

## **ORIGINAL MANUSCRIPT**

# **National autonomy and democratic standardization: Should popular votes on European integration be regulated by the European Union?**

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## **Abstract**

Given the increasing use of direct democratic votes on questions of European integration, this paper explores whether or not Member States may have good reason to agree on common regulations for popular votes of this nature. Conceiving of the European Union as a political system designed to serve the interests of states and citizens, it is argued that where direct votes have the potential to undermine the territorial, functional, normative or existential integrity of the EU, then states may have good reason to sacrifice a degree of national autonomy to adopt common regulations for certain uses of direct democracy. This leads to a case for democratic standardization across Member States when it comes to withdrawal, accession, Treaty ratification and opt-in decisions.

## **1 | INTRODUCTION**

The European Union is a scheme of cooperation based on the normative commitment to accommodate the diversity of legal regimes while nevertheless maintaining a common framework for cooperation between them. On this view, the central question of European integration is as follows: when do Member States have good or sufficient reason to constrain their national autonomy in an area by developing uniform principles and regulations at the supranational level? Put differently, when should Member States seek to overcome their diversity to pursue deeper unity, becoming less foreign to one another, and ultimately more tolerant of common rules that constrain sovereign expression?

This paper relates this fundamental question to the issue of *democratic standardization* in the EU. Democratic standardization may be defined as the extent to which Member States decide to constrain or regulate their respective domestic decision-making processes in common at the supranational level. Treatment of this issue is relatively rare in legal and political theory, but is not without precedent. In particular, normative reflection on democratic standardization has been provoked by the issue of democratic backsliding in Central and Eastern Europe, on

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the one hand,<sup>1</sup> and the dramatically increasing use of popular votes on issues of European integration, on the other.<sup>2</sup> This paper aims to make a contribution to the latter debate by exploring the argument for democratic standardization when it comes to the direct democratic practices of Member States on questions of European integration.

There is already significant democratic standardization in the EU. Most obviously, substantial EU regulation structures how elections to the European Parliament (EP) should be carried out within each Member State.<sup>3</sup> Meanwhile, all European citizens are guaranteed electoral rights in local elections, regardless of where they reside in the EU. Furthermore, Member States have committed to instituting democratic systems as a condition of their membership in the Union (Art. 2 TEU). While it is recognized that democratic values can be secured using a wide range of institutional configurations and political practices, a certain degree of standardization is implied in that not just any institutions and practices will embody and serve to promote these values. In fact, Article 7 TEU provides various mechanisms to allow for the sanction of Member States who would significantly undermine their own domestic democratic practices.

Of course, differences in the use of institutions of direct democracy will be very often just one of the permissible ways in which Member States differ in their democratic practices. This will be typically the case when it comes to the resolution of purely domestic issues. However, when the issue being put up for popular vote directly implicates the EU in some way, and may even threaten the legitimacy or sustainability of this political system, we should not dismiss the possibility that some kind of democratic standardization may be desirable. To the extent that the Member States remain ‘Masters of the Treaties’, and that this state of affairs is justified, a persuasive case for democratic standardisation must appeal to the values and interests that can be shared in principle by all Member States.

The next section outlines the conceptual resources upon which I draw to make my main arguments. On the one hand, the EU is identified as a democracy, or social contract between states and citizens. On the other hand, it is explained why Member States have good reason to ensure the sustainability and legitimacy of the EU by protecting and promoting its integrity, where integrity is understood as a multifaceted concept including normative, territorial,

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<sup>1</sup> B. Bugarić, ‘A Crisis of Constitutional Democracy in Post-Communist Europe’, (2015) 13 *International Journal of Constitutional Law*, 219; J-W. Müller, ‘Should the EU Protect Democracy and the Rule of Law Inside Member States?’, (2015) 21 *European Law Journal*, 141.

<sup>2</sup> C.F. Rostbøll and T.V. Olsen, ‘Why Withdrawal from the European Union is Undemocratic’, (2017) 9 *International Theory*, 436; F. Cheneval, ‘*Caminante, no hay camino, se hace camino al andar*’: EU Citizenship, Direct Democracy and Treaty Ratification’, (2007) 13 *European Law Journal*, 647.

<sup>3</sup> See A. Scherz, this volume.

functional and existential dimensions. When the democratic practices of Member States in some significant way threaten the integrity of the EU, it is argued, there is a case for some regulation of these practices at the European level so that the threats they embody can be limited. Focusing on institutions of direct democracy, I distinguish between different kinds of votes. It is argued that popular votes on secession, accession, Treaty ratification and opting-in to new policy areas have the strongest case for at least some common regulations. The case for polity-wide regulation of popular votes on other types of issues, such as granting EU membership or association status to third countries, is much weaker. The penultimate section considers certain challenges to my account posed by territorially divided societies in the EU, including Belgium, Spain and the UK. Finally, I conclude with a note on strategic implementation for improving the regulation of popular votes on European integration.

## **2 | THE IDEA OF DEMOICRACY AND THE CONDITIONS OF INTEGRITY**

Demoicracy refers to a political system where liberal democratic sovereign statespeoples voluntarily agree to establish a supranational order that is designed to increase international policy coordination in a way that is responsive to both the values and interests of the signatory states and their citizens. The concept of demoicracy purports to both describe the EU as it is, while providing attainable normative guidance for this political system.<sup>4</sup> By first outlining the concept of demoicracy, we are provided with a general theoretical framework within which the question motivating this paper must be pursued. In other words, attempting to determine the extent to which Member States have good reason to standardize any of their direct democratic practices must be consistent with the nature of the EU as a demoicracy. Having articulated the idea of demoicracy, I then attempt to identify more precisely what are the relevant kinds of reasons that Member States may consider in attempting to determine how far they should standardize their democratic practices.

