



Webpapers on
Constitutionalism & Governance
beyond the State

Year 2006 | No 6

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ISSN: 1756-7556

conWEB – webpapers on Constitutionalism and Governance beyond the State

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The Problem of Legitimacy in the European Polity. Is Democratization the Answer?

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Originally published in:

Colin Crouch & Wolfgang Streeck (eds.) (2006) *The Diversity of Democracy. Corporatism, Social Order and Political Conflict*. Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing.

Abstract:

The authors discuss potential sources of legitimacy of the EU, i. e. of the normative bindingness of its decisions. After rejecting the views that such legitimacy is either not needed, not feasible, or provided for already, they focus upon the corrosive impact of the EU upon democratic legitimacy within member states. Brussels-based 'governance' is essentially uncontested and can hardly provide for the legitimacy that results from the interplay between government and opposition within nation states. The problem boils down to achieving legitimacy in the absence of the political community of a 'demos'. The paper outlines a solution to this problem that relies on the apparently oxymoronic model of a 'republican empire' - a political community, that is, which is held together not by the bonds of some presumed sameness, but, to the contrary, by the shared contractual recognition of the dissimilarity of its constituent parts from which legitimacy can flow.

Keywords: democracy; legitimacy; diversity/homogeneity; governance

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Is there a legitimacy deficit in the Euro-polity?

No problem, no solution

Even though complaints and uncertainties about the ‘democratic deficit’ of the EU are as widely shared as the perceived need to think about institutional solutions which would remedy this condition, agreement on the actual presence of such a deficit is by no means universal. Before we address the nature of and possible solution to the problem, therefore, we need to deal briefly with views that deny either the existence of the problem or at least the availability of a solution.

Three such views can be identified. First, there is the *technocratic* view. This rightly claims that only the political choice between alternative courses of action advocated by different elite segments and mass constituencies qualifies as the substance of politics and hence needs to be made within a framework of rights, values and democratic procedural rules. If, however, the agenda of European elites consists of matters that cannot be reasonably debated, but must be competently deduced from some compelling technical calculus, then making choices through democratic procedures is bound to diminish the efficiency of decision-making and the quality of the decisions. These are better left to experts, professionals, epistemic communities and bureaucrats with their specialized knowledge in order to maximize ideological neutrality. The more reliably such technical decisions are insulated from politics and general legitimation demands, the more effective and efficient the process will be in which some ‘one best way’ will eventually be determined. As the purpose that rules are supposed to achieve is clear and unambiguous, namely Pareto optimality in the Single Market, the regulatory regime serving that purpose is entirely for the experts to determine. They have their tested methods of dealing with the three familiar types of public-choice problems and market failures. These are (i) negative externalities (that is, economic actors securing advantages at the expense of third parties), (ii) the inverse case of the provision of public goods (that is, economic actors having to be adequately rewarded for providing benefits to some collectivity, for otherwise they would not provide them) and (iii) common pool problems (that is, economic actors having to be prevented from inflicting damage upon their future selves through the unwise overutilization of scarce resources, such as fish or the environment). This view of the EU as a technocratic regulatory state is often associated with the work of Majone (1997). In order for an efficient regulatory regime to be avail-

able, decisions must be kept strictly out of the politicized circuits of democratic representation and accountability.

Second, there is the *democratic saturation* view which, in contrast to the technocratic view, does not deny the need for democratic legitimation of the European policy process but rather claims that the democratic requirements of accountability and representation are already sufficiently fulfilled in the current institutional set-up of the EU. From a normative point of view it may be asked why there should be a need for distinct mechanisms of legitimation for EU policies since the member states, first, have voluntarily acceded to the EU, based upon democratic procedures according to their respective constitutional rules, and, second, are fully represented in the institutions which draft and implement EU policies. In other words, there is a solid and continuous chain of legitimation from the individual citizens in the member states up to the institutions of the EU. After all, the members of the Council are members of democratically elected governments of member states, and Commission members are nominated by their governments and have to withstand the scrutiny of the EP, the directly elected European legislature. So democracy is in place, people do not generally complain about its absence, and concerns about a 'deficit' are unwarranted. The author with whose writings these views are often associated (as found in Follesdal and Hix 2005) is Andrew Moravcsik (1998).

