

DEFICIT REDUCTION: DEMOCRACY, TECHNOCRACY, AND CONSTITUTIONALISM IN THE EUROPEAN UNION

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I. INTRODUCTION

The past dozen or so years have seen the public image of the European Community (EC)—now the European Union (EU)¹—transformed from that of a customs union with grand ambitions to a central actor on the global stage. This apparently sudden rise to prominence resulted from the confluence of the extended internal development of the EU—symbolized by the Single European Act's (SEA) "1992" initiative²—and the radical change in Western Europe's external environment brought about by the end of the cold war.³ In the realms of both high and low politics, from the fate of the Bosnian Muslims to the fate of Camembert cheese,⁴ the EU is

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1. TREATY ON EUROPEAN UNION [EU TREATY]. The EU TREATY introduced the term "European Union." EU TREATY, tit. 1, art. A. The European Union has historically been referred to as the European Community. General descriptive terms now designate the organization the "European Union," "Union," or "EU." However, the terms "European Community," "Community," or "EC" are retained where appropriate.

2. Single European Act, 1987 O.J. (L 169) 1, as revised in 1987 O.J. (L 304) 46. See generally Claus-Dieter Ehlermann, *The "1992 Project": Stages, Structures, Results and Prospects*, 11 MICH. J. INT'L L. 1097 (1990) (detailing the history and development of the SEA); Andrew Moravcsik, *Negotiating the Single European Act*, in THE NEW EUROPEAN COMMUNITY: DECISIONMAKING AND INSTITUTIONAL CHANGE [hereinafter THE NEW EC] 41 (Robert O. Keohane & Stanley Hoffmann eds., 1991) (analyzing the history of the SEA and its present success).

3. The collapse of the East-West confrontation not only decreased external threats to the Community; it also increased pressure on the EC member states to act more cohesively in order to fill the leadership void. See Finn Laursen, *Explaining the Intergovernmental Conference on Political Union*, in THE INTERGOVERNMENTAL CONFERENCE ON POLITICAL UNION: INSTITUTIONAL REFORMS, NEW POLICIES AND INTERNATIONAL IDENTITY OF THE EUROPEAN COMMUNITY 229, 240-41 (Finn Laursen & Sophie Vanhoonacker eds., 1992) [hereinafter THE IGC ON POLITICAL UNION].

4. See Noel Malcolm, *Is There a Doctor in the House?: The EC's Fantasies of Superpowerdom have had Consequences that are all too Real*, NAT'L REV., July 5, 1992, at 39;

now the relevant forum for many of the most important decisions shaping the lives of Europeans.

But by what right have the institutions of the EU assumed such power? Many analysts discuss a "democratic deficit" in the Union, a deficit created by the allocation of more and more functions to the existing Union organs without a corresponding strengthening of institutions to provide democratic oversight.⁵ The concern these writers express is genuine, and their attempts to address it are made in good faith. The difficulty, though, is that the solutions currently being proposed do not reach to the root of the problem.⁶

The European Parliament has been directly elected by the citizens of the member states since 1979.⁷ It has thus been the natural focus of efforts to democratize the EU. One apparently simple solution to the EU's problems of democratic legitimacy is to reform its internal workings to give the democratically elected European Parliament more power.⁸ The Union's problems, though, are more basic than the reformers realize. The democratic deficit is less a question of formal accountability than of the legitimacy of the EU as a new supranational polity, and as such it will not be amenable to the technocratic quick fix. Only a fundamental political mobilization and transformation will create the sense of dual citizenship the European Union needs to truly legitimate its power.

This Article argues that constitutionalism provides the best means for legitimizing the EU in the eyes of Europe's people. As Part II illustrates, the gap between popular acceptance of the EU and the functioning of Union governance is not easily bridged by altering the formal configuration of the Union's governing organs. Uneasiness with the EU runs deeper than its organizational chart; the Union may

Runny, Smelly, and Safe, ECONOMIST, June 27, 1992, at 60.

5. See EUROPOLITICS: INSTITUTIONS AND POLICYMAKING IN THE "NEW" EUROPEAN COMMUNITY 277-78 (Alberta M. Sbragia ed., 1992) [hereinafter EUROPOLITICS]; MARTIN HOLLAND, EUROPEAN COMMUNITY INTEGRATION 85-87 (1993); SIMON SERFATY, TAKING EUROPE SERIOUSLY 158-64 (1992); Finn Laursen, *The Maastricht Treaty: A Critical Evaluation*, in THE IGC ON POLITICAL UNION, *supra* note 3, at 249, 249-52; Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2466-74 (1991); Shirley Williams, *Sovereignty and Accountability in the European Community*, in THE NEW EC, *supra* note 2, at 155, 162-72.

6. See discussion *infra* part IV.

7. The Treaty of Rome made provisions for the direct election of the European Parliament. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EC TREATY] art. 138. However, an implementing decision was not taken until 1976. Council Decision 76/787, 1976 O.J. (L 278) 5. For an overview of the European Parliament's structure, history, and duties, see FRANCIS JACOBS ET AL., THE EUROPEAN PARLIAMENT (2d ed. 1992).

8. See *infra* text accompanying notes 32-35.

only gain legitimacy by fundamental adjustments. Part III describes the characteristics of legitimacy, noting that a government's legitimacy depends not so much on formal structures as on a popular belief that those structures properly serve the citizenry. Thus, as Part IV explains, of utmost concern to European integrationists is the fundamental question of whether the EU is a legitimate polity.

Constitutionalism, providing an opportunity for popular discourse on fundamental concerns of government, is the best means to legitimate governing authority. Part V describes the process by which citizens construct fundamental laws. The present EU treaties, lacking the characteristics of fundamental law, cannot legitimate the EU's governing structure in the eyes of the people of Europe. As the present time manifests a unique opportunity to construct a new Union, a federal constitutional structure is the best hope for legitimizing an integrated Europe.

II. THE DEMOCRATIC DEFICIT

The EU's development has been marked by a great expansion of its powers over time.⁹ The debate over the reasons for these changes is far from settled,¹⁰ but there is little doubt about the result: more decisions are being taken by Union institutions that were once taken by national governments alone.¹¹ The problem is that those institutions were designed with the politicians of Europe rather than the peoples of Europe in mind.

A. The Traditional View

Jean Monnet is widely regarded as the symbolic father and single most influential architect of the European Community.¹² Monnet's conception of the EC was unabashedly elitist, as befitted someone

9. For an excellent account of the historical development of the European Community, see Weiler, *supra* note 5.

10. Among the better recent attempts at analyzing the development of the EC are EUROPOLITICS, *supra* note 5 and THE NEW EC, *supra* note 2.

11. See Robert O. Keohane & Stanley Hoffmann, *Institutional Change in Europe in the 1980's*, in THE NEW EC, *supra* note 2, at 1-3. The 1992 initiative associated with the SEA, for example, required harmonization of national laws in hundreds of areas. Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final [hereinafter White Paper]; Single European Act art. 8A and Declaration.