### **2.1 The idea of demoicracy**

Demoicracy endorses the value of national demoi as contexts of self-government that facilitate individual autonomy and the solidarity necessary to create just institutions. However, it also recognizes that individuals have an autonomous value that is not reducible to their membership in states. For this reason, the demoicratic social contract includes states and citizens as the

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<sup>4</sup> J. Lacey, 'Conceptually Mapping the European Union: A Demoi-cratic Analysis', (2016) 38 *Journal of European Integration*, 61.

relevant normative subjectivities. On this approach, states cannot be expected to give up their sovereignty in favour of empowering a supranational citizenry, any more than citizens would give up their rights to ensure that there are mechanisms that protect their interests in the institutional configuration establishing a supranational association.<sup>5</sup>

Although the EU by no means entirely fulfils the normative standards of democracy, as an institutional configuration it embodies, or comes close to embodying, a number of democratic ideals.<sup>6</sup> Most relevantly for this paper, the EU satisfies the democratic requirements that states must voluntarily enter the Union while maintaining a unilateral right to withdraw from it, in addition to unanimously agreeing upon constitutional change, including the terms of differentiated integration, whereby some states may pursue forms of closer cooperation in which not all states are interested. Through representative arrangements in the Council and the EP respectively, the EU also largely fulfils the democratic prescriptions that states and citizens are equally represented institutionally in making secondary law, while the principle of non-discrimination fulfils the democratic requirement that Union law is applied equally to both states and citizens. The creation of European citizenship, and the empowerment of the EP and the Court of Justice of the European Union (CJEU) to represent and protect the rights of European citizens respectively, may be at odds with a more statist understanding of the EU that favours purely intergovernmental decision-making. However, the democratic emphasis on national autonomy puts it in tension with more supranationalist conceptions that place a much greater emphasis on the role that institutions representing citizens of the political union, independently of their membership in a given state, ought to play in shaping this Union.

For example, in a nuanced account of the EU as a mixed constituent power, Markus Patberg claims that citizens in both their national and transnational perspectives ought to be institutionally represented as equal in making and revising the Treaties.<sup>7</sup> The democratic account resists this position. It is not that citizens in their transnational perspective as Union citizens should be ignored in making primary law. Nonetheless, admitting that the perspective of citizens *qua* Union citizens should be considered in making Treaty change, does not translate

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<sup>5</sup> F. Cheneval, *The Government of the Peoples: On the Idea and Principles of Multilateral Democracy* (Palgrave Macmillan, 2011).

<sup>6</sup> For deeper discussions, see K. Nicolaïdis, 'European Democracy and its Crisis', (2013) 51 *Journal of Common Market Studies*, 354; 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; F. Cheneval and F. Schimmelfennig, 'The Case for Democracy in the European Union', (2016) 51 *Journal of Common Market Studies*, 334.

<sup>7</sup> See M. Patberg, this volume.

into the moral claim that Union citizens should be given the authority to co-constitute the EU by holding equal institutional power to states when it comes to making and changing the Treaties. Such a move would in many respects put a putative European demos on a normative par with consolidated national demoi. On the demoicratic account, however, it is only the form of self-rule guaranteed by national demoi that is robust enough to legitimate decisions pertaining to the primary law of the Union.

A similar objection may be raised against Rostbøll and Olsen, who argue that withdrawal of a state from the EU is undemocratic because it violates a version of the all-affected interests principle that they believe is internal to democratic theory. Essentially, they maintain that unilateral withdrawal does not give a say to all those European citizens who may be affected by the decision. Meanwhile, the eventual withdrawal of the state (even if it is mutually agreed) diminishes the possibility for citizens of states, whose decisions are likely to continue affecting one another, to engage in democratic rule together in the future.<sup>8</sup> The demoicratic perspective runs counter to this position by aligning itself with the ‘stakeholder’ conception of citizenship.<sup>9</sup> While this view also recognizes a principle of all-affected interests as internal to democracy, it insists that the affectedness of an individual or state by a decision does not ground a right to inclusion for the affected in a common decision-making process. It is only those individuals who are pursuing a plan of life in a political community, and thereby have an equal stake in the collective fate of that community, who have a rightful claim to inclusion in the democratic process. The principle of all-affected interests on this account asserts no less than a democratic duty for decision-makers to give due consideration to those who will be affected by the decision. In the EU context, this means that both the withdrawal decision by citizens of the prospective secession state, and any subsequent arrangement between the seceding state and the Union,<sup>10</sup> should be made with the interests of all those affected in mind.

## **2.2 | Conditions of integrity in a political system**

An ideal demoicracy is one that manages to preserve as much national autonomy as possible in the context of increased policy coordination that is pursued on the basis of compelling reasons. What then are the reasons why Member States may pursue deeper integration in one

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<sup>8</sup> Rostbøll and Olsen, above, n. 2.

<sup>9</sup> R. Bauböck, ‘Morphing the Demos into the Right Shape: Normative Principles for Enfranchising Resident Aliens and Expatriate Citizens’, (2015) 22 *Democratization*, 820.

