“Congress shall make no law…”
American Constitution, Amendment I

“We know however that no Society ever did or can consist of so homogeneous mass of Citizens […] It remains then to be enquired whether a majority having any common interest, or feeling any common passion, will find sufficient motives to restrain them from oppressing the minority. An individual is never allowed to be a judge or even a witness in his own cause. If two individuals are under the bias of interest or enmity against a third, the rights of the latter could never be safely referred to the majority of the three. Will two thousand individuals be less apt to oppress one thousand, or two hundred thousand, one hundred thousand?”

James Madison, Letter to Th. Jefferson, October 24, 1787*

“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections”

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“Deux compères ont trouvé une belle somme d’argent dans la rue et commencent à se chamailler pour savoir qui l’empocherait, quand survient le molla Nasroddine. Ils lui demandent son arbitrage.
-  J’accepte, dit-il, à condition qu’aucun d’entre vous ne remette en cause le jugement que j’aurai rendu. - Nous le promettons, disent-ils.
- Eh bien, mes chers amis, comme j’ai bien plus que vous besoin de cet argent, je vais le garder et je vous promets que, dès que mes finances iront un peu mieux, je vous le rendrai pour que vous vous le partagiez !” †

♦ Quoted by S. Holmes, Passions and Constraints, Chicago U.P., 1995, p. 135. See also: R. Dahl, How Democratic is the American Constitution, Yale University Press, New Haven, 200?, p. 51: “Some interests, however, may be protected from the ordinary operation of majority rule. To a greater or lesser degree, all democratic constitutions do so”. It is intersting to notice that Dahl speaks of interests not of rights.
1. Europe, Democracy and Outvoting

All democratic regimes (with this term I mean to indicate elected/representative governments) harbor a characteristic, which they do not much like to speak about: they constrain the minority to accept and adopt the choices of the majority. This characteristic explains why the topic of social homogeneity (and, to a certain extent, of economic and cultural homogeneity) has been one of the central problems of democratic ideology, from Rousseau on (here I am thinking of Carl Schmitt and of Hermann Heller, for example – but also of Robert Dahl). In the current European debate, this theme of homogeneity returns, frequently, in the form of the question of the European demos. In debating its

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2. The point is taken up with his usual clarity by Michele Salvati in an article that appeared in La Repubblica on June 13th, 2003: “A good democracy tolerates a rather restricted range of dissent and emotional intensity: it is possible if opinions and beliefs about what citizens find crucial for themselves are not too far apart or too intense, if the electoral victory of the opposition is considered an unpleasant possibility with which one could peaceably coexist – not a tragedy or a threat”.
presence or absence, more often than not, one neglects to indicate what is at stake in the discussion. Since it seems self-evident and, therefore, unnecessary to clarify the reasons for which democracy presupposes a demos, debate slips over whatever substance the term contains.

Empirical research (in particular what has been conducted within the Eurobarometro) shows that, for example, among the citizens of the Scandinavian countries and the United Kingdom there is a strong distrust of strengthening European political ties\(^3\) – the same distrust of being part of the same political community that includes countries such as those of central and southern Europe, which have a history and especially a democratic pedigree that is different from theirs, one, it must be said, not particularly brilliant. From the moment when an ever greater number of decisions will be made, within the EU, not by unanimity rule, but on the basis of some qualified majority, it is not surprising that Swedes feel threatened by the possibility of being outvoted and of seeing themselves subjected to a political will that corresponds to the will of countries such as Italy, Spain, Greece, Portugal, or even of France and Germany – not a particularly southern country, but one perpetually chastised for the evils of its past. It could be that the English and the Scandinavians have in mind a democratic model more their own than that of continental or southern Europe: they think (implicitly or explicitly) of the Westminster model, in which the power of the elective majority is much stronger and largely free of those checks and balances that characterize, in principle, the constitutional structures of post-authoritarian regimes (such as Germany, Spain, and Italy

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\(^3\) For example, an 80% majority of Italians, Spaniards, and Hungarians approve of the idea of having a European constitution, while in Great Britain, Denmark, and Sweden, the same idea is shared by only 45% of the population (figures are from *Il Sole 24 ore*, July 27\(^{th}\), 2003). The results of the recent Swedish referendum on the European currency simply confirm these polls.
– this last, unfortunately, at risk these days of losing credibility in this respect). The reality is that, without realizing it, what they have in mind is the France of the Third and Fourth Republics, where the absence of a judiciary with the attributes of real power – that is of counter-power – allowed parliament sovereignty far greater than of the United Kingdom, where the majority is accustomed to exercising self-control and courts of Common Law exert control on the actions of the government.

