationalism” but the old (!) “federalism”, as expounded in the early years of European integration. For a discussion of the “old” federalist theory of European integration, see C. Pentland, *International Theory and European Integration* (Faber, 1973), Chapter 5.

<sup>177</sup> K. Nicolaïdis, “*We, the Peoples of Europe...*” (supra n.171), 101.

<sup>178</sup> K. Nicolaïdis, *Our European Democracy* (supra n.171), 144.

<sup>179</sup> K. Nicolaïdis, *European Demoicracy and its Crisis* (supra n.171), 352 et seq., and especially 353: “contrary to a *via media* [demoicracy] is normatively antithetic to both”. For an excellent criticism of this view, see: M. Ronzoni, *The European Union as a demoicracy* (supra n.173).



In what ways, then, is the European Union, as a democracy, ontologically distinct? For Nicolaïdis, three conceptual shifts are responsible for this. They are: *first*, “seeking the mutual recognition of all the members’ identities rather than a common identity”; *second*, “promoting a community of projects, not a community of identity”; and, *third*, “sharing governance horizontally, among states, rather than only vertically between states and the union”.<sup>180</sup>

Let us explore each of these three “ontological” elements of the standard model in turn.

First, the standard model demands that there cannot be a European demos: “one is not to cross the Rubicon which separates a European Union ruled by and for multiple *demos* from a Europe ruled by and for one single *demos*”.<sup>181</sup> Democracy is to take “to their ultimate logic the implications of pluralism and the rejection of identity politics”; and this, in particular, means that “[i]n political terms, a democracy is not predicted on a common identity, European public space and political life”.<sup>182</sup> The EU is all about multiculturalism through free movement *between* States; a normative reduction that makes the quest for a complementing normativity or European identity obsolete. “We do not need to develop a ‘common’ identity if we become utterly comfortable borrowing each other’s.”<sup>183</sup> Not a *common* political identity undergirding all national identities, but the differential sharing of national identities is what democracy wants. The concrete manifestation Nicolaïdis cites in this context is the EU Treaties’ commitment that EU nationals may use each other’s consular services which, according to her, permit, say a Spaniard, “to be a bit Italian or a bit British when traveling outside the Union” – but never do they feel European a such. The Union is, and ought to be, a community of *others* not a community of *brothers*.<sup>184</sup>

This categorical rejection of a European demos constitutes the normative foundation of (almost) all existing models of EU democracy;<sup>185</sup> and this should, in theory, also imply a rejection of the very idea of *Union* citizenship. A citizen simply cannot be a member of a national political community while, at the same time, considering herself to be a member of the European political community, because such “[a] theory of the duplicity of the citizen effectively opposing each other within the same citizen” is to lead to “insanity” in the same way as “Dr B” in Zweig’s famous “Chess Novel” is gradually driven mad by playing against himself. “European citizens involved in a game in which they have to oppose themselves as national vs. EU citizens could only escape from the insanity of this project by stopping to be involved in politics”.<sup>186</sup> The idea of a dual citizenship, in the sense of (“ontologically”) belonging to two political communities, and simultaneously owing two political allegiances, is thus discarded as incongruent with democracy. Citizens can only be members of one *single* political community: their *national* community – even if they are allowed to horizontally move between national communities within the Union.

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<sup>180</sup> K. Nicolaïdis, “*We, the Peoples of Europe...*” (supra n.171), 102.

<sup>181</sup> K. Nicolaïdis, *The Idea of European Democracy* (supra n.171), 247.

<sup>182</sup> K. Nicolaïdis, *Our European Democracy* (supra n.171), 145.

<sup>183</sup> *Ibid.*

<sup>184</sup> K. Nicolaïdis, *The Idea of European Democracy* (supra n.171), 256. Importantly, her universalist commitment implies “no othering”; and Nicolaïdis subsequently uses her “universalist” philosophy to criticise Habermas (*ibid.* 270): “It is for this reason that when [Habermas] chose to uphold the ideal of a European Union defined *against* that of the United States, it is fair to say that Habermas stepped outside the democratic ethos.”

<sup>185</sup> The notable exception is J. Lacey’s excellent “Centripetal Democracy: Democratic Legitimacy and Political Identity in Belgium, Switzerland, and the European Union” (Oxford University Press, 2017), esp. 85.

<sup>186</sup> K. Nicolaïdis, *The Idea of European Democracy* (supra n.171), 243. For the opposite idea, namely that “schizophrenia” is an integral part of democracy, see: P. Rosavallon, *Democracy: Past and Future* (Columbia University Press, 2007), 91. The idea is, of course, also inherent in Rousseau’s distinction between the will of all and the general will. Within federal orders, this schizophrenic attitude is further reinforced through the idea of each person being a part of the general will of two political orders. On the idea of dual loyalties in federal orders, see supra n.95.

This brings me to the second conceptual shift advocated by Nicolaïdis: the European Union is not a union of identity but a union of *projects*.<sup>187</sup> Since the Member States are seen as “Masters of the Treaties”, each (!) is said to have remained free to individually (!) determine the projects it wishes to partake in. Demoicracy is consequently enthused with the philosophy of differential integration according to which each national people can pick and choose the parts of the EU Treaties with which it wishes to engage.<sup>188</sup> The union of projects conception also naturally entails and affirms a unilateral right to withdrawal. For Nicolaïdis, demoicracy is, in fact, most emblematically expressed in each Member State’s right to withdraw from the Union; it is indeed celebrated as “the ultimate mark of *demoicracy*”.<sup>189</sup> The European Union as a union of projects is therefore nothing but what each state takes out of it – an à la carte community of projects in which you can opt-in and opt-out on the day,<sup>190</sup> and from which you can leave whenever you so desire.<sup>191</sup>

What are the concrete institutional expressions of demoicracy? The third conceptual shift evocative of demoicracy returns to an early interest in Nicolaïdis’ scholarly work: the principle of mutual recognition.<sup>192</sup> “[T]he European Union requires its many peoples not only to open up to one another but to recognize mutually their respective polities and all that constitutes them”.<sup>193</sup> Horizontal in operation, mutual recognition is here understood as a legal instantiation of non-domination. As a form of “transnational” governance, it stands in stark opposition to a “supranational” government that hierarchically imposes its common solutions. Instead of European harmonisation, mutual recognition thus favours the coordination of diverse national solutions (with only the most minimalist central interference).<sup>194</sup> The public mission of the Union is consequently reduced to a conflict-of-law task: “European policies and laws should deal with tensions between home and host country jurisdiction *through conflict-of-law approaches and managed mutual recognition*.”<sup>195</sup> Or, as an oft-quoted passage, better explains:

“A demoi-cracy should not be based on a vertical understanding of governance, with supranational constitutional norms trumping national ones and supranational institutions standing *above* national

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<sup>187</sup> This is, in my view, another ambivalence in the Nicolaïdis thinking: while, on the one hand, she rejects “identity politics” in a categorical sense, she still seems to admit that “doing” can generate a form of belonging or identity (K. Nicolaïdis, *Our European Democracy* (supra n.171), 146).

<sup>188</sup> J.W. Müller, *The Promise of ‘Demoi-cracy’: Democracy, Diversity, and Domination in the European Public Order*, in: J. Neyer and A. Wiener (eds.), *Political Theory of the European Union* (Oxford University Press, 2011), 187 makes the link between demoicracy and enhanced cooperation (ibid., 196). This link is, for example, also expressly made by R. Bellamy, *A Republican Europe of States* (Cambridge University Press, 2019), Chapter 6: “Differentiated Integration and the Democratic Constitution of the EU”.

<sup>189</sup> K. Nicolaïdis, “*We, the Peoples of Europe...*” (supra n.171), 105.

<sup>190</sup> K. Nicolaïdis, *European Demoicracy and its Crisis* (supra n.171), 363.

<sup>191</sup> Ibid., 362: “Peoples as states must have the *de jure* right, but also *de facto* capacity, to choose to enter or exit the Union, or parts of the Union[.]”

<sup>192</sup> There is, again, no lack of quantity as regards Nicolaïdis publications on the principle of mutual recognition; but this cannot be the place to analyse her unstable and shifting conception of mutual recognition in detail. However, I will return to some aspects of her thinking in Section 5 (b) below.

<sup>193</sup> K. Nicolaïdis, *The Idea of European Demoicracy* (supra n.171), 248. See also: K. Nicolaïdis & G. Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, (2005) 68 *Law and Contemporary Problems* 263 at 317: “Mutual recognition represents the acceptance of other systems and approaches as valid, having parallels with multiculturalist goals within polities.”

<sup>194</sup> K. Nicolaïdis, *European Demoicracy and its Crisis* (supra n.171), 363: “In a Demoicracy, shared projects (for example, Single Market, Single Space, Single Money) do not require harmonised standards, but minimal compatibility and maximal recognition.”

<sup>195</sup> Ibid., 364. This argument has excellently been criticised by J. Sievers and S.K. Schmidt, *Squaring the Circle with mutual recognition? Demoi-cratic governance in practice*, (2015) 22 *Journal of European Public Policy* 112.

ones. Instead, our demoi-cracy ought to be premised on the horizontal sharing and transfer of sovereignty. It involves a dialogue rather than a hierarchy between different legal or political authorities such as constitutional courts ... national and European parliaments, national and European executives. It is about multi-centered not only multi-level governance, with decision made not by Brussels but *in* Brussels as well as elsewhere around Europe. When it comes to rules, procedures and institutions, a European demoi-cracy is neither national nor supranational but *transnational*.<sup>196</sup>

But what exactly are the institutions, procedures and modes of transnational governance here advocated? Drawing on the republican idea of non-domination, all governmental arrangements that do not respect the sovereign equality of national peoples are suspect within the standard model. One of the Union's "greatest failing", in institutional terms, is therefore seen in the move, as regards the Council, towards a population requirement (discussed in Section 3) because the latter upsets the sovereign equality between states.<sup>197</sup> Where does this leave the European Parliament? The democratic legitimacy of the European Parliament is, for Nicolaïdis, out of the question, because "without a single European demos, a 'European majority' could be undemocratic if it overrode the will of a large number of national majorities".<sup>198</sup> The only true institutional manifestations of democracy are, alas, the *national* parliaments within the European Union. It is they, and only they, who offer the democratic substance behind the formal principle of mutual recognition; and the same is true for their involvement in monitoring the principle of subsidiarity, which "respects the spirit of *demoicracy* by having directly elected national representatives police the boundary of union powers in the name of national majorities".<sup>199</sup>

Let us, then, try to sum up the essential contours of the standard model. Its normative heart lies in an egregious *anti*-majoritarianism at the European level: "the lack of a European *demos* means that *European citizens will not and should not accept to be bound by a majority of Europeans*".<sup>200</sup> And condemning all forms of EU majoritarianism as forms of hegemonic domination,<sup>201</sup> the European Union ought to be solely governed by national parliaments through a "decentralized model represented by the mutual recognition approach".<sup>202</sup> For the standard model, therefore, democracy is necessarily confined to the national sphere – even if the principle of mutual recognition opens and "pluralises" national democracies horizontally. From a vertical point of view, however, democracy means decisional intergovernmentalism with regard to positive integration,<sup>203</sup> as well as EU Treaty reform and

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<sup>196</sup> K. Nicolaïdis, *Our European Democracy* (supra n.171), 146.