12. See MICHAEL BURGESS, FEDERALISM AND EUROPEAN UNION: POLITICAL IDEAS, INFLUENCES AND STRATEGIES IN THE EUROPEAN COMMUNITY, 1972-1987, at 55-59 (1989); DEREK W. URWIN, THE COMMUNITY OF EUROPE: A HISTORY OF EUROPEAN INTEGRATION SINCE 1945, at 172 (1991).

whose influence was rooted in his access to European leaders.¹³ In his vision, far-sighted European statesmen were gradually to build an ever-thicker web of pan-European institutions, and public support would naturally follow at some point in the future. Indeed, Monnet saw public participation in the early stages of Community development as an evil to be avoided.¹⁴ It was only after European leaders had gently guided the people into a *de facto* new Europe that popular opinion could be trusted: "I thought it wrong to consult the peoples of Europe about the structure of a Community of which they had no practical experience."¹⁵

Monnet's elite-driven vision, while successful in creating a European Community with meaningful powers, has drawn increasing criticism.¹⁶ Precisely because Community institutions have slowly grown in power, many are troubled by the exclusion of the peoples of Europe.¹⁷ Monnet's pragmatism has started to look more like paternalism, and there is a growing sense that the EU does not fully live up to the democratic ideals of Europe. The turmoil surrounding the Maastricht Treaty is but the latest expression of this trend,¹⁸ Denmark, whose voters initially rejected the treaty, has traditionally been among the most skeptical of the legitimacy of decisions taken in Brussels.¹⁹

13. See HOLLAND, *supra* note 5, at 8-13. Monnet's long and unusual career included several posts of some importance in French and international bureaucracies, but his overarching influence on European affairs was exerted largely beyond the bounds of his formal positions. For an account of Monnet's life, see JEAN MONNET: THE PATH TO EUROPEAN UNITY (Douglas Brinkley & Clifford Hackett eds., 1991).

14. BURGESS, *supra* note 12, at 46-48, 54.

15. *Id.* at 54 (quoting Jean Monnet).

16. *Id.* at 55-60 (After the creation of the Community, "the political centre . . . remained weak and impotent, lacking the capacity to go beyond what existed and unable to adapt to new forces and problems encountered at a European level."). *Id.* at 58.

17. See, e.g., Williams, *supra* note 5, at 169 ("Strasbourg is inaccessible to Greek peasants, Portuguese fishermen, Spanish factory workers, and Scottish bank clerks . . . without citizen participation, Citizens' Europe languishes. For all the high-pressure public relations on Europe 1992, the man and woman in the European street feel uninvolved.")

18. See DAVID ARTER, THE POLITICS OF EUROPEAN INTEGRATION IN THE TWENTIETH CENTURY 212-16 (1993); WOLFGANG H. REINICKE, BUILDING A NEW EUROPE: THE CHALLENGE OF SYSTEM TRANSFORMATION AND SYSTEMIC REFORM 122-23 (1992).

19. The Danish Parliament, for example, maintains closer control over its government's positions in EC institutions than do the parliaments of other states; EC debates and referenda are also a prominent feature of national politics. See Finn Laursen, *Denmark and European Political Union*, in THE IGC ON POLITICAL UNION, *supra* note 3, at 63, 63-70; Williams, *supra* note 5, at 159-60.

The vague sense of unease about the democratic foundations of the Union has traditionally been analyzed in terms of the EC's formal structure. The most frequent targets of criticism are the two most powerful organs of the Union, the European Commission (Commission) and the Council of the European Union (Council). The Commission is the backbone of the Brussels bureaucracy; it has wide ranging executive responsibilities in the supervision and implementation of community activities and is the source of new proposals for Union action.²⁰ The Council is the primary decision-making body, and as such, exerts considerable influence over the other organs, especially in developing policy.²¹ Criticism of the Commission is rather straightforward.²² That body is not elected, but rather appointed to fixed terms by common accord of the member states.²³ Once appointed, Commissioners are essentially unaccountable.²⁴ The Commission can be removed *en banc* by the European Parliament, but disciplining individual Commissioners is not possible.²⁵ The European Parliament has never used the power to remove the Commission as a whole and, dependent on the EU for such power as it does have, is unlikely ever to create an institution-threatening crisis by firing the entire executive organ of the Union.²⁶

While the Commission is still influential, its power has been checked by the Council, the organ made up of ministers from the member state governments. The Council provides a means whereby national governments can oversee Union decision making. Such intergovernmental oversight and control of Union action has increased in direct proportion to the power allocated to the Union.²⁷ The development of intergovernmental checks on Union authority, however, does not satisfy those who criticize the Union's democratic shortfall. Decisions of the Council are made by government ministers

20. See B. Guy Peters, *Bureaucratic Politics and the Institutions of the European Community*, in *EUROPOLITICS*, *supra* note 5, at 75.

21. See *Id.* at 78-84; NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN COMMUNITY* 376 (2d ed. 1991).

22. See, e.g., Laursen, *supra* note 5, at 250 ("The Community claims to be democratic . . . [y]et, how democratic is it to be run by a non-elected Commission and a Council that meets in camera?").

23. EC TREATY art. 158.

24. See Peters, *supra* note 20, at 98-100.

25. EC TREATY art. 144.

26. JOHN PINDER, *EUROPEAN COMMUNITY: THE BUILDING OF A UNION* 36-37 (1991) (addressing the relationship between the European Parliament and the Commission).

27. Weiler, *supra* note 5, at 2423-30.

behind closed doors.²⁸ Many note that this process, which can result in Union action binding on the member states, decreases the accountability of national executives to their parliaments.²⁹

Other forces further constrain oversight by national parliaments. The detailed workings of the EU are frequently arcane and confusing, the government of the day often limits the issues on which the national parliament is consulted, and when the parliament is consulted it is usually after the most basic decisions have already been made. Even when ministers do report back to parliament, it is all too easy to blame unpopular aspects of a decision on obstinate partners; no one actor is accountable for the final product as a whole.³⁰ Furthermore, the process disrupts established national channels of lobbying and influence. Only the best organized national groups can have an effective voice in EU decision making.³¹

In keeping with the structural focus of their critiques, most observers of the Union argue that the solution to the EU's problems of democratic legitimacy is to shift the balance of power among the Union's institutions.³² If the Commission is completely unaccountable to democratic bodies and the Council that has evolved to check it is imperfectly so, the obvious remedy is to strengthen the European Parliament as a check on the Council.³³ The European Parliament is now directly elected (before 1979, national parliaments delegated members to it),³⁴ and it thus seems to be the one EU institution with impeccable democratic credentials. If it is given powers of co-decision with the Council on new legislation and if the Commission is made accountable to it, the problems highlighted by the above-mentioned criticisms could be solved. A democratic institution would be intimately involved with all phases of EU action.

28. See Laursen, *supra* note 5, at 250; Williams, *supra* note 5, at 163.

29. NUGENT, *supra* note 21, at 371; Williams, *supra* note 5, at 158-60; see Juliet Lodge, *EC Policymaking, Institutional Considerations*, in *THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE* 31-32 (Juliet Lodge ed., 1989);

30. See PINDER, *supra* note 26, at 38-39.

31. See Lodge, *supra* note 29, at 51-54; Weiler, *supra* note 5, at 2453-54.

32. BURGESS, *supra* note 12, at 93-101; Laursen, *supra* note 5, at 250; James O'Connell, *The Making of Europe: Strengths, Constraints, and Resolutions*, in *A CONSTITUTION FOR EUROPE* 23, 36-37 (Preston King & Andrea Bosco eds., 1991); see NUGENT, *supra* note 21, at 164-65, 300-12.

33. See Williams, *supra* note 5, at 167-69.

34. Juliet Lodge, *The European Parliament—From 'Assembly' to Co-Legislature: Changing the Institutional Dynamics*, in *THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE*, *supra* note 29, at 58, 60; NUGENT, *supra* note 21, at 142.