<sup>10</sup> Cf. C. Lord, ‘The Legitimacy of Exits from the European Union’, (2017) 35 *Journal of European Integration*, 499.

area or another? There are first-order and second-order goods that may motivate deeper integration between states. First-order goods in this context are those material and normative goods that may be difficult or impossible to attain by nation-states without significant coordination with other states—goods such as international free movement and trade, regional peace and the development of international human rights norms. Second-order goods are those that provide the political union itself with the resources required to preserve and promote its *integrity*. The integrity of a political system may be defined as *the ability to persist through time and the rightful claim to do so*. Effectively, in a social contract between states and citizens, both normative subjects have strong reasons to pursue forms of integration that secure those second-order goods necessary for the sustainability and legitimacy of the political union they have agreed to found together for the purpose of securing first-order goods.

Four main types of integrity may be distinguished. One type is *territorial integrity* and refers to the ability of a political system to maintain an established geographic scope. Another is *functional integrity* and relates to the capacity of the political system to carry out the tasks with which it is charged. *Normative integrity* pertains to the values on which the political system bases its legitimacy. In the EU, the normative *acquis* is partly set out in the Treaties, especially Title I and II of TEU, where the principles of sincere cooperation, conferral, proportionality and subsidiarity are laid out, as well as more general commitments to liberal democratic values. Some of its values are more thoroughly developed in the Copenhagen Criteria, the European Charter of Fundamental Rights, and the rulings of the CJEU. *Existential integrity* denotes the extent to which citizens identify with and generally support the existence and overall trajectory of the political system. It is largely determined by how the territorial scope, functional operation and normative values of the political system reflect the ideas of citizens concerning what ought to be the geographic limits, standard of institutional and policy performance, and values of their political system. At the same time, a low level of existential integrity could in turn jeopardize other types of integrity, by generating secessionist demands or presenting resistance to the successful implementation of Union law.

Democratic standardization of direct votes on European integration can be justified only as a second-order good. Indeed, the very question of such standardization arises only to the extent that direct votes on European integration continue to prove problematic for the sustainability and legitimacy of the EU. The remainder of this essay will focus on how certain direct democratic practices within Member States may jeopardize some aspect of the EU's integrity and whether or not it should be endowed with mechanisms for regulating or curtailing these practices. To be clear, my focus is not solely on the options that may be available to the

Union for these purposes within the current Treaty framework. Rather, the primary interest of this paper is to determine the kind of measures that would allow the EU to protect its integrity in a way that is consistent with a democratic ideal.

### **3 | NATIONAL POPULAR VOTES AND EUROPEAN INTEGRATION**

At the time of writing, there have been almost 50 referendums in Member States pertaining to issues of European integration, with the majority of these coming since the turn of the century.<sup>11</sup> These referendums divide into roughly four groups: secession (three votes), accession (19 votes), Treaty ratification (16 votes), and a mixed bag of more idiosyncratic issues (10 votes). Article 10 TEU states that the functioning of the EU should be based on representative democracy, but insists that a condition of this is that Member States are ‘themselves democratically accountable either to their national Parliaments, or to their citizens’. Accountability to parliaments or citizens directly, then, is considered a minimum condition of democratic practice in the Member States for representative democracy to function in the EU.

Article 2 TEU states that the Union is founded on respect for democracy, among other values, suggesting that, even if the Union itself is based on representative democracy, there is value attached to democratic practices in the Member States that are not reducible to purely representative functions. Although Article 10 demonstrates that the EU at least partially bases its legitimacy on the assumption of representative democracy in the Member States, no position is taken on the desirability or permissibility of referendums in general or in specific circumstances. However, respect for the democratic practices of Member States when these go beyond traditional representative functions need not be unconditional when they pose significant threats to one or other aspect of the EU’s integrity. In what follows, I will attempt to evaluate the extent to which the main types of referendum presented above pose a threat to European integrity and if this is enough to justify Member States pursuing a degree of democratic standardization relating to popular votes on European integration.

#### **3.1 | Withdrawal votes**

The UK is responsible for the two most significant EU secession referendums, one unsuccessful in 1975, and another in 2016, which has led to the British government triggering Article 50 of TEU to start proceedings for withdrawal from the EU. In a very obvious way, the act of secession undermines the EU’s territorial integrity, thereby reducing the geographic

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<sup>11</sup> F. Mendez and M. Mendez, *Referendums on EU Matters* (European Parliament, 2017).

scope of a common area of freedom, justice and security for European citizens. It fundamentally changes the horizon of expectations concerning the territory in which European citizens can exercise unfettered free movement with guaranteed legal protections.

Withdrawal is also a challenge to the functional and existential integrity of the EU, although the extent to which this is true in each case will vary depending on a number of factors. Socioeconomic weight and population size are two of the main variables determining the extent to which a seceding state will affect the EU's functional integrity. A withdrawing state that is a net contributor to the budget will cause far more disruption to the functioning of the EU than a net recipient by reducing available funds, while any resurrection of trade barriers is likely to negatively impact the economic performance of Member States and their corresponding ability to contribute towards the EU budget. Moreover, the departure of a large Member State with a significant number of personnel represented in the main EU institutions will significantly upset the operations and diminish the human capital of these institutions. Withdrawal of a state also has the potential to jeopardize existential integrity. Not only may the diminished opportunities pertaining to trade and free movement that come with territorial shrinkage reduce the EU's appeal, any functional difficulties that arise from this state of affairs may further negatively impact citizens' identification with and support for the EU.

Of course, the reverse situation is possible, such as when the withdrawal of a small Euro-sceptical state that is a net budget recipient actually facilitates the strengthening of the EU's functional and existential integrity for the remaining Member States. However, gambling with the uncertainty concerning which type of Member State may decide to withdraw from the Union and just how likely this is to facilitate the European project is hardly an adequate basis on which to draw conclusions concerning democratic standardization. The assumption must be that the withdrawal of any state from the EU is negative in itself by undermining the territorial integrity of this political system, while simultaneously being a potential risk to the functional and existential integrity of the Union.

