

Why Europeans will not embrace constitutional patriotism

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Europeans will not become constitutional patriots any time soon. The first part of the article argues that this is not because of anything inherently implausible about the idea, either generally, or when applied to the European Union. But the actual institutional features of European politics make it improbable that Europeans will develop allegiances to the European Union grounded in shared constitutional ideals. Without meaningful electoral politics at the heart of the European political process, the citizenry's attitude toward European institutions will continue to oscillate between disinterest, fickle support, and resentment.

In the European Union (EU), the nationals of member states are also European citizens,¹ although many do not conceive of themselves that way. The lack-luster interest in the constitutional debates accompanying the negotiations and deliberations on the draft Treaty establishing a Constitution for Europe (hereinafter constitutional treaty or CT), followed by the resounding “no” of French² and Dutch³ voters, and the dismal and decreasing turnout for elections to the European Parliament,⁴ as well as the various responses to

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¹ See Treaty establishing the European Community, Nov. 10, 1997, 1997 O.J. (c 340) 3 [hereinafter EC Treaty], art. 17.

² On May 29, 2005, France held a referendum to decide whether the country should ratify the proposed constitution of the European Union. The result was a victory for the “no” campaign, with 55 percent of voters rejecting the treaty, on a turnout of 69 percent.

³ On June 1, 2005, a consultative referendum was held in the Netherlands to ask whether the country should ratify the proposed constitution of the European Union. Official results say that 61.5 percent of voters rejected the constitution, on a turnout of 63.3 percent.

⁴ In the parliamentary elections of June 2004, voter turnout was 45.7 percent, the lowest it has ever been. For details, see <http://www.elections2004.eu.int>.

Eurobarometer surveys⁵ all seem to confirm a widely held view that there is no such thing as a robust European identity. The so-called Reform Treaty,⁶ which revives the constitutional treaty, will include most if not all of the substantive content of the previous text but will dispense with its constitutional rhetoric and symbolism. In some jurisdictions this would pave the way for ratification of the treaty without subjecting it to the vagaries of public referenda.⁷

As to whether there is a robust European identity, this would not matter much if the EU were merely a glorified free-trade zone. It is unlikely that the EU will return to a pre-Maastricht,⁸ much less a pre-Single European Act⁹ structure, and it is clearly more than a glorified free-trade zone, as it currently stands. If the EU is to master, successfully, the tasks assigned to it and, using a nonconsensual procedure, decide on policies that concern the security of its citizens or that have significant distributive effects, then a sufficiently robust common identity seems necessary to legitimate the polity and ensure its

⁵ See EUROBAROMETER 60.1: CITIZENSHIP AND SENSE OF BELONGING (European Research Group 2004), available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_199.pdf (finding that 43 percent of European citizens feel they are nationals only, and 47 percent feel they are, first, citizens of their own country and, then, citizens of Europe. Only 7 percent feel they are Europeans first, and then citizens of their country, while 3 percent feel solely European). See, more generally, A.-Paul Frogner & Sophie Duchesne, *Is There a European Identity?*, in PUBLIC OPINION AND INTERNATIONAL GOVERNANCE 194–226 (Oscar Niedermayer & Richard Sinnott eds., Oxford Univ. Press 1995).

⁶ The current draft is officially titled the “Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community,” although it may become known as the Lisbon treaty once it is signed by governments in December 2007.

⁷ In the Netherlands and France, for example, the reform treaty will be subject to the ordinary national treaty ratification procedure, without a popular referendum.

⁸ The Maastricht treaty (the Treaty on European Union [TEU], which was signed on February 7, 1992, in Maastricht, and entered into force on November 1, 1993) introduced, among other things, a commitment to a European currency, European citizenship, and significant expansion of qualified-majority voting.

⁹ The Single European Act, signed at Luxembourg on February 17, 1986, and at The Hague on February 28, 1986, with entry into force on July 1, 1987, effectively enabled the enactment of European legislation concerning the internal market by qualified-majority voting, rather than requiring unanimity in the Council of Ministers. This occurred by way of introduction of art. 100a (now art. 95) of the EC Treaty.

functioning in the long term.¹⁰ Assuming that a significant regression is not desirable and that some version of either the status quo or a more deeply integrated European polity is, what could such an identity be?¹¹ And under what circumstances is it likely to develop?

Section 1 of this paper presents the concept of constitutional patriotism¹² as a European identity that the constitutional treaty invites citizens to adopt. It critically discusses a range of conceptual and practical arguments against the concept and, undertaking a close reading of the preamble, explores what it might mean to be a constitutional patriot in Europe. Section 2 examines the connection between existing institutional structures and the absence of a meaningful European identity. The core argument here is that the development of a European identity focused on constitutional patriotism would require meaningful electoral politics on the European level. Otherwise, European citizens will continue to oscillate between fickle support, disinterest, and national recalcitrance in their attitudes toward the European Union. In fact, the current institutional arrangements within the EU help to sustain and reinforce a political culture that is incompatible with the development of constitutional patriotism in Europe. Section 3 briefly addresses claims that the establishment of meaningful electoral politics on the European level is neither possible nor desirable.

¹⁰ Empirical research suggests a strong correlation between the development of a European identity and support for European institutions. See Maurits van der Veen, *Determinants of European Identity: A Preliminary Investigation*, at <http://www.Isanet.org/noarchive/vanderveen.html> (analyzing Eurobarometer statistics to show that a sense of European identity is not simply a proxy for support for European integration and has a far greater impact on support for integration than vice versa. Moreover, variables that are often argued to promote support for European integration are shown to do so primarily through their impact on a sense of European identity). For an explanatory account why that may be so, see JÜRGEN HABERMAS, *Ist die Herausbildung einer europäischen Identität nötig, und ist sie möglich?* [Is the development of a European identity necessary and is it possible?], in *DER GESPALTENE WESTEN* [THE DIVIDED WEST] (Suhrkamp 2004).