In short, in the eyes of many scholars a strong European Parliament means a democratic European Union, and the source of the EU's current problems is simply the European Parliament's weakness. Lest the point appear overstated, the democratic deficit is commonly *defined* in terms such as "the gap between the powers transferred to the Community level and the control of the elected Parliament over them."³⁵ Thus, the question of democratic accountability is easily answered by shifting power among the already-existing parts of the EU machine; all that is required is another step in the incremental process of institutional development that has carried the Union to this point. This is the "technocratic" view; it proposes expert institutional redesign as the solution to the problem of the EU's exclusion of the peoples of Europe.

B. A Critique, or, Technocracy Is Not Democracy

There are serious problems with the mainstream analysis of and prescription for the democratic deficit. There is no doubt that the changes prescribed would be worthwhile and would lead to a Union that is somewhat more democratic. However, they would not be nearly as effective as their proponents think, and the democratic deficit would continue to yawn wide even if the contemplated changes were fully enacted.

The difficulty is that there is something more afoot than a break in the chain of democratic control. Indeed, there is no gap in the formal democratic accountability of the Council of the European Union. The ministers are, after all, members of the freely elected national governments of the day acting within their legal authority, and they remain individually accountable to their governments for their actions.³⁶ Furthermore, they are acting within the confines of European institutions that have been duly approved by national democratic processes. Though the national parliaments may face some tactical obstacles in overseeing EU actions, they certainly retain the power to force a more accountable pattern of decision making

35. Williams, *supra* note 5, at 162; see also ERNEST WISTRICH, AFTER 1992: THE UNITED STATES OF EUROPE 102 (1991); Peters, *supra* note 20, at 90; cf. Weiler, *supra* note 5, at 2466 (noting the prevalence of such definitions).

36. See Williams, *supra* note 5, at 158-60 (discussing the relationship between ministers and national parliaments).

through their control over national affairs;³⁷ in fact, the Danish *Folketing* has been quite successful in doing exactly that.³⁸

This is not to say that the link between the people and EU decisions has not become attenuated in Union institutions; it has.³⁹ It is possible to criticize European decision making on those grounds even while recognizing that formal accountability still exists.⁴⁰ It bears noting, though, that the attenuation of parliamentary control involved in the EU's operations is not very different from the realities of modern national political life. Similar criticisms—that citizens' access to government has been reduced and many governmental actors are no longer clearly accountable to the electorate for their actions—can and have been made about the modern administrative state in general.⁴¹ However, there is not the same widespread sense of democratic crisis surrounding the bureaucracies of Paris as one finds in Brussels. The differences in the structure of democratic control alone are not great enough to account for the profound difference in perceived democratic legitimacy.

If the European Union's democratic deficit is not solely the product of institutional features, reform strategies that only change the institutions are unlikely to be effective. A deeper transformation of the European polity is needed, but first we must obtain a clearer view of the problems to be addressed.

III. THE QUESTION OF LEGITIMACY EXPLORED

Joseph Weiler's distinction between formal and social legitimacy provides a useful beginning in unearthing the roots of Europe's democratic deficit. Weiler defines formal legitimacy as "legality understood in the sense that democratic institutions and processes created the law

37. Techniques of control can include questioning ministers, withholding approval of government measures, or altering national legal requirements. France and Germany have recently amended their constitutions to increase parliamentary control over EC policy, but it is too soon to tell how well the modifications will work in practice. FR. CONST. ART. 88-4; GER. CONST. ART. 23.

38. NUGENT, *supra* note 21, at 375; Laursen, *supra* note 19, at 66-67.

39. See *supra* notes 28-31 and accompanying text.

40. Alberta M. Sbragia, *Thinking About the European Future: The Uses of Comparison*, in *EUROPOLITICS*, *supra* note 5, at 257, 277-78.

41. See, e.g., Irving L. Horowitz, *The Norm of Illegitimacy—Ten Years Later*, in *LEGITIMATION OF REGIMES* 23, 25 (Bogdan Denitch ed., 1979) ("In Western capitalism and democracy, those societies most characterized by parliamentary representation, the problem has been that within a mass society there has been a stretching out effect of representational government.").

on which [an institution] is based."⁴² One might add a requirement that the new entity remain, at least technically, subject to the ultimate control of democratic institutions. Social legitimacy, by contrast, "connotes a broad, empirically determined societal acceptance of the system."⁴³

Weiler's distinction echoes throughout the literature on political legitimacy. For these purposes, the literature may be grouped into two broad categories: political philosophy and political science. Political philosophy often concerns itself with questions of formal legitimacy, trying to describe the ideal political system against which the existing structures should be judged. Political science, on the other hand, focuses almost exclusively on social legitimacy by asking whether in fact the citizens of a society accept the social order as basically just.

The currently dominant emphasis on the EU's formal structure is consonant with the concerns of political philosophy. The search for formal normative principles as the source and sign of state legitimacy can be traced back to Rousseau,⁴⁴ and it remains a strong current in democratic theory today.⁴⁵ The hallmark of this approach is a concern with constructing normative justifications for the state's exercise of power. Thus, attempts to legitimate the EU by altering its structure to more closely conform with norms of democratic accountability draw their inspiration from this vision of legitimacy.

Political science, on the other hand, provides a new perspective. Seymour Lipset's definition of legitimacy is a classic example of political science's emphasis on social legitimacy: "Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society."⁴⁶ While Lipset's definition does not even hint at anything but popular acceptance as a mark of legitimacy, the literature did not at first clearly distinguish between political and social legitimacy; one

42. Weiler, *supra* note 5, at 2469.

43. *Id.* For a similar classification system, see DAVID BEETHAM, *THE LEGITIMATION OF POWER* 4-16 (1991).

44. J.G. MERQUIOR, *ROUSSEAU AND WEBER: TWO STUDIES IN THE THEORY OF LEGITIMACY* 9, 57 (1980).

45. See LESLIE GREEN, *THE AUTHORITY OF THE STATE* 63-91 (1988) (noting political theory's concern with normative justification); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 *POL. THEORY* 338, 352-59 (Lily Stein & Jayne Mansbridge trans., 1987) (grounding legitimacy in open social deliberation, as opposed to Rousseau's constructive grant of unanimous consent).

46. SEYMOUR M. LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 64 (1981).

was thought to produce the other in the modern state. Following Weber, political scientists tended to find the legitimating basis of the modern state in rational justifications of the political order.⁴⁷ Later theorists, however, emphasized and distinguished the purely subjective elements of legitimacy, reducing rationality to one element of the equation. John Schaar's emphasis on the continuing importance of myth, ritual, and citizen participation in the discursive construction of social identity is typical of this trend.⁴⁸

The content and rationality of the social order remain constituent elements of legitimacy for political scientists. Most important is Jürgen Habermas's argument that a "legitimation crisis" in modern capitalist states can arise if a state's need to legitimate social and economic intervention outstrips the capacity of the dominant individualist ideology to support it.⁴⁹ However, even though Habermas believes that claims of legitimacy may theoretically be constructed so as to allow rational testing—a "truth" independent of psychology—in the end he is still interested in explaining the subjective reactions of citizens to the state.⁵⁰

While these theorists were concerned with the legitimacy of nation-states, their focus on subjective factors transfers well to multinational entities. One need look no further than the European Court of Justice (ECJ) to see that acceptance is more important than formal lines of authority. The ECJ's nominal powers are limited. Member states or the Commission can bring suit for a violation of treaty obligations, and there are other narrow categories of jurisdiction over direct actions, but the Court has no effective means of enforcement.⁵¹ However, the ECJ has been able to persuade national courts

47. See, e.g., Max Weber, *Legitimacy, Politics and the State*, in LEGITIMACY AND THE STATE, 32-34 (William Connally ed., 1984) It should be noted that Weber saw legitimacy strictly as a social phenomenon not always produced by rational justification resembling formal legitimacy; it was only in the modern state that he saw rationality as the dominant legitimating tool. *Id.* at 32-33. See also JOHN H. SCHAAR, LEGITIMACY IN THE MODERN STATE 19-22 (1981) (noting a gradual shift from the strictly formal concerns of political philosophy to the empirical approach of modern political science).