As we have seen, even though there might be good moral reasons to resist the withdrawal of a Member State from the Union on the basis of concern for all-affected interests, there is no consideration that can override the right of a Member State to withdraw from the Union on a democratic account. Nevertheless, given the prospect for significant damage to Union integrity, we may ask whether or not there should be some conditions placed on how Member States exercise their right of withdrawal. Clearly, most Member States, many of whom have little to boast by way of a direct democratic tradition, believe that a decision so



consequential as determining EU membership should not be made without the express approval of citizens through referendums.

As already noted, a condition of EU membership is that all Member States share a commitment to democracy. And one may argue that there are strong democratic grounds for each Member State to make any future decisions concerning their membership of the Union by way of referendum.<sup>12</sup> However, this is not the primary argument I wish to make for standardizing the means of making membership decisions in the EU. On the contrary, it is the instrumental protection to the Union's integrity by making membership decisions through referendum that I wish to emphasize. This may seem like a strange position, given that it is through the use of a popular vote that the UK challenged EU integrity. However, as I shall demonstrate, it is not just the use of popular votes to determine EU withdrawal decisions *per se* that allows them to play a protective role. Rather, a great deal hinges on how such devices are designed.

Students of direct democracy are critical of (most uses of) the plebiscite as a form of direct democracy insofar as such votes are typically called in an *ad hoc* fashion on the basis of executive or parliamentary fiat. Indeed, a core normative prescription for direct democratic devices is that they serve as a check on executive and parliamentary power. They are not supposed to be additional tools in the hands of elected officials, who may at their whim call a plebiscite to suit an electoral schedule or to circumvent the normal law-making process.<sup>13</sup> The *mandatory referendum*, which is responsible for a significant number of EU referendums in Denmark and Ireland, is an example of good referendum design in that it helps to ensure that the government cannot alter fundamental constitutional provisions without the direct legitimation of the people. It is this type of referendum design that I propose for secession from the EU.

Unfortunately, the 2016 British referendum on EU membership was a plebiscite and embodied many of the vices that such a form of direct democracy often entails. The promise of a referendum on UK membership was primarily an electoral gambit by the then UK Prime Minister David Cameron and Conservative Party leader, who wanted to appease the Eurosceptical members of his party and neutralize the electoral threat of the United Kingdom Independence Party. Precisely because of the transparent electoral opportunism motivating the

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<sup>12</sup> See J. Lacey, *Centripetal Democracy: Democratic Legitimacy and Political Identity in Belgium, Switzerland and the European Union* (Oxford University Press, 2017), ch. 7.

<sup>13</sup> See, also, A. Auer, 'The People Have Spoken. Abide? A Critical Review of the EU's Dramatic Referendum (In)experience', (2016) 12 *European Constitutional Law Review*, 400.

referendum and the failure of the government to provide a meaningful articulation in advance of what leaving the EU would mean in practice, the legitimacy of the vote was in doubt from the beginning, and vocally called into question by the losers when 52 per cent of voters advocated British withdrawal from the EU. Faced with the task of implementing a decision which it did not support, and for which there was no plan, the UK government has put a strain on its own and the EU's integrity.

The problem is not that a party would make secession from the EU part of its policy programme in the run-up to an election. This is the democratic right of any party. Rather, the problem consists in a party making an electorally strategic promise to use an *ad hoc* referendum as a means of upsetting the normal parliamentary decision-making procedure. A *mandatory* referendum on secession from the EU, ideally constitutionalized in the Treaties, would offer an improvement. On this scenario, the national parliament would be first required to pass an Act to access TEU Article 50 on withdrawal from the EU. The government would then be prevented from putting this act into effect by EU law until this Act had been approved by a binding national referendum. Not only would this be the most democratic arrangement by securing Member State citizens' control over the decision, it would also set out well in advance the decision-making procedure for these kinds of issues, so that all actors are aware of the rules of the game before the question of withdrawal even arises. Precisely because the proposed type of referendum is necessary, and therefore predictable, while serving as a check on the government's power rather than as a tool for electoral manipulation, the result will be democratically legitimate and far more likely to be perceived as such. Furthermore, to the extent that the government is required to register its intention to trigger Article 50 in advance, one can presume that a rational plan of action for post-EU membership would be formulated from the beginning.

Once again, the aim of this proposal is not to make it impossible for states to leave the EU. This would be unacceptable from a democratic perspective. Rather, the point is to ensure that it is possible for a state to exit the Union only when there is demonstrable congruence between the will of parliament (through its desire to trigger Article 50) and citizens (through their referendum vote). By raising the barriers to exit, and in a way that actually improves the democratic legitimacy of popular votes, the risk of withdrawal from the EU will be significantly reduced. As such, the integrity of the EU is better protected by supranational regulation of secession referendums. In fact, there seem to be few countervailing reasons for Member States to resist this measure. This is especially true when we consider the potential risks to their own

integrity posed by a withdrawal from the Union – a risk that is exacerbated when there are any reasonable doubts concerning the legitimacy of the decision-making procedure.<sup>14</sup>

### **3.2 | Accession votes**

Referendums on accession to the EU have become the new norm, with the vast majority of recent accessions decided by referendum. Yet the contingency of this remains problematic. Precisely because of the gravity of a referendum on EU withdrawal, a prudent demand should be for all applicant Member States to also approve their accession using the legitimacy conferring credentials of a referendum. It is not that citizens will not change their mind about the value of EU membership over time, much as proved to be the case between the 1975 and 2016 popular votes in the UK, but that the mandatory referendum on accession will demonstrate beyond doubt that the citizens are in line with their parliament's desire to enter the Union.

