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**‘An ever closer union among the peoples of Europe’: Republican Intergovernmentalism and *Demoicratic* Representation within the EU**

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**ABSTRACT** EU institutions are best conceived as representing the peoples of Europe – a contention set out in the first, introductory, section and developed over the next five sections. The second section establishes how democratic legitimacy involves governments being representative of a people and specifies the characteristics a people need to possess for such representation to be possible. Though no EU demos exists with these features, the third section shows how in an increasingly interconnected world, governments have incentives to form associations of democratic peoples via a process of republican intergovernmentalism. Such associations guard against the domination of one people by another by preserving the capacity of the associated peoples for representative democracy. They constitute a form of *demoi-cracy*. The fourth section describes how the EU’s system of representation corresponds to such an association and facilitates mutual respect and fair terms of cooperation between the peoples of Europe. However, as the fifth section indicates, moves away from such a union of peoples towards greater political unity involve an inevitable loss of representativeness and democratic legitimacy. The sixth and concluding section argues the euro crisis results from attempting such a move. Current efforts to resolve the crisis through yet further integration compound economic with political failure by circumventing the EU’s associational decision-making mechanisms. The only democratically legitimate and non-dominating solutions will be those that respect the EU’s fundamentally *demoi-cratic* character.

**KEYWORDS** Peoples, Representation, Republicanism, *Demoi-cracy*, Eurocrisis

**1. Introduction: ‘An ever closer union among the peoples of Europe’**

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The aspiration to create 'an ever closer union among the peoples of Europe' has formed the ostensible aim of the European integration process since the Treaty of Rome of 1957. However, this goal has tended to be conceived as the ever greater integration of the various peoples of Europe into a single European people, rather than as increasing and deeper forms of cooperation between them. This article defends the latter view on grounds of democratic legitimacy. It develops a thesis of 'republican' as opposed to 'liberal' inter-governmentalism. Whereas a liberal account views democracy as instrumental to upholding individual rights and interests, and therefore as being justifiably constrained should so doing serve to increase these 'outputs' (Keohane, Macedo and Moravcsik 2009), a republican account regards democratic 'inputs' as of intrinsic worth, and the only legitimate means for pursuing and preserving our rights and interests (Scharpf 2012, 3-13). The terms liberal and republican as employed here denote normative rather than explanatory theories. Nonetheless, they have implications for how we should assess the actual integration process, with the republican account evaluating the EU according to how far it has come about via, and continues to uphold, a legitimate democratic process.

Republicans contend the democratic legitimacy of states rests on their being representative of a people (Pettit 2010b, 144-50). A democratically representative system aims to ensure politicians and their policies are authorised and accountable to citizens in ways that are publically committed to treating them with equal concern and respect. Such arrangements create a condition of civic freedom in which citizens are neither dominated nor dominate. However, republican democracy at the domestic level can be undermined if states are dominated in their turn by other states or by organisations and individuals operating across states, such as corporations or financial institutions (Pettit 2010a, 77-79). The potential for domination by these various external actors increases as states become more interconnected, posing the problem of how to regulate the movement of goods, capital, and persons between peoples in democratically legitimate ways. The solution proposed here is that of an international association of democratic states. This article maintains the EU's political system can be interpreted in certain key respects as meeting the requirements of such an association.

The next section explores the normative case for the focus on peoples. It elaborates criteria for a *demos* which can then be deployed to determine the characteristics the people of a given polity require to sustain a democratic regime.

This analysis supports the *no-demos* thesis with regard to the EU. However, if the EU is unlikely to achieve democratic legitimacy as the representative of a European people, it might be able to do so as a Union of democratic peoples on the basis of a form of republican intergovernmentalism. The third section elaborates the rationale and criteria for such a Union, while the fourth section argues that the system of representation within the EU can be viewed as conforming to this model. As a result, the EU can be classified as a *demoicracy* more than a democracy (Nicolaidis 2003, 2013; Chevenal and Schimmelfennig 2013). The fifth section insists that in the EU context the former arrangement possesses greater democratic legitimacy than the latter, a point that the sixth and concluding section illustrates with reference to the euro crisis.

## **2. The Normative Criteria for a 'People': Democratic Legitimacy and Representative States**

The term 'people' may refer to an ethnic, a cultural, a professional or an interest group, or even a haphazard agglomeration of individuals. Here, though, it is employed in a specifically political sense to refer to a group of persons who regard themselves as forming a political community that is capable of self-government. This definition of a people is normative rather than empirical. It involves specifying the criteria for a political order to be legitimate and the qualities a people must possess for such an arrangement to be possible, and only then exploring the social and other conditions under which such qualities are likely to obtain.