Third, there is the *unfeasibility/undesirability* argument. This argument comes in one of two versions. As far as the feasibility of a stronger democratic legitimation at the EU level is concerned, it invokes the seemingly obvious absence of a European demos. The citizenries of member states are simply 'too different' (by size, by historical experience, by religion, by language, by level of economic development and so on) to be able to form a minimally coherent political community with which even losers in elections would identify. The presence of a durable self-identified and robust political community, as opposed to a multinational population, is an essential precondition for any form of democracy. Turned on its normative side and regarding the issue of desirability, the argument is that democratic legitimation procedures at the European level would inevitably lead to a deepening of European involvement in matters which properly belong to member states and thus would interfere with the desire of the latter to maintain and increase national autonomy. Czech president Vaclav Klaus (2005) is a prominent propo-

ment of this view. The implication is that there is no democratic deficit because something that cannot or should not be changed cannot meaningfully be called a 'deficit'.

Why there is a problem, and not just for the EU

So the very existence of the problem we are going to discuss in this chapter needs first to be established. In establishing it, we rely, among other things, on arguments advanced by Follesdal and Hix (2005), Beetham and Lord (1998), and Weiler, Haltern and Mayer (1995). Two points seem important. First, the lack of democratic accountability at the European level penetrates into the domestic arena and affects the quality and credibility of the practice of national democracy. Thus the problem is not primarily that the *EU* must *become* democratic; it is that *member states* must *remain* democratic. Second, major institutional actors at the EU level (the ECB, the ECJ and the Commission when operating as a rule enforcement agency) have a direct impact upon the citizens of member states and therefore must be subjected to an institutionalized legitimacy test.

As to the first of these points, Schmitter has argued that the democratic deficit does not just exist at the EU level of the policy process but, partly as a consequence of this, at the member state level as well. '... [T]he shift of functions to and the increase in the supranational authority of the EU have been contributing to the decline in the legitimacy of "domestic democracy"' (2000a, p. 116). National parliaments are losing control, the making of collectively binding decisions is being denationalized and 'executive actors can effectively ignore their parliaments when making decisions in Brussels' (Follesdal and Hix, 2005, p. 5). To a large extent this can be attributed to the fact that national governments, in particular parliaments, are no longer in the position to control the basic parameters of their national economies. The intensity of institutional interdependence between the national and the European levels of governance is bound to thwart all attempts to isolate the two levels and to protect the national political system from the effects of democratic deficiencies at the European polity. Thus there is in fact reason for concern that, if the shift of political power from the democratically legitimized national governments to the EU is not accompanied by some kind of compensation through additional channels of supranational legitimation, democracy within nation states will decay.

While this is clearly not the place to engage in a lengthy elaboration of the meaning of democracy, it still seems worthwhile to highlight one aspect of what we take to be one of its essential ingredients. A democracy is a system of political rule, with a basic division between rulers and ruled. There are two characteristics of how rulers are institutionally positioned in a democracy, one passive and one active. As to the passive mode, rulers and their activity of ruling are subject to the scrutiny and evaluation of voters, the media, organized interests etc., by whom they are held accountable. As a consequence, democratic rulers are defined by the institutionalized possibility that they may lose their office. Yet in order for a system of rule to qualify as a democracy, there is also an active aspect to the practice of ruling: rulers need not only find support; they must be willing and able, both *de lege* and *de facto*, to transform this support into policies, thus determining, at least to some significant extent, the conditions and developments of the political community on behalf of which rulers rule.