<sup>197</sup> K. Nicolaïdis, "We, the Peoples of Europe..." (supra n.171), 107.

<sup>198</sup> Ibid., 107. In a typical Nicolaïdis "move", the last conditional sub-sentence injects a philosophical ambivalence as to whether a European majority could be democratically legitimate *if it overrode only a small number of national majorities*.

<sup>199</sup> K. Nicolaïdis, "We, the Peoples of Europe..." (supra n.171), 105. For a critical evaluation of this claim, see K. Granat, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order* (supra n.153).

<sup>200</sup> K. Nicolaïdis, *European Democracy and its Crisis* (supra n.171), 356 (emphasis added).

<sup>201</sup> Ibid., 363: "A democracy seeks to counter the drift to majoritarianism inherent in modern democratic logic, be it as majorities of states or majorities of EU-wide population".

<sup>202</sup> K. Nicolaïdis & G. Shaffer, *Transnational Mutual Recognition Regimes* (supra n.193), 307-8: "In the mutual recognition context, democracy will work primarily at the national level through creating constraints on national administrators... It makes more sense to expand accountability beyond the polity not through creating elected legislative bodies at the global level, but rather through expanding other accountability mechanisms, such as those used traditionally in national administrative law. (...) From a principal-agent perspective, in mutual recognition arrangements, the ultimate principals remain the public within a national polity, their respective agents being their national regulators who, in turn, engage with foreign regulatory counterparts."

<sup>203</sup> K. Nicolaïdis, *The Idea of European Democracy* (supra n.171), 272 – with express endorsement of Weiler's equilibrium "theory".

amendment.<sup>204</sup> And the rise of the consensus-based European Council, and the “New Intergovernmentalism” in the wake of the Euro-crisis, are therefore welcomed as fully in line with the democratic ethos.<sup>205</sup> In essence, Nicolaïdis model shares a great family resemblance with intergovernmentalism; yet its insistence on mutual recognition justifies her associating it with the related concept of transnationalism.<sup>206</sup>

### b. Alternative Models: “Republican Intergovernmentalism” and “Popular Sovereignty”

The “Third Way” model has come to dominate, thanks to its author’s ubiquitous literary presence, much of the European discussion of democracy; yet, two important shortcomings within it eventually gave birth to two theoretical rivals. The greatest *normative* weakness of the standard model is, in my view, its brazen inability to conceptualise and justify the – supranational – principle of mutual recognition from within its chosen democratic point of view.<sup>207</sup> Yet the descriptive un-realism of the standard model really constitutes its fatal Achilles heel. For despite all of her lip service to “normative inductivism”,<sup>208</sup> the theoretical propositions of Nicolaïdis’ model are so far removed from what the Union is actually “doing” that the only way to make her philosophical “theory” match legal reality is to abandon the Union in dismay or to re-found it on intergovernmental principles.<sup>209</sup>

Out of these two central flaws within the Nicolaïdis’ model, two alternative models have grown. They can be labelled the “republican intergovernmentalism” model – today chiefly propounded by Richard Bellamy; and the “popular sovereignty” model prominently defended in the work of Francis Cheneval. The former takes the non-domination emphasis within the standard model to its logical conclusion (by marginalising the supranational principle of mutual recognition). The latter has, by contrast, helpfully managed to inject a degree of constitutional realism into the European discussion of democracy (by accepting majoritarian decisions at the Union level). Let us look at both alternative models in turn.

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<sup>204</sup> Nicolaïdis consequently criticises the “bypassing of the unanimity rule for treaty revision in 2012” when the British government infamously objected to the fiscal compact (K. Nicolaïdis, *European Democracy and its Crisis* (supra n.171), 363).

<sup>205</sup> *Ibid.*, 355: “If the Rome Treaty had provided an original institutional matrix faithful to the core tenets of a democratic vision, it was improved by sequential amendments, from the institutionalisation of the European Council, to the right of exit clause or the role of national parliaments in the Lisbon Treaty.”

<sup>206</sup> K. Nicolaïdis, *Epilogue: the challenge of European demoi-cratization* (supra n.171), 146. For an overview of the similarities and differences between intergovernmentalism and transnationalism, see Table 5 below.

<sup>207</sup> What I mean is this: if “[m]utual recognition arrangements, like any governance mechanism, are subject to power asymmetries” (K. Nicolaïdis & G. Shaffer, *Transnational Mutual Recognition Regimes* (supra n.193), 310), how can it be said to be the best expression of democracy as republican non-domination? Yet more critically: what legitimizes the European “imposition” of the principle of mutual recognition onto Member States (or do the national parliaments unilaterally and voluntarily decide to mutually recognize each other’s national solutions)? For the principle is not all about expanding “rights” – that is allowing private exporters to sell goods in a foreign market or allowing “nomads” (her word) to move and work in another country; indeed, the principle of mutual recognition imposes corresponding “obligations” on those “settlers” (her word), that have stayed in their home state and who must henceforth accept that different normative solutions apply also to them – for example being subjected to lower consumer rights or a different professional standard – even though this is not what they [!] have decided for themselves in their own state. If a national community has thus found “its” legislative compromise for various interests (consumer rights v. free market) why ought it accept previously “illegal” solutions within its territory? If, indeed, the shift from host-state to home-state control implies “a horizontal transfer [!] of sovereignty”, why should the “settlers” (the overwhelming majority of people within the Union) accept this? Is this vision of constitutional tolerance towards “others” not simply a conscious or unconscious neoliberal plea for competition between legal orders in which the “market” ultimately decides? I shall return to this point below.

<sup>208</sup> K. Nicolaïdis, *European Democracy and its Crisis* (supra n.171), 357 as well as “The Idea of European Democracy” (supra n.171), 261 et seq.

<sup>209</sup> This point applies to the “standard model” as well the “republican intergovernmentalism” model, see F. Wolkenstein, *Democracy, Transnational Partisanship and the EU*, (2018) 56 *Journal of Common Market Studies* 285 at 291.

aa. Bellamy's "Intergovernmentalism": Democracy as National Sovereignty

The "republican intergovernmentalism" model offers – without a doubt – the most radical sovereigntist model of democracy. It unconditionally accepts the absolute primacy of national communities and thus propagates a purely international and intergovernmental reading of the Union.<sup>210</sup> Its normative vision is that of a "republican association of *sovereign* states" that facilitates and enables nation states "to regulate their *external* sovereignty in non-dominating ways".<sup>211</sup>

In this neo-Kantian "federal republic", states ought never to give up parts of their sovereignty; and as the "republican" counterpart to "liberal" intergovernmentalism;<sup>212</sup> the Bellamy model also rejects all differences in power between States. The central core of this democratic model is the sovereign *equality* of all states in an "international governance" arrangement that opposes all forms of domination.<sup>213</sup> In this way, states "preserve both popular and polity sovereignty";<sup>214</sup> and republican intergovernmentalism therefore categorically rejects the view of "the EU as an independent constituted order with a direct relation to citizens" and in which EU institutions make "laws" that the Court of Justice enforces "in a hierarchical, top-down manner".<sup>215</sup> And it almost goes without saying: each state must of course always be free to leave the European Union whenever it so wishes.<sup>216</sup>

What does all that mean for the Member States governing "together"? Like the standard model, this second model aims to cull all majoritarian elements from the Union because they are seen to contradict the spirit of democracy.<sup>217</sup> All majoritarian choices, whether made by the European Parliament or the European Court, and through which Union rights are granted against national majorities "undercut democracy at the member state level".<sup>218</sup> Worse: "for a popularly sovereign polity to incorporate under a supranational or transnational sovereign authority, even of a partial character, *would be self-contradictory and a denial of the moral values that existing systems instantiate for their members*".<sup>219</sup>

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<sup>210</sup> See especially: R. Bellamy, 'An Ever Closer Union Among the Peoples of Europe': *Republican Intergovernmentalism and Democratic Representation within the EU*, (2013) 35 *Journal of European Integration* 499; R. Bellamy, *A European Republic of Sovereign States: Sovereignty, republicanism and the European Union*, (2017) 16 *European Journal of Political Theory* 188; and now: "A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU (Cambridge University Press, 2019).

<sup>211</sup> R. Bellamy, *A European Republic of Sovereign States* (supra n.210), 190 (emphasis added).

<sup>212</sup> R. Bellamy, 'An Ever Closer Union Among the Peoples of Europe', (supra n.210), 500.

<sup>213</sup> The key notion of "non-domination" within Bellamy's republican intergovernmentalism is taken from Philip Pettit's idea of republicanism. But Bellamy is unable to properly define the parameters of his conception of non-domination. For "[i]f domination arises from being subject to a master, then individuals will only be non-dominated to the extent they are free from mastery as a result of possessing sovereignty" (R. Bellamy, *A European Republic of Sovereign States* (supra n.210), 192), does that not mean that all forms of *government* in which individuals are subject to majority rule are "dominating" because they create, by definition, a superior? And even if the Rousseauian solution of the general will is used to solve this dilemma within a direct (?) democratic polity, can there ever be a non-dominating democracy if we insist, as Bellamy does, that "[m]astery of a kind that leads to domination arises from an imbalance of power" (ibid., 195). True "republicanism", as total non-domination, can then, it seems, only be achieved in a Communist utopia in which all differences of power and knowledge have been totally levelled.