48. SCHAAR, *supra* note 47, at 15, 37-42. See also BÉETHAM, *supra* note 43, at 4-18 (distinguishing between formal and subjective elements of legitimacy).

49. Jürgen Habermas, *What Does a Crisis Mean Today? Legitimation Problems in Late Capitalism*, 40 SOC. RES. 643 (1973).

50. See JÜRGEN HABERMAS, LEGITIMATION CRISIS 95-110 (1975) (arguing that perceived legitimacy can be explained and tested by reference to accepted conceptions of moral legitimacy).

51. EC TREATY art. 169, 170, 164-88; Martin Shapiro, *The European Court of Justice*, in EUROPOLITICS, *supra* note 5, at 123, 124-26. See generally NUGENT, *supra* note 21, at 178-87

to refer cases to it and give force to its judgements.⁵² The ECJ is effective because it is respected by (and respectful of) the national courts, not because of its nominal power.⁵³

Similarly, the Single European Act had an influence out of proportion to its formal effects. The impact of the 1992 initiative was much more a result of its influence on expectations and attitudes than of the institutional and ideological changes it wrought.⁵⁴ Additional support for the importance of perception in international interactions can be found in an important branch of international relations theory emphasizing the significance of cognitive factors in building a stable community among a group of states.⁵⁵

The political science literature suggests a serious flaw in the current debate on democratic reform in the EU. Reform proposals focusing exclusively on the balance of authority between existing EU institutions only address the formal legitimacy of EU institutions, as expressed by chains of democratic accountability.⁵⁶ It seems clear, though, that EU reformers are more concerned with real political results than abstract forms of governance. If so, social legitimacy is not just another issue to be considered. It is the most important issue. In looking only at technical democratic accountability, those trying to fill the democratic deficit have confused means and ends; formal structure helps to engender social legitimacy, but it is not the same thing. For instance, the key to understanding the different reaction to a lack of formal accountability in the French bureaucracy, as compared with the European Union, is social legitimacy: a widespread sense that the political institution is an appropriate and

(describing the powers of the ECJ).

52. G. Federico Mancini, *The Making of a Constitution for Europe*, in *THE NEW EC*, *supra* note 2, at 177, 184-85.

53. *Id.* See also Weiler, *supra* note 5, at 2420-22.

54. See Hans Kastendiek, *Convergence or a Persistent Diversity of National Politics?*, in *THE POLITICS OF 1992: BEYOND THE SINGLE EUROPEAN MARKET* 68, 83 (Colin Crouch & David Marquand eds., 1990).

55. See, e.g., BARRY BUZAN, *PEOPLE, STATES, AND FEAR: THE NATIONAL SECURITY PROBLEM IN INTERNATIONAL RELATIONS* (1983) (arguing that concepts of community and security deserve greater emphasis in the study of international relations); KARL W. DEUTSCH ET AL., *POLITICAL COMMUNITY AND THE NORTH ATLANTIC AREA* (1957) (describing the phenomenon of "security-communities" wherein the societies have attained a notion of "community" such that the prevailing mood reveals a strong expectation of the peaceful resolution of problems). *But see* JOSEPH M. GRIECO, *COOPERATION AMONG NATIONS: EUROPE, AMERICA, AND NON-TARIFF BARRIERS TO TRADE* (1990) (arguing in the "neorealist" tradition that international cooperation is governed above all by mutual rivalries and the distribution of power).

56. See *supra* notes 20-34 and accompanying text.

integral part of the accepted social order. The ideal forms of direct democratic control do not exist in practice in the modern state. A sense of social legitimacy makes up for any gaps in the formal chains of accountability when the system falls short of the unattainable democratic ideal.⁵⁷

When proposals to narrow the democratic deficit are evaluated against the need for a public sense that EU institutions and actions deserve respect and acceptance, the weaknesses of a reform strategy focusing on the European Parliament become apparent. The European Parliament as an institution, while formally more democratic than the other Union organs, does not have enough prestige and respect among ordinary European citizens to single-handedly bridge the Union's democratic deficit. More importantly, available evidence indicates that vesting greater power in the European Parliament is unlikely to increase its stature enough to allow it to play the role of the great legitimator.

The European Parliament's public image at the moment (to the extent it has one) is wholly unenviable. A blunt but accurate assessment of the general perception of the European Parliament is that it is a "yuppy" tourist club or "grave train" which is "relatively unknown and widely misunderstood" by the public at large.⁵⁸ This image has been reinforced by the national parties' tendency to use European Parliament seats as sinecures or convenient places for inconvenient people.⁵⁹ Interest in the European Parliament and awareness of its work remain quite low, despite the attempt to engage public interest and participation with the move to direct elections in 1979.⁶⁰ Furthermore, European elections have done little to boost the sense of a European polity. Elections have turned almost exclusively on national political issues.⁶¹ More surprisingly, even many of

57. See Joseph Rothschild, *Political Legitimacy in Contemporary Europe*, in LEGITIMATION OF REGIMES, *supra* note 41, at 37, 39-40. See also BEETHAM, *supra* note 43, at 33 (noting that legitimacy is needed to enable governments to withstand shocks and failures).

58. Lodge, *supra* note 34, at 58-59, 61.

59. Williams, *supra* note 5, at 169.

60. MILES HEWSTONE, UNDERSTANDING ATTITUDES TO THE EUROPEAN COMMUNITY: A SOCIAL-PSYCHOLOGICAL STUDY IN FOUR MEMBER STATES 36 (1986) (collecting and analyzing public opinion data and concluding that Europeans are generally neither informed about nor interested in the European Parliament).