This 'active' characteristic of democratic rule is less often focused upon by democratic theorists than the 'passive' one. To reverse this imbalance, we might say: a democratic system of rule is one in which rulers are actually able to 'make a difference' in terms of the public goods and protection they provide through the making of public policy. A system of rule in which rulers are held perfectly accountable by the ruled yet cannot accomplish anything is as much a caricature, or an impoverished version, of democracy as a system of rule that is highly effective in shaping conditions and developments without being accountable to the ruled. Moreover, the two aspects of democratic rule hang together, as it appears unlikely that the ruled will have good reason to support a set of rulers whose capacity for significant policy-making and problem-solving has evidently evaporated.

The ruled are powerless when the institutional resources to control rulers are absent. But the rulers themselves can also be powerless, and thus do not qualify according to our second criterion of what a democracy is, when they find themselves incapable of dealing effectively with problems of providing public goods or of protecting society from 'public bads'. When this is the case, the system of rule loses its policy-making capacity, and democratically constituted political power is idled. Rulers can be deprived and dispossessed of (all or significant parts of) their policy-making capacity by, for instance, military threats. In modern capitalist societies, however, the major cause of in-

capacitation of rulers is of an economic nature. Markets hold would-be policy makers to ransom: as soon as they adopt an activist approach to the solution of social problems through policy-making, they may be ‘punished’ by the adverse reactions of economic actors, such as investors or employers, on whose activities policy-makers depend for their tax base as well as their political support. The present configuration of the Euro-polity and its ‘negative integration’ is clearly such that it enables economic actors to make extensive use of this mechanism of ‘punishment’ and thus to disable the making of public policies.

It follows from this brief conceptual exploration that the democratization of the Euro-polity would hinge on two conditions: not just on the institutionalization of mechanisms by which ruling elites are made accountable and responsive to the ruled, but also on the enhancement of the rulers’ capacity for action, that is their capacity to withstand and constrain the exercise of economic power if and whenever such power stands in the way of the making and implementing of public policy. This latter condition applies to the EU level of rule as much as it does to the policy-making capacity of the governments of member states – a capacity that has been vastly decimated at the member state level by the process of EU integration, without being resurrected at the EU level itself.

As to our second point, the widely shared belief is that there is a growing imbalance between what the EU can do to European citizens and the role the preferences of European citizens are permitted to play in the EU. To be sure, European citizens can register their preferences in European elections. Yet the political resources of the EP remain limited in relation to what it can do in terms of both the selection of Commission members and the substantive legislative proposals of the Commission. European elections reveal even more of the malaise that is familiar from national elections, some of the symptoms of which are low turnout, decline in voters’ party identification, and a very widespread ignorance about what European legislation involves and what the alternatives are. The low turnout in the EP elections is not necessarily a sign of citizens’ indifference towards the EU but may rather be an expression of feelings of frustration and perceived powerlessness, which at some point might also undermine the trust in the regular working of national democratic institutions. In addition, as a consequence of voters’ cognitive, as well as affective, distance from the issues and agendas before the

EP, European elections are perceived to be somehow less important electoral contests within member state arenas, a misperception that is also suggested by the fact that the parties competing for votes are the national parties, according to the electoral law under which EP elections are held. ‘Voters in Euro-elections are simply not offered an opportunity to choose between rival partisan elites presenting alternative programmes at *that* level of aggregation’ (Schmitter 2000b, p. 230; emphasis added). For what is at issue in European elections is hardly what European leaders have done in the past or promise to do in the future. It is rather an expression of support or disapproval aimed at national parties and governments. To be sure, members of the main legislative body of the EU, the Council, obtain their mandate as the result of a democratic process. But this mandate, again, is typically both sought and won in terms of an executive role at the national level, not a legislative role at the European level. This is almost inevitable, since the Council’s negotiations take place behind closed doors, typically concern policy packages and involve mechanisms such as log-rolling and variable coalition-building that remain highly opaque to the national public. Rule-making within the EU is based upon ‘highly secretive and technically obscure decision-making practices’ (Schmitter 2000b, p. 227). The result is an extremely thin kind of accountability, leading to the condition that ‘the EU adopts policies that are not supported by a majority of citizens in many or even most member states’ (Follesdal and Hix 2005, p. 6). Moreover, the main actors in the field of European economic and monetary policy (the Commission, the ECJ and the ECB) remain to a large extent unaccountable¹ to any representative body, pursue policies that privilege market-making ‘negative integration’, and are informed by ‘a neo-liberal regulatory framework and a monetarist framework for EMU’ (ibid.). As a result, these policies are consistently to the right of the policy preferences of the median European voter. As the Commission, in its role as agenda setter and rule enforcer, is unaccountable to both the Council and the EP, it is all the more open to pressures and influences from organized interests that are present in Brussels.