Widespread citizen support for EU membership within states is crucial to sustaining the territorial integrity of the EU political community over time. As such, there is good reason to ensure that a prospective Member State is well-placed to contribute to, rather than undermine, the kind of identification with the EU (i.e. existential integrity) that is necessary to maintain its territorial integrity. It is difficult to imagine a decision-making device that could do this as effectively as a referendum. Indeed, precisely because of the connection between existential integrity and territorial integrity, there is an argument to be made for requiring a supermajority and minimum quorum in a national referendum for a state to accede to the EU. Whatever the appropriate threshold, a vote under these conditions would ensure that a higher and more legitimacy-conferring consensus is reached on EU membership than a referendum requiring a simple majority and no quorum. In other words, a state that enthusiastically enters the EU with a wide consensus among a significant majority of its voting population is less likely to jeopardize the integrity of the EU.<sup>15</sup> In particular, it is more likely to have the public support to engage in the kind of sincere cooperation that is essential to the EU's functional integrity, while being less likely to threaten EU territorial integrity at a later date through secession demands.

### **3.3 | Treaty revision votes**

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<sup>14</sup> Indeed, as the aftermath of the Brexit referendum demonstrates, the decision to leave the EU has caused functional problems (related to the economy and Brexit-burdened political institutions) and territorial problems (pertaining to Scotland and Northern Ireland). Other threats to UK integrity could be also enumerated.

<sup>15</sup> Cf. F. Mendez and M. Mendez, 'The Promise and Perils of Direct Democracy for the European Union', (2017) 19 *Cambridge Yearbook of Legal Studies*, 1, 6.

According to TEU Article 48.4, each Member State must follow the ratification procedure dictated by their respective constitutions when it comes to Treaty change. For Francis Cheneval, this leads to a situation of discrimination between states that is inconsistent with the equal treatment of states required by the democratic conception.<sup>16</sup> The issue is not that the states representing their peoples have an unequal say in whether or not a Treaty is ratified, but that the peoples themselves do not have an equal say in ratification under current procedures. Procedurally, some peoples are constitutionally required to hold referendums, others may leave ratification to the parliament, while others still may be contingently treated to a plebiscite so that the parliament may elicit a definite popular opinion before considering ratification. This effectively gives some peoples a greater say in the future of the Union than others. Discursively, ratification procedures are not simultaneous across Member States, leading to unnecessarily unequal conditions and opportunities for political debate. Not only does early ratification by some states lead to added pressure on other states to do likewise, the reverse situation where the people reject Treaty change renders any further referendums and their attendant debates in the remaining countries redundant. This is because, in principle at least, the unanimity requirement for Treaty change makes just one failed ratification enough to scupper a Treaty reform project.

Clearly, in this case, the EU's normative integrity is being undermined. As such, we may say that Member States have good reason to standardize the Treaty reform process. There is, however, a further reason pertaining to the EU's existential integrity. It has been argued that referendums have the ability to foster identification by citizens with the political system through their participation in the decision-making process.<sup>17</sup> In accord with this view, Simon Hix attempts to at least partly explain the steep decline in UK enthusiasm for the European project since the 1990s by the absence of any real opportunities for citizens to shape their relationship with this political system since joining by referendum in 1973. Denmark, by contrast, who joined the integration project in the same year, has regularly given its citizens the opportunity to shape their national relationship with the EU through the use of referendums. This has corresponded with a consistently pro-European attitude over time, contributing to the EU's existential integrity.<sup>18</sup>

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<sup>16</sup> Cheneval, above, n. 2.

<sup>17</sup> Lacey, above, n. 12, ch. 2.

<sup>18</sup> S. Hix, 'Democratizing a Macroeconomic Union in Europe', in O. Cramme and S. B. Hobolt (eds.), *Democratic Politics in a European Union Under Stress* (Oxford University Press, 2014).

Two main options are available for standardizing Treaty ratification practices in the Member States. One is a ban on all Treaty referendums in the Member States, so that parliaments alone are responsible for ratification. The other is an agreement by all Member States to legally provide for a national mandatory referendum requirement in cases of Treaty change. Even though the first option may be the most reliable way of ensuring that a Treaty passes, thus reinforcing the EU's functional integrity, it has the serious defect of prohibiting a valid democratic practice within Member States. Unlike the case of withdrawal discussed above, when it was argued that the poorly designed plebiscite should be replaced by a well-designed mandatory referendum, the elimination of mandatory referendums to reduce the hurdles to Treaty ratification would undermine democracy at the national level by removing a legitimate avenue of will-formation for the peoples of the Union. Indeed, European citizens (and to a lesser degree their representatives) overwhelmingly support national referendums as the appropriate legitimization device for ratifying Treaty change.<sup>19</sup>

The second proposal, favoured by Cheneval, is more appealing in that it equally empowers peoples by way of a democratically valid decision-making tool. Nevertheless, this idea presents significant challenges to functional integrity in the EU. On the one hand, there is a higher risk that Member States will fail to pass a Treaty aiming to take integration steps or make institutional reforms that may be necessary for the proper functioning of the Union. On the other hand, given the daunting ratification hurdles, Member States may be disincentivized from pursuing necessary Treaty revisions in the first place. Thus, there would appear to be a significant trade-off between securing the EU's normative integrity by way of this second proposal and the functional integrity of the Union. This trade-off can be greatly reduced, however, by modifying the conditions under which the standardized procedures for Treaty ratification are carried out.