<sup>214</sup> R. Bellamy, *A Republican Europe of States* (supra n.210), 90.

<sup>215</sup> Ibid., 91.

<sup>216</sup> Ibid., 69: "The democratic legitimacy of EU level decisions, therefore, would depend on them meeting a dual standard. These decisions must not only reflect the consent of each of the *demoi* to whom they apply but also must not undermine the capacity for those *demoi* to give or withdraw their consent. As such, this approach operates as a form of 'republican intergovernmentalism'".

<sup>217</sup> Ibid., 194: "Towards the Democratic Constitution of the EU: Overcoming Constitutional Supremacy and the Allure of Majority Rule".

<sup>218</sup> R. Bellamy, 'An Ever Closer Union Among the Peoples of Europe' (supra n.210), 512.

<sup>219</sup> R. Bellamy, *A European Republic of Sovereign States* (supra n.210), 203 (emphasis added).

Republican intergovernmentalism thus insists on the full “internal sovereignty” of each people within the Union; and employing the intergovernmental logic of “two-level” games,<sup>220</sup> each national demos is seen as an essentially closed civic association whose own choices must never be contradicted by other states – hence: no supranational mutual recognition – or by the European Union.

What does this specifically mean for *parliamentary* government within the Union? For republican intergovernmentalism, the European Parliament represents an anomaly that ought, in the final analysis, be abolished. For not only can it never generate the necessary loyalty towards its citizens,<sup>221</sup> even if a European superstate were ever to be created, the democratic re-constitution of majoritarian institutions at the European level could not “but be a diminishment of democracy”.<sup>222</sup> The sole and exclusive way to realize democracy between Member States is to task their – national – parliaments with “governing” the European Union. The horizontal cooperation between national parliaments therefore constitutes, for Bellamy, the paradigmatic democratic mechanism for republican intergovernmentalism.<sup>223</sup> Sadly, the concrete procedure for their international cooperation remains disappointingly underspecified; but considering the model’s emphasis on non-domination and national sovereignty, we should assume that only a unanimous and non-majoritarian decision among all the national parliaments could generate the democratic legitimacy that republican intergovernmentalism proudly demands.

Finally, what about each state’s external sovereignty? Bellamy here concedes the principle of non-discrimination;<sup>224</sup> yet his republican intergovernmentalism cannot generate, let alone justify, the federal principle of mutual recognition. For the latter interferes with the *internal* sovereignty of States.<sup>225</sup> The only way to introduce this principle would thus be via an international agreement, whereby “the rules governing their mutual relations are under the *equal* influence and control of the elected representatives of those states”.<sup>226</sup>

#### *bb. Cheneval’s “Supranationalism”: Demoicracy as Popular Sovereignty*

Bellamy’s radicalized intergovernmental model is even further removed from the “realities” of European integration than the standard model.<sup>227</sup> A third model of demoicracy has therefore emerged, whose main advantage over its two theoretical rivals is to recognize the real-existing majoritarian elements within the EU institutional system.

This third model of demoicracy defines the concept primarily by reference to “popular sovereignty”, which is said to have remained with each State. The creation of the Union is, rightly, viewed as a decision

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<sup>220</sup> See especially: R. Bellamy and A. Weale, *Political legitimacy and European monetary union: contracts, constitutionalism and the normative logic of two-level games*, (2015) 22 *Journal of European Public Policy* 257.

<sup>221</sup> R. Bellamy, *A Republican Europe of States* (supra n.210), 86.

<sup>222</sup> *Ibid.*, 10.

<sup>223</sup> *Ibid.*, 125. See also R. Bellamy and S. Kröger, *Domesticating the Democratic Deficit? The Role of National Parliaments and Parties in the EU’s System of Governance*, (2014) 67 *Parliamentary Affairs* 437.

<sup>224</sup> R. Bellamy, *A Republican Europe of States* (supra n.210), 92: “[C]itizens of different peoples ought not to be discriminated against in their interactions[.]”

<sup>225</sup> For this point, see: R. Schütze, *From International to Federal Market* (supra n.108), *Introduction*.

<sup>226</sup> R. Bellamy, *A Republican Europe of States* (supra n.210), 4.

<sup>227</sup> For this excellent point, see again F. Wolkenstein, *Democracy, Transnational Partisanship and the EU* (supra n.209), where the “unrealities” of Bellamy’s political vision are eloquently contrasted with the post-Maastricht “realities” and in which the author rightly claims that the only normative import of Bellamy’s vision is to advise “Member States to decouple themselves from the EU via Article 50 TEU and then renegotiate their relationship with what remains of the Union in such a way that national parliaments can take centre stage” (*ibid.*, 291). It seems that the United Kingdom has followed Bellamy’s (and Nicolaïdis’) advice; because both models of demoicracy directly lead – even if their authors disagree – to justifying the Brexit decision in light of the “hegemonic” and “antidemocratic” nature of the European Union.

of a plurality of peoples – a plural *pouvoir constituant*; and it is this pluralist foundation that is seen as the “first and fundamental principle of demoi-cracy”. “As demoi-cracy cannot presuppose a common political demos as *pouvoir constituant*, it has to constitute the framework of decision-making by agreement of the participating *demos* and accept that the *demos* may exit the political order or veto its further development.”<sup>228</sup> Viewed in this existentialist light, the EU is considered to be a paradigm case of democracy: because not only is a unanimous decision of all Member States seen to be required to create or amend the EU Treaties,<sup>229</sup> a unilateral exit right equally guarantees the non-domination of any state people.<sup>230</sup>

This identification of democracy with (plural) popular sovereignty has a significant side effect: it liberates the concept from its association with (intergovernmental) governance arrangements; and this third model of democracy consequently has little difficulty – unlike the standard model – to accept supranational majoritarianism within the Union. The third model thus permits, with regard to the functioning of EU government, that individual states/peoples can be outvoted by others; and it even generally asserts that “[t]he proper domain of demoi-cracy is a polity of democratic states with hierarchical, majoritarian features of policy-making”.<sup>231</sup> All that matters for the existence of a democracy is that “[n]o People is subjected to majority rule of common governmental institutions it shares with other Peoples if it has not accepted this rule in the first place.”<sup>232</sup> Where the unanimously agreed EU Treaties allow for majority voting, there is no violation of democratic principles.

Importantly, however: even this third model adheres to the no-demos thesis.<sup>233</sup> The reason for this lies in its belief that the existence of a European demos would undermine democracy’s core commitment to the existence of a plural constituting power.<sup>234</sup> And yet: the model does seem to admit that the “people” can enjoy a “double status as a collective and as a plurality of citizens”;<sup>235</sup> and it even positively “embraces the dual character of the EU as a community of both states (peoples) and individuals in a common supranational polity”.<sup>236</sup> The reality of co-decision within a bi-cameral EU legislature can therefore be reconciled within this model;<sup>237</sup> and the model also has no problem in expressly recognizing “vertical” and “hierarchical” Union elements as long as the Member States voluntarily join and voluntarily stay within the European Union.<sup>238</sup> Philosophically, however, the EU citizenry stays

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<sup>228</sup> F. Cheneval et al, *Demoi-cracy in the European Union: principles, institutions, policies*, (2015) 22 *Journal of European Public Policy* 1 at 4.

<sup>229</sup> *Ibid.*, 6: “The treaty-based organizational structure of the EU is in line with the fundamental constitutional principle of demoi-cracy. It preserves the sovereignty of the statespeoples’ *pouvoir constituant* requiring unanimity and national ratification for all changes of the basic rules.” I shall critically engage with that statement in Section 5 (a) below.

<sup>230</sup> *Ibid.*, 4.

<sup>231</sup> F. Cheneval et al, *Demoi-cracy in the European Union* (supra n.228), 14.

<sup>232</sup> *Ibid.*, 4 (emphasis added).

<sup>233</sup> F. Cheneval and F. Schimmelfennig, *The Case for Democracy in the European Union*, (2013) 51 *Journal of Common Market Studies* 334 at 337: “If we define the *demos* as a political community that shares a purpose, and possesses the institutional infrastructure, of self-government, a single European *demos* does not exist.”

<sup>234</sup> However, as the US American case has shown, this is simply not the case: there can be a pluralist constituent power in the past; and yet an (emerging) Union people in the future. Section 5 will, again, return to this point below.

<sup>235</sup> F. Cheneval, *The Government of The Peoples: On the Idea and Principles of Multilateral Democracy* (Palgrave, 2011), 20.

<sup>236</sup> F. Cheneval et al, *Demoi-cracy in the European Union* (supra n.228), 2.

<sup>237</sup> F. Cheneval and F. Schimmelfennig, *The Case for Democracy in the European Union* (supra n.233) at 342: “statespeoples as well as citizens are equally entitled to participation in the secondary legislative rule-making of the multilateral democratic order.”

<sup>238</sup> *Ibid.*, 345-346.

atomised as a multitude of individual EU citizens that never emotively feel and act as a collective European people.

## 5. Theorizing EU Demoicracy II: “Republican Federalism” as a New Model

We saw in Section 4 that quite “different conceptions of demoicracy” co-exist in political science discussions of the European Union today.<sup>239</sup> The three models, discussed above, however also showed important family resemblances. Indeed, each of them is based on the “no-demos” thesis; and all three were united in their rejection of a “federal” analytical reading.<sup>240</sup> Stuck in a *sui generis* reading of the Union, the historical experiences of other Unions of States are disregarded, especially as regards the first two models, and the conceptual capital potentially resulting from such a comparative enterprise remains woefully underinvested. To remedy this shortcoming, a fourth model of demoicracy is here proposed. This fourth model focuses on the idea of a *dual* popular sovereign and a *dual* democratic government as the key characteristics of all federal unions – something that none of the three existing models can do in light of their conceptual denial of a European people. This fourth model will be called “republican federalism”.