If actors involuntarily suffer losses or disadvantages inflicted by other specifiable actors (rather than anonymous market forces), and if the infliction of such losses is not stipulated by national law (such as tax law or civil law), then such losses require justification and, failing that, compensation. While it doubtlessly provides for gains and opportunities, the EU routinely inflicts such losses. First, and due to the principle of the

direct effect of EU law on member states, citizens have to comply with or are exposed to the effects of European rules even if they have not been decided upon unanimously, but by qualified majority decision in the Council. These can be described as political losses, sometimes dramatized as bordering on ‘foreign rule’. Second, the EU rules and orders which the citizens of member states have to comply with, beginning with the four market freedoms, have virtually always, and in spite of the pretension of a distributionally neutral enhancement of technical efficiency (‘Pareto optimality’), (re)distributive side effects, which benefit some category of economic actors and hurt others. These are equivalent to losses of economic opportunity. Third, as EU-level actors impose constraints and conditions which limit the policy-making capacity of member states in such crucial policy areas as fiscal, monetary and competition policy, states and their democratically accountable governments suffer losses in terms of their political autonomy – losses which can be perceived by national constituencies as plain cases of uncompensated ‘political expropriation’. These three types of losses can be sufficiently severe to require justification.

Standard justifications and their weaknesses

The two standard justifications that Europe offers its member states and citizens are (i) the backward-looking justification that member states have, after all, voluntarily given up some of their sovereignty at the point of joining the Union and (ii) the forward-looking, or functionalist, justification in terms of ‘output legitimacy’. The latter is claimed on the grounds that general observance of European constraints and universal compliance with European regulations will eventually turn out to be for the better, in terms of prosperity, equitable burden-sharing and security from negative externalities, for all sides involved. Losses, Europeans are assured, are of a transitory nature, and corresponding gains of a long-term nature. However, because of the long time that has elapsed since the EU-6 member states originally decided to form the Community, and because of the fact that the Union was a *fait accompli* to the new members of EU-25 when they joined in 2004, justification (i) appears weak. So does justification (ii) in view of the debatable question of whether the promises and hopes for universal gains in prosperity have actually realized or, for that matter, will be redeemed at some (indeterminate) point in the future. It is in view of these two weaknesses that it seems desirable

that, in addition to the backward-looking and the forward-looking justification, a third more presentist justification mechanism should be developed.

It also seems consistent to argue that the more harm and loss an institutional actor is capable of inflicting, the more strictly it should be supervised and held accountable. As Scharpf (2004) has pointed out, the institutional structure of the European policy process consists of two constituent arenas. On the one hand, we find the arena of institutional actors (Commission, ECJ, ECB), who control highly concentrated power resources with a major impact upon European member states and citizens; yet these actors and the ways their resources are employed are not accountable to anybody. On the other hand, there is the arena of the Commission in its agenda-setting role, of the Council and of the EP; this is a set of institutions in which power is extremely dispersed and the number of veto points is arguably greater than it is within any national democracy. Given the highly consensual and consociational nature of this latter arena, it seems effectively prevented from doing much harm. Taken together, the proportionality rule stated in the first sentence of this paragraph is stood on its head: the more power, the less accountability, and vice versa.