¹¹ The debate on what European citizenship could mean was spurred by the inclusion of a citizenship clause in the Maastricht treaty. See, e.g., Franz Mayer & Jan Palmowski, *European Identities and the EU—The Ties that Bind the Peoples of Europe*, 42 J. COMMON MKT. STUD. 573 (2004); John Fossum, *The European Union in Search of an identity*, 2 EUR. J. POL. THEORY 319 (2003); JOSEPH WEILER, *To Be a European Citizen: Eros and Civilization*, in *THE CONSTITUTION OF EUROPE* 324 (Cambridge Univ. Press 1999); Jesserum d'Oliveira, *European Citizenship: Its Meaning, Its Potential*, in *EUROPE AFTER MAASTRICHT: AN EVER CLOSER UNION?* (Renaud Dehousse ed., Kluwer 1994); Josephine Shaw, *Citizenship of the Union: Towards Post-National Membership*, 6 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 237 (Academy of European Law 1995). See also GARCIA SOLEDAD, *EUROPEAN IDENTITY AND THE SEARCH FOR LEGITIMACY* (Pinter 1993).

¹² Jan-Werner Müller, *On the Origins of Constitutional Patriotism*, 5 CONTEMP. POL. THEORY 278–296 (2006).

1. The concept of constitutional patriotism

One well-known answer to the question of what might constitute a European identity is that Europeans should become constitutional patriots.¹³ The basic principles of the liberal democratic constitutional tradition should be understood as the focal point of the development of a common European identity. The constitutional commitment to human rights, democracy, and the rule of law, highlighted as the foundational values of the European Union in art. I-2 of the constitutional treaty,¹⁴ is the bond meant to ensure cohesion among European citizens.

But what does it mean for an identity to be shaped by these ideals?

The idea of constitutional patriotism has been subject to three kinds of critiques.¹⁵ First, that as an identity focused on universal ideas, it is not sufficiently connected to anything that is specifically European. Rather, it is an identity defined by commitment to a set of principles shared by liberal democracies as diverse as Canada, South Africa, and India. These principles claim to be morally valid everywhere human beings politically organize their coexistence with one another. As such, they are unable to provide a suitable focal point for the identity of a particular community, distinct from others. Call this the argument of *conceptual inadequacy*. However, the universality of an ideal does not make it formally inadequate as an ideal central to the identity of a particular community. The inclusiveness of the ideal does not render it too weak to serve as a common identity's essential focus. The fact that Christianity or Islam claim to provide universal doctrines leading to salvation surely has not undermined the power of either to structure individual and collective identities.

¹³ The best-known contemporary proponent of constitutional patriotism as an identity for citizens in liberal constitutional democracies, generally, as well as in the EU, is Jürgen Habermas. See Jürgen Habermas, *Why Europe Needs a Constitution*, in *DEVELOPING A CONSTITUTION FOR EUROPE* 19–35 (Erik Erikson, John Fossum, Augustine Menéndes eds., Routledge 2004). See also JÜRGEN HABERMAS, *The European Nation-State: On the Past and Future of Sovereignty and Citizenship*, in *THE INCLUSION OF THE OTHER* 105–127 (MIT Press 1998) and HABERMAS, *supra* note 10. See also Attracta Ingram, *Constitutional Patriotism*, 22 *PHIL. & Soc. CRIT.* 1 (1996). See, most recently, JAN-WERNER MÜLLER, *CONSTITUTIONAL PATRIOTISM* (Princeton Univ. Press 2007).

¹⁴ See TREATY ESTABLISHING A CONSTITUTION FOR EUROPE (hereinafter, CT), art. I-2 (“The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights ...”).

¹⁵ A prominent skeptic of constitutional patriotism is Richard Bellamy. See Richard Bellamy, *Which Constitution for What Kind of Europe? Three Models of European Constitutionalism* (unpublished paper on file with author). See also Richard Bellamy & Dario Castiglione, *Legitimizing the Euro-Polity and its Regime: The Normative Turn in EU Studies*, *EUR. J. POL. THEORY* 7 (2003). See also Michelle Everson, *Strong Evaluations, Self-Interpretation and Constitutional Patriotism*, in *CONSTITUTION MAKING AND DEMOCRATIC LEGITIMACY* 177 (Erik Erikson, John Fossum & Agustin Menéndez eds., Arena Report No. 5 2002).

Nonetheless, there is a different problem with universalist ideals. As the ideals of a territorially exclusive community, they do not establish decisive criteria for who may or may not belong to it. To illustrate the point: Christians and Muslims do not constitute territorially exclusive communities—that is to say, neither the community of Muslims (the Umma) nor the community of Christians (the Church in Christ) establish public authorities whose jurisdictions are territorially circumscribed. Everyone is welcome to convert to Christianity or Islam. Europe, on the other hand, is a territorially exclusive community. Not all liberal states may join the European Union; only European states may do so.¹⁶ Neither South Africa nor Japan nor India, for example, may join, no matter how perfect their institutionalization of rights, democracy, or the rule of law.

But it does not follow that territorially circumscribed communities cannot develop universalist ideals as focal points of collective identities. The requirement that a state be European is no reason to engage in soul-searching about the ontology of Europeanness. There is no need to locate the soul of Europe somewhere between Athens, Rome, and Jerusalem in an ancient past in order to distinguish it from some “other”—be it an Islamic threat or an uncouth America that, in recent years, has reinvented itself as a rogue state. The requirement of Europeanness is best understood and, in fact, has been understood as a loose geographical criterion that underlines the idea that the European Union is a regional and not a global organization. The universal idea it embodies is one of a world order in which states are regionally integrated as well as belonging to organizations with universal membership. The boundaries of a regionally integrated organization such as the EU should be drawn based on political considerations of a practical kind in such cases as the accession of Turkey, Bosnia, or the Ukraine.