Importantly, and unlike the federal integration theory of the 1950s,<sup>241</sup> the purpose of republican federalism is not to advocate the creation of a European super-state. On the contrary, it strongly rejects the “statist” reductionism inherent in the “nationalist” understanding of federalism stemming from the nineteenth century *Staatsrechtslehre*. Republican federalism is, on the contrary, built on the American idea of *dual* sovereignty, *dual* democracy, and *dual* citizenship. The European Union, as a Union of States (in the plural), is seen as a political and constitutional *dualism*; and in rejecting the “federal state” destination, the integration theory underlying this fourth model is best described as “neo-federalism”.<sup>242</sup>

This last section aims to explicate the conceptual contours of republican federalism, as a fourth model of demoicracy, and to compare and contrast it to the three established models discussed in Section 4. Table 3 presents a preliminary comparison of what I consider to be “the” distinctive feature each model identifies with demoicracy (while a more detailed Table 5 in the “Conclusion” below offers a more

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<sup>239</sup> T. Hüller, *Out of Time? The democratic limits of EU demoicracy*, (2016) 23 *Journal of European Public Policy*, 1407 at 1408.

<sup>240</sup> The ever-ambivalent Nicolaïdis quickly flirts with the federal idea (e.g. “The Idea of European Demoicracy” (supra n.171, 259) but rejects it on the ground that it has been captured by the federal state. This rejection is however, once more, too simple and only serves to cement her “third way” claim. For even if, in a federal state, the question of popular sovereignty is believed to have been “resolved” (as, say, in the United States after the New Deal), a federal state is still never just *one* democracy or *one* parliament (“union as democracy”), but always at least *two* democracies and *two* parliaments. To blindly gloss over this by assuming that federalism equals a federal state that is “ontologically” identical to a unitary state commits a serious historical and conceptual mistake. To give just one example of a “federal” conception of democracy and of the “people(s)” in a federal state, let us look at contemporary Germany. For here, and in addition to the “German people”, there also exists a “Saxonian people”. The Saxonian Constitution indeed not only invokes the language of its “people” in its preamble (“*hat sich das Volk im Freistaat Sachsen dank der friedlichen Revolution des Oktober 1989 diese Verfassung gegeben*”); Article 5(1) leaves not much doubt on an independent democratic subject: „*Dem Volk des Freistaates Sachsen gehören Bürger deutscher, sorbischer und anderer Volkszugehörigkeit an.*“ The existence of two “peoples”, two parliaments, two citizenships etc. is thus also envisaged in a federal state; and it is these *governmental* features (and not the metaphysical question of a constituent “sovereignty”) that, in my view, are the quintessential features of a demoicracy. I will return to this in Section 5 below.

<sup>241</sup> For a discussion of the “old” federalist theory of European integration, see C. Pentland, *International Theory and European Integration* (supra n.176).

<sup>242</sup> Within the last decade, I have tried to promote the term “neo-federalism”, within the context of the EU and beyond. With regard to the European Union, it specifically refers to a new integration theory, which (like “neo-functionalism” and the “new intergovernmentalism”) is meant to represent an improved version of an older integration theory – in this case the “federalist” theory of the 1950s.



refined comparison). In line with all previous sections within this Working Paper, let us again divide the analysis alongside the two dimensions of popular *sovereignty* and popular *government*.

Table 3. Models of Democracy: Distinctive Features

	Popular Sovereignty	Popular Government
Republican Intergovernmentalism		<i>Horizontal</i> cooperation between sovereign national peoples (via their parliaments).
“Third Way” Transnationalism		<i>Horizontal</i> power-sharing between sovereign national peoples (via mutual recognition).
“Popular Sovereignty” Democracy	<i>Horizontal</i> cooperation between sovereign national peoples in the constituent power.	
Republican Federalism		<i>Vertical</i> power-sharing between the European and national peoples (dual government).

**a. Dual Sovereignty: Who are the “Masters” of the EU Treaties?**

Who really is/are the popular sovereign(s) in the European Union? Republican federalism recognises, like the “Popular Sovereignty” model,<sup>243</sup> a historically *pluralist* constituent power. The European Union, like the United States, was founded on the *unanimous* consent of its constituent states (peoples); and, unlike the United States, every formal “re-founding” of the European Union has so far also always required the participation of *all* previous Member States.<sup>244</sup> This historical convention is however not constitutionally mandated: on the contrary, a majority of Member States could decide to “re-found” the Union without the participation of *some* existing members. This follows today from a constitutional provision we already met: Article 50 TEU. For the latter not only offers a *unilateral* right to each Member State to leave the Union. Behind it also stands the more radical constitutional principle that the “old” Union can be dissolved in order to re-constitute a “new” European Union. For if *all* Member States

<sup>243</sup> Bellamy’s model is unable to generate a “constitutional” claim for the Union; and he is therefore treated as not having a conception of an EU *pouvoir constituant*. The same is, to some extent, also true for Nicolaïdis whose position on this is however, once again, left ambivalent.

<sup>244</sup> Within EU constitutional history, a re-foundation with potentially less than all previous Member States appears to have been envisaged only once. For the 1953 European Political Community, Article 117 of its draft Treaty stated (third indent, emphasis added): “The present Treaty shall come into force on the day when the instrument of ratification shall be deposited by the *penultimate* [!] State to fulfil this formality.” By contrast, Article IV-447 of the 2004 Constitutional Treaty was, again, based on the idea that all previous Member States of the Union (including the already identified new Member States of Central and Eastern Europe) would have to ratify it to become binding. For while Article IV-447(1) CT did not identify the “High Contracting Parties”, Article IV-447(2) CT made its legal validity dependent on “*all* the instruments of ratification” (emphasis added) having been deposited, and Article IV-448 concretely specified the envisaged (future) Member States and their languages. This constitutional “conservatism” contrasts with the solution advocated in the Commission’s “Penelope Project”, which suggested in Article 6 (2) of the “Agreement on the Entry into Force of the Treaty on the Constitution of the European Union that “[s]hould a Member State which has not ratified this Agreement not have made the solemn declaration before the date of entry into force of the Treaty on the Constitution, it shall be deemed to have decided to leave the Union at that date.”

can withdraw from the Union, a (qualified) *majority* of them must – *argumentum a maiore ad minus* – be able to re-claim and re-form the constitutional foundations of the Union.<sup>245</sup>

But more importantly: the constituent power behind the Union does not, unlike what all other models of democracy assume, exclusively express itself through the – very few – foundational moments, like the signing of the 1957 Rome Treaty or that of the 1992 Maastricht Treaty. It can equally be seen, albeit in less fundamental ways, when the Union *amends* its founding treaties; or, when the membership of the Union is *enlarged* or *reduced*. All these situations reflect moments when a *pouvoir constituant dérivé* comes to the fore; and we must look at these types of constitutional amendments closely to investigate whether the Member States really are the sole masters of the EU Treaties. And, much more importantly still: there have also been constitutional moments in which informal “amendments” to the EU Treaties radically changed the EU governmental system. Table 4 offers a summary of the main players involved in effecting such formal and informal amendments to the EU legal order, which need to be discussed in turn.

Table 4. Non-Foundational Constitutional Change in the EU: Main Actors

Formal Amendments	Informal Amendments	EU Enlargements	EU Withdrawals
Member States EU Institutions	European Court European Legislator	EU Institutions Member States Third State	Member State

*aa. Derived Constituent Power: Formal and Informal Treaty Amendments*

Following Article 48 TEU, two types of formal treaty amendments must be distinguished: ordinary and simplified revisions.<sup>246</sup>

The ordinary revision procedure is structured into initiation, drafting and conclusion. The first two stages are dominated by Union institutions, and especially the European Council. The latter is charged to formally initiate the amendment process; and where a simple majority (!) of the European Council so decides, its President “shall” (!) convene a constitutional “Convention” composed of representatives of the Member States (national parliaments, national governments) and the European Union (European Parliament, European Commission).<sup>247</sup> The Convention is thus conceived as a mixed body, even if the precise mixture is left underspecified. The Convention adopts its recommendations “by consensus”, and a “conference of representatives of the governments of the Member States” has, “by common accord”,

<sup>245</sup> In *Whitman and Others v Secretary of State for Exiting the European Union*, Case C-621/18, EU:C:2018:999 the European Court held that “given that a State cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will” (*ibid.*, para.65). However, the second part of this proposition does, in my view, not follow from the first; and in any case, if a majority of States decided to withdraw in order to re-found the Union, the legal successor of the Union would be that (qualified) majority of Member States.

<sup>246</sup> Within the EU legal order there is no conceptual distinction between “amendments” and “revisions”. For an excellent general overview, see S. Peers, *Amending the EU Treaties*, in R. Schütze & T. Tridimas (eds.), *Oxford Principles of European Union Law – Volume 1: The EU Legal Order* (Oxford University Press, 2018), Chapter 13.

<sup>247</sup> The constitutional obligation to convene a constitutional convention is dispensed for minor treaty changes (Article 48 (3) TEU – second indent), where “this is not justified by the extend of the proposed amendments”. The European Council here still needs the consent of the European Parliament – a Union institution.

the last word on which of these recommendations survive.<sup>248</sup> The envisaged drafting stage is, while admittedly dominated by the Member States, still a mixed process; and this – mixed – character can also be seen, albeit in an even more diluted form, at the conclusion stage. For while every proposed amendment will solely enter into force once “ratified by *all* the Member States in accordance with their respective constitutional requirements”;<sup>249</sup> Article 48 (5) TEU leaves open the possibility that four-fifths of the Member States might, despite the failed ratification by a Member State (or two), move ahead if the European Council so decides.<sup>250</sup>

Within the simplified revision procedure(s), all Union-elements are much stronger still. The European Council can here *unilaterally* propose, if backed by a unanimous decision of its members, whether to amend special parts of the EU Treaties. These proposals will however also have to be ratified by the Member States “in accordance with their respective constitutional requirements”;<sup>251</sup> or, at least, without any objection by a single national Parliament.<sup>252</sup> Yet for a special part within these special parts of the EU Treaties, the European Council can only act “after obtaining *the consent of the European Parliament*”;<sup>253</sup> and this means nothing else than that the European demos must be formally-though-indirectly involved in the treaty amendment process. Nonetheless, in all existing revision procedures the unanimity requirement, at the conclusion stage, means that every formal revision can be vetoed by every single Member State.