Legitimacy can be distinguished from justice and indicates the criteria that determine whether the exercise of coercive power by political institutions over citizens is justified (Pettit 2010b, 142-3). Legitimacy is more permissive than justice in that institutions may be deemed legitimate without being fully just – indeed, it allows for there to be disagreements about justice. While justice may offer *pro tanto* grounds for complying with the laws of a given political institution on the part of those who regard them as just, legitimacy provides *pro tanto* grounds for accepting these laws even if one regards them as unjust, and seeking to alter them through the approved political procedures. Legitimacy may presuppose certain elements of political and even redistributive justice, such as rights to free speech and education. However, even these rights only become legitimate through being established and enforced in ways citizens can endorse as appropriate.

This way of conceiving legitimacy and its relationship to justice follows Rawls (1999) and Philip Pettit (2010 a and b) in stressing the normative significance of collective self-government (Macedo 2004, 103). On this account, the use of coercive power by a government can only be legitimate when it is exercised via processes and within constraints that are accepted by those subject to it, and for purposes that correspond to their needs and values. Therefore, a legitimate government must be representative of the views and interests of the governed. These criteria might be met in part within a non-democratic regime, such as those designated by Rawls as ‘decent hierarchical peoples’ (Rawls 1999, 62-70), in which benign and expert rulers govern according to a moral code subscribed to by the ruled. However, modern societies tend to be pluralist and complex, undermining the possibility of a generally agreed comprehensive conception of the good and rendering the perspective of even well-intentioned and informed rulers partial and limited. Consequently, the representativeness of such regimes can be doubted. Democracies seek to overcome these difficulties by putting in place procedures of authorisation and accountability designed to ensure governments represent the diverse views and interests of all citizens with equal respect and concern (Christiano 2010, 121-2).

Nevertheless, democratic procedures will not operate legitimately unless they likewise function according to norms and serve ends that can be commonly avowed by those involved (Pettit 2010b, 145-49).<sup>1</sup> It will not be sufficient that they involve the public, they must do so on a basis that can be publically acknowledged by those to whom they apply as fair and appropriate, not least in demonstrably giving equal consideration to their views and interests in framing collective policies (Buchanan 2002). No matter how far such procedures may conform to abstract democratic principles in theory, their legitimacy will be impugned to the extent their operation is perceived in practice to reflect unduly the values of a subsection of the political community, such as the ruling elite, and of responding disproportionately to their sectional interests (Christiano 2008). As a result, democratic legitimacy will depend to some degree on whether those to whom democratic decisions apply relate to each other in ways that render such a public and equal process possible and appropriate (Rawls 1999, 23-25).

The character of these social, economic and cultural relations, and their suitability for sustaining the public conditions that underpin the legitimacy of common political institutions, serve to define a people or *demos*. First, to justify

giving them an equal say, the persons and groups concerned will need to have important issues in common that require a collective decision. Moreover, they must also have a roughly equal stake in the entire set, if not each and every, of these issues and decisions (Christiano 2010: 130-31). These conditions assume not only a high degree of interdependence between the members of a political community, but also that their most important interests are more or less equally tied up in that community, and will be so over a long period of time – sufficient for them to care about the impact of present decisions on future generations - at least so far as the whole range of collective decisions is concerned. As a result, it becomes possible to ascribe to them an equal interest in ensuring that the basic structures of social cooperation are fair and equitable, including those employed for deliberating on the public good.

Second, there will need to be what J. S. Mill referred to as ‘common sympathies’ among members of a political community (Mill 1861: Ch. 16; Rawls 1999: 23-24). We can to some extent detach the logic underpinning this idea from Mill’s historical and sociological speculations as to its origins in a shared history and political culture of a kind associated with a common nationality. The argument is that to ensure the government pursues the public rather than sectional interests; citizens must both conceive of themselves as a public and be able to act as such and in a public manner (Miller 2009, 212-13). For example, a religious or ethnic group will be more inclined to seek rules that oppose discrimination against all groups, rather than to employ government power to suppress groups different to theirs, where solidarity exists between groups, so that they see themselves as part of the same political community. They must also be capable of sharing certain public principles that extend beyond the convictions of their own particular group, such as a commitment to a given understanding of toleration. Finally, it helps if there is sufficient public communication between groups for politicians to have to address the public as a whole, rendering it harder for them to play different groups off against each other.

Third, as a corollary of the two aforementioned points, democratic legitimacy will be harder the more divided a society is into discrete and insular publics, with distinct interests and views on key issues (Dahl 1989, 258-59). In these circumstances, politics is much more likely to be factionalised, increasing the probability of persistent minorities, with compromises on a common position harder to negotiate. Meanwhile, moves away from the *status quo* are likely to involve pork barrelling and derogations that increase transaction and policy costs.