As far as the second arena (Commission as agenda setter, Council, EP) is concerned, one of the most striking differences between the domestic democracies at the member state level and the EU polity is that the latter does not have an institutionalized opposition. One might say that, lacking hierarchical enforcement capacities and taxing powers of its own, the EU cannot afford an opposition, as the policy process is utterly dependent upon consensus and is extremely vulnerable to non-cooperative moves on the part of member state governments. As a consequence, legislative outcomes emerge from bargaining behind closed doors in the Council and are adopted under decision rules based on either unanimity or 'oversized majority'. In its legislative activities, the EU rules by elite consensus and compromise, and it cannot rule where these are not forthcoming. This style of ruling without an opposition is what is meant by governance – a concept whose rise to amazing popularity in academia and beyond is itself symptomatic of the scarcity of power resources that are both legitimate and effective. 'Governance' means coping with conflicts and policy problems through negotiation, compromise, deliberation, voluntary cooperation, and non-coercive ('soft') modes of persuasion and policy coordination. The Commission's White Paper on 'European Governance' (Euro-

pean Commission 2001) urges the ‘use of non-legislative instruments’, ‘co-regulatory mechanisms’ such as the ‘open method of coordination’, ‘involving civil society’ and strengthening a ‘culture of consultation and dialogue’. ‘Good’ governance can thus be described as an activity that tries to create and maintain order in a complex world of highly interdependent elements with a blurred line between state and non-state (that is, economic and ‘civil society’) as well as national and supranational actors, and with multiple veto points and a severe scarcity of sovereign power resources. In this world, the activity of ‘ruling’ loses much of its vertical dimension of bindingness and ‘giving orders’; it transforms itself into horizontal acts of winning support through partnership and a highly inclusive participation of all pluralist collective actors to the extent that they muster any capacities at all for vetoing or obstructing policy results or for contributing to desired outcomes.

Both of these institutional subsets, however, share the feature of deficient accountability. They lack what we have termed ‘presentist’ legitimacy. In spite of the normative appeal of some of the catchwords (such as ‘openness’, ‘participation’, ‘accountability’) employed in the document on European governance, we must note that the type of governance the document outlines is an elite-sponsored executive strategy to win support and cooperation in a supranational context. This strategy is driven by the necessities of scarce political resources rather than by normative principles, and it is advertised, with an evident technocratic ambition, as ‘good’ governance rather than normatively ‘right’ governance, which would be based upon and answerable to the preferences of European citizens. The legislative process is all-inclusive and non-partisan rather than based upon a set of (essentially contested) political values and programmatic priorities. The European style of governance is strongly non-adversarial and consociational, often slow, erratic and opaque as to who is responsible for which policy, its conceivable alternatives and the outcome of its implementation. Lacking an opposition and, as a consequence, an ongoing contest between governing and opposition forces, European governance at the elite level and beyond is deprived of the creative ‘learning pressure’ that democratic political competition can instil.

Instead of a political opposition, it is individual countries or groups of countries that are perceived to act as contestants in European policy debates within the Council. But member states and coalitions of member states are not equivalent to an opposition

proper. Citizens have no choice between being, say, Spanish or Irish, while they do have a choice between supporting, say, social democratic or market-liberal policy proposals, provided such a choice were offered to them. The absence of an equivalent to an opposition (or a counter-elite to the governing elite, preparing for taking office after the next elections) has, we argue, three implications, all of which are relevant for issues of legitimacy:

First, a regime of European governance that has no opposition does not allow for institutionalized dissent. It thus tends to leave dissenters with the only option of populist, nationalist, xenophobic and protectionist anti-EU mobilization. Such of fundamental opposition movements, located partly on the political left but mostly on the right, have been gaining momentum in virtually all member states and even have achieved a not insignificant minority of seats in the EP itself. The elite consensus reached in the Council and the Commission remains vulnerable, and increasingly so, to what Beetham and Lord (1998, p. 14) refer to as ‘direct popular counter-mobilization’.