It remains true that in the purest model of representative democracy, of which the United Kingdom is perhaps the best approximation, minorities live for the next election and in hopes of replacing the government of the incumbent majority. This has certain virtues (above all in the case of politically bipartisan and constitutionally parliamentary systems) : in particular, that of rendering political responsibilities evident and easily identifiable, and of making it easier for the governed to punish those who govern, by way of a popular vote censoring the incumbent majority, in case of dissatisfaction with its actions.

2. Voting and conflict resolution.

Here I would like to draw attention to the following point: the democratic vote is a particular mechanism for conflict resolution.\(^4\) What concern me are several of its

\(^4\) Here I am concerned with the vote in a deliberative and decision-making assembly, not in an electoral assembly; in general, the latter is equated immediately to the former. I am aware of its importance and complexity of this question, but I do not engage this aspect of analysis here. [I want to quote nonetheless a text by A. Esmein, *Eléments de droit constitutionnel français et compare*, Paris, 1927, p. 351, fn. 136 –
salient characteristics. It is sensible to assume that disagreement is an essential and unavoidable dimension of living together. Within a stable group of individuals, disagreement (if it is serious) produces conflict. If one wants to avoid recourse to arms, with the high costs that follow, or the attribution of exclusive decisional power to a monocratic subject, a ‘prince’ – a topic on which the chapter of Machiavelli’s Prince dedicated to the ‘Civil Principality’ remains fundamental – an alternative means of transcending discord is to call for a vote cast by the members of the community itself. This method of conflict resolution (I will shortly consider an alternative) comes with consequences and presupposes some preexisting conditions. The conditions necessary to its functioning are that the members of the group consider themselves substantially equals,\(^5\) that the dimension of radical animosity is extinct within the group (so that one can begin to speak of “political unity”),\(^6\) and that there is some awareness of an “us,” of a common fate or destiny (or, perhaps, of a shared history – this contributes to the Wir-

\(^5\) The question is raised in the old, extraordinary, still provocative text of Edoardo Ruffini, *Il principio maggioritario* (1926), Adelphi, Milano, 1976; here one reads, for example: “The equivalence of votes [...] presupposes an equality, actual or conventional, of authority among the voters; it follows that an assembly made up of the weak and the strong can not decide by majority rule” (50).

\(^6\) This is the one sense in which Schmitt’s observations on the criterion of political seem theoretically relevant to me.
Bewusstsein, but to me it does not seem a *sine qua non* precondition). Because it is only under these conditions, whose details are difficult to specify, that the outvoted section of the group will ultimately accept the will of the majority and, thanks to this acceptance, transforming it into what it was not at the moment of the vote: the *general will* – a will, that is, that shall be accepted, followed, and carried out by (almost) everybody. If this were not so, the defeated minority would take up arms, or at least exert passive resistance to the will of the majority, which would then become no more than the will of one part of the group (even when a majority). The existence of a *demos*, which is to say in this context a group that can be considered sufficiently homogeneous and consensual as to accept the will of the majority, is the ineradicable condition for the existence of a stable political community.