61. HOLLAND, *supra* note 5, at 146-47; DEREK W. URWIN, WESTERN EUROPE SINCE 1945: A POLITICAL HISTORY 368 (4th ed. 1989). This fact remains true even when the European Parliament undertakes relatively high-profile initiatives for major reforms in the Community, such as the Draft Treaty on European Union. *Id.* at 379-80.

the referenda held on specific European issues have not significantly increased public interest, but have been resolved on the basis of the national politics of the day.⁶²

One could argue, of course, that the low level of interest in European Parliament elections is perfectly rational given the Parliament's relative insignificance in the Union's present governing process.⁶³ Perhaps a more powerful European Parliament would attract more interest and better-known candidates. Recent history, though, gives reason to doubt this optimistic assessment. First, even the referenda which directly determined national policy towards the EU have not focused much attention on European issues.⁶⁴ Second, the recent gains in the European Parliament's power have not been accompanied by a rise in public interest in that institution. The Single European Act significantly increased the European Parliament's consultative role in the formation of legislation, gave it the power to assent to or reject all new trade or cooperation agreements, and added the requirement of European Parliamentary consent to the accession of any new country to the Union.⁶⁵ These powers were modest, but came packaged with the high-profile 1992 project and the accompanying sharp rise in interest and expectations regarding the EU as a whole. The electoral result? Turnout at the 1989 European Parliament elections *declined* significantly to an average of 58.4 percent, quite low by European standards.⁶⁶

Such evidence as exists is not conclusive. It is possible that if the EU shifted more power to the European Parliament, the Parliament would become a more significant part of European life. Perhaps an increase in the formal democratic legitimacy of the Union would even make participation in European elections so much more significant for the peoples of Europe that the entire enterprise would acquire the widespread social legitimacy it seeks. But formal legitimacy is *not* the same as social legitimacy; it is an instrument through which the ultimate goal of social legitimacy may be attained. Furthermore, while the available evidence does not absolutely rule out the

62. NUGENT, *supra* note 21, at 374 (“[I]t is hard to sustain a case that [referenda] have added very much to the democratic base of the Community: partly because of their infrequency, and partly because at least three of them were not genuine attempts to consult the citizenry but were the consequences of internal politicking.”).

63. *See supra* notes 25-26 and accompanying text.

64. *See supra* text accompanying note 62.

65. Single European Act, *supra* note 2, arts. 7-9; Williams, *supra* note 5, at 164.

66. *See* HOLLAND, *supra* note 5, at 54; HEWSTONE, *supra* note 60, at 213.

possibility of legitimating the EU through changes in the European Parliament alone, neither does it provide any support for the confident assertions of the proponents of such change.

IV. A NEW DIRECTION

It is nonetheless valid to ask why the adoption of the familiar trappings of parliamentary democracy should not provide the social legitimacy that would bridge the democratic deficit. It is obviously not the nature of parliamentary systems in general that would leave the reformed EU less legitimate than its constituent states. Implicit so far in the discussion is the answer: the form of government at the European level is not the cause of current problems. Rather, the question of whether the European Union itself is an appropriate polity by which the citizens of its member states can be governed is the central issue. The challenge is not to reform the mechanisms by which the people are governed, but to reconsider the boundaries of political space.

Weiler recognizes that democratic theory alone cannot prescribe the territorial limits of a legitimate government, the area within which legitimate coercion by a majoritarian government can take place.⁶⁷ Coercion is inevitable; no society is perfectly homogeneous, and every power struggle has winners and losers. Social legitimacy, not formal legitimacy, holds society together despite the imposition of one group's will on another. Robert Dahl, on whom Weiler draws heavily, provides an apt example:

The criteria of the democratic process presupposes the rightfulness of the unit itself. If the unit itself is not a proper or rightful unit, then it cannot be made rightful simply by democratic procedures. If the United States were to compel Costa Rica to become the fifty-first state, would not Costa Ricans rightly feel—and we too—that a grave injustice had been done?⁶⁸

Of course, in the European Union the change in political boundaries is brought about by the consent of elected representatives rather than by forcible conquest. The point, however, is that the question of the legitimacy of the polity is prior to the question of the procedures by

67. Weiler, *supra* note 5, at 2471.

68. Robert A. Dahl, *Federalism and the Democratic Process*, in LIBERAL DEMOCRACY 95, 103-04 (NOMOS XXV, J. Roland Pennock & John W. Chapman eds., 1983); see also LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 55-55 (1989) (posing the hypothetical case of one country annexing another and attempting to legitimate the act through an appeal to formal democracy).

which it constitutes itself and through which it acts. Normal representative principles fall short when a profound shift in the foundation of the polity is considered.

Weiler also argues that a new federal democratic polity is initially less legitimate than its constituent parts.⁶⁹ As the polity becomes larger, the ability of any particular group to influence policy is diluted. It may at first seem odd to say that a political unit that is larger is *ipso facto* less democratic than a smaller one; one does not think of the German government as less democratic than that of Portugal merely because Germany is seven or eight times larger and each individual's influence is less in Germany. The ultimate legitimating solution is the boundary shift outlined above—the constituent groups of a new federal polity, formerly the highest arenas of political power, must adjust to the idea that they can now be overridden by the other groups.⁷⁰ This adjustment is difficult and gradual. Political attachments based on emotion rather than reason cannot be changed overnight; much time and effort will be expended before the new polity is accepted as the valid area within which majority rule applies. The key to legitimacy is not formal democracy but a popular acceptance of the system.

Given that the challenge is to bolster the social legitimacy of the EU by bringing about a subjective redefinition of the polity, how can that challenge be met? Weiler's analysis stops here; he asserts only that it is an "open question" whether the proper conditions for popular acceptance of a redefined political boundary exist.⁷¹ Perhaps an answer is implicit in his emphasis on the importance of the passage of a transition period and his optimistic view of the 1992 initiative's effects in mobilizing pro-Union opinion.⁷²

It is doubtful that the success of projects like 1992 will eventually build popular acceptance of the Union order based solely on the EU's ability to advance people's material interests. It may be true that an ineffective government will be unable to maintain social legitimacy, but it does not follow that an efficient government will automatically achieve legitimacy. As Joseph Rothschild argues, efficiency can never fully substitute for legitimacy.⁷³ No government is perfectly efficient in achieving material goals, and whether the inevitable everyday

69. Weiler, *supra* note 5, at 2471.

70. *Id.* at 2470.

71. *Id.* at 2473-74.

72. *Id.* at 2471-72, 2480-83.

73. See Rothschild, *supra* note 57.

frictions and imperfections of government are tolerated depends on the independent social legitimacy of the government.⁷⁴ As with an emphasis on formal structure, an exclusive focus on economic results obscures the central issue of subjective political identity.

V. TRANSFORMING THE POLITY

Constitutionalism provides the best route for a self-conscious redefinition of the European polity. Although the substance of a new constitution for Europe does matter, the *process* of deliberate public mobilization and political transformation inherent in constitution making is more important than the content of the final document. Constitutionalism is not used here to denote centralism, as Euroskeptics often fear.⁷⁵ Indeed, as will be seen below, constitutionalism can serve to guard against overcentralization.

A. The Virtues of Constitutionalism

The development of the European Union has been gradual by design. The neofunctionalists, long the dominant group among integration theorists, argued that attempts to integrate Europe would lead to "spillover" amongst related areas of concern and would inspire self-interested pressure groups to demand greater integration in the name of efficiency.⁷⁶ Even after neofunctionalist theory was largely abandoned,⁷⁷ European institutions drawing on similar inspirations have lived on.⁷⁸

74. *Id.* at 48-49.

75. *Cf.* Moravcsik, *supra* note 2, at 41, 53 (discussing British conservatives' distrust of both written constitutions and centralizing tendencies within the EC).

76. *See generally* ERNST B. HAAS, *THE UNITING OF EUROPE* (1957) (outlining an early version of neofunctionalism); LEON N. LINDBERG & STUART A. SCHEINGOLD, *REGIONAL INTEGRATION: THEORY AND RESEARCH* (1971). Neofunctionalism is a branch of integration theory focusing on the role of international institutions in promoting cooperative economic and social problem-solving. The hope is that as international institutions prove their utility in solving practical material problems, participants will be encouraged to address other, related problems through joint action and will develop ties to the institution and each other that will cut across national boundaries and cement peaceful political relationships. *Id.* at 6-8.