Second, the highly consensual and opaque style of legislation within the Council, as well as the uncontested agenda-setting role of the Commission, leave most European citizens in a state of semi-illiteracy concerning European matters and issues. As Follesdal and Hix (2005, p. 13–17) convincingly argue, the lack of knowledge and interest that citizens show in these affairs and policy issues does not have to be genuine, but may well be an artefact of the lack of public debate and controversy at the elite level. Voters form and, as it were, ‘discover’ their preferences endogenously in the policy process itself, that is by following the contest between alternative policy packages and political programmes. Both the lack of such contests and the technical complexity of many of the issues make it exceedingly difficult for citizens to gain and apply what citizenship requires, namely an ‘adequate understanding’ (Dahl) of issues, agendas and their own ‘rightly understood’ interests and preferences. Perceiving very well that European legislation is in some way consequential for them and their interests and values, but at the same time being deprived of the wholesome ‘learning opportunity’ that comes with the public debates on democratic politics and the contest of clearly distinguishable parties and programmes, citizens observe the EU policy process with a sense of apathetic fatalism and sceptical non-involvement.

Third, the legitimacy of the domestic democratic policy process itself is bound to suffer if the citizens of member states perceive that elected national governments are embarrassed by having to submit to ‘Brussels-based’ policy decisions which contradict the expressed preferences and evident interests of the member state government and its constituency. These citizens have reason to feel politically dispossessed if national legislatures are being by-passed² by the Council and the EP as institutions authorizing laws that apply to the national citizenry. Inversely, and to mitigate voters’ frustration with this inconsistency, member state governments have strong incentives to delay and obstruct unpopular Council decisions whenever national elections are forthcoming and the governing parties must fear losses due to the impact of EU policies upon critical parts of the national electorate.

We conclude from this discussion, to repeat, that stronger and more ‘presentist’ forms of legitimating EU-level decisions and policies are called for – not just for the sake of building European democracy, but equally to preserve the credibility of democratic arrangements within member states. Technocratic, or what Beetham and Lord call ‘performance-based’, justifications are no longer good enough. For one thing, and as the ‘European Employment Strategy’ (as adopted by the Lisbon European Council in 2000 and significantly watered down in its ambitions by the Brussels European Council of 2005) serves to demonstrate, indicators of actual performance are not as compelling as they would have to be if the burden of justification of EU policies were to be borne by them alone. For another, there is no such thing as exclusively ‘technical’ policy-making that follows a ‘one best way’ charted by experts or, for that matter, the ECB. Any presumably expert decision has (re)distributive effects and can be politically challenged in terms of their fairness and appropriateness. Moreover, virtually all students of the politics of European integration agree that the ‘permissive consensus’ that used to generate passive and detached acceptance of EU decisions is wearing thin with the European citizenry, and that the EU has turned from a generator into a net consumer of generalized support.

Another reason that leads us to conclude that a more robust procedural framework of legitimation is needed derives from the dual fact that (i) the redistributive impact of European policies is making itself felt ever more acutely by citizens (an example being the Commission’s abortive Services Directive) and (ii) the tolerance for redis-

tributive effects appears to decline with enlargement. For as long as there is a sense of shared identity, solidarity and familiarity with ‘our neighbours’ (say, within the EU-6), we do not object to them profiting from some redistributive effects. It is an entirely different matter if beneficiaries can be framed as ‘those other people’ or ‘those poor newcomers’ who gain (major, permanent and perhaps even seemingly ‘undeserved’) advantages ‘at our expense’.

A final reason that adds to the urgency of legitimation issues is the fact that the EU is a moving object that is still in motion, and will remain in motion for the foreseeable future, continuing to be involved in a dynamic process of maturation, evolution and further expansion. These dynamics concern both the (mutually conflicting) objectives of territorial expansion (‘widening’) and of the (re)allocation of policy competences within the Union (‘deepening’). We further conclude that if legitimation of EU policies can

- neither derive from unquestioning trust in the technical correctness of expert decisions (aptly described as ‘Pareto authoritarianism’ by Follesdal and Hix)
- nor develop from the reliance on sentiments of widely shared sympathy, identity and solidarity with our fellow European neighbours,
and if
- neither the chain of justification of domestic member state democracy that extends from national elections to the Council and the Commission is strong enough
- nor opposition-free consociationalist European governance is an adequate answer,
then there is ample reason to explore additional options for the legitimation of European rule.