The norms and processes that structure decision making, on the one hand, and their acceptability to and suitability for a given people, on the other, comprise the *regime* and *polity* aspects of legitimacy respectively (Bellamy and Castiglione 2003). To the extent the one is congruent with the other, it becomes possible for a state to be so organised that its government is representative of its people. Such legitimate representative states provide citizens with civic freedom of the kind republicans associate with freedom as non-domination (Pettit 2010b, 144-45). For the regimes of such polities provide the means for their citizens to secure and advance their interests on an equal basis to each other as defined by public terms and procedures that they can share and control as a people. Citizens can ascertain that the administration and legislation conform to public norms and pursue public purposes, informing and controlling the definition of these norms and purposes as part of an on-going process of public deliberation among and between the people and their representatives. As a result, governments are constrained from governing arbitrarily – according to their own or some sub-group’s views or interests. They can only employ the coercive power of the state in so far as they have been authorised and are accountable to do so on grounds that conform to the commonly avowed views and interests of the people they serve.

Thus, states have legitimacy to the extent they are able to represent peoples in ways that are public and equal, and in so doing create mechanisms that provide for civic freedom among citizens. Of course, these criteria are not met in full by any actually existing democratic states. No regime represents its polity entirely equally and publically – not least because peoples are rarely sufficiently homogenous for that to be possible. However, even among quite diverse peoples, the regime can be so tailored to the composition of the polity as to promote equity and publicity among different groups to some degree, as the experience of various multinational and multicultural states indicates. Yet, as these states also illustrate, the more economic, historical and cultural divisions become aligned with territorially concentrated groups and/or the various social cleavages found within pluralist societies cease to be cross-cutting and become segmented in ways that create separate political communities, the less acceptable collective decision-making among them tends to become. Over time, one or more groups begin to question not just the regime but also the polity legitimacy of the state, demanding ever more devolution of power (Kymlicka 2001, 212-13)..

This issue poses a potential problem for those who wish the EU to become a polity (e.g. Duff 2011, Habermas 2012), a point to which I return below. Most commentators acknowledge that while the EU possesses a regime of a supranational as well as an intergovernmental nature, its transnational polity-like features are at present limited (Weiler, Haltern and Meyer 1995). This situation reflects the nature of the integration process as a series of intergovernmental agreements. Therefore, the issue to be addressed here is whether such a process can be consistent with the account of democratic legitimacy given above, especially if successive agreements give rise to and further empower supranational institutions. In particular, what circumstances might justify such a development and which criteria must the resulting arrangements meet to retain democratic legitimacy?

### **3. Republican Intergovernmentalism and a 'Union of Peoples': The Criteria for an Association of Democratic States**

As was noted above, a legitimate state offers its citizens the conditions whereby they can enjoy civic freedom. These domestic conditions will be insufficient, though, if the ability of the state to represent its people is undermined by bodies external to it, not just other states but also private organisations, such as corporations or financial institutions, that are located in other states or operate to some extent multi- or trans-nationally (Pettit 2010a, 77-79). External interference by other states - be it intended, as in the case of conquest or the threat of armed conflict, or an unintended product of various negative externalities resulting from domestic decisions - limit the capacity of governments to represent their peoples in fairly obvious ways. A government that must act to palliate or defend against the potential aggression of a hostile state is dominated by that other state. It is inhibited in its actions and to that extent is unfree to respond to and represent the views and interests of its citizens, curtailing their freedom in the process. Likewise, if the domestic policy choices of one state effectively undermine those of another, say by one state polluting upstream from another state that has tried to reduce pollution, then the behaviour of the one reduces the presumptive options of the other in ways that involve illegitimate coercion of one people by another.

Powerful states can also dominate weaker states in numerous ways that fall short of explicit interference (Pettit 2010a, 73-77). For example, they may impose inequitable and disadvantageous terms of international trade on them by exploiting

various forms of economic pressure that arise from their control of important markets, their ability to manage various financial instruments, or their access to key resources, and so on. Powerful corporations can exert similar forms of pressure and influence, as when they threaten to withdraw from states with taxation or employment policies they regard as unduly reducing their profits. In such situations, governments become to a greater or lesser degree controlled by these alien powers. They feel obliged to act 'responsibly' and satisfy these various external demands lest the domestic economy suffer and be less able to supply the basic needs of the population. Yet such responsible action can lead to a failure to adequately represent the concerns of their own citizens. For example, they might overturn domestic employment laws or cut public spending in ways citizens not only did not desire but also would not have needed to do had it not been for such external demands (Mair 2011).