Ought this unanimity rule for collective exercises of the Union’s *pouvoir constituant* be a hallmark of democracy? All three older models of democracy, discussed above, come to this conclusion in one way or another. Republican federalism, on the other hand, reaches a profoundly different result – a result that stems from the analytic distinction between founding a “new” and amending an “existing” constitution.<sup>254</sup> For whereas republican federalism resolutely affirms, just like its three theoretical rivals, the ultimate sovereign choice of each State people to *enter* or *exit* the Union, it asserts that once a *Member State* is within the Union, constitutional amendments should be subject to a (super)majority decision *as long as each Member State retains the unilateral ability to exit the European polity*.<sup>255</sup>

Significantly, the replacement of the unanimity rule by a majority rule for EU Treaty amendments does not, in any way, undermine the *plural* nature of the constituting power at play; on the contrary, the decision of a *plurality* of state peoples in favour of constitutional change is increased by removing the possibility of a *single* Member State to block a future amendment.<sup>256</sup> Indeed, and in light of the conceptual link between democracy or demoiocracy and majoritarianism, discussed in Section 1, only *the*

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<sup>248</sup> Article 48 (4) TEU – first indent. The last word might, in fact, belong to the European Court of Justice. For in the past the Court has alluded to the idea of substantive limits to the Union’s amendment powers. For an excellent discussion of this possibility, see: B. de Witte, *Rules of Change in International Law: How Special is the European Community?*, (1994) 25 Netherlands Yearbook of International Law 299 at 318-322.

<sup>249</sup> Article 48 (4) TEU – second indent (emphasis added).

<sup>250</sup> If this ever happened, it would not necessarily mean that a non-ratifying Member State would be bound by the new amendment. It could also mean that the non-ratifying State “leaves” the reformed Union. This second solution had been suggested by the 2002 “Penelope Project”. The relevant Article 103 (1) here stated: “Where a revision to the Constitution has entered into force and a Member State has not been able to adopt it in accordance with its constitutional requirements, such State may, after a period of two years after the entry into force of that revision, apply to withdraw from the Union.”

<sup>251</sup> Article 48(6) TEU.

<sup>252</sup> Article 48 (7) TEU – third indent.

<sup>253</sup> Article 48 (7) TEU – fourth indent (emphasis added).

<sup>254</sup> On the distinction, see: C. Schmitt, *Verfassungslehre* (Duncker & Humblot, 2003), 102-112.

<sup>255</sup> This had been proposed by the Commission’s “Penelope Project” in its Article 101.

<sup>256</sup> Let me, tongue-in-cheek, quote a passage from the German Constitutional Court’s Maastricht Judgment here ((1994) CMLR 57 at 86): “Unanimity as a universal requirement would inevitably set the wills of the particular States above that of the Community of States itself and would put the very structure of such a community in doubt.”

*elimination of the unanimity rule would, in fact, offer terminological credentials to the idea of democracy* as a “government” of the “many” peoples here. From an ideal-typical perspective, such a majority rule for constitutional amendments would also benefit and reflect the federal character of Unions of States. Building on the work of Carl Schmitt, this point was recently and insightfully made by Jean Cohen:

“It would thus seem logical that the ideal-typical amendment rule of a federation should reflect its position between a [international] confederation and a [sovereign] federal state. Whereas for a confederation (bündnis or staatenbund), the amending powers, the states, are outside the treaty and classically, amending the treaty requires unanimity, in the case of a federal state, the “states” are within the constitution and can be treated as organs of the federal union with respect to the federal constitution. (...) *For a federation of states the amendment rule, as for a confederation, would have to retain the states as the sources of fundamental legal change (the treaty component) but the constitutional dimension of the pact would have to entail that a qualified majority of these formally equal states (one state-one vote) would be able to bind the minority.* (...) A federation would have, from the state’s perspective, a single source of ultimate legitimacy: its constitutional authorities remain the member states.”<sup>257</sup>

The introduction of a (qualified) majority rule for Treaty amendments is indeed inherent in the conceptual logic of republican federalism; yet – unlike Cohen’s thinking – the view that the Member States remain the exclusive authorities here ought to be qualified. For if we take the idea of *dual* sovereignty seriously, all constitutional amendments should be subject to a mixed *pouvoir constituant*. Only the latter integrates and combines the two popular sovereigns – the Union people and the state peoples – acting directly or indirectly in a compound amendment procedure.<sup>258</sup> From the perspective of republican federalism, the involvement of the Union – though Union institutions, like the European Parliament – should thus be welcomed as an expression of federalism and democracy. Because wherever a Union “citizenship” and a Union “citizenry” or “people” has been constitutionally constructed, the latter should – whether directly or indirectly – be involved in decisions that concern “its” constitution. Republican federalism consequently stands for a mixed constituent power.

Finally, can we think of EU Treaty amendments in which only Union institutions are involved? Strangely ignored by all three older models of democracy, we do find even formal procedures allowing for autonomous “small” treaty amendments in the past and present of the Union.<sup>259</sup> But much more importantly still: once it is accepted that the nature or character of the *material* constitution can radically change without formal amendment, as powerfully described by Bruce Ackerman for the United States,<sup>260</sup> who are the “masters” of such informal constitutional change in the European Union?

Early on, the Court of Justice trimmed the powers of the *Member States* to informally operate outside the formal amendment channels.<sup>261</sup> Informal treaty amendments have therefore been mainly in the hands

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<sup>257</sup> J. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge University Press, 2012), 127 (emphasis added).

<sup>258</sup> For the US American example, see supra n.68; for the Swiss example, see supra n.130.

<sup>259</sup> For the most well-known past expression, see the “small revision” procedure envisaged by the European Coal and Steel Community. Article 95 (4) of the ECSC Treaty here allowed for amendments, in limited areas, to “be proposed jointly by the [Commission] and the Council, acting by a five-sixths majority of its members”, which would subsequently come into effect “if approved by a majority of three quarters of votes cast and two thirds of the members of the [European Parliament]”. For a contemporary example of such an autonomous revision procedure, see only Article 126 (14) TFEU according to which the Council may “in accordance with a special legislative procedure” change the constitutional provisions set out in the Protocol on the excessive deficit procedure annexed to the EU Treaties.

<sup>260</sup> For his remarkable account of this, see B. Ackerman, *We The People* (supra nn.66 and 67).

<sup>261</sup> The European Court has clarified that the Member States are not able to rely on their general international treaty-making powers to amend the EU Treaties outside the formal Union channels. On this point, see my “European law and Member

of Union institutions. First among all Union institutions here ranks the European Court of Justice. For when the European Court decided to change the EU Treaties from ordinary international treaties to constitutional treaties in *Van Gend en Loos*; or, when it transformed the EU internal market from an international to a federal market in *Cassis de Dijon*, these fundamental changes were really *judicial* “amendments” that the Member States only retrospectively – and sometimes reluctantly – accepted over the course of time.<sup>262</sup> But there have, secondly, also been moments when the national governments themselves wished, via the Union legislator, to make “small” amendments to the EU Treaties. And the best illustration of such “organised” change towards an ever-closer union is the story of Article 352 TFEU.<sup>263</sup> This broadest of all legislative powers of the Union offered, from the very beginning, a limited form of “competence-competence” that would allow the Council to act where the EU Treaties had “not provided the necessary powers”. This legislative competence-competence is nonetheless, and as the Court has confirmed, constitutionally “bounded”. For it can only be used to (informally) “amend” the EU Treaties in ways that would not touch the constitutional identity of the European Union.<sup>264</sup>

*bb. EU Membership: Entering and Exiting the EU Constitutional Order*

Every change in the membership of the Union represents a fundamental change in its material constitution. Who, then, are the Masters of the EU Treaties here? Future Union membership is regulated in Article 49 TEU; while the withdrawal of an existing member is set out in Article 50 TEU. Let us take a closer look at both provisions.

The historic task of the Union has always been “to lay the foundations of an ever closer union among the peoples of Europe”; but this task was, also from the very beginning, complemented by the idea of an ever *wider* union.<sup>265</sup> The European project was “open to the participation of the other countries in Europe”;<sup>266</sup> and having modestly started as the “Europe of the Six” in 1958, several enlargement waves have increased membership of the Union to nearly thirty States today.

Outside States are generally free to apply for EU membership if three conditions are fulfilled. For a candidate, to be eligible, it needs to be a “State” that is “European” and which subscribes to the foundational values of the Union expressed in Article 2 TEU. While the formal notion of “statehood” is thereby left to international law, the European Union appears to have been originally reticent to accept – formally independent – micro-States.<sup>267</sup> The requirement to be a “European” State has been more

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State agreements: an ambivalent relationship?” in “Foreign Affairs and the EU Constitution” (Cambridge University Press, 2014), Chapter 4. Within the European legal order, in the words of de Witte, “[t]he amendment of the European Treaties is not, therefore, within the ‘*domaine réservé*’ of the States” (B. De Witte, *Rules of Change in International Law: How Special is the European Community?* (supra n.248), 315–6).

<sup>262</sup> My two studies on the “changing structure of European law” indeed deal, predominantly, with “informal” or “philosophical” amendments to the EU legal order – brought about, primarily, by the European Court of Justice. With regard to the gradual acceptance of the principle of supremacy, see: K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, 2003).

<sup>263</sup> For my youthful fascination with the provision, see: R. Schütze, *Organized Change towards an ‘Ever Closer Union’: Article 308 EC and the Limits to the Community’s Legislative Competence*, (2003) 22 Yearbook of European Law 79; and, more maturely, “From Dual to Cooperative Federalism: The Changing Structure of European Law” (Oxford University Press, 2009), 133-143 as well as 151-156.

<sup>264</sup> Opinion 2/94 (*Accession to the ECHR I*) [1996] ECR I-1759.

<sup>265</sup> On the debate between “deepening” and “widening”, see: A. Tatham, *Enlargement of the European Union* (Kluwer, 2009), 3.

<sup>266</sup> Schuman Declaration, in: A.G. Harryvan & J. van der Harst, *Documents on European Union* (Macmillan, 1997), 61.