First, it has been argued from several different perspectives that the EU Treaties are over-constitutionalized, in that too much Union law is codified as primary law and thereby protected by the high revision hurdles of unanimity.<sup>20</sup> The common proposal is to redraft the Treaties so that the vast majority of articles are relegated to the status of secondary law and thereby open to more flexible revision procedures. What would be left is a single Treaty document much like the TEU, outlining Union principles, competences, institutional structure,

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<sup>19</sup> Mendez and Mendez, above, n. 11, at 43, 46.

<sup>20</sup> For example, F.W. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy', (2015) 21 *European Law Journal*, 384; D. Grimm, 'The Democratic Costs of Constitutionalisation: The European Case', (2015) 21 *European Law Journal*, 460.

etc. In this scenario, the peoples of Europe would maintain control over the basic structure of the Union insofar as universal approval by way of referendum in each Member State would be required to change the newly formulated TEU, while the Union would attain greater problem-solving flexibility. Moreover, the chances that sweeping change of the reconstituted TEU would be regularly required are slim, suggesting that the standard approach to changing this Treaty would be on a single-issue basis.

Second, any proposal to significantly transfer competences from the Member States to the EU would need ratification in those states by way of simultaneous referendums. In that case, the allowances for differentiated integration on a democratic conception of the EU could be particularly valuable. However, any agreement to permit deeper integration among a minimum number of Member States who happen to ratify the proposal should be approved in advance by the European Council. This is essential to ensure that any deeper integration between particular Member States do not adversely affect the interests of those who may choose to opt out of deeper integration.

Even with these modifications to Cheneval's proposal, it is still possible that the Union's functional integrity may be undermined in certain respects when citizens refuse to endorse a change to the basic architecture of the Union, or if the European Council refuses to allow for differentiated integration in case some states do not pass an integration referendum. Nonetheless, what these modifications do is reduce the trade-off between advancing the EU's normative and existential integrity (by way of securing non-discriminatory ratification procedures that involve the participation of citizens) and threatening to undermine its functional integrity. In the absence of such modifications, however, the trade-off between democratic standardization of Treaty ratification and functional integrity may be too great, thus justifying the status quo where Member States retain the right to ratify Treaties in accord with their own traditions and preferences.

### **3.4 | Miscellaneous votes**

Other popular votes on issues of European integration constitute somewhat of a mixed bag,<sup>21</sup> which can be broken into five main categories: *opting in* to particular policy areas; indirectly *petitioning* the EU; making *ad hoc agreements* to deal with particular policy issues; granting membership or association *status to a third country*; and *post-hoc contestation* of decisions already made at the European level.

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<sup>21</sup> Mendez and Mendez, above, n. 11, at 24.

Opt-in popular votes—such as the Danish referendums on joining the euro in 2000, acceding to the European Unified Patent Court in 2014 and opting-in to certain Justice and Home Affairs Issues in 2015, as well as the Irish referendum on acceding to the Fiscal Compact in 2012—have to do with changing the distribution of decision-making competences between the Member State(s) in question and the EU. Based on the democratic commitment to the sovereignty of states in making international agreements, there can be no grounds for precluding the use of popular votes in Member States when it comes to opting in to policy areas. In fact, there are grounds for thinking that mandatory referendums on particular kinds of opt-in decisions should be instituted. There is, however, a qualitative difference between relatively minor schemes of cooperation that complement a particular policy area and more significant schemes that involve some transfer of competences from the Member States to the EU. It is opting in to the latter schemes where there is a case for democratic standardization.

On the one hand, much as with the case of accession, particular schemes of cooperation pursued within the EU have an interest in maintaining integrity over time. The referendum device gives demonstrable support for this kind of integration among national citizens. It may thereby help to preserve the integrity of this form of cooperation and, by extension, the Union as a whole. On the other hand, much as was argued in the critique of existing Treaty ratification practices, a situation of discrimination arises when some states opt-in to new forms of integration by popular vote when other citizens are not given the same opportunity to do so. As such, it is only an agreement to hold mandatory referendums that can restore this aspect of the EU's normative integrity when it comes to opt-in decisions involving the transfer of competences.<sup>22</sup>

Highly idiosyncratic votes—like petitioning the EU (e.g., the 1989 Italian citizens' initiative for the EP to develop a European constitution) or forging *ad hoc* agreements between a Member State and the rest of the EU (e.g., the 2015 plebiscite in Greece on agreeing a bailout package)—need not be regulated at the European level. Although it is possible that a highly confrontational or salient popular vote could jeopardize EU integrity in one way or another, there is nothing essential to either petition-type popular votes, or those between a Member State and the rest of the Union designed to resolve a particular issue, that would obviously pose a significant threat to European integrity. It may be argued that a common agreement to avoid

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<sup>22</sup> While changing the basic structure of the Union or ceding sovereignty to the supranational level is likely to be of concern for all Member States, we may expect much greater variation among them concerning what counts as a salient issue concerning less fundamental decisions. As a matter of principle, therefore, the choice of one or a few Member States to employ direct democratic devices on what may be minor issues to most states does not appear to be discriminatory in a normatively significant sense.

plebiscites on idiosyncratic policy issues is minimally desirable. However, Member States who have a tradition of using such devices relatively responsibly may have good reason to resist this, especially when an idiosyncratic decision turns out to be highly consequential and difficult to legitimate without a popular vote.