That the EU must possess the characteristics of a homogeneous *demos* as described above is debatable and the subject of much disagreement within the Union, as it is among scholars. To speak therefore of a “democratic deficit” (or of democratic sufficiency) is to put the cart before the horse. In the greater number of cases it winds up obscuring the matter under discussion. So it is, moreover, with the debate over sovereignty, as though it were (as Bodin, Rousseau, and their followers believed) similar to a hen’s egg, which must be broken to be shared. It seems to me that the real problem underlying this entire discussion of the European people, of the democratic deficit of the EU and so on, has to do with the logic of the majority vote (simple, but also, up to a

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7 It is not clear, for example, what the “common” history of Italy was in 1861. On this point, see the thesis of Jürgen Habermas – taken up again in the Introduction, by Gustavo Zagrebelsky, to *Diritti e costituzione nell’Unione Europea*, Laterza, 2003.
certain point, qualified), which constrains the defeated minority to accept the will of whichever alliance within the political group collects the greatest number of votes.\(^8\)

3. Vote, majority, and identity.

As authors of varying stripes (such as Robert Dahl and Carl Schmitt) have taken the opportunity to observe, the democratic principle of majority rule is a method of managing dissension and conflict realizable, as I have indicated, only in societies unafflicted (any longer) by radical conflict (or in which the positions of radical contestation are limited to very slight minorities controllable by the police). In cases where conflict is extensive and radicalized, such as in the case of the religious civil wars of modern Europe – those conflicts in which the minority group will never accept the will of the majority – the democratic option is not available, and recourse must be made to the “principality,” in the Machiavellian sense of monocratic power: to absolute monarchy, to territorial partition (\textit{cuius regio ejus religio}), or to the “conversion” (voluntary or, where possible, forced) of the dissenters. The reasons for all this are clear if one pauses to reflect on the mechanism of decision-making through the vote. A group of individuals can accept being outvoted only if the consequences of the vote are not catastrophic for the

\(^8\) Romano Prodi, in the Introduction to the volume \textit{La tela di Prodi} (G. Tognon, ed. Baldini & Castoldi, 2003), to the question “Why, in general, does the majority vote inspire such fear?” answers, appropriately: “Because every member State is afraid of finding itself in the minority in certain situations and as a result being forced to respect unwelcome decisions. In other words, it is the fear of losing sovereignty that impedes some States from accepting the principle of giving up unanimous decisions. The point is that, in some sectors of society, national sovereignty has unfortunately become completely fictitious” – a critical issue, but one that can not be explored here.
losers. It is not solely a matter of guaranteeing that the results of the vote are not irreversible, that one can always call another vote (we can term this the *lex posterior* principle – in the sense of a legal decision that can abrogate a decision made by a previous majority). Notice that this has a remarkable implication, which is that the minority is not absolute, or insulated – incapable, that is, for whatever circumstances of becoming a majority. Moreover, it is necessary that *some options or choices be not the object of a vote* – those options which a subunit within the group considers essential to the maintenance of its identity, because a concession on those conditions would mean to concede the nature, figure, or very existence of its members (for a militant Catholic, religious affiliation can not be subordinated to the democratic process – and we all possess identities from which we feel inseparable: our gender, perhaps our language, etc.).

On the basis of these observations, we can state that it is necessary to distinguish between the two senses of equality, or rather between two dimensions upon which it can be predicated. A democratic community (here in the sense that it resolves its disputes through the vote – which is perhaps the best minimalist definition of the term democracy)\(^9\) presupposes the acceptance of the principle of equality, in the sense of *one citizen, one vote*.\(^10\) In any case, in a society that is not totally homogeneous (realistically, in all societies), not every choice can be put to a vote. In this sense, *all choices are not born equal* (in distinction from the members of the community). *Some of them, for now let’s call them those relative to the identity of the individuals, are excluded from the vote.*

\(^9\) More reduced to the essence than the one proposed by Adam Przeworski and Norberto Bobbio, who maintain that a society is democratic if the government can be fired without violent conflict simply using ballots: “paper stones”.

\(^10\) Here in the sense of equal participation in decision-making, the equivalent of the the principle of inclusion in the sovereign body.
In other words, these must be exempted from the possibility of being outvoted, and thus of being defeated. The options withheld from the vote are such for two opposed reasons: either because there is substantial agreement within the group about them (exactly what is meant by the term homogeneity); or because the choices are not at the disposal of the majority. These are options that are protected, guaranteed, and thus excluded from the democratic game. It is not possible to call a community vote on matters of my gender, religion, or language (up to a certain point). Of course, it must be said immediately that in a democratic community _dissension may arise concerning the border between the two domains_: the one subject to a vote and the one that is protected. We must pause here and consider this point further.