<sup>267</sup> D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer, 2008), 25 – who mentions in particular: San Marino and the Principality of Monaco.

controversial. For even if it “combines geographical, historical and cultural elements”,<sup>268</sup> geography has often been controlling.<sup>269</sup> A European State will, most importantly, have to adhere to the values on which the Union is founded, that is: “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”.<sup>270</sup>

Once these three conditions are fulfilled, Union membership is nonetheless no unilateral right that can be demanded. On the contrary, it needs to be accepted by the Union and its Member States. Procedurally, Article 49 TEU here distinguishes between a “Union phase” (first indent) and a “Member State phase” (second indent). The Union institutions must first decide on the “admissibility” of the new State; and only once Council and Parliament have taken a positive decision on the candidate State are the Member States asked to conclude an accession agreement with the acceding State. The constitutional requirement of a *dual* consent – from the Union and its Member States – here softly endorses republican federalism because it requires the agreement of two political bodies: the Union and its Member States.<sup>271</sup> Importantly, however, the final accession treaty is an international treaty that is concluded by the acceding State and the collectivity of the old Member States. All accession treaties are seen to enjoy formal “constitutional” status and are part of the “primary law” of the European Union.

What about secession from the Union? Most sovereign States categorically prohibit secessions from their territory;<sup>272</sup> whereas most international organisations implicitly permit withdrawals of their Member States.<sup>273</sup> Within the European Union, a sovereign “right” to withdraw has always been implicit in the Union legal order.<sup>274</sup> In Article 50 TEU, the Lisbon Treaty has today made this implicit right explicit.

What is the nature and character of this exit right? Article 50 represents a compromise between the “State-centred” and the “Union-centred” versions tabled during the (failed) European Convention. The compromise found is however much closer to the former than to the latter. For the right to withdraw from the Union is unconditional and unilateral; yet it is also no longer automatic, since Article 50

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<sup>268</sup> Commission, *Europe and the Challenge of Enlargement*, (1992) Bulletin of the European Communities, Supplement 3/92, 7 at 11.

<sup>269</sup> For example: Morocco’s application was deemed inapplicable in 1987.

<sup>270</sup> Article 2 TEU. The provision continues: “These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” These constitutional criteria have been further specified through the so-called Copenhagen criteria according to which the candidate country must have achieved “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”, “a functioning market economy”, and – most generally – the “ability to take on the obligations of membership”. On the Copenhagen Criteria, see C. Hillion, *The Copenhagen Criteria and their Progeny*, in: C. Hillion (ed.), *EU Enlargement: A Legal Approach* (Hart Publishing, 2004), 1.

<sup>271</sup> This contrast, strikingly, with the “national” enlargement power under the US Constitution. Article IV, Section 3 here states: “New states may be admitted by the Congress into this union[.]”

<sup>272</sup> On this point, see Section 1(b) above. Some federal States are more tolerant with regard to secessionist claims. For the Canadian constitutional order, see *Reference Re Secession of Quebec* [1998] 2 SCR 217.

<sup>273</sup> On the “sovereign” right of withdrawal, see T. Christakis, *Article 56: Denunciation of or Withdrawal from a Treaty Containing No Provision regarding Termination, Denunciation or Withdrawal*, in: O. Corten and V. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary – Volume II* (Oxford University Press, 2011), 1251. This is not uncontested, see only: N. Feinberg, *Unilateral Withdrawal from an International Organisation*, (1963) 39 *British Yearbook of International Law* 189. Today, the 1969 Vienna Convention on the Law of Treaties has clarified that a right to withdrawal depends on whether the parties to a treaty agreed to it either expressly or implicitly.

<sup>274</sup> For the same view, see: J. H.H. Weiler, *Alternatives to Withdrawal from an International Organisation: The Case of the European Economic Community*, (1985) 20 *Israel Law Review* 282. It is however unclear how that conclusion is reached. For while Weiler generally holds “that orthodox *legal* analysis would confirm, in the context of the EEC, Feinberg’s general conclusion against the automatic right of unilateral withdrawal” (ibid., 287 – emphasis added), he nonetheless finds that, *politically*, and in the absence of techniques for avoiding all obligations arising under European law “[i]f a Member State cannot accept these obligations, better it be allowed to withdraw, even unilaterally” (ibid., 298).

imposes a procedural obligation on the Union and the departing Member State to try and reach a contractual resolution in the form of a “withdrawal agreement”.<sup>275</sup> This “withdrawal agreement” is designed to settle the past – not the future – relations between the Union and the soon-to-be-third-State; and unlike an accession treaty, this withdrawal agreement has no formal constitutional status. Nonetheless, and as we noted above, every change in the membership of the Union is a – dramatic – material constitutional change. Exiting the Union is thereby the sole constitutional change within the Union that can be effected by a single Member State.

Like the three older models of democracy, republican federalism normatively endorses such a unilateral right to withdraw from the Union. Yet unlike its theoretical rivals, it refuses to associate this exit right with the idea of democracy as such. The reason for this conceptual dissociation lies, again, in the postulated association between democracy and majoritarianism. From this point of view, neither the *unanimously* agreed foundation of the Union, nor the *unilateral* decision to withdraw from it should be seen as manifestations of democracy. They are manifestation of popular *sovereignty* – whether in the plural or the singular, which should be clearly distinguished from the idea of a popular government of peoples, that is: democracy.

### **b. Functioning Government: Dual Majoritarianism, Dual Citizenship**

This brings me to the quintessential difference between Nicolaïdis’ standard model and my neo-federal model of democracy: majoritarian government. The standard model is – albeit in a more ambivalent manner than Bellamy’s intergovernmentalism – permeated by an international law philosophy grounded in the sovereign equality of States. Majoritarianism here must not take place in the external – international – sphere but is restricted to the internal – national – sphere; and the sole way to protect the distinct democratic choices of each national community is to insist on unanimity in the transnational relations between democracies.

But how can we then even speak of a “government” of peoples in this context? If each and every state people always remains the “author” – to use the brilliant Hobbesian phrase – of its own political and legal obligations, where do we find the “rule” of the “many” peoples here? From a conceptual point of view, all *non*-majoritarian versions of democracy actually cannot, without distorting the core meaning of the neologism, make any meaningful semantic claim to refer to a government of *peoples* because each and every *people* continues to democratically and sovereignly govern itself. For the standard model, the Union’s sole credit to being more than a “union of democracies” is the principle of mutual recognition; yet, Nicolaïdis categorically and relentlessly refuses to think of the European “[U]nion as democracy”.

Republic federalism, by contrast, positively conceives the European Union as *both* a “union of democracies” (*qua* Member States) and a “union as democracy” (*qua* Union); and it indeed primarily identifies this vertical duality of the Union as a “democracy of democracies” or a “republic of republics” with *demoiocracy*. Building on the federal theory of the United States of America, republican federalism thus accepts the co-existence of state *demoi* governing together but not as one, but it also accepts the idea of a constitutionally constructed (and morally emerging) federal *demos* and the consequent co-existence of two independent political wills formed and articulated in two independent arenas of parliamentary decision-making. Each person is always a citizen of two political communities: her state people and the federal people.

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<sup>275</sup> The wording of Article 50 TEU only imposes an obligation to negotiate such an agreement on the Union; yet such a duty is equally imposed on the withdrawing state. This duty, while not directly based on Article 50 TEU, derives from its (continued) status as a Member State of the Union and the duty of loyal cooperation under Article 4(3) TEU. For the opposite view, insisting on a unilateral obligation on the Union only, see: C. Hillion, *Accession and Withdrawal in the Law of the European Union*, in: A. Arnulf & D. Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015), 126 at 139.

But more than that: for republican federalism, demoicracy is not just dual democracy. Demoicratic credentials can also be found in two horizontal expressions: one at the Union level, and one at the state level. As regards the former, the European Union has, as we saw in Section 3, a bicameral legislature in which the State representatives in the Council take a *majority* decision on behalf of their state *peoples*. Seen through a republican lens, the *inequality* of votes within the Council becomes in fact a distinctive hallmark of demoicracy because the different sizes of national peoples are here *directly* and better represented when compared to their indirect and equal representation *qua* states.

The most important horizontal expression of demoicracy is, however, the principle of mutual recognition. Demoicracy here means the co-existence of a plurality of – democratically validated – national solutions within the European Union. Yet importantly: the principle of mutual recognition is a *federal* principle.<sup>276</sup> It only exists within the Union legal order because of the Union’s constitutional capacity to generate – vertical – legislation for its Member States.<sup>277</sup> Republican federalism thus categorically rejects the unbounded transnationalism à la Nicolaïdis.<sup>278</sup> It believes that the principle of mutual recognition must always be bounded by a “common will”; and for that common will to exist, there must be majoritarian institutions representing and co-constituting that political will.

For the principle of mutual recognition this means that it must be confined, as a constitutional principle, to those “sister” states that have subjected themselves to the will of the Union via a supranational social contract. For an unbounded cosmopolitanism to “others” here fatally undermines the common *kratos* that stabilises the demoicratic aspects of mutual recognition. The principle of mutual recognition, while horizontal in operation, must indeed always operate within a *vertical* context in which the horizontal transfer of sovereignty between Member States is coordinated by vertical institutions of government – whether they be the European Court of Justice, or ideally, the EU legislator. The “privileges and immunities” of mutual recognition should therefore always be – and in the constitutional practice of the European Union indeed always are – confined to the Member States of the Union. Mutual recognition must be confined to those “sisters” or “brothers” that have “subjected” themselves to the constitutional disciplines of a new political and legal order. Mutual recognition without such discipline or order is, *pace* Nicolaïdis, not demoicracy but transnational anarchy.

Descriptively, the analytical picture drawn in Section 3 for the European Union, corresponds already in large parts to the philosophy of republican federalism. And yet, there are constitutional propositions that have so far not yet translated into the empirical reality of the contemporary Union. Apart from the suggested majority rule for constitutional amendments, what are its main normative recommendations here? *First* and foremost: full-blown legislative majoritarianism. The Union should, in the future, completely eliminate unanimity voting in the Council; and it should generally reduce instances where

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<sup>276</sup> R. Schütze, *From International to Federal Market: The Changing Structure of European Law* (supra n.108), Introduction.