These examples are not intended to highlight problems of global *distributive* justice *per se*, although such issues are connected, but rather problems of global *political* justice that result when one state's capacity to be democratically legitimate gets undermined by the dominating actions of another state or of some other organisation based within another state or states (Macdonald and Ronzoni 2012). Even if the aforementioned actions of states and corporations were deemed entirely just in distributive terms, as some libertarians might argue if the pressures involved no direct interference and respected formal rights to freedom of contract and property, they would still infringe the moral interest a people has in collective self-government. At a minimum, therefore, states seeking to have their own democratic legitimacy respected have reason to acknowledge a set of international norms whereby they respect the democratic legitimacy of others by observing a duty of non-intervention (Rawls 1999: 34-35). Yet, in an increasingly interconnected world, states are likely to interact so intensely and frequently that there will be ample scope for some to exert various forms of domination over others. Such domination may stop short of direct intervention but inhibit and intimidate states in ways that undercut their representative character. Interconnectedness also generates problems that can only be effectively tackled through collective action between states, where again powerful states may skew common agreements in their favour without deploying outright coercion. Finally, globalisation has brought with it not simply greater interaction between states but also directly between their peoples and citizens. Not only are peoples involved in global processes of production and exchange, but also migration is altering their



character, rendering them increasingly multicultural, and creating a growing problem of stateless persons and denizens, who belong to dispersed and oppressed peoples and lack citizenship.

As a result of these developments, peoples and persons have a growing interest not only in the legitimacy of democratic decision-making *within* states but also *between* them (Pettit 2010b: 151-52). On the one hand, they will wish their governments to be representative of them when negotiating with those of other states, and for the negotiations to give equal weight to each state so that the ensuing accords tackle matters of common concern in mutually beneficial ways. In other words, they will wish similar criteria of publicity and equality to operate in the international sphere as they do at the domestic. On the other hand, peoples will want their direct interactions with other peoples to involve mutual respect on both sides, with each respecting the domestic rules and regulations of others so long as no peoples discriminate against other peoples when it comes to trading or travelling in a different state to their own. In other words, every state should treat all peoples as equals under domestic law, with a similar rule of non discrimination operating for those seeking access to citizenship and prepared to undertake the same duties as already existing citizens.

It might be argued that the easiest way to meet these various desiderata would be to establish an international regime on the model of a domestic state with authority over member states (Held 1995). Yet such an international regime would itself only be capable of democratic legitimacy to the extent it could become suitably congruent with an international polity. However, even advanced processes of globalisation have not generated anything like the same degree of interdependence between states as exists within them, with multinational production estimated at barely 10% of output in the world's most integrated economies (Christiano 2006: 86). As a result, the degree to which citizens of a global democracy would share common issues and have an equal stake in collective decisions is likely to be rather limited at best. Similarly, the common sympathies needed for public reasoning also face the challenge of linguistic and cultural diversity between and within different existing peoples. On both counts the likelihood of persistent and intense minorities and majority tyranny seems highly probable (Christiano: 2010: 132-34).

At the regional level these problems are arguably less severe. Regional economies are far more integrated, especially the EU where intra-EU trade is higher

than extra-EU trade in each EU Member State, with the exception of the United Kingdom (Eurostat 2011). However, as the Euro crisis has revealed, integration has not produced economic and social convergence between states. Nor have a European people, sharing a common political identity and public sphere, come into existence. Fewer than 15% of EU citizens consistently identify themselves as Europeans compared to around 40% who consider their identity to be exclusively national, with the 15% being disproportionately composed of the well educated and highly mobile (Fligstein 2008: 141-2, 156). Likewise, no pan-European media of any significance have come into existence, with European discourse again restricted to elites. At best, there is evidence of some modest Europeanization of the various national media and the simultaneous and parallel discussion of EU issues (Risse 2010). As a result, pan-European political mobilisation has proven decidedly weak. Parties remain embedded in national systems, with EP elections largely second-order national elections (Hix and Marsh: 2011). Much the same can be said of civil society organisations. Again, there is evidence of some Europeanization of national organisations, yet these remain mainly focussed on influencing domestic policy (Beyers and Kerremans: 2007). Therefore, the infrastructure needed to connect individual European citizens to legislative power at the EU level in a public and equal way is lacking. Indeed, the politicisation of European integration has mainly fuelled right-wing euro sceptic populist parties within the MS rather than promoting trans-European federalist political movements (Bartolini 2005).