For example, to resolve the issue of Turkish membership, there is no point in asking whether Turkey is really European. Its largest city is, most of its land mass is not; nonetheless, most of its population centers are west of Cyprus, already an EU member since May 2004. Instead there are different questions that need to be asked: What is there to gain or to lose for the progressive realization of European constitutional principles and the practices that embody them? Could Turkey’s membership help integrate Muslim communities more effectively in current member states, such as the U.K., France, and Germany, and thus enrich European political practice by deepening an understanding of pluralism in Europe? Will Turkish membership help stabilize and spread the ideas of human rights, democracy, and the rule of law into the Muslim world, where they are currently struggling to take hold? Given the EU’s stance vis-à-vis Turkey in the past, which has given rise to legitimate expectations, what would be the effects in the Muslim world were the EU simply to reject the

¹⁶ See CT, art. I-1, para. 2 (“The European Union shall be open to all European states which respect its values and are committed to promoting them together”).

latter's application? Or, on the other hand, would welcoming Turkey into the Union effectively preclude the development of genuine European democracy, a European public sphere, and strong social cohesion in Europe by alienating a majority of European citizens and strengthening Euroskepticism across the continent? It may indeed be desirable for the political establishment in member states to make serious efforts in favor of Turkey's accession; at the same time, it would be highly problematic, politically, to proceed with Turkish integration over the objections of a clear and stable majority of European citizens. Clearly, the stakes are high and the answer is not easy, but it is a mistake to assume that arguments based on European identity provide good reasons to exclude Turkey. Thus, there is no reason why a European identity should not focus on the realization of ideals that are universal in Europe.

A second argument against viewing constitutional patriotism as a European identity lies in the challenge of *interpretative diversity*. Rights, democracy, and the rule of law cannot serve as focal points for that identity as long as there is no European consensus on what they mean; they are conceptually too thick to have this function ascribed to them, so it is argued. Human rights in Ireland are not the same as in the Netherlands. Democracy in France is not the same as democracy in Spain. And the British idea of the rule of law is different from the German *Rechtsstaatsprinzip*. However, disagreement over the meaning and implications of principles does not rule out the principles proper as the focus of a common identity. The consensus on principles need not extend to their full specification. All that is needed is some level of consensus on what they mean, supplemented—when political and legal conflicts become serious—by a consensus on the vocabulary that is to be used to structure debates about what should be done. For example, in the European Union,¹⁷ there may be disagreement as to what the role of the European Parliament should be in order for the European legislative process to be democratically legitimate; still, there is a consensus that legitimacy is a function of some conception of democracy that integrates the idea of the rule of law with individual rights. Legitimacy in Europe is not a function of Europe's remaining true to its Christian heritage, or of effectively maximizing the wealth of all citizens, or of giving authentic expression to a particular stage of class struggle in the development of world history. Furthermore, democratic legitimacy clearly requires more popular participation than Louis XIV deliberating with his personal advisers about what to do, though less than an Athenian democracy or a New England town hall meeting. "Democracy," as the common term of reference in discussing issues of legitimacy, focuses and constrains whatever disagreement may exist. At any point in time, there is likely to be a relatively thick, shared understanding about what these concepts mean that can limit the range and depth of

¹⁷ The CT presupposes such a consensus in art. I-2, *supra* note 14. See also art. I-59 (authorizing the suspension of certain rights in cases of a serious and persistent breach of these principles by a member state).

disagreements while providing a common set of references that facilitate constructive debate and mutual engagement. Even if human rights, democracy, and the rule of law are essentially contested concepts,¹⁸ they provide meaningful shared points of reference to structure legal and political debates. They also illustrate characteristic features of a liberal identity—an identity centered on debates, contestation, and justification rather than a rich substantive consensus that establishes unquestioned *a priori* truths.

A third criticism claims that the political liberal tradition of human rights, democracy, and the rule of law is *insufficiently thick* to function effectively as the cement of a supranational political community, given the conflicting loyalties that may be connected to thicker national identities. How can abstract principles—rather than collectively shed blood, sweat, and tears—unite a political community? This argument misunderstands the relationship between abstract principles, on the one hand, and the identities that a commitment to these principles tends to foster, on the other. Abstract principles may be thin, but identities focused on them are not. Constitutional patriotism is misunderstood as a mere attachment to universal moral principles contained in constitutional texts. This is certainly not an adequate representation of the idea as presented by its best-known contemporary proponent, Jürgen Habermas.¹⁹ According to his conception, these principles are given a specific interpretation and take on a concrete institutional shape in a constitution. This concrete institutional shape is, to some extent, the response to the historical experiences of the community and the objectives it has set itself for the future. Stories relating to blood, sweat, and tears are also likely to be central to the identities of citizens committed to constitutional patriotism. Moreover, these tales of sacrifice, heroism, or failure will be crafted around the vindication of, struggle for, or tragic violation of the universal principles that lie at the heart of constitutional patriotism. Constitutional patriots will not celebrate the power and glory of the community, as such, and certainly not define themselves simply in relationship to the external enemies they have vanquished or the neighbors they have succeeded in dominating.

Constitutional patriotism is, thus, a thick identity. It does not merely consist of abstract commitments but, rather, it connects an account of the past with a

¹⁸ On the features and function of essentially contested concepts in the context of European integration, focusing in particular on sovereignty, see Samantha Besson, *Post-souveraineté ou simple changement de paradigmes? Variations sur un concept essentiellement contestable* [Post-sovereignty or a Simple Paradigm Shift? Variations on a Fundamentally Contestable Concept], in *LA SOUVERAINETÉ AU XXIÈME SIÈCLE* [SOVEREIGNTY IN THE TWENTY-FIRST CENTURY] (Tiziano Balmelli, Alvaro Borghi & Pierre-Antoine Hildbrand eds., EdIS 2003).