<sup>277</sup> One cannot emphasize this point emphatically enough: *Cassis de Dijon* happened, despite the absence of Union harmonisation in that case, *because of and within the constitutional context of Union harmonisation powers*. For an analysis of the dialectic relationship between the principle of mutual recognition and positive integration, see: R. Schütze, *Re-Constituting the Internal Market: Towards a Common Law of International Trade?*, (2020) 39 Yearbook of European Law (forthcoming).

<sup>278</sup> One of the most striking aspects of Nicolaïdis’ conception of mutual recognition is that it ought not (!) to be confined to the Member States of the European Union. Indeed, according to her universalist and cosmopolitan vision “demoicracy calls for the consistent treatment of both other Europeans and non-European “others” in that “Europeans must not look for some “other” against which to bond, but extend their logic of mutual recognition and inclusion to outside partners” (K. Nicolaïdis, *“We, the Peoples of Europe...”* (supra n.171), 106 and 109). She consequently applies the principle of mutual recognition also to the international and global sphere and indeed sees it as a cosmopolitan principle of Kantian vintage: “mutual recognition may be the foremost legal incarnation of what Kant referred to as cosmopolitan law – that is, the law that exists between domestic and international law, the law that defines the obligations of a state regarding citizens of other states” (K. Nicolaïdis & G. Shaffer, *Transnational Mutual Recognition Regimes* (supra n.193), 266). This, however, is an untenable “pop-philosophical” misreading of Kant and his legal theory; and I might also add that it blatantly contradicts European Union law (see: R. Schütze, *Re-Constituting the Internal Market* (supra n.277).



special legislative procedures exclude the European Parliament. *Second*, the degressive proportionality within the Parliament is, from the point of view of republican federalism – and *contra* Habermas, not at all a rational reconstruction of dual sovereignty within the Union and should therefore be replaced by a purely proportionate system that fully respects the equality of all EU citizens *as citizens*. *Third*, the European Union might, in the future, need to better protect republicanism at the national level so as to also better protect Union democracy; and it may for that reason need to replace the defunct Article 7 TEU (ultimately requiring unanimity!) with a US-inspired “guarantee clause”.<sup>279</sup> *Fourthly*, the principle of mutual recognition within the Union should, ideal-typically, only come to operate after the Union legislator has set common standards that apply to all Member States. For while the judicial principle of mutual recognition was good to build the EU internal market, the future regulation of that market must lie in the more democratic hands of the Union parliament.

## **Conclusion: Models of European Democracy**

How best to theoretically define the idea of “demoicracy”; and can we find historical expressions of the idea in the past? In order to answer this compound question, Section 1 began with a brief philosophical exercise in conceptual clarification. In a first step, the idea of democracy was distinguished from the idea of popular sovereignty. Democracy was taken to refer to a form of *government* in which the *many* rule, whereas popular sovereignty was said to refer to the (re-)founding of a new polity in which *all* sovereign subjects agree to be bound by a common will. Democracy, as popular government, thus primarily relates to majority decisions;<sup>280</sup> whereas popular sovereignty, especially in the social contract tradition, implies unanimity. When two or more states come together, the idea of popular sovereignty therefore means that their “people” – each people as a collective unit – unanimously agree, directly or indirectly, to form a union. Classic international law thereby traditionally insisted that this union must either be an international organisation in which each state (people) retained its sovereignty and in which decisions remain taken by consensus; or, the two or more existing states (peoples) merge into a new state (people) – as happened with the foundation of the United Kingdom. None of these two situations can, however, be identified with the idea of demoicracy *if* demoicracy means a *government* by a *majority* of *peoples*. Instead, in the former scenario we have, if the Member States are based on republican principles, a “union of democracies”; while in the latter scenario, we have a “union *as* democracy”.

Can we nevertheless find manifestations of the idea of demoicracy in the constitutional history of the United States? Section 2 tried to answer this question by closely analysing the “compound republic” as a “republic of republics” in which the “atom of sovereignty” was said to have been split between two political orders. The American conception of federalism means duplex regimen; and under a republican form of federalism, this means *dual democracy* and *dual citizenship*. There are always two fora of democratic deliberation and decision-making: a state people is represented by its state parliament; and a Union people is represented (and co-constituted!) by a Union parliament. Dual democracy means dual citizenship and that also includes dual patriotism. (All these dualism have of course flattened since the Civil War and the New Deal; yet, pluralistic conceptions of sovereignty and democracy can still be found in contemporary US constitutionalism.<sup>281</sup>) Is that enough to describe the U.S. as a demoicracy? If demoicracy means government by a plurality of peoples, we could already identify the very co-existence

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<sup>279</sup> Article IV, Section 4 US Constitution states: “The United States shall guarantee to every State in this Union a Republican Form of Government[.]” For two recent and comprehensive analyses of the clause, see: C. Shapiro, *Democracy, Federalism, and the Guarantee Clause*, (2020) 62 Arizona Law Review 183; as well as R.C Williams, *The Guarantee Clause*, (2018) 132 Harvard Law Review 602. For a related discussion in the European Union, see: C. Möllers & L. Schneider, *Demokratiesicherung in der Europäischen Union* (Mohr Siebeck, 2018).

<sup>280</sup> Just to repeat: when this Working Paper has referred to “majority” decisions it did not only refer to simple majority decisions but also to qualified or super-qualified majorities.

<sup>281</sup> R. Schütze, *Federalism as Constitutional Pluralism: Letter from America* (supra n.62), esp.201-209.

of two peoples' governments operating in the same territory with democracy; yet, as we saw in Section 2, more specific expressions of a peoples' government can even be found in the "Senate" and the horizontal opening of each "sister" state towards the other. Viewed in this light, it is unquestionably wrong to claim that such a horizontal opening of states "is what distinguishes a democracy from a federation".<sup>282</sup>

Is the European Union a "union of democracies" or a "union as democracy" or something else; or all of these things at once? Section 3 tried to analyse the democratic and demoiocratic structures within the Union. Based on a plural *pouvoir constituant*, the Union is different from classic nation states; yet in its contractual origins, it can be compared to the pluralist founding of the United States. A dynamic understanding of popular sovereignty equally envisages the potential and gradual emergence of a new popular "sovereign": a Union general will. This general will is likely to be produced most strongly in the European Parliament, where the very process of collective representation promises to eventually co-constitute the "we-feeling" for a European people. The EU constitutional order is, today, already characterised by the co-existence of two "sovereigns" within Europe; and in terms of government, the Union also is – once more like the United States – based on the idea of dual democracy and dual citizenship. Each European citizen belongs to two political communities – her national community and her European community – both of which are democratically represented in and co-constituted by their respective parliaments.

Can we identify these constitutional and institutional arrangements with "demoiocracy"? Section 4 introduced the standard definition of "demoiocracy", espoused by Nicolaidis, as well as two alternative models that have, in the last two decades, been developed in the political science literature on the European Union. All three models deny that there is – and ever can be – a European "people"; and they all three thus reject the possibility of a European Union *as democracy* out of hand. There were, nevertheless, also significant normative differences between the three models. These different conceptions of demoiocracy were further enhanced through the introduction of a fourth model in Section 5. And looking at all four models of demoiocracy with the eyes of a constitutional comparatist, is there any overlapping consensus to be found between them? Table 5 offers an analytic summary of the theoretical and normative commitments characteristic of each model. We can see here that, apart from all models affirming a unilateral right to withdraw from the Union, there is very little general commonality. Table 5 however also reveals a – relatively – clear dividing line between two groups of demoiocracy models in which we find distinct family resemblances. Models 1 and 2 (Bellamy, Nicolaidis) indeed share a great many similarities with each other; while the same is true for models 3 and 4 (Cheneval, Schütze).

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<sup>282</sup> Wikipedia – "Demoiocracy" (10 June 2020 – on file with the author). The full passage states: "Rights and legitimate interests of citizens are not limited to their own demos/polity but are extended across the borders to what is usually considered internal affairs of the other polities and people. This horizontal relationship is what distinguishes a democracy from a federation where the internal affairs of a federal unit are insulated from external contestation at least horizontally." This passage completely ignores the history of federal citizenship in which the "horizontal" dimension has traditionally been "the" core element. For a wonderful comparative constitutional analysis here see: C. Schönberger, *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht* (Mohr Siebeck, 2006).

Table 5. Models of Democracy: Analytic Summary

	<b>Republican Inter-governmentalism Model</b>	<b>“Third Way” Model</b>	<b>“Popular Sovereignty” Model</b>	<b>“Republican Federalism” Model</b>
<b>Popular Sovereignty</b>				
<i>Constituent Power</i>	No Constituent Power	No Constituent Power	National Peoples (Unanimity)	National Peoples (Unanimity)
<i>Amendment Power</i>	National Peoples (Unanimity)	National Peoples (Unanimity)	National Peoples (Unanimity)	National Peoples (Majority) European People (Majority)
<i>Withdrawal Right</i>	Unilateral	Unilateral	Unilateral	Unilateral
<b>Popular Government</b>				
<i>Democratic Principal</i>	National Peoples. There is no European people.	National Peoples. There is no European people.	Statespeoples <i>and</i> “European Citizenry”; yet there is no European people.	National Peoples and a (gradually emerging) European people.
<i>Democratic Agent(s)</i>	National Parliaments	National Parliaments	National Parliaments <i>and</i> European Parliament	European Parliament <i>and</i> National Parliaments
<i>Power Sharing</i>	None	Horizontal	Vertical	Vertical and Horizontal
<i>Legal Instrument</i>	International Treaty	Mutual Recognition	Legislation	Legislation and Mutual Recognition
<i>Decision-Making</i>	Consensus	Consensus	Majoritarianism	Majoritarianism
<b>Integration Theory</b>	Intergovernmentalism	Transnationalism	Supranationalism	Neo-Federalism

Which group has the stronger arguments and better theory here? From an empirical point of view, republican intergovernmentalism and the “Third Way” (standard) model should quickly be disqualified. They fail – miserably – in explicating and explaining the “physical” realities of the Union. And normatively, too, they raise grave concerns. For the intergovernmental emphasis on republican non-domination, expressed through unanimous consent, may work in a rational utopian arcadia where all states and peoples always agree with all what the common good is. But it translates into a “tyranny” of the minority in a non-ideal world in which political compromises are not always Pareto efficient and in which the “few” are simply allowed to refuse to give to the “many”. To insist on unanimity here translates into a tyranny of one and this is a tyranny of the *status quo*.<sup>283</sup> Bellamy’s republican intergovernmentalism, in particular, supports a democratic nationalism that cavalierly dismisses the realities of the contemporary world. His anachronistic celebration of the sovereign republic comes at a time when international corporations have outflanked (especially smaller) nations almost everywhere,<sup>284</sup> and in which the “consensus” requirement in international organisations has meant nothing but regulatory gridlock for the most vital problems that humanity faces today.<sup>285</sup>

This intergovernmental vision of *no* government and *non*-governance above the sovereign nation is only partly remedied by Nicolaïdis’ account of mutual recognition. For her, mutual recognition is a horizontal form of governance in which a plurality of national democratic solutions ideally co-exists without any vertical harmonisation or “hegemony” by the European Union. But would mutual recognition ever have been introduced into the Union without the possibility of prior or subsequent European legislation;<sup>286</sup> and if she really thought so, who then guarantees the *permanent* presence of diverse national solutions within the Union? Mutual recognition, as a form of *negative* integration, means that national solutions will come to compete with each other in a single market characterized by a competition between national legislatures.<sup>287</sup> In the absence of – majoritarian – European harmonization setting out the mandatory *public* rules of play, mutual recognition here bears the risk of a regulatory race to the bottom in which only the most market-conforming and “leanest” national legislations survive. The result of such a neoliberal logic is a common market without a common legislature; and in which the only form of Union governance is – *pace* Nicolaïdis – not a government of *peoples* but the governance of the *market*.