The rest of this article lays out an alternative model for achieving democratic legitimacy within the EU to a European polity - that of an international association of democratic states. Such an international association seeks to promote and be compatible with the possibility for all individuals to live in representative states that possess democratic systems where collective decisions are made in ways that show them equal respect and concern through being under their public, equal control. Four criteria guide this arrangement. First, this argument presupposes a commitment to the values of representative democracy, and their equal enjoyment by all peoples. Second, if the legitimacy of democratic states stems from them offering reasonably effective, public mechanisms for the identification and equal advancement of the interests of their citizens, then the legitimacy of international systems stems from them doing likewise through being in their turn under the shared and equal control of the signatory states acting as the representatives of their respective peoples. Third,

citizens of different peoples ought not to be discriminated against in their interactions. The mutual concern and respect that operates among states ought to apply to the citizens of those states in moving and trading between them. Finally, membership of such international systems should be voluntary. Not all states will have an equal stake in collective arrangements on a given issue, and many will not have equal bargaining power. Voluntary arrangements allow states to tailor their international commitments to the interests of their populations and ideally to negotiate the terms of their adherence accordingly.

The next section applies this model to the system of representation within the EU. The analysis shall show how in many respects it proves compatible with these criteria, even if its current practice often falls short of fulfilling them. The resulting republican intergovernmentalist account provides a picture of the EU in which democratic states negotiate an ever closer union of mutual benefit to their peoples while preserving the civic freedom of their citizens.

#### **4. *Democracy and the System of Representation within the EU***

In formal terms, the Post-Lisbon Consolidated Treaty of the European Union (TEU) can be aligned with all four of the criteria outlined above – even if this interpretation is contentious and may fall short in practice. I shall take them in turn.

##### *1. A commitment to the values of representative democracy*

The first criterion is evident in the preamble, which confirms the Union's 'attachment to the principles of liberty, democracy and respect for human rights', and in Article 2, which notes how these values are 'common to the MS'. The contracting parties also affirm that the deepening of 'the solidarity between their peoples' has to be balanced by 'respecting their history, their culture and their traditions', while the process of 'an ever closer union among the peoples of Europe' has to be one 'in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'. Indeed, Article 4 explicitly requires the Union to 'respect the equality of MS before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' and portrays the Union as based in a principle of 'sincere cooperation' and 'mutual respect'. Thus, the commitment to democratic values goes hand in hand with respect for the ways these may have been configured differently by

the various peoples and that as far as possible decisions ought to be taken by each people.

*2. Shared and equal control of the international association by the signatory states acting as the representatives of their respective peoples*

The second criterion, whereby an international association should be under the shared and equal control of the signatory states in order to ensure the public and equal advancement of the interests of their respective peoples, emerges from the account of Union's political system in Title II. This commits the Union to being itself organised in accordance with democratic principles and the equality of citizens, with Article 10 explicitly grounding its functioning in representative democracy. This Article identifies three channels whereby European citizens are represented in the EU's political system: directly via elections to the European Parliament (EP), indirectly via their Heads of State or Government in the European Council (EC) or in the Council by their Government, and in domestic elections which hold these last democratically accountable to National Parliaments (NPs) or to citizens.

Of the three, the second channel – whereby citizens are represented in the EC by heads of state or government and in the Council by members of their governments - *prima facie* corresponds most obviously to the republican intergovernmentalist model. Although the EC has no legislative functions, it 'defines the general political directions and priorities' of the Union (TEU 15.1), not least because any major change would require a revision of the Treaties in which national executives naturally take the lead. Decision-making is also invariably taken by consensus, which nominally at least respects the norm articulated above of giving equal weighting to each MS. The situation in the various configurations of the Council is more complicated, but similar reasoning prevails. Even though qualified majority voting (QMV) is formally the default for decision-making, in practice it operates through consensus wherever possible. Moreover, the proposed double-majority rule for QMV from 1 November 2014, involving 55% of MS representing at least 65% of the population, is designed to ensure that decisions must balance the interests of large and small states by preventing the former imposing a decision on the latter and vice versa.

Although NPs are mentioned in the main text of the Treaty for the first time, the negative and positive roles assigned them in Art 12 TEU play an important role in ensuring that the MS act as representatives of their peoples as the second criteria

demands. Executives traditionally exercise wider discretion in foreign compared to domestic policy, and this remains true of the EU despite its significant domestic impact. Hitherto European issues have rarely been salient in domestic elections, and so the election of governments cannot *per se* ensure they represent citizens with regard to the EU. NPs perform a potentially crucial function in this regard. On the one hand, they have a right to be informed by Union institutions and to see draft legislative acts and have formed European Committees to scrutinise them and the decisions made by ministers. They may also send reasoned opinions to the Commission and engage in an informal political dialogue. Empowering parliaments in these ways can be justified as ensuring Ministers continue to represent their peoples when negotiating within the Council. On the other hand, the Treaty introduces an 'Early Warning Mechanism' (EWM) that assigns national legislatures the right to scrutinize proposed EU decisions and initiatives for compliance with the principles of subsidiarity and proportionality. Furthermore, NPs can have a collective legislative influence in that a majority of them may force, by way of a so-called 'orange card', an early vote on an EU legislative proposal in the Council and the EP. They are also now involved in the evaluation of measures taken within the area of freedom, security and justice (Articles 70, 85, 88 TEU), may block Treaty changes under the simplified revision procedures (Article 48 TEU) and must be informed of new applications to join the EU (Article 49 TEU). These powers serve the republican intergovernmentalist purpose of providing a means for the component demoi of the EU to ensure the integration process only extends to those areas that clearly require international collaboration, and does not undermine democracy at the national level. Indeed, the enhanced cooperation between NPs within COSAC offers among the clearest expressions of a republican demoi-cracy in facilitating the direct interaction between the representatives of the different peoples of Europe (Cooper 2012).