The oldest example of a popular vote concerning the status of a third country is the plebiscite that France held in 1972 on enlarging the then European Community. This has been followed there by the introduction of a constitutional provision in 2005 requiring a popular vote on the accession of candidate countries to the EU,<sup>23</sup> unless there is a supermajority in favour of accession in the national parliament (according to a 2009 amendment). Meanwhile, the Dutch vote on the EU–Ukraine association agreement in 2016 is a sign that even future association agreements may be subject to national referendums. Article 218 (8) TFEU makes unanimous decisions in the Council necessary to conclude association agreements, while Article 49 TEU sets unanimity among existing Member States as the internal decision-making rule required to grant accession of a new Member State. There is a strong normative argument to be made that any (European) liberal democratic state with sufficient functional capacity should be granted an association agreement or accession to the Union after the appropriate negotiations have been satisfactorily concluded. In other words, once an objective standard is met by the prospective associate or Member State, that state has a strong moral claim on existing Member States to ratify the agreement in question.<sup>24</sup>

Andreas Auer goes so far as to conclude from such considerations that the ‘voters of one state simply have no legitimacy to decide on the accession of another willing to join’.<sup>25</sup> There are two issues to be disentangled here. First, should EU citizens’ opinions matter when it comes to the just inclusion claims of third-countries? The only democratic answer to this question is that governments should not force their citizens to share in the production of first-order goods with citizens of another state. Governments should rather attempt to build public support for the rightful inclusion of the appropriate third-countries.<sup>26</sup> In fact, proceeding with accession or association agreements without the requisite public support has the potential to jeopardise EU integrity over time. For example, sharing a space of free movement with some of the newer Member States turned out to be a major point of discontent in the UK that

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<sup>23</sup> This provision did not apply to the Bulgarian, Croatian and Romanian accessions, despite taking place after 2005.

<sup>24</sup> J. Lacey and R. Bauböck, ‘Enlargement, Association, Accession—A Normative Account of Membership in a Union of States’, (2017) 39 *Journal of European Integration*, 529.

<sup>25</sup> Auer, above, n. 13, at 406.

<sup>26</sup> T.A. Börzel, A. Dimitrova and F. Schimmelfennig, ‘European Union Enlargement and Integration Capacity: Concepts, Findings and Policy Implications’, (2017) 24 *Journal of European Public Policy*, 157.



encouraged citizens of that Member State to question their role in maintaining the EU's territorial integrity.

Second, even if we concede that public support for accession and association agreements is either important or necessary, should Member States agree to constrain their national autonomy and prohibit the use of popular votes on these occasions? The key issue on the account laid out in this paper is whether or not denying a third-country with just claims to accession or association status would have a substantially deleterious impact on EU integrity. It is not obvious that it would. Meanwhile, as we have seen, the failure to secure public support for accession and association agreements pose a distinct threat to the sustainability and legitimacy of the EU. Member States, therefore, would not seem to have sufficiently compelling reasons to give up their autonomy in deciding upon issues of association and accession according to their own preferred democratic practices. We must, however, be critical of Member States who do not accept the just claims to inclusion by third-countries, whether the Member States in question fail to do so by parliamentary fiat or popular vote. The Hungarian plebiscite on EU migrant quotas is an unprecedented type of popular vote in a Member State. Unlike the Dutch referendum, which took place before ratification of the EU–Ukraine agreement and where unanimity in the Council was the decision-making rule, the Hungarian vote took place after the Hungarian government had lost a qualified majority vote on the assignment of refugee quotas across the Union. In this sense, it is a *post-hoc* contestation of a decision already taken according to agreed procedures at the European level. Generally speaking, national constitutions recognize certain suspensions of sovereignty when it comes to meeting international commitments. And in some constitutions, like the Danish constitution (Section 42 (6)) and the Hungarian fundamental law (Article 8.3b), popular votes are explicitly prohibited in such cases. For this reason, the constitutional validity of the plebiscite was widely disputed in Hungary as detractors claimed that it did not meet the condition stated in the fundamental law that popular votes may be held only on issues within the competence of the national assembly (Article 8.2).<sup>27</sup>

Although the proposal to reject EU migrant quotas passed overwhelmingly, the necessary quorum to legally validate the vote was not reached. A more direct clash between Hungary and the EU was thus avoided on this occasion. Allowing *post-hoc* popular votes, or parliamentary votes for that matter, on issues where the Union clearly acts within its

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<sup>27</sup> Z.T. Pállinger, 'The Hungarian Migrant Quota Referendum of 2016 in the Context of Hungarian Direct Democracy', in Mendez and Mendez, above, n. 11, at 162.

competences would place a major strain on its functional integrity by creating a situation in which Member States can refuse to implement potentially unpopular decisions taken at the supranational level.

Certainly, in this regard, the principle of sincere cooperation is fundamental to the EU's functional integrity and commits Member States to 'refrain from any measure which could jeopardize the attainment of the Union's objectives' (Article 4.3 TEU). As such, sovereign expressions like the Hungarian referendum are at least implicitly precluded within the Union, *prima facie*. What could justify a push back from the national level is an instance where a particular decision of the Union may infringe on national constitutional values that were established *prior to* joining the EU. However, this case had not been made when the Hungarian Supreme Court allowed the popular vote to go ahead, claiming that it met all the relevant legal requirements.<sup>28</sup> The Kúria, however, is itself mired in questions of legitimacy given the ruling Fidesz party's replacement of the entire supreme court judiciary with its own hand-picked judges.<sup>29</sup> On this basis, we may conclude that the Hungarian plebiscite does not so much illustrate the need for greater democratic standardization of direct democracy at the Union level, but the effective guarantee of democratic standards within national representative institutions.<sup>30</sup>

#### **4 | SOME CLARIFICATIONS ON TERRITORIALLY DIVIDED SOCIETIES**

Before concluding, it is necessary to make some clarificatory remarks concerning two special problems for my account that may be posed by territorially divided societies, like Belgium, Spain and the UK. I have already indicated that there does not seem to be a strong countervailing general argument, provoked by concerns for national autonomy, against the standardization of certain direct democratic practices on issues of European integration. However, there may be some very specific reasons why a particular Member State would have a sound case for opting out of such arrangements. A potentially serious case in this regard would be a divided society whose territorial integrity could be put in jeopardy in the event that the respective communities express different preferences to one another in a referendum.