On the basis of these empirical and normative objections, models 3 and 4 should be preferred over models 1 and 2. The “popular sovereignty” model and the “republican federalism” model can indeed much better *explain* what the European Union today actually does; and in accepting *majority* decisions at the Union level, they allow for a *government of peoples* and therefore also have a stronger semantic claim over the concept of democracy.

The fourth model thereby enjoys – it will hardly come as a surprise – in my view a much firmer conceptual grounding than the third model, because it resolutely disconnects democracy from the question of popular sovereignty by focusing on democracy as the *government* of peoples. Within the social contract tradition, there is simply no intrinsic or necessary link between the foundational authority

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<sup>283</sup> For that insightful point, see: B. Barry, *Political Argument* (University of California Press, 1990), esp. Chapter 14: “Constitutional Choice and Public Interest”.

<sup>284</sup> Without wishing to single out Ireland, the genesis of the “double Irish” tax scheme – written by US American companies for US American companies – is a powerful illustration of how “local” legislatures might be captured by “global” companies. Bigger states do, of course, have a better chance to escape such corporate “hegemony”; yet, even they may come within the sphere of “influence” of bigger trading powers (such as the United States, China or the European Union). For a recent analysis of the “normative” power of the European Union, see: A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, 2020).

<sup>285</sup> D. Held et al, *Gridlock: Why Global Cooperation is Failing when We Need It Most* (Polity, 2013).

<sup>286</sup> For my own answer here, see: R. Schütze, *Re-Constituting the Internal Market* (supra n.277).

<sup>287</sup> N. Reich, *Competition between legal Orders: A New Paradigm of EC law?*, (1992) 29 Common Market Law Review 861.

and the form of government created by the social contract. And in any case, and as Section 5 has tried to show, the formalist understanding of the Union's *pouvoir constituant*, adopted by model 3, is severely reductionist in turning a blind eye to the dramatic informal and material constitutional changes in the EU legal order. For there exists, *pace* Cheneval, not just one pluralist constituent power but a plurality of pluralist constituent powers in the European Union! Finally, model 4 also has much better comparative constitutional credentials; and in doing so, it actively helps the Union to benefit from good and bad federal lessons learnt elsewhere.<sup>288</sup> In that learning spirit, a number of normative recommendations were proposed by model 4 for the future of the European Union.

How, then, to best define “demoicracy” from the vantage point of republican federalism? The idea of demoicracy here stands for a “Union of States” in which both the Union and its Member States are founded on republican principles and in which the peoples of the Union govern together as many but also as one. This model of demoicracy allows us to simultaneously conceive the Union as a “union of democracies” and a “union *as* democracy”, because demoicracy primarily means dual democracy in a “republic of republics”. However, it also captures the co-existence of a plurality of national solutions within the Union legal order via the principle of mutual recognition; yet fundamentally, this horizontal form of plurality depends on the existence of a common *kratos* – a Union legislator.

In conclusion, there is surely no doubt: the history of the idea of demoicracy is curious; and the history of demoicracies is puzzling. But the need to re-think and re-form democracy in the twenty-first century is alarmingly urgent. In the words of the late David Held:

“Throughout the nineteenth and twentieth centuries theorists of democracy have tended to assume a ‘symmetrical’ and ‘congruent’ relationship between political decision-makers and the recipients of political decisions. In fact, symmetry and congruence have often been taken for granted at two crucial points: first, between citizen-voters and the decision-makers whom they are, in principle, able to hold to account; and secondly, between the ‘output’ (decisions, politics and so on) of decision-makers and their constituents – ultimately, ‘the people’ in a delimited territory. (...) But the problem, for defenders and critics of modern democratic systems, is that regional and global interconnectedness contests the traditional national resolutions of the key questions of democratic theory and practice.”<sup>289</sup>

This contestation has been equally, and superbly, captured by Eyal Benvenisti in a passage also worth quoting:

“The “globalization” of commerce provides ever-growing opportunities for producers, employers, and service providers to shop the globe for more amenable jurisdictions. While they enjoy a “race to the top,” an international “race to the bottom,” spawned by decreasing relocation costs, threatens to compromise the achievements of the welfare state and lower standards of consumer protection. National governments, weakened by competition that entails leaner budgets, find it increasingly difficult to cooperate in the appropriation of crucial shared natural resources, seriously endangering these assets while damaging the environment. Not only does the growing global competition create both efficiency losses and social-welfare problems, it also challenges principles of democracy and self-determination.”<sup>290</sup>

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<sup>288</sup> For a recent plea that “understanding the EU through a federal lens helps EU studies avoid parochialism”, see: D. Kelemen, “Federalism and European Integration”, in: A. Wiener et al. (eds.), *European Integration Theory* (Oxford University Press, 2018), 27 at 28.

<sup>289</sup> D. Held, *Democracy and the Global Order* (Polity, 1995), 16.

<sup>290</sup> E. Benvenisti, *Exit and Voice in the Age of Globalization*, (1999) 98 *Michigan Law Review* 167 at 168.

Globalisation (and Europeanisation) have significantly weakened the public powers any national “government” can today exercise over mobile private actors, and especially corporate “non-citizens”.<sup>291</sup> Public borders and public rules have become porous in the “global” twenty-first century. How can any democratic steering power be regained? Should free movement be stopped because a national utopia can only be built in a closed commercial state?<sup>292</sup> Or, should we accept the benefits of globalisation, as a social force uniting humanity; yet try to re-built democratic structures above the nation state so that the “few” do not escape the interests and needs of the “many”? If one believes, as I do, that globalisation is here to stay and that the collective action problems humanity faces require collective actions as solutions, then, (representative) democracy can only be rescued if successfully translated into a supranational format. This new format must abandon the idea that majoritarian government can only legitimately take place inside isolated national communities, called “the people”, that must, so as to protect their *national* democratic choices, externally cooperate exclusively via unanimous consent. This solution simply no longer works in a world where the unanimous agreement of 200 states is needed to reach an international answer to an international problem.

What to do, then, in a world in which the nation-state has lost its social autonomy to freely choose for its “people”, and in which the idea of a cosmopolitan democracy that includes all of humanity remains a far-flung and utopian project? The answer this Working Paper has closely analysed is the European Union. Standing between “cosmopolitanism” and “nationalism”, its supranational “regionalism” has, as a non-ideal solution in a non-ideal world, much to recommend. From its very beginning, the Union was meant to contain the – external – pressures of globalisation,<sup>293</sup> while offering, at the same time, an – internal – compromise combining democratic diversity with democratic unity. Its form of democracy, as a *majoritarian* government of peoples, is not perfect. But the Union has, decidedly, more democratic credentials than those debilitated national governments that, straightjacketed by the global market, have been outmanoeuvred by international corporations and the “hegemonic” forces of hyper-capitalism. The fear of European federalism is therefore often the fear of losing something (sovereignty, control) that is, ironically, already lost.<sup>294</sup> The world is however not “without alternatives”;<sup>295</sup> but in order to realise these alternative visions of the future, to regain democratic agency and choice, one needs to re-construct government and democracy above the nation state. This should, in no way, lead to a super-state or super-republic with one people and one parliament. On the contrary, the future of democracy lies in democracy. It lies in a “republic of republics” in which the people(s) govern together as many and as one.

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<sup>291</sup> For a powerful analysis of the increasing schism, even within powerful national legal orders, between “states” and “markets”, see: S. Strange, *States and Markets* (Bloomsbury, 2015); as well as her “The Retreat of the State: The Diffusion of Power in the World Economy” (Cambridge University Press, 1996).

<sup>292</sup> This seems to have been the position of many left-wing advocates of the British exit from the EU. For a prominent “Lexit” political philosopher’s view, see: R. Tuck, *The Left Case for Brexit* (Polity, 2020).

<sup>293</sup> For this point, see: W. Mattli, *The Logic of Regional Integration* (Cambridge University Press, 1999), 70-71 but also and especially: S. Meunier, *Trading Voices: The European Union in International Commercial Negotiations* (Princeton University Press, 2007). This argument is, of course, the “economic” version of Montesquieu’s famous argument for smaller republics to federalise.

<sup>294</sup> A. Giddens, *Turbulent and Mighty Continent: What Future for Europe* (Polity, 2014), 10: “Most concerns about federalism are about loss of national sovereignty. However, to have any meaning, sovereignty must refer to real control over the affairs of the nation. You cannot surrender something that you have largely lost anyway.”

<sup>295</sup> The British conservative slogan that “[t]here is no alternative” (TINA) was famously used by Margret Thatcher to discredit anything that contested her laissez-faire capitalism; the German Chancellor Angela Merkel has more recently used her “alternativlos” to block any criticism of her “choices” as regards the governance of the Eurozone.