¹⁹ “The political culture of a country crystallizes around its constitution. Each national culture develops a distinctive interpretation of those constitutional principles that are equally embodied in other republican constitutions ... in light of its own history.” HABERMAS, *The European Nation-State*, *supra* note 13, at 118.

commitment to a concrete set of constitutional arrangements as a framework for the political realization of common aspirations for the future. Reflections on the past focus on how such patriotism exemplified or failed to live up to its ideals; present institutions are conceived of as interpretations of these ideals; and the future is imagined as creating a more perfect union as defined by a greater realization and deeper understanding of the ideals. In this way, universal values are meaningfully connected to concrete political and legal practices of specific communities.

2. Constitutional patriotism as a European identity

What this might mean concretely, in the context of the European Union, is illuminated by a careful study of the preamble to the constitutional treaty, which provided a shorthand account of some central themes around which a European identity could develop. The preamble is an invitation to European citizens to think of themselves as participating in—and giving further substance to—the bare-bones structure that it describes.

The first substantive paragraph of the preamble reaffirms that human rights, democracy, and the rule of law are universal values.²⁰ It mirrors the Union's foundational values as articulated in article I-2 of the treaty, namely, respect for human dignity, freedom, equality, democracy, and the rule of law. These are the bedrock, the protagonists, of the story. This is the universalist core of any identity properly described as constitutional patriotism. Nonetheless, even as they are introduced in the first paragraph, these ideas are connected to the "cultural, religious and humanist inheritance" from which they developed in Europe. The past is thus cast as a source of inspiration that culturally sustains the commitment to human dignity, human rights, democracy, and the rule of law. But awareness of universal values has its source in the particular history of a community and is embedded in a particular culture.

History is more than an inheritance to be handed down, or an inspiration to be drawn upon; it also provides lessons. The peoples of Europe, "reunited after bitter experience," are cast in the preamble to the treaty as "determined to transcend their former divisions."²¹ These allusions invoke the dark side of the past as something to be transcended. Europe is envisaged as a space where wars, persecutions, genocide, and ethnic cleansing are to be relegated to the past by giving them only a virtual presence in the form of memory. Naturally, the specifics of the lessons will be different for, say, Germans, Spaniards, Estonians, Poles, or Czechs. But these lessons will converge on a commitment to human rights, democracy, and the rule of law that embraces

²⁰ CT, pmbl. ("DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law ...").

²¹ *Id.*

both appropriately reconceived national identities and the commitment to forge a common destiny and build a Europe “united in its diversity.”²²

Thus, the lessons offered in the preamble concern the concrete legal and political forms of organization that are desirable in Europe. A commitment to universal principles is connected with the establishment of a special kind of supranational community on the European level—neither a full-fledged federal state nor a mere international organization—that is a response to the lessons of the past. It emphasizes that “the peoples of Europe” remain “proud of their own national identities and history.”²³ European integration and the commitment to universal values are cast as compatible with celebrating national identity and the historical narratives that sustain it. The European Union is not supplanting national identities with a European identity. The citizenship clause²⁴ is illuminating in this respect. All nationals, and only nationals, of member states shall be citizens of the Union. Not only does EU citizenship not replace national citizenship, it makes the latter a prerequisite.²⁵ But national identity and history must be reconceived as open to transnational integration into a wider community. Nationality must no longer serve as a divisive force in Europe; as European nations coexist with and flourish within the constitutional framework established by the supranational community, this will help to “forge a common destiny.”

What, then, are the contours of that common destiny to be forged and the common future to be built? How are the lessons of the past, and the commitment to a particular supranational community in Europe, connected to the future? The preamble spells out some features of the “path of civilization, progress and prosperity” on which Europe is to embark. It is to be “for the good of all inhabitants, including the weakest and most deprived.” Europe “wishes to remain a continent open to culture, learning and social progress. . .” And it “strives for peace, justice and solidarity throughout the world,” while being aware of its “responsibilities towards future generations and the earth.” Thus, with regard to these aspirations, continuity, rather than a break with the past, is the theme. Europe “intends to *continue* along the path of civilization, progress and prosperity.” It is similarly “determined to *continue* the work within the framework of the Treaties establishing the European communities and the Treaty on European Union, by ensuring the continuity of the Community acquis.”

The specific list in the preamble reveals—at least in part—how Europe defines itself and in relation to what. The constitutional convention that drew

²² *Id.*

²³ *Id.*

²⁴ CT, art. I-10.

²⁵ See WEILER, *To Be a European Citizen*, *supra* note 11 (emphasizing the interdependence between national and European citizenship).

up this text, under the presidency of Valéry Giscard d'Estaing, was at work when the United States launched the war in Iraq. As illustrated by unprecedented mass demonstrations in London, Barcelona, Madrid, Rome, Paris, and Berlin on February 15, 2003, many Europeans saw the United States not just as dangerously disrespectful of international law but also as a country led by a less-than-articulate president who is supported by a nonprogressive religious base and is aggressively engaged in distributive politics in favor of the well-to-do, all the while refusing to engage seriously with environmental concerns. This image is the inverse of the constitutional treaty's notion of a "culture of learning and social progress," for "the good of all inhabitants including the most deprived," "striving for peace and solidarity in the world," and recognizing "responsibilities towards future generations."²⁶ The United States shares with Europe the foundational commitments referred to in the preamble and, historically, has played a central role in fostering them in Europe. The U.S. Constitution is, after all, the earliest such document to be grounded in Enlightenment political ideals; nonetheless, the contemporary interpretation of these commitments, as embodied in the policies of the Bush administration at the time the CT was drafted, may well have provided a focal point for a widespread consensus on how these values were *not* to be understood in Europe. The preamble provides a competing interpretation of these commitments and articulates the core themes of an alternative vision of a transnational liberal civilization, the realization of which it describes as the "great venture." This alternative—of Europe as a "special area of human hope"—echoes the "city on the hill" theme that is a staple of American exceptionalism.²⁷ Europe, too, aspires to be a model that others have reasons to emulate.²⁸

The preamble thus connects a commitment to universal principles with an account of the past. Similarly, it connects a commitment to a particularly constituted supranational community in the present to a set of aspirations for the future. Europe, as a political idea, thus develops specific and distinct contours. It is grounded not just in universal principles but in a religious and humanist culture that is its inheritance. It embraces a supranational legal and political form that is neither a European nation-state nor a mere intergovernmental

²⁶ See CT, pmbi.