On the surface, the EP offers a less obvious fit with the model. The wording of Article 10 suggests the existence of a European demos in stating that European citizens are represented directly in the EP. However, Union citizenship derives from being a national of a MS and is 'additional to national citizenship and shall not replace it' (Art 9 TEU). The derivative and additional character of this status is reflected in the way seats are allocated within the EP by MS rather than simply by population, employing the principle of 'degressive proportionality', with a minimum threshold of 6 seats for the smallest MS and a maximum of 96 for the largest (Art 14.2

TEU). The official rationality behind this arrangement has been to ensure that the range of political opinion found in even the less populous MS gets represented. Indeed, European parties do not mobilise a pan-European electorate, but are rather groupings of national parties within the Parliament. As the German Federal Constitutional Court noted in its Lisbon judgment (2BvE 2/08: para. 286), the EP's allocation formula is testimony to the absence of a European demos and the need adequately to represent each of the European demoi. Therefore, the EP can also be conceived as an institutional embodiment of European demoi-cracy.

### *3. Mutual respect and non-discrimination between the citizens of the states within the association*

Like the very status of Union citizenship, the representation of citizens even in the EP as members of national constituencies, can also be linked to the third criterion of non-discrimination and equality between citizens of different peoples. This is a key element of Union citizenship (Articles 18- 25 Treaty on the Functioning of the European Union (TFEU)). Union citizenship does not provide citizens with goods or services through EU funds or agencies. It offers access on a par with national citizens to engage in economic activity with, and enjoy the services and benefits provided by, another MS, and – certain judgments of the Court of Justice of the EU (CJEU) notwithstanding - need not be seen as creating a unified European citizenry. It is only activated through a MS citizen moving to, or trading with, another MS. Moreover, certain 'limitations and conditions' justified on grounds of public policy, public security or public health protect various non-market liberties associated with national citizenship. Thus, the 1990 Residence Directives, later repealed and incorporated into Article 7 (1) b and c of Directive 2004/38, together with certain provisos of Article 45 TFEU, restrict the right of residence to those engaging in economic activity or possessing adequate funds not to become a burden on the national system of social assurance and covered by sickness insurance. The definition of national citizenship remains a preserve of the MS, and EU citizens resident in another MS can vote in local and European elections but not in national ones.

### *4. A voluntary association, as not all states have an equal stake in every decision*

Finally, the fourth criterion, whereby such an international association should be voluntary and in the long term equal interest of the peoples concerned, could be

regarded as guiding the need for all treaty changes to be negotiated and unanimously approved not just by MS governments, but also by their peoples – either directly via referenda or indirectly by a majority of their parliamentary representatives. MS have also negotiated numerous opt-outs from particular EU policies. Such variable geometry reflects a situation in which membership of such an association that is not imposed or compulsory in all respects, but can be tailored to the needs of each contracting people.

### **5. The Limits of Demoi-cracy**

The resulting political system involves more counter-majoritarian checks and balances than are found in any national democracy. EU legislation must secure consensual support from national leaders within the European Council to be placed on the agenda, a proposal from the majority of the Commission, a formal 2/3 majority – but in practice a consensus – of weighted MS votes in the Council of Ministers, a series of absolute majorities within the EP – which as we saw can itself be viewed as involving a series of coalitions between national parties - and the assent and active support of the 27 national administrations, legal systems and parliaments responsible for its implementation (Moravcsik 2008: 334). In a domestic context, such high consensus requirements ought not to be necessary and would be hard to justify. Among a demos, there should not only be sufficient solidarity for majoritarian decision-making to be acceptable, but it also provides the fairest and most public means for treating all citizens equally. By contrast, between *demoi* it is not necessary to meet as stringent standards of political and social justice.