Concerning the question of withdrawal. Each of these divided societies has some kind of history with plebiscites and, as the British case demonstrated, may not be immune from political pressures to hold such votes on the question of European membership. To the extent

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<sup>28</sup> Decision IV.37.222/2016/9 of the Kúria.

<sup>29</sup> Bugaric, above, n. 1.

<sup>30</sup> See Müller, above, n. 1.

that this is true, at least in principle, there is every reason for these states to subscribe to the kind of democratic standardization of EU secession votes advocated in this paper. When it comes to Treaty ratification and opt-in decisions, the answer is not so straightforward. Should territorial cleavages in these states become reinforced by different preferences on European integration, direct votes may reveal these differences in a stark manner that emboldens within-country secessionist movements. Yet, at the same time, it is not clear how much direct votes on Treaty change or opt-in decisions would exacerbate tensions between within-country territorial communities. In the absence of referendums on European integration, advocates of Scottish independence were perfectly able to politicize the differences between pro-EU Scotland and Eurosceptical England as part of their effort to justify a referendum on seceding from the UK in 2014. In sum, although divided societies may have additional reasons to resist some democratic standardization of popular votes at the European level, the case for such standardization remains strong in these states.

There is, however, another issue concerning divided societies that arises in the context of this paper. Specifically, should territories who wish to secede from a Member State of the EU have their decision-making procedures for determining independence regulated at the European level? For a start, Member States ought to make clear by common accord what are the consequences concerning EU membership when a territory secedes from a Member State. That is to say, it must be legally specified in advance whether or not seceding from a Member State also means leaving the EU, and under what conditions.<sup>31</sup> If secession from a Member State does not entail also leaving the EU, then the problems for EU integrity are relatively few and common regulations for any vote that transpires would seem unnecessary. But if, as indicated in the run-up to the 2014 Scottish independence referendum, secession of a territory from a Member State and EU withdrawal are bound up in some way, then the integrity of the Union may be jeopardized by a national secession vote.

Nevertheless, the potential benefits of common EU rules for national-cum-EU secession referendums can be minor only. Member States have no compelling reason to assume in advance that territories have the automatic right to secede from their respective states. Therefore, any common EU framework would have to presuppose that the right of a given territory to secede in principle is first granted by the central authority of the Member State in

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<sup>31</sup> This question cannot be resolved here. Carlos Closa, for one, argues that the secession of a territory from a Member State should not equal automatic EU membership for the seceding territory, even if the EU has special duties to the newly independent state for close cooperation, including the possibility of eventual readmission. Closa, 'Changing EU Internal Borders Through Democratic Means', (2017) 35 *Journal of European Integration*, 515.

question. Moreover, it is highly unlikely that such a right will be granted by the central authority without the condition that a referendum in the prospective seceding territory is held. At best then, a common agreement to make referendums mandatory on the issue in question would play the nominal role of providing the further guarantee that a popular vote on secession from a Member State does in fact take place. As we have seen in discussing the withdrawal of a Member State from the EU, a mandatory referendum would help to ensure that there is congruence between the government of the prospective independent state and its citizens when it comes to the question of leaving both the state in question and the EU.

## **5 | CONCLUSION**

Conceiving of the EU as a democracy, Member States have reason to sacrifice a degree of national autonomy in favour of democratic standardization when their democratic practices may pose a threat to EU integrity. In the first instance, it was argued that greater European regulation of popular votes on accession, secession, Treaty ratification and opt-in decisions is required to safeguard EU integrity. Furthermore, when it comes to deciding upon the secession of a territory from a Member State, where this also means withdrawal from the Union, a degree of democratic standardization is nominally desirable. In the second instance, it was argued that there are no obvious threats to EU integrity when it comes to popular votes on petitioning the EU, *ad hoc* agreements to deal with particular policies and granting membership and association status. As such, Member States may be justified in resisting democratic standardization of their direct democratic practices on these kinds of issues. Meanwhile, the principle of sincere cooperation arguably prohibits post-hoc contestation of EU decisions by way of popular vote. Finally, it was argued that the case for democratic standardization presented in this paper remains strong, even when confronted by the special circumstances of territorially divided societies.

To conclude, I make a brief note on strategic implementation. Treaty change would be the ideal way to implement the proposals I have put forward. However, it is possible to take positive steps towards these goals in the absence of prospects for Treaty amendments. The Venice Commission has already produced a very general set of best practices for the use of referendums at the national level. A document of this ilk, tailored specifically to endorse a set of best practices for the use of direct democracy on European issues, perhaps along the lines set out in this paper, could serve as a valuable resource. The most desirable outcome on this scenario would be where as many Member States as possible adopt the recommended best practices in national legislation. Failing that, the mere existence of such a document, officially

put forward and endorsed by at least one EU institution (European Council, EP or Commission), could serve as a powerful normative resource with which to guide and critique Member States in their handling of direct votes on European integration.