77. Ernst B. Haas, *Turbulent Fields and the Theory of Regional Integration*, 30 *INT'L ORG.* 173 (1976), is generally read as neofunctionalism's eulogy. Haas methodically and comprehensively showed that the core assumptions of these theories were "becoming less and less relevant to the behavior patterns actually displayed by governments active in regional organizations." *Id.*

78. *See generally* BURGESS, *supra* note 12, at 32-33 (describing the incrementalist design of the EC).

The underlying premise of the neofunctionalist approach, that economic efficiency will necessarily create social legitimacy, is mistaken.⁷⁹ Furthermore, the gradualist approach poses special dangers in today's world. A gradual buildup of ties between the peoples and nations of Europe was certainly needed to lay the groundwork for a radical transformation of the polity. Perhaps the transformation could occur by itself over time. The problem is that such a transformation is needed now. For reasons discussed below, the EU is at a unique crossroads of opportunity and danger.⁸⁰ The existing concerns over the democratic deficit clearly indicate that the realities of new European institutions have outstripped the capacity of existing national-citizen paradigms to legitimate them. The crisis of legitimacy is not something that will develop into an obstacle to European development in the future; it is here now.

Bruce Ackerman's work with the United States Constitution describes the way in which constitutionalism is capable of sparking the decisive paradigm shift and bringing about a transformation of the polity. Ackerman analogizes constitution making with revolution.⁸¹ Revolution is a political activity capable of breaking history in two: the period before the revolution is different in kind from what comes afterwards.⁸² While revolutions are usually mounted by enemies of the regime, Ackerman's idea can encompass a consensual revolution as well. In a consensual revolution, the attachment to the new regime born of long struggle and sacrifice present in violent revolutions would be lost. However, the crucial element of revolution is that the mobilized population thinks that there *is* an active revolution, that their purpose is to reconstruct the political order with exceptional seriousness and attention.⁸³ Revolutionary legitimacy, though often associated with a violent rebellion against the status quo, at core rests on a claim that one is acting in the name of the people, in the people's interest, and outside the normal channels of government.⁸⁴ Once the revolution declares itself a success, a constitution can serve to solidify and enshrine the changes it has produced. Ackerman's

79. See *supra* text accompanying notes 73-74.

80. See discussion *infra* part IV C.

81. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 204-212 [hereinafter *FOUNDATIONS*]. Ackerman builds upon Hannah Arendt's description of revolution as both a break with, and a reinterpretation of, the past. See HANNAH ARENDT, *ON REVOLUTION* (1963).

82. *FOUNDATIONS*, *supra* note 81, at 204-06.

83. *Id.* at 203-04; BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 5-6 (1992) [hereinafter *LIBERAL REVOLUTION*].

84. *FOUNDATIONS*, *supra* note 81, at 170-72.

model, naturally, is the United States Constitution, which was the revolutionaries' attempt "to give self-conscious structure to the great public stage they had built for themselves."⁸⁵

Ackerman's concept of "higher lawmaking"⁸⁶ is also relevant. It consists of four phases: signaling entry into the constitutional process, proposing changes, mobilizing popular deliberation, and codifying the law.⁸⁷ Higher lawmaking takes place within an existing system, and lacks the *Sturm und Drang* of full-scale revolution to capture popular attention. However, the procedure of constitutional debate itself sets off enough signals of political importance to increase the salience of the issues for the people as a whole and to engage them in the debate.⁸⁸

Any transformation of the EU would not fit neatly into either the revolutionary or higher lawmaking pattern. The changes that would legitimate a pan-European polity are neither within the boundaries of the current system nor wholly destructive of it.⁸⁹ Whatever the hybrid constructed, however, the key point is the same. The way to transform political identity is to take center stage in the public arena and loudly announce that the question of political self-definition is open for debate. Constitution making is an easily recognized statement of such a purpose in Western states. The process of creating a constitution with mass participation clarifies and focuses debate on the issues, leaves evidence of what was agreed upon, and is in the end legitimated by the process that went into making it.

B. Treaties Cannot Substitute for a Constitution

The treaties establishing and modifying the EU,⁹⁰ together with the associated ECJ jurisprudence, are not a substitute for a constitution. While the existing body of law serves some of the same defining

85. *Id.* at 206.

86. *Id.* at 266.

87. *Id.* at 266-67.

88. *Id.* at 285-87.

89. While any new European system would, necessarily, be rooted in the EC experience, the creation of a constitution for one European polity is outside the treaty paradigm of an agreement between separate polities. See discussion *infra* part IV D (considering proposals for changing the EU).

90. The most significant treaties are the TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY], the TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY [EURATOM TREATY], the EC TREATY, the Single European Act, and the EU TREATY.

and governing purposes as a constitution would, it is not now and will not become capable of serving the necessary legitimating functions.

There are several substantive weaknesses in the existing treaties.⁹¹ First, as treaties, they are addressed exclusively to states, not to citizens. There is no detailed concern in the treaties with individual rights or civil liberties.⁹² The ECJ's vague promise that it will restrain arbitrary government⁹³ is a poor substitute for real concern about the individual's relation to European authority.⁹⁴

Second, the treaties do not adequately serve a constitution's function of constraining political power. Because of their setting in international law, the treaties' language is all enabling, not restrictive. The international law paradigm begins with a presumption of the autonomy of the sovereign state, and unless one can point to a source of authority limiting state action it is not constrained.⁹⁵ The focus on enablement allows a virtually unlimited use of the treaties' language to expand EU competence, with little or no language that can be cited as a countervailing limiting principle. The first step towards addressing this imbalance explicitly is the insertion of the "subsidiarity" principle in the Maastricht treaty.⁹⁶ However, this principle, which in theory limits the Union to performing those functions that cannot adequately be performed by member states, has been criticized as "weak, subjective, and open-ended."⁹⁷ The growing reality of action without unanimous consent of the member states, either by majority vote of the Council of Ministers or the independent action of the ECJ or Commission, makes the lack of any clear limits on the expansion of EU power troubling and strengthens the hands of those seeking to

91. For similar critiques of the treaty-based paradigm, see Mancini, *supra* note 52, at 178; Frank Vibert, *Europe's Constitutional Deficit*, in JAMES M. BUCHANAN ET AL., *EUROPE'S CONSTITUTIONAL FUTURE* 69, 87 (1990).

92. Indeed, there was none at all until the Maastricht treaty. EU TREATY art. F ("The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . .").

93. *See, e.g.*, Case 4/73, *J. Nold KG v. Commission*, 1974 E.C.R. 491, 14 C.M.L.R. 338 (1974) (looking to international treaties and member state constitutions as sources of individual rights in EC law); Case 11/70, *Internationale Handelgesellschaft v. Einfuhr-und-Vorratsstelle Getreide und Futtermittel*, 1970 E.C.R. 1125, 11 C.M.L.R. 255 (1972) (recognizing that protection of fundamental individual rights is implicit in EC law).

94. *See* Joseph H.H. Weiler, *Eurocracy and Distrust*, 61 WASH. L. REV. 1103, 1105 (1986).

95. *See* S.S. Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10; *see also* Eric Stein, *External Relations of the European Community*, in 1 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 115, 132 (1991) (noting this feature in EC law).

96. EU TREATY, art. G(5).

97. *See* Vibert, *supra* note 91, at 80; HOLLAND, *supra* note 5, at 184.

erode support for the EU by warning of a virtual dictatorship of the Brussels bureaucrats.⁹⁸ Whatever one thinks the final structure and limit of EU power should be, the failure to clearly delineate those powers erodes the EU's legitimacy.