As we saw, republican intergovernmentalism aims at ensuring the interactions between representative states are mutually advantageous while protecting their equal rights to collective self-determination (Miller 2008, 394-6). Each of these states has its own internal systems of social and political justice for which its citizens are co-responsible thorough their equal participation within majoritarian systems of democracy. To the extent the non-dominated status, wealth and survival of these states depends on cooperation with other states, it seems appropriate to share the costs and benefits of these arrangements equitably. To provide such agreements with democratic legitimacy it will be sufficient that the citizens of each MS are satisfied that this is an area where interaction and cooperation is necessary or desirable – for example in order to set fish quotas so fishing will be sustainable or to promote trade.

Moreover, the surpluses generated by such accords need only be Pareto-improvements, with each party gaining to an equal degree from the resulting benefits subject to compensatory measures for temporary losers so that a ‘no wealth effects’ condition holds. For this purpose, a mix of consensual and super-majoritarian mechanisms between representatives of states and their peoples will be justified since nothing in such a system suggests any change is required with the status quo so far as the relative standing of the parties involved is concerned. Central institutions, such as the CJEU, can be justified as solutions to prisoner’s dilemmas and free riding, in order to ensure all states maintain their mutually beneficial commitments in a credible manner. However, to meet the four criteria, they need to be ultimately under the control of the contracting states and peoples.

The difficulties arise when such a political system is forced to operate as if it was representing a pan-European citizenry because its decisions have either undercut the capacity of the MS to respond to the demands of their citizens, or entered policy areas where no such win-win solutions exist. For example, the teleological reasoning of the CJEU in regard to Union citizenship has drawn criticism from some commentators for judgments such as *Schwarz*<sup>2</sup> and *Watts*<sup>3</sup> that give citizens rights to access public services across the Union with no correlative duty to contribute to their provision (Scharpf 2012, 20). Advocate General Stix-Hackl claimed in *Schwarz* that ‘shortfalls in tax revenue are [not] to be taken into consideration as matters of overriding general interest’ when MS seek to overrule free movement and residence rights. Yet, such matters go to the heart of the capacity for MS to respond to their citizens priorities when setting their budgets (Nic Shuibhne, 2008). Not to take them seriously, risks disturbing the reciprocal ties between citizens that make public spending sustainable. Moreover, no mechanism exists to address the problem by transfers between MS, because the EU has neither the competence nor the democratic legitimacy to promote social welfare or public goods at the pan-European level.

Such decisions not only override the *demoi-cratic* decision-making structure of the EU but also undercut democracy at the MS level without creating it at the EU level. This problem has been even more apparent in the series of judgments where the CJEU has prioritised EU level economic freedoms over MS level social rights (*Viking*,<sup>4</sup> *Laval*,<sup>5</sup> *Rueffert*,<sup>6</sup> and *Luxembourg*<sup>7</sup>). In these cases, the Court has attempted to impose a uniform, minimum standard of wage legislation that overrides local collective bargaining agreements, thereby hindering the exercise of union rights.



Neither these decisions nor those regarding access to public services have contributed to the creation of a European *demos* because they dissociate social and economic rights respectively from membership of a political community in which all citizens must participate as equals. In the case of access to public services, the Court overlooks the mutual obligations citizens have to contribute to maintaining public goods at a sustainable level for all. In the case of economic freedoms, the Court undermines the politically negotiated balance between labour and capital, designed to achieve a degree of equity between the two. In both cases, the CJEU has misconstrued Union citizenship as if it consisted of a set of human rights to participation in a spontaneously arising and self-sustaining free market, rather than being grounded in the mutual recognition of the rights of citizens within an association of democratic states. This failure to respect the democratic systems of the MS proves self-defeating. For it is these systems that provide the basis for Union citizenship not only formally, in that citizenship of an MS is a precondition for Union citizenship, but substantively, in that it is collective solidarity among citizens of each of the MS that generates the legal, economic and social infrastructure on which the enjoyment of their economic and other rights as Union as well as national citizens depend.

The EU requires the cooperation of the associated MS to implement policy – apart from them its existence is exiguous at best. To flout or circumvent the EU’s democratic structures, therefore, can only undercut both the legitimacy and the efficacy of its decision-making, risking in the process the very forms of inter-state domination the avoidance of which provides its most compelling rationale. Yet, these structures limit not just how the EU can act but what it can do. By their very nature they are ill-suited to policies that imply or require a *demos* to be legitimately and effectively pursued.

## **6. Conclusion: The Eurocrisis – Beyond Demoi-cracy?**

This article has explored the normative case for conceiving the EU as an ‘ever closer Union of peoples’ rather than as the formation of a European people. That case rests on considerations of democratic legitimacy and the role a people plays within a system of public and equal political representation capable of securing conditions of civic freedom. A people of the requisite kind are unlikely to exist at the global or European level. However, this case is consistent with representative states forming an

international association to secure mutual concern and respect between their peoples given their increased interaction. The EU in many respects resembles such an association, and can be characterised as the product of a process of republican integration.