²⁷ The original draft drawn up by the convention went further and described Europe as "a continent that has brought forth civilization," claiming that "freedom, equality and respect for reason" were humanist (as opposed to religious) values and introduced the preamble with a quote from Thucydides on the meaning of democracy in ancient Greek (a language that fewer than 3 percent of European citizens can read). Furthermore, the secularist triumphalism of the original draft made no mention of "bitter experiences." [insert cite to official text of draft document in question] After strong criticism, the Intergovernmental Conference that later approved the CT made the revisions in June 2004.

²⁸ See Armin von Bogdandy, *The European Constitution and European Identity: Text and Subtext of the Treaty establishing a Constitution for Europe*, 3 INT'L J. CONST. L. (I•CON) 295 (2005).

organization. And it subscribes to a political program, and to an ideal of a liberal civilization, that is distinctively European. This is the identity the preamble invites Europeans to make their own by engaging with it, giving substance to it, and making it real.

Collective identities are not established merely by writing them into the preamble of a constitutional text. In their preambles, in their provisions on rights, and in the way they structure institutions and describe their functioning, constitutions—at most—can invite citizens to identify with the core commitments they reflect. But is it likely that European citizens will accept such an invitation? What reasons are there to believe that, under the reform treaty, if it is ratified, matters will be different from what they are now? How can citizens engage with constitutional ideals, give substance to them, and make them real? How can the commitments of the constitution, as described in the preamble, be anchored in the public culture of a political community and thus become an integral part of the way in which citizens understand themselves?

3. Why Europeans will not become constitutional patriots

By not changing the role of electoral politics significantly in the European Union, the CT and its successor, the reform treaty, leave intact the European institutional arrangements that hinder rather than foster the development of a robust European identity. Whatever else may be necessary for such an identity to develop, without meaningful electoral politics on the European level, it is unlikely to happen. Instead, European citizens' attitudes toward the European Union are likely to continue wavering between fickle support and a lack of interest in European political life, on the one hand, and a stubborn nationalism, on the other. The following section will explore the link between existing political structures and the culture of disinterest and discontent that characterizes European citizens' attitudes toward Europe.

3.1. European parliamentarianism and its discontents

In the European parliamentary elections in June 2004, the voter turnout was 45.7 percent, the lowest it has ever been.²⁹ This figure is skewed only slightly by the particularly low participation rate in the new member states.³⁰ Ever since the introduction of such elections in 1979, voter turnout has consistently fallen, from 65.9 percent in 1979 to the previous low of 53 percent in 1999. Among the nine countries that participated in the first direct elections to

²⁹ See http://www.elections2004.eu.int/ep-election/sites/en/results1306/turnout_ep/index.html.

³⁰ In the new member states—Slovakia and Poland, for example—voter turnout was below 20 percent. Less than one third bothered to vote in the Czech Republic, Estonia, and Slovenia. On the other hand, voter turnout in Malta was above 80 percent. In Belgium and Luxembourg it was over 90 percent. *Id.*

the European Parliament in 1979, turnout in 2004, on average, had fallen nine percentage points. Across Europe, turnout for European elections was on average 25 percent below that in domestic elections.³¹ Another striking feature of these elections has been the success of a diverse group of anti-European movements and parties, now well represented in the European Parliament. The picture that emerges belies a simple narrative of progress concerning the advance of Europeanization.

How is it that the European Parliament—regardless of the significant powers it has acquired since its inception as a consultative assembly in the original treaties of Rome—remains so insignificant in the public eye? What accounts for the fact that, even as the Parliament's role is strengthened in the Single European Act and the treaties of Amsterdam and Nice, voter turnout continues to decline? Many reasons have been put forward, but none of them plausibly explains the phenomenon. First, one might surmise that the Parliament's legitimacy is in doubt due to the method by which seats are apportioned.³² Yet it is likely that few European citizens even knew how this is done.³³ Second, citizens' lack of interest in European parliamentary elections is not an expression of a general hostility toward the very idea of a European Parliament. On the contrary, a large majority approves of a European executive responsible to a European Parliament.³⁴ Third, European legislative decisions, it has been suggested, are of low public salience³⁵ and tend to be of a Pareto-optimizing, coordinating nature.³⁶ However, as the BSE or "mad cow" crisis in the late '90s and

³¹ For a helpful analysis of the elections, see Richard Rose, *Europe Expands, Turnout Falls: The Significance of the 2004 European Parliament Election*, at <http://www.idea.int/elections> (last visited Feb. 2, 2005).

³² The number of seats that each state has was determined by negotiations and reflects a compromise between the idea of equal representation of states, which would require all states to have the same number of representatives, and the principle of equal representation of citizens, which would require the number of seats to be proportional to the national population. Luxembourg, for example, has 6 MPs, Germany has 99. This means that there is one MP for every 67,000 citizens of Luxembourg, but only one MP for every 828,000 citizens of Germany.

³³ For a discussion of this issue, see Miguel Maduro, *Where to Look for Legitimacy?*, in *CONSTITUTION MAKING AND DEMOCRATIC LEGITIMACY* 81 (Erik Eriksen, John Fossum & Agustin Menéndez eds., Arena Report No. 5 2002).

³⁴ A standard Eurobarometer survey consistently shows that a great majority of Europeans would prefer a parliament with a strong supervisory function over a European executive.

³⁵ Andrew Moravcsik, *In Defense of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603 (2002).