The current substantive defects in the treaties are perhaps remediable by amendment, but there are other inescapable features of treaties in general that substantially undercut the quest for social legitimacy. Treaties necessarily fuel the elitist tendencies of the Union.⁹⁹ They are negotiated by national executives in highly technical, closed-door bargaining.¹⁰⁰ Word of the course of negotiations gets out, but news leaks are hardly interchangeable with mass political participation.¹⁰¹ Nor do treaties have the same inspirational potential as constitutions. Treaties do not carry a sense of unique importance, an earnest declaration of the purposes and aspirations of a people. Neither do they go out of their way to provoke a thoughtful debate or consensus on the key features of the new polity. To return to the subject of legitimacy, the key to socially legitimate authority is to help the individual answer these questions: "Who am I as an individual? Who am I as a member of this society? Who am I as a mortal member of humanity?"¹⁰² The dense, dry language dominating the EU treaties is of no more help in answering these questions than is the telephone book.

Although constitutions have major advantages over treaties as vehicles for real change, as a practical matter constitutionalism must overcome Euroskeptical biases. Constitutionalism has a bad name among those who seek to limit the further growth of the Union, probably because the word calls forth associations with a desire for a strong, centralized EU authority at the expense of state sovereignty.¹⁰³ Although the need for social legitimacy will be even greater if the EU grows significantly in power—and such growth is more likely than not—constitutionalism is primarily a means of legitimating and defining the European order, regardless of what its content may

98. See *supra* notes 20-31 and accompanying text; see also Weiler, *supra* note 5, at 2450-53.

99. Sbragia, *supra* note 40, at 273-74.

100. See PINDER, *supra* note 26, at 201.

101. See Williams, *supra* note 5, at 173, 175 (stressing the lack of public participation and leadership accountability within the EU today).

102. SCHAAR, *supra* note 47, at 40.

103. PINDER, *supra* note 26, at 3. For other works that view constitutionalism similarly see O'Connell, *supra* note 32; Charles Grant, *An Expanding Universe: Time for a New Constitution*, *ECONOMIST*, July 7, 1990, at 29; A CONSTITUTION FOR EUROPE, *supra* note 32 (collecting essays by pro-expansion authors favoring constitutionalism).

be. A stronger social base would benefit the Union as it exists today, and in any case would serve to cement whatever European accord emerges. For that reason, some who strongly oppose centralization support constitutionalism, on the theory that only a well-defined, consensually legitimate crystallization of the political order can halt the expansion driven by European institutions.¹⁰⁴

The fate of Canada's constitutional referendum provides an instructive cautionary tale. Though not technically a treaty, the constitutional proposal shared the relevant features of the treaties discussed above. It was negotiated by the provincial and national executives in physical and symbolic seclusion from the rest of the society, then presented to the people as a conclusive agreement.¹⁰⁵ The tone and style of the proposal were, to say the least, not calculated to set hearts racing in Saskatoon. When the referendum came the proposal was soundly rejected.¹⁰⁶ Two common explanations for the failure of the referendum were that the people simply did not feel they understood the proposal sufficiently, and that they did not see why it was important to make changes at that time.¹⁰⁷ The elected leaders of the provinces had agreed after a long and difficult debate on the best way to reform the Canadian political order; they failed because they left the people out of the process.

C. Opportunity and Crisis

Several forces have converged to ensure that Europe can and must seize the moment for constitutional reform. Essentially, they break down into two categories: internal dynamics and external change. Internally, the Habermas-like tension between the functional-interventionist need for the legitimacy of an expanding EU and the

104. See, e.g., James M. Buchanan, *Europe's Constitutional Opportunity*, in EUROPE'S CONSTITUTIONAL FUTURE, *supra* note 91, at 1; Vibert, *supra* note 91 (arguing for constitutional limitations on EC power).

105. See Alan C. Cairns, *Citizens and Their Charter: Democratizing the Process of Constitutional Reform*, in THE MEECH LAKE PRIMER 109 (Michael D. Behiels ed., 1989); Richard Simeon, *Political Pragmatism Takes Precedence over Democratic Process*, in *id.* at 125; Jennifer Smith, *Representation and Constitutional Reform in Canada*, in AFTER MEECH LAKE: LESSONS FOR THE FUTURE 69 (David E. Smith et al. eds., 1991).

106. Carol Goar, *Canadians Do Find Unity — In Rejecting Leaders' Vision*, TORONTO STAR, Oct. 27, 1992, at A1.

107. See, e.g., George Bain, *Education is a Two-Way Street*, MACLEAN'S, Nov. 2, 1992, at 52 (highlighting the Canadian public's feeling that the government failed to educate them on the referendum); Mark Clayton, *Behind 'English' Canada's Rejection of Unity Pact*, CHRISTIAN SCI. MONITOR, Nov. 4, 1992, at 3 (describing the post-vote sentiment that the need for change had not been adequately explained).

limits of the underlying ideology has been building for years. Talk of the democratic deficit is not a recent phenomenon.¹⁰⁸ However, it gained some urgency with the relaunch of the EU in the Single European Act, an action inspired by: juridical evolution; political and economic reaction to the "Eurosclerosis" of sluggish economic growth, inflation, and political drift in the 1970s; and adroit institutional maneuvering within the EU.¹⁰⁹ The symbolic success of the 1992 initiative brought questions of EU identity forward on the agenda and raised their importance to the public at large.

The development of public opinion in the EU has also reached a stage where mobilization and redefinition are possible. There is widespread public support for the Union and for pan-European ideals.¹¹⁰ The support is unfocused and thin, more a vague emotional sense than a carefully developed position.¹¹¹ However, it does suggest that the citizens of EU member states may well be prepared for precisely the sort of persuasion and intellectual solidification that constitutional debate would bring to their generally positive feelings towards Europe.

Recent changes in Europe are also highly conducive to transformation of the EU order. The revolutions of 1989 and the end of the cold war have destroyed the old external order and forced the EU to redefine its position, whether it wants to or not. The vacuum of power and political organization left by the end of the superpower confrontation will inevitably be filled. There is thus a unique opportunity to seize the moment of transition and consciously guide it in the desired direction.¹¹² The internal and external developments are mutually reinforcing: the EU is a natural candidate to step into the breach because of its recent activism. Most importantly, the

108. See, e.g., P.D. DASTOGLU, BASIC PROBLEMS OF THE EUROPEAN COMMUNITY 81-83 (1975); DAVID MARQUAND, PARLIAMENT FOR EUROPE 64-66, 87-90 (1979); Karl Bracher, *Democracy, in EUROPEAN COMMUNITY: VISION AND REALITY* 99 (James Barber & Bruce Reed eds., 1973). See generally URWIN, *supra* note 12, at 166-70 (outlining early pressures for democratization).

109. See generally David R. Cameron, *The 1992 Initiative: Causes and Consequences, in EUROPOLITICS, supra* note 5, at 23 (tracing the convergence of forces leading to the 1992 initiative). See also Keohane and Hoffmann, *supra* note 11, at 23-25 (finding the roots of the initiative in national adjustments of political and economic policy).