Radical democrats (such as Jeremy Waldron) insist that only the democratic majority can decide on the location of this border. If one reflects for a moment, one realizes that such a thesis is reasonable only in a society that is perfectly homogeneous (a New Zealand, Waldron’s homeland, somewhat idealized and without the Maori) – where, moreover, the question is not even raised. In such a society, by definition, the founding values of the group identity are shared (language, religion – but not gender; whence the celebrated sentence – often cited without, perhaps, a full understanding of its meaning – of Delolme, who presented the English doctrine of parliamentary sovereignty in these exaggerated terms: the English Parliament may decide on everything but the gender of the subjects of her majesty). In the opposite case (when the society is not completely

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11 Of course no vote is taken on what exceeds the concrete possibility of action of the group, such as the number of stars, the existence of the seasons, etc. As Aristotle noted, it is possible to deliberate and decide only about that which lies within our power, our forces and our will.

12 For example, see _Principio di maggioranza e dignità della legislazione_, Giuffrè, Milano, 2001; see also, in Italian, the book by Anna Pintore, _I diritti della democrazia_, Laterza, Roma-Bari, 2003.

13 In other words, this of course cannot be decided by a vote, because the gender of a subject cannot be effectively changed by such a decision. In this sense, the English Parliament could decide everything that
homogeneous) the doctrine in question is a perfect recipe for tyranny, thanks to which we could see not only the imposition of the amount of taxation, the number of “public works” that will be carried out in the next ten years, or the maximum speed on the highways, but also a religion, a language, or, some day, our own gender identity!

The age-old aversion of western Europe to democracy, from Plato to Leibniz, stems not only from the excessively litigious character (whether this is real or not) of actual democratic experience, but from the circumstance that the most numerous group in every traditional society was manifestly the poor (the original meaning of the Greek word demos!). It stems, also, from the fact that the most reflective or most privileged groups always constitute a minority in every community, and would never accept any form of subjection to the rules and the identity of majorities that could systematically impose their will by means of the democratic vote (that which makes all members equal, and imposes its results on all minority groups). In this context, one recalls the proposition of John Stuart Mill, who wanted each cultivated person [?] to be allotted more than one ballot! “Representative government” has meant, to some extent, the possibility for the elites to protect themselves from the effects of popular majority vote (Sieyes and Madison, respectively in Europe and in America, are theorists of this doctrine, which passes for democracy today). The central choice of representative government is found in shifting the locus of decisional power from the ekklesia (the assembly of the people) to the elected Parliament. From the people to an elected oligarchy – much more

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14 The two usually coincide. When this is not the case, as at the end of the Ancien Régime in France, there may be radical breaks and sometimes revolutions in society. [It is worth reflecting on the case of Medieval Christianity, in which the Church held a near monopoly on culture, while political power lay in the hands of whoever controlled men of arms.]
homogeneous – in which the privileged classes, due to culture or property, are capable of moderating the effects of a majority decision and avoiding the risks of a democracy dominated by the classes described as “dangerous” in the nineteenth century. Of course the choice and selection of representatives depends upon the people (upon the voters), but the people must choose from among those privileged groups that can make of politics a profession. The extension of suffrage, so feared by the most conservative groups and sought after by those closest to socialist ideals, has not changed the elitist nature of representative governments, even if everyone in modern democracies is free to express whatever doubts they might have about the quality of the political elites, and to compete in the contest for the majority in the elected assemblies.

4. Brief digression into Iraq.

The fact that democracy (in the sense clarified above), rather than being humanity’s ultimate horizon (as once was said about another political religion in decline and disuse today: Marxism), instead appears to be a system replete with shadows and light, is more clear if we think for a moment of the Blairian obsession with imposing democracy on Iraq – which is the ‘left’ (liberal) justification for the military occupation. If one indeed accepts today (and who knows for how much longer) democratic rules for the solution of conflicts in Iraq, it would follow that the majority would subject the minorities, Sunni, Christian, and Kurdish, to a Shiite theocracy. This would not only contradict the occupation forces’ wish to see an entity in power that is not hostile to the USA, but would
also create an intolerable situation for the minorities, which no one sensible hopes for. One need only recall the dramatic but perfectly defensible choice to annul the election in Algeria won by fundamentalist Islamic groups, or the election results in Germany at the end of the Weimar republic.