³⁶ "Pareto-optimizing" refers to the situation in which, given alternative allocations among parties, allocations that leave at least one individual better off, without making any others worse off, are Pareto-optimized, in line with the theories on economic efficiency by Italian economist/sociologist Vilfredo Pareto (1848–1923). For the relevance of this principle to EU legislative processes, see Fritz Scharpf, *Negative and Positive Integration in the Political Economy of European Welfare States*, in *GOVERNANCE IN THE EUROPEAN UNION* 15 (Gary Marks et al. eds., Sage 1996).

the responses following 9/11 have illustrated, citizens support the role played by the EU in the allocation and management of risks in areas of high political salience. Furthermore, the rules generated by the EU affect domestic priorities and require significant domestic allocation of resources. The Euroskeptics in particular do not doubt that Europe matters. They just do not think it should.

Nor is the lack of interest in European parliamentary elections explained by the absence of a common European language and the lack of an appropriately structured public sphere that would enable citizens to understand what goes on in Parliament, although these factors are relevant.³⁷ Even in a world where everyone spoke all European languages (or just one language) and was bombarded by coverage of European affairs, citizens still would be unlikely to focus on what goes on in the European Parliament. Why?

To put it bluntly, the European Parliament is not a place where alternative visions of Europe's future are translated into competing programs by competing parties in a way that is likely to shape significantly the European political process. This is due, in part, to the internal structure of Parliament; the party structure remains underdeveloped, even though changes are taking place. More importantly, the European Parliament, as conceived under the current treaties and the Reform Treaty is not the central agenda setter in Europe. It is an editor, not the author, of European laws. It has a veto over most legislation but not the power to set and aggressively pursue a legislative agenda. With the European Council setting the agenda, the Council of Ministers as the core decision-making venue, and given the relative independence of the Commission when drafting and proposing legislation, the role of Parliament is not significant in a way that citizens have much reason to care about. The European Parliament is not irrelevant, but it differs in one crucial respect from the way Parliaments normally function. Generally, if citizens are alienated by political outcomes they can vote for change, with a reasonable hope of legislative remedy, or can express their dissent by voting for a clearly defined alternative set of programs and persons. This is the way parliaments have functioned since the early nineteenth century, even when there are other domestic veto players with the power to curtail the will of parliamentary majorities. Moreover, that is what citizens would expect of the European Parliament were they to read the constitutional treaty, where it is the first institution mentioned,³⁸ before the European Council or the Council of Ministers. The CT emphasizes the importance of representative democracy and the role of the European Parliament as

³⁷ See Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L. J. 282 (1995); Fritz Scharpf, *Democratic Policy in Europe*, 2 EUR. L. J. 136 (1996).

³⁸ Art. I-19 CT lists the European Parliament as the first element of the EU's institutional framework. Art. I-20 provides details about the Parliament. Arts. I-21 to 25 CT address the European Council, Council president, and Council of Ministers, and art. I-26 CT addresses the Commission.

the first institution reflecting that principle,³⁹ and it states that the Parliament elects the Commission President.⁴⁰ In other words, it reads as if the Parliament were the primary agenda setter in the Union, flanked by strong member state representation in the European Council and Council of Ministers, but with the Parliament as the primary agenda setter, nonetheless.

When Europeans originally voted for a parliament, they may well have believed they were voting for an institution whose role would be comparable to that of the parliaments in their respective domestic settings; the subsequent decline in voter turnout possibly reflects the gradual realization that such expectations were not valid. The fact that citizens turn out for elections at all, knowing that their vote is practically certain not to change anything, has long puzzled public choice theorists. It may be that citizens are generally motivated to vote not only because of the effect it may have on future policies, but because it provides them with an opportunity to express approval or disapproval of the personnel, party and policies that govern them as compared to available alternatives; if so, they have reasons to vote in national parliamentary elections, but not in European elections. When elections are for seats in an institution that does not create or publicly represent alternative political programs embodied in competing personnel, and is not linked to political power in such a way that winning elections would make a significant difference, then the act of voting cannot play a meaningful expressive role.

Additionally, frustrations with the European Parliament—and those that may be anticipated under the CT—may be linked to the discrepancy between the language and traditional institutional forms of democracy that have been adopted as a matter of public rhetoric (and constitutional presentation), and the reality of indirect rule that is more reminiscent of predemocratic forms of governance. It is a much contested question whether it is desirable for the European Parliament to be a central agenda-setter for Europe. But the compromise—offering rhetoric to appease those who think it should play that role while leaving member state governments in control—is likely to provoke resentment and suspicion from both sides.

3.2. National government accountability and its discontents

However, the problem is not just that citizens cannot look on the EU Parliament as an institution designed to bring about legislative change or hold persons or parties accountable for their failed politics. The fact is that there are no alternative

³⁹ Art. I-46 CT establishes that the functioning of the Union “shall be founded on representative democracy” and immediately thereafter states that “citizens are directly represented at Union level in the European Parliament,” before going on to mention the European Council and Council of Ministers as institutions representing member states accountable to national parliaments or citizens.

⁴⁰ Art. I-20 sect. 1 states that the European Parliament “shall elect the President of the Commission.”

actors in the European Union that voters—in their capacity as European citizens—can hold accountable. The president of the Commission and its membership are generally determined by the European Council, even if Parliament formalizes those choices by electing the president and approving the appointment of members of the Commission. The only hope of electoral accountability, then, seems to lie with the national governments. As the framing of the preamble illustrates, they are in the driving seat. Of course, the governments cannot be held accountable as European actors by citizens acting collectively as European citizens, though they can be held accountable nationally, in national elections. In fact, is that not the very point of co-opting national institutions to serve as European actors—to ensure the legitimacy of the European process by linking it to national accountability mechanisms?

However, national accountability mechanisms, where they do not serve as a complement to other stronger accountability mechanisms, are likely to function badly. These mechanisms are responsible for creating just the sort of disinterest and national recalcitrance that characterizes the current attitude of the European citizen to political life in Europe—and for two reasons.