110. See Jim Campbell et al., *Implementing the Internal Market, in THE POLITICS OF 1992, supra* note 54, at 138.

111. See HEWSTONE, *supra* note 60, at 206; HOLLAND, *supra* note 5, at 150-52.

112. LIBERAL REVOLUTION, *supra* note 83, at 36-38.

task of institutional reform has been made much more urgent by the sudden disappearance of the prior order.¹¹³

These current opportunities are paired with clear risks. The internal opportunity for reform is imperiled by the uneasiness with the new EU, as epitomized by the crises arising out of the Maastricht reforms.¹¹⁴ Development seems in danger of stalling, and prior agreements could fall apart. The external opportunity is paired with even more obvious risks: a failure to consolidate the EU as the anchor of a new European order threatens a slide into a new pan-European disorder with unforeseeable consequences. The benefits of acting now, and the costs of failing to do so, counsel immediate action. It is clear the Europe will change. The only question is whether the change will be conscious or merely a random drift.

D. Some Substantive Suggestions

The aforementioned prescriptions could be criticized as all process and no content, and in a sense such criticism would be accurate. The legitimating experience of debating and defining the European political order is more important than the precise contours of whatever substantive decisions are made by Europeans. The EU project needs to be placed upon much firmer political and social footing to avoid the risk of falling apart. While the argument of this Article is that Europeans must come together and choose their own path, certain political ideas and institutions seem especially well-suited to their needs.

First and most important among these is federalism. "Aha," cries the Euroskeptic, "we suspected all along that your secret agenda was a United States of Europe ruled by a paper fist from Brussels!" Not at all. As was the case with constitutionalism, federalism is an idea unjustly set up as a threat by those who oppose further centralization.¹¹⁵ Federalist ideas provide important principles to ensure a legitimate and stable European polity, regardless of the range of the EU's authority. The conflation of federalism with centralism in non-academic (and sometimes academic) European rhetoric obscures its true function.¹¹⁶ In fact, federalism already exists to some degree

113. Laursen, *supra* note 3, at 240-41 (discussing the EC's actions in relation to the recent external and internal political changes in Europe).

114. See *supra* notes 18-19 and accompanying text.

115. BURGESS, *supra* note 12, at 15.

116. In Britain, for example, federalism is treated as virtually synonymous with centralism. See, e.g., *Not Quite Pulling Together*, *ECONOMIST*, Nov. 23, 1991, at 63 (quoting former Prime

in the EU if, like many authors, one accepts as its core notion a more or less permanent division of competences between levels of government.¹¹⁷ For example, the competence to conclude international agreements is clearly divided between the EU and the member states in a federalist manner; some functions are left to the states, while others are reserved to the Union alone.¹¹⁸ The important thing to keep in mind is that federalism operates to exclude issues from the competence of the larger unit as well as to include them. Far from being a road to a unitary state, federalism is an alternative to it that seeks to establish a stable division of power that should “no longer be viewed as a new unitary state in the making but rather as something distinctive in its own right.”¹¹⁹

Aside from stabilizing and defining the European order, federalism has normative contributions to make to the EU. Choosing federal rather than unitary arrangements respects and incorporates cleavages between the constituent units.¹²⁰ One of the key integrative maneuvers in the prelude to the 1992 initiative was the decision to address interstate regulatory differences through a validation of national standards rather than through harmonization and the elimination of national differences.¹²¹ The change is emblematic of a federalist philosophy that attempts to accommodate difference, not obliterate it. As Weiler argues, such a federalism of cross-national and cross-cultural tolerance is one of the most important contributions the EU can make to the development of international relations.¹²²

The drive towards decentralization in many European states, including Belgium, Spain, and even France, appears at first glance to

Minister Thatcher attacking Maastricht as a “conveyor-belt to federalism”).

117. Dahl, *supra* note 68, at 95-96; HOLLAND, *supra* note 5, at 56.

118. Generally, the EC has competence to make treaties on the subjects entrusted to it (e.g. tariffs), while member states retain treaty-making authority in other areas (e.g. foreign policy). EC TREATY arts. 113, 229-31, 238; Case 27/70, ERTA, 1971 E.C.R. 263, 10 C.M.L.R. 335 (1971) (extending treaty-making power to any internal competence). This division of authority has led to the “mixed agreement” treaties, which both the EC and its member states sign in order to address issues falling within the authority of each. P.J.G. KAPTEYN & P. VERLAUEN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 773-76 (2d ed. 1989). Though conflicts arise over the precise division of treaty-making authority between the states and the Community, *see* Stein, *supra* note 95, at 115-32, the point remains that there is an explicit division and allocation of powers between the two levels of authority.

119. BURGESS, *supra* note 12, at 18.

120. Buchanan, *supra* note 104, at 2; Sbragia, *supra* note 40, at 279-80.

121. Kastendiek, *supra* note 54, at 78-79. Mutual recognition of national standards was one of the central innovations of the 1985 White Paper launching the 1992 initiative. White Paper, *supra* note 11.

122. Weiler, *supra* note 5, at 2479-81.

be in tension with the construction of a new, even larger European polity.¹²³ If federalism is properly understood, though, the paradox is resolved. European views of federalism emphasize subsidiarity, a concept with varying definitions but essentially reducible to the proposition that governmental functions should be allocated to the smallest unit capable of carrying them out effectively.¹²⁴ Whether or not subsidiarity would provide a justiciable limiting principle for EU actions, it at least provides intellectual coherence to a redistribution of power from the nation-state that flows both up and down. Some functions, such as defense and macroeconomic policy, may be better performed on a higher level, whereas others, such as education, could be best served by control on the local or regional level.

Subsidiarity in the EU's context carries within it hints of the demise of the European state. The argument could easily be made that most important governmental functions are best performed either on as large a scale as possible, to maximize the advantages of size, or on as small a scale as possible, to maximize local control. It is at least true that subsidiarity does not serve well as the great defender of national sovereignty, and that a federalist EU could pose especially strong threats to federalist states with strong internal cleavages.

Still, the idea of a "Europe of the regions" is best left aside for the moment. As a practical matter, the European state system is too entrenched to challenge directly. This is not only true in terms of formal political power, which could perhaps be overcome by a constitutional mobilization, but in terms of the values of the peoples of Europe.¹²⁵ National identities, while not all-powerful, are still an important part of the European political persona, and it is ahistorical to think that they will disappear instantly. It is so unlikely that Europeans would be willing to abandon their national identities for local and European ties (that is, after all, the issue on which many of the current worries about legitimacy center) that any attempt to incorporate such a move in the short-run transformation of the European polity is likely to derail the entire process. A Europe of the regions is something that could develop in the future—but not now.

123. See generally *FEDERALISM AND FEDERATION IN WESTERN EUROPE* (Michael Burgess, ed., 1986) (analyzing national trends).

124. See *supra* notes 96-98 and accompanying text.

125. Cameron, *supra* note 109, at 73-74; Sbragia, *supra* note 40, at 274-75.

VI. CONCLUSION

The European Union lacks sufficient democratic legitimacy in the eyes of many who live within it. Moreover, the proposals that dominate the reform debate will not resolve the problem. They focus on the mechanisms through which the EU acts rather than on the legitimate reach of its power to act at all. What is needed is a politics of mobilization and consensus around the shape of the European order, whatever it will be, to reach agreement on the game as well as the rules. Constitutionalism provides an arena for Europeans to engage in considered aspiration and self-definition. The point is not legalism for its own sake, but producing what will truly be a “people’s Europe”—not because the leaders tried to protect the people’s interest, but because the people built it themselves.