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So it seems – this is the first provisional conclusion – that the democratic form of conflict resolution: the vote – can not reasonably be applied in every case. Some choices must be withheld from the voting process; without abusing the term too much, I believe we can call them (fundamental) RIGHTS.¹⁵

These rights are not, therefore – to follow the reasoning that we have so far developed – within the purview of the democratic majority. Nevertheless, conflicts do exist, as indicated above, over the nature, extent, implications, etc., of these rights. What could be the means of resolution for such conflicts – that is, those that fall into the territory dividing conflicts liable to the democratic process and those excluded from that type of conflict resolution?

5. The judge and constitutional control.

If we reject democratic tyranny – according to which all dissent and conflict is resolved through recourse to the vote – we must ask ourselves what alternative ways or

¹⁵ Another meaning for the term rights exists (and sometimes even they are constitutionalized), which must be distinguished from the ones discussed in this text: the right to work, to healthcare, etc. Here, rather than choices protected from the vote, one must be speak stimuli for legislative action.
modes exist for the non-violent resolution of conflict within a political community. If violence and various magical practices are excluded (analysis of animal guts, interpretation of the flight of birds, etc.), history and some thought yield at least one important alternative mode. Before considering it we should remember, first of all, that in a given number of cases, it is inconceivable to decide matters with a vote – particularly in all those cases in which the disagreement is between two parties, because in this case the vote will not resolve the conflict.\textsuperscript{16} In this eventuality, the alternative solution is that which consists of turning to a third “neutral party” given the authority to resolve the conflict with an authoritative decision (with no possibility of appeal). This we can call \textit{the neutral third party, or the judge}.

It should be clear immediately that the arbiter-judge in question has nothing in common with the fictional “\textit{bouche de la loi}” which is limited to unraveling practical syllogisms.\textsuperscript{17} The judge of which I’m speaking bears the ancient name of Solomon. In an already complex form he appears for the first time in a scene told by Homer, in Book XVIII of \textit{The Iliad}, in which the shield of Achilles is described.

In the conflict between two parties, the vote is useless since it does not produce any effect. In some other cases, it cannot be applied because the results will be unacceptable due to an irremediable conflict of interest. Let’s take a look at the reasons why.

\textsuperscript{16} So that the vote will deliver a result – as Hobbes observed – certain formal conditions are necessary: the number of decision-makers must be an uneven number greater than one. Assemblies comprised of an even number of members run the risk of not being capable of deciding anything. In such cases a non-democratic expedient is necessary – that of endowing a member of the assembly (the oldest, or the president) with the power to transform one of the stalemated halves into the dominant faction with his vote. An alternative possibility, in case of an even split in the vote, is that of keeping the \textit{status quo ante}.

When one speaks of “two parties”, various situations may be implied (and I limit myself to conflicts that presuppose the existence of a political community and that occur within it). In the strictest sense, the two parties are two individuals. In this case, resolution through recourse to a vote is impossible; it would be just another name for disagreement, not a way out of the impasse. There are also cases in which the parties are two groups, or an individual on one side of an issue and a group on the other (or put ‘institution’ in the place of ‘group’). If the case is of two groups and one of the two is an insulated minority, and destined to remain so in all probability in the future, resolution through the vote would be a mockery. It is clear that a decision resolving such a conflict must be referred to a third party judge, for the same reason the vote is not used to resolve such issues: in order to avoid the tyranny of the majority. More interesting is the case of conflict between one citizen, whoever that may be, and the political majority, or the legislator, or another state institution, over constitutionally protected rights. Here too the vote is out of place. It would be like deciding a disagreement between the USA and the republic of Andorra through armed conflict!