First, when governments are held accountable for their role on the European stage, it is by means of debates that address their actions in the national context and these tend to be structured primarily along the national/European divide. These debates are framed in terms of being for or against Europe. The sovereigntists battle the Europeanists. Costs and benefits are analyzed in terms of what “we” as a national community stand to gain or lose. How much do we pay in, how much do we get back? There is a structural bias that tends to preclude discussion of what kind of Europe is desirable for European citizens, a debate that would emphasize what Europeans have in common and provide competing visions and political programs to guide what Europe should become. When U.S. senators are held accountable by their constituencies for what they have done in Washington, such debates tend to follow a similar pattern. The questions focus on what was done to benefit the individual state. In federal or quasi-federal systems there are good reasons for the existence of such accountability structures. But, unlike in the United States, where there are presidential elections that produce a debate of a very different kind, in Europe there are no other elections of significance to complement elections that have this structure. Thus, the peculiar and impoverished nature of debates on the future of Europe may not be because there is no strong independent European identity; rather, it may be that there is no strong European identity because existing accountability structures perpetuate debates that end up reinforcing the national/European divide and so preclude the development of such an identity.

Second, given a national government’s interest in defending its record, it will have an incentive, when called to account, to take credit for everything good that happens on its watch while blaming on Europe, and the need to

compromise, everything that goes badly. The problem of shifting blame is not just a problem for the EU in gaining acceptance among European citizens, and it does not affect the legitimacy of the European Union alone. It also raises questions about sufficient domestic accountability. If governments can contrive to blame the EU for what are, in fact, the deficiencies of their own domestic policies, then the lack of transparency at the European level has the effect of undermining the adequate democratic control of domestic institutions. The idea that national parliaments can be a sufficient check on blame-shifting practices is questionable. Even though some countries have done a better job than others in strengthening mechanisms of parliamentary control with regard to the executive branch,⁴¹ at best the problem can be mitigated but not resolved. Especially with Council meetings still generally closed to the public, it is simply too easy for the executive branch to claim that complicated negotiations and bargains struck between member states made a compromise necessary. Furthermore, a perverse effect of a stronger and more successful involvement of national parliaments is that it exacerbates the problems of structural bias discussed above. It tends to intensify the need of the executive branch to justify its actions in terms of narrowly defined national interest.

4. Between the “cold Putsch” and “spaceship Brussels”

According to the CT, the participation of the European Parliament in the codecision procedure⁴² and the role of the national governments in the European Council and Council of Ministers complement one another to ensure that European political practice adequately embodies the principle of representative democracy. Unfortunately, in the European Union, the two prongs of representative democracy tend to undermine rather than complement one another. On the one hand, the Parliament is, at best, a junior partner of the Council in the legislative process, with its influence further diminished by the relatively independent status of the Commission. European citizens have few reasons to take an interest in such a parliament. On the other hand, even a government that sits on the Council is only one actor in a legislative process that includes other governments, the Commission, and the European Parliament, to name only the most prominent. A neo-Madisonian idea of the dispersion of power through interinstitutional checks and balances, complemented by requirements of reason giving and cooperative mutual engagement, has many agreeable features. But its concrete form in the European Union has

⁴¹ Germany, for example, has amended its Constitution (art. 23 of its Basic Law) to enable domestic actors to better control the actions of the executive. Denmark, too, has established effective procedures to better control the actions of the executive branch on the European level.

⁴² The now-prevailing procedure, introduced under the Maastricht treaty, by which the European Parliament and the Council of the European Union adopt legislation jointly, provided they agree on an identical text.

two highly unattractive side effects, both of which present potent obstacles to the development of a European identity.

First, the current structure amounts to a massive empowerment of the collective executive branches of member states at the expense of national parliaments. A leading German newspaper made an important point when it described the European Union, albeit hyperbolically, as the result of a “cold Putsch” (brought off by the treaty of Maastricht) on behalf of the executive branches. Legislatures and citizens then reluctantly ratified the treaty in the name of peace and prosperity in Europe for fear that failure to do so would undermine the whole idea of European integration. Fundamentally, nothing much has changed since then. The extension of the codecision procedure from the treaty of Maastricht to the treaty of Nice and the constitutional treaty has effectively expanded the role of the European Parliament as a veto player and given it some additional clout. But neither this, nor the co-optation of national parliaments by the CT, which grants them a weak role in the European legislative process, changes the political dynamics significantly.

Second, the requirement that national institutions, the executive branch, and—under the CT—the national parliaments must engage and deliberate with other European actors undermines their accountability to citizens. As already noted, once all actors are somehow involved in the European legislative process, no one among them can reasonably be held accountable for its outcomes. From the citizenry’s perspective, the European political process becomes a “spaceship,”⁴³ that is to say, a complex, self-enclosed, relatively autonomous process among officials largely immunized from the influence of terrestrial electoral politics. Everyone in the interinstitutional deliberative network talks to everyone else and a consensus is eventually formed, perhaps attended by occasional protest from this or that member state. But these deliberative interactions do not produce contending visions of what the European Union should become, embodied in opposing programs and personnel. Since there is no electoral competition among European elites connected with rival policies, elections do not function as mechanisms to express support for one or another vision, program, or set of personnel. They do not serve as a meaningful way to effect political change. Citizens cannot identify with one side as opposed to another or express dissent by favoring an alternative program and vision of Europe’s future. If everyone is somehow involved, but no electorally accountable actor can meaningfully be held responsible for outcomes, and no alternative political programs are available to choose from, then one would expect electoral debates to have two features, both of which are apparent in Europe.

First, instead of debate on alternative visions, programs, and personnel, there would be debate for or against Europe. One must either support the package of rules supplied by the European political process or reject the very idea

⁴³ ANDREAS OLDAG & HANS MARTIN TILLACK, *RAUMSCHIFF BRÜSSEL [SPACESHIP BRUSSELS]* (Argon Verlag 2003).

that there should be a European package of rules. One is either a Europhile or a Euroskeptic. One wants either more Europe or less Europe. Since Europe appears as a monolithic whole that produces a set of outcomes without institutionally producing a menu of alternative outcomes, one can only be for the product or against it. There is no visible institutional embodiment of an alternative Europe. There is little opportunity to use the vote to express support for an alternative European political program, not least because such an alternative is unlikely to have been developed and presented by European actors.