A *demoi*-cracy should not be understood as an alternative form of democracy – it has a different scope. It exists to regulate the interactions between states rather than their internal processes. That poses limits to the sorts of policies the EU should attempt to pursue. The Eurocrisis reveals the problems of going beyond these limits all too dramatically. The single currency was supposed to produce a convergence of the MS economies. Instead, it reinforced their divergent dynamics. As a result, the international financial crisis has had a far greater impact on the former soft-currency countries of Greece, Ireland, Portugal, Spain and Italy than on Germany and most northern economies. However, the type of rescue package the EU can offer has been constrained by the capacity of its political system to redistribute between MS. As a result, it has been limited to addressing state-credit crises rather than the underlying economic problems of the debtor economies, and involved strict conditionalities designed to protect the investment of the taxpayers of creditor states. Yet, this approach compounds the original democratic legitimacy problem. For in removing core budgetary decisions from domestic politicians, the discipline imposed by the Fiscal Pact and the EU's Six-Pack Regulations effectively institutionalise a system of domination of the creditor over the debtor states – precisely the sort of situation the EU exists to prevent (Scharpf 2012, 23-24). In George Soros's words, the crisis 'has transformed the EU from a voluntary association of equal states into a creditor-debtor relationship from which there is no easy escape.'<sup>8</sup> Indeed, these measures have been largely designed outside the Union's *demoi*-cratic decision-making processes, sidelining not only the supranational institutions of the EP and Commission but also the intergovernmental mechanisms of the Council. As Joseph Weiler has remarked, 'the resort to an extra-Union Treaty, as a centrepiece of the reconstruction, is but the poignant legal manifestation of this political reality' (Weiler 2012, 831).

This problem has led to calls for greater political integration so as to institutionalise republican democracy at the EU level (Habermas 2012). The analysis presented here suggests there are normative as well as empirical problems with this proposal. The experience of existing multi national states suggests that the presence of multiple *demoi* within the EU would give it weak polity legitimacy at most and

require a highly complex regime that would be unlikely to be able to provide citizens with public and equal control over governments. Some authors contend that segmental cleavages among national *demos* might be counterbalanced by transnational cross-cutting cleavages between pan-European interest groups and parties (Bohman 2007: 313). However, such associations are largely artefacts of the EU, operating as umbrella organisations of national associations that are themselves largely not Europeanized. Even the 2% of Union citizens who live in another MS to their own seem only moderately Europeanized (Favell 2008). Habermas's suggestion that a post-national commitment to civil and political rights might overcome the no-*demos* problem obscures the fact that it is precisely such a commitment that underpins *demos*-cracy at the EU level: for it goes hand in hand with acknowledging the right of each people to institutionalise these rights in their own way.

Therefore, the normative challenge posed by the crisis is to justify transfers between the MS without undermining the right of each people to be publically and equally represented in national and international decision-making. Paradoxically, though monetary union itself may have overstepped what a republican intergovernmentalism could legitimate, the crisis might justify quite generous if temporary transfers between MS in order to sustain their equal capacity to remain self-governing (Laborde 2010). However, exploring this avenue falls outside the scope of this article. What can be affirmed is that, absent a European *demos*, political union would compound rather than assuage the lack of democratic legitimacy of the current rescue package. The EU would prove to be not only a sub optimal currency area but a sub optimal democracy area, composed of extremely heterogeneous *demos*. The challenge, therefore, is to find a solution consistent with the *demos*cratic character of the EU. Though a survey of the potential solutions lies outside the scope of this article, what does follow from the above is that the only policies likely to prove legitimate and lasting in the long run are those that can be made and sustained through the existing *demos*-cratic structures.

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## Notes

<sup>1</sup> The criterion of 'commonly avowed' should not be understood as entailing universal consent, which most regard as impossible to meet (Simmons 1976), but rather the weaker notion of equal respect for the views of the governed by virtue of the existence of a plausibly democratic system that gives citizens equal participation in decision-making (see Buchanan 2002).

<sup>2</sup> *Schwarz and Gootjes-Schwarz v. Finanzamt Bergisch Gladbach* [2007] ECR I-6849

<sup>3</sup> *Watts v. Bedford Primary Care Trust* [2006] ECR I-4325

<sup>4</sup> Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* [2008] IRLR 143

<sup>5</sup> Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160

<sup>6</sup> C-446/06 *Dirk Rüffert v Land Niedersachsen* [2008] IRLR 467

<sup>7</sup> Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

<sup>8</sup> George Soros, 'How to Save the European Union from the Euro Crisis, Speech in Frankfurt 9 April 2013 as reported in *The Guardian*, 10 April 2013, p. 27.