I maintain that the intervention of a neutral third party is the only rational and just way to resolve conflict between a citizen and the institutions of the state, whether the former claims that the latter (even if it enforces a majoritarian will, as in the case of a statute passed by the majority in the Parliament) would be violating the original pact of

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18 This is the most evident and intuitive case of abusive recourse to the democratic principle of majority rule. “Let us” – Schumpeter wrote – “transport ourselves into a hypothetical country that, in a democratic way, practice the persecution of Christians, the burning of witches, and the slaughtering of Jews. We should certainly not approve of these practice on the ground that they have been decided on according to the rules of democratic procedures (Capitalism, Socialism and Democracy, Harper and Row, New York, 1975, p. 242).

19 The objection that a decision made by a judge has an ‘aristocratic’ character, as opposed to the ‘democratic’ character of a decision made by an elected, politically responsible majority, owes something to magical thinking and fetishistic terminology. To think that the choice of one hundred thousand is always
the political community: the one that protects fundamental rights from the vote! Whether or not this is true – i.e. whether this violation of the citizen’s basic rights does or does not take place – cannot be decided democratically by the majority, either the majority of the citizens, or a majority of elected and accountable officials. What I propose gives constitutional control a foundation that is more ‘radical,’ so to speak, than that which derives from constitutionalism *stricto sensu*: the existence of “rigid constitutions”, one could say in a certain sense provides the theoretical justification for the rigidity of the constitution. My thesis maintains that the mechanism of the democratic vote has to be avoided as a means of *conflict resolution* in a whole series of cases that arise within the community, because it would undermine the very basis of coexistence within the group – to echo Thomas Hobbes, it would import war, rebellion, and violence, rather than peace and order. This involves not only cases that concern ‘structural’ minorities, but also the rights of individuals in the face of public authority – or even conflicts between branches of the state, in constitutional systems where a real separation of powers exists, and thus lack of sovereignty by a single branch or institution of the state. The principle of the “rule of law,” according to Dicey, just like that of *Rechtstaatlichkeit*, says precisely this – that in the case of such conflicts, what is needed is a judge, not a vote. And naturally superior to the choice of a single individual is just as irrational as it is to think the opposite. It is equally absurd to believe the third party judge will be in the wrong simply because he is an individual, or because he belongs to a small group (literally a monarchic or oligarchic subject).

20 The expression *rigidity of the constitution* means, at least since the work of James Brice (see the Italian translation edited by A. Pace of his *Costituzioni flessibili e rigide*, Giuffrè, Milano, 1998), the principle by which constitutional norms are exempted from the possibility of modification by a majority of the parliament, but require sanction by a qualified majority or special procedure in order to be modified.

21 In a particular form – moreover, one which worked to the advantage of the poorest citizens (whence the name ‘democracy’) – this also occurred in the Athens of the fourth century B.C. with the *graphè paronomòm*: legal action against a decree the assembly had voted for, but that was considered contrary to the laws of the city, which took place in the *dikastérion*, the supreme court of the city and its most important institution – as Mogens H. Hansen, the foremost scholar of the institutions of Athenian democracy, has shown (*The Athenian Democracy in the Age of Demosthenes*, Blackwell, Oxford, 1991).
6. Objections.

One could say that the neutral judge is an illusion, and that even judges, in the case of a judicial college (not of a monocratic judge), like popular and parliamentary assemblies, decide by means of the majority vote. This is an important objection that must be considered here, at least briefly.

The word neutrality is not meant to denote the naive illusion of a judge-machine, an automaton without passion or emotion, who utters like the “mouth of the law”; neither is it meant to indicate the Arab phoenix, god on earth, an entity that is impossible to find and therefore all too easily dismissed as a myth. Neutrality is simply meant to denote the property of being an independent third party. Between the two parties in a political assembly there is a natural conflict of positions and conceptions, and in general an opposition of interests. The democratic mechanism for resolving conflicts by definition attributes to the major pars the quality of the deciding authority. The judge, by contrast, must have no stake in the conflict, which she is to resolve. If such were the case, the parts can object to her, and ask for a neutral judge. She certainly has her opinions and her own conception of justice, but she may not derive any material benefit from a decision in the favor of one party or the other. Naturally it is possible that she will decide in the

Notice that the graphè was brought indirectly against the decision of the ekklesia and directly against the proposer of the psephismata.