In fact, aside from simply expressing support for, or protest against, the concept of Europe, European elections tend to be determined by domestic politics. Most regard it as too radical or too blunt a choice to stand against Europe and the whole “European system.” After all, everyone signed on to this system, and the costs of exit and the general benefits of membership are high. Not surprisingly, the protest vote, though significant, in the end remains relatively ineffectual. Thus, neither European parliamentary elections nor national elections are primarily about Europe. Instead, European citizens vote for the party or candidate whose stance they favor on domestic issues. In the end, European parliamentary elections are often treated as a barometer for the popularity of national governments and domestic policies.

4.1. Lines of resistance

The very structure of the political process is, therefore, one central reason why it is unlikely that European citizens will develop a European identity along the lines envisioned by the constitutional treaty. Citizens’ identities are not shaped by constitutional texts, unless the texts have been the focal point of political and legal contestation and deliberation meaningfully connected to the citizens’ collective political action. It is difficult to know what are the necessary and sufficient conditions for the development for such an identity. The availability of appropriate historical narratives, public education, and, perhaps, outside threats all have a potentially important role to play.⁴⁴ Nonetheless, what the foregoing analysis suggests is that—if an identity is to develop around constitutional patriotism in Europe today—one necessary condition is the establishment of a meaningful electoral process on the European level.⁴⁵ Such a process would allow European citizens to vote for and against competing visions of what Europe ought to become and participate in debates about what this implies for political programs, parties, and leaders.

⁴⁴ For a conception of European history that supports the development of a European identity and the role of public education, see Mattias Kumm, *The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History*, 6 GERMAN L. J. 319 (2005).

⁴⁵ For an argument that the development of national identities was linked to the emergence of representative institutions on the national level, replacing more indirect forms of rule, see MICHAEL HECHTER, *CONTAINING NATIONALISM* (Oxford Univ. Press 1999).

Of course, the remaining barriers to the development of a robust European identity would still be considerable. The absence in Europe of a well-developed public sphere, or of a common language, presents a significant obstacle,⁴⁶ and such obstacles will be overcome only if institutions are established that provide sufficiently strong incentives to do so. The conventional wisdom, which insists that a common identity is a prerequisite for a meaningful electoral politics, gets it the wrong way around. Current institutional structures perpetuate the very obstacles that are invoked as a reason not to establish meaningful electoral politics at the heart of the European political process. They perpetuate the conditions of apathy and national recalcitrance that provide the sociological and political background to the academic cottage industry currently writing on the “democratic deficit” in Europe.

Additionally, the argument for a more central role for the European Parliament does not depend either on an idealized description of parliamentary government⁴⁷ or on instituting Westminster-style parliamentarianism. The argument is not that everything should be decided by Parliament and that the complex administrative procedures, characteristic of the “comitology” process,⁴⁸ should be replaced. As on the national level, a parliament offers but one among many jurisgenerative procedures. But whatever the role of other administrative processes, a formal legislative process and a strong European Parliament, at the very least, would serve as a “mechanism for the public control of the cumulative unintended consequences of scattered forms of decision-making.”⁴⁹ Parliament deserves to emerge as an independent and strong agenda setter that is at least an equal to the member states as a legislator within the codecision procedure.

European constitutional theorists may have been too quick to think of the defenders of parliamentarianism as intellectually complacent or naïve statist, who refuse to take seriously the task of translating⁵⁰ the basic commitments

⁴⁶ See Grimm, *supra* note 37.

⁴⁷ See, e.g., Andrew Moravcsik, *In Defense of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603 (2002); and Renaud Dehousse, *Beyond Representative Democracy*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 135 (Joseph Weiler & Marlene Wind eds., Cambridge Univ. Press 2003).

⁴⁸ The procedure whereby the Commission involves national administrations in preparing implementation of EU legislation. Such legislation often instructs the Commission to work with a committee of representatives of member states to ensure that implementation measures are appropriate to the situation in each affected country. See 1999/468/EC; OJ L 184/23 of 17.7.1999 (“the Comitology Decision”).

⁴⁹ Christopher Lord & David Beetham, *Legitimizing the EU: Is there a “Post-Parliamentary Basis” for its Legitimation?*, 39 J. COMMON MKT. STUD. 443, 454 (2001).

⁵⁰ See Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE*, *supra* note 40, at 27.

underlying the democratic constitutional tradition to a setting beyond the state. A seeming infatuation with the *sui generis* character of the European Union—Europe’s constitutional *Sonderweg* as Joseph Weiler aptly calls it⁵¹—has led to stigmatizing the idea of a robust European parliamentarianism as a sign of intellectual inertia. The case against representative democracy in Europe may not be as strong as it seems⁵² and the costs of making do without it may be very high.

Finally, establishing electoral politics at the heart of the European political process does not imply the establishment of a federal state. It does not suggest that the European Union should be doing more than it is currently doing; or that the particular supranational structure of its authority should be changed; or that the structure and role of the comitology process be radically altered. It does suggest, however, that an important dividing line between citizens, when debating the future of Europe, is the dividing line between democrats and republicans. Democrats would insist on establishing some form of meaningful electoral politics on the European level, whereas republicans would argue that the division of powers, rights protection, along with the formal framework of a constitution and administrative oversight for the exercise of public authority are sufficient. If the argument presented here is plausible, those who find attractive a European identity focused on constitutional patriotism must side with the democrats.

⁵¹ Joseph Weiler, *In Defense of the Status Quo: Europe’s Constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE*, *supra* note 40, at 7.

⁵² See Renaud Dehousse, *Beyond Representative Democracy: Constitutionalism in a Polycentric Polity*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE*, *supra* note 40, at 135, 136, and 155 (attacking parliamentarianism as “orthodoxy ... deeply anchored in western political culture” and “resting on a mechanical, transmission belt vision of public policy” that loses its plausibility once “a complex constellation of preferences and interests” are revealed to be behind “convenient abstractions”).