22 Independence should be understood in a twofold sense. First of all, the third party who judges must be independent and neutral with regards to the two parties in conflict, in order to be trusted by them and therefore be capable of ‘justly’ resolving the conflict. Secondly, in a constitutional state, the third party must be independent of the other branches and institutions of the state (in particular, of the legislative and the executive branches); if not, it will be impossible to judge cases in which these various state organs are parties to the conflict.

23 His decision, for example, may not have any impact on his rank, stipend, or continuing employment.
same manner as the democratic majority would have. But there can be no doubt – as should be clear to all – that her choice is more neutral than one of the interested parties would have been, or than her own would have been had she felt pressure from the majority to decide in a certain way in order to keep her position – yet this is the exact situation, in fact, for the elected officials, who are held accountable (responsible to the electorate), and are thus under direct pressure from the public on whom they depend for the renewal of their mandate. The logic that denies the possibility of a judge attaining third-party neutrality simply because he is the bearer, like every human being, of beliefs, passions, and preferences of every type, is a form of doctrinaire extremism that denies the value of the rules and mechanisms of appointment to public office (election pro tempore with possible renewal of the mandate, rather than a lifetime appointment; or for a proscribed time period, without the possibility of renewal) – and also, without being able to offer any evidence, denies the very possibility that the judge might be able to act or decide impartially, trying to realize justice.

Regarding cases when the judicial body reaches a decision by way of a vote, not just after an exchange of opinions and reaching a final consensus, the following should be considered: first, a vote within the judicial body should be only an extrema ratio, resorted to because judges, like everyone else, cannot deliberate in aeternum. The vote, in this context, is just an expedient and a means to put an end to the discussion. Secondly, and more importantly, the participants in the discussion are not the parties in conflict. This is an essential difference from the democratic vote, in which the concerned parties themselves vote on the matters that directly concern them.

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24 As well known, two criticisms are most often leveled at the institutions that protect constitutionality: the first, that they are against the majority and therefore non-democratic; the second, that they decide according to what the democratic majority wants, and are therefore useless. This is not the place to evaluate such criticisms, their foundation, or their merits and limits. I will only note that they recall those critiques of his work which Manzoni, with his great sense for irony, claimed cancelled each other out!

25 This is an essential difference from the democratic vote, in which the concerned parties themselves vote on the matters that directly concern them.
do not share their interests, and there is the essential provision that from their decision, whatever it is – and this is worth repeating – they do not derive any material or professional benefit. If, as in the decision of the U.S. Supreme Court in the case of *Bush v. Gore*, the judges are divided along the same ideological lines that divide the parties before the court, justice loses credibility and its exercise becomes an abuse.

**Coda.**

The preceding observations, it should be clear, represent a preliminary attempt to study some aspects of the institutional reality of the constitutional state regarding the problems of conflict resolution, of which the “third-party judge” and the “democratic vote” are two complementary and at the same time alternative versions. The essential hypothesis on which this discussion is based is that the constitutional state is a *mixed government* founded on elected, representative and judicial bodies that embody diverse forms of legitimacy, in addition to possessing diverse modes of conflict resolution.\(^{26}\)

\(^{26}\) On some of the conceptual matters addressed in this brief article, allow me to recommend the fundamental writings of the Norwegian jurist, Torstein Eckhoff: *Impartiality, Separation of Powers and Judicial Independence*, in Scandinavian Studies in Law, IX, 1965, pp. 11-48, and *The Mediator, the Judge and the Administrator in Conflict-resolution*, in Acta Sociologica, 1967, pp. 148-72. I would like to thank my friend Carlo Guarnieri, who pointed out to me these important and little-recognized works. Regarding questions of constitutional control, permit me to cite my own article, *Tipologia della giustizia costituzionale in Europa*, in Rivista trimestrale di diritto pubblico, 2002, n.2, pp. 359-369 [English version on the web site of the Jean Monnet Center of NYU].