Democratic legitimacy in the absence of a demos?

Legitimation is a set of procedural norms from the application of which legitimacy emerges. Legitimacy must first of all be distinguished from ‘acceptance’, as one is the opposite of the other. The latter term comprises favourable habitual attitudes, opinions, calculations of interests, and sentiments which, taken together, condition the empirical agreement of parts of a population with political decisions and regimes. Legitimacy, in contrast, is the effect of the compliance of actors with ‘pre-established norms’ (Schmit-

ter 2001, p. 2) that generate the 'rational' motivation (which is open to argument and insight) of all members of a political community, the demos, to comply with acts of political rule, even if these acts (laws, executive and court decisions) are in conflict with the habits, opinions, sentiments and interests of those who still comply. These pre-established norms generate motivational force because they are believed to be intrinsically and demonstrably just and valid. They stipulate the (limited) right of rulers to rule and the (equally limited) obligation of the ruled to obey.

The source of validity of the constitutive norms can vary widely: it can be divine revelation, national tradition, the universally shared belief in the exceptional qualities of a ('charismatic') leader, or the belief that these norms, in addition to being intrinsically valid, will also have desirable consequences (such as domestic and international peace). As far as the EU and its member states are concerned, this source of validity cannot be anything other than democratic in nature, meaning, at a minimum, the equal political rights of citizens, the free exercise of these rights under a regime of civil liberties, and procedures that hold rulers accountable for what they do while ruling. These rights and obligations are always thought to be embedded in a constituted political community whose members, due to the longitudinal stability of a shared past and a hoped-for shared future, encounter each other with greater expectations of trust, reciprocity and solidarity than the expectations they have of people who do not belong to that constituted community or demos.

The problem, however, is that the European political community for which both the right of rulers to rule and the obligation of non-rulers to obey must be designed is different from the demos as we know it from consolidated national democracies. The notion of a national demos, because it invokes a shared past and the commonality of a common future fate, provides a powerful and pervasive reminder of the collectivity in whose collective interest rule must be conducted and in whose favour (namely that of 'our' fellow citizens and, as such, the democratic co-authors of the law) compliance is called for (from all fellow citizens).³ There is clearly no equivalent of the national demos at the transnational European level. Moreover, there is hardly a prospect of the national populations of current and future EU member states undergoing a fusion that will make them into a demos. Even if the Treaty on the Constitution of Europe (TCE) had been adopted, the capacity of such a unifying document to integrate its subject-

citizens into something remotely resembling a demos would remain in doubt (Grimm 2004).⁴ As a rule of thumb, a durable and solidly self-recognizing political community – that is, a demos – is created by constitutional design only under two rather exceptional context conditions: either a historical rupture associated with a liberating revolutionary experience (France, the United States) or a similarly deep discontinuity after historical defeat and breakdown, with widely shared resolve to make a new beginning (France, Germany, Italy after World War II). As neither of these conditions applies to today's Europe, the energies of passion that are released by the shared awareness of a dark past of dictatorial rule or a shining future of liberty are not generally available to drive the process of European integration. Such passions may play a limited role in the Central East European states that after 1989 escaped from the supranational regime of authoritarian state socialism. Yet in spite of all the rhetoric of 'returning to Europe', what these countries are eager to return to is the condition of their own nationhood, with joining the EU being largely perceived as a tribute to economic expediency, not to political aspiration.

If anything, the process of European integration, the substance of which has largely been 'negative' integration into the Single Market, has tended to release considerable centrifugal in addition to integrative energies. While the proverbial saying that 'good fences make good neighbours', if applied to European state borders, has been at best of limited truth in the history of the twentieth century, the opposite does make some sense in the recent experience of the Single Market: the absence of 'fences' may create tensions between neighbours. While the small North West European economies (Ireland, Denmark, Benelux) as well as the Baltic countries have every reason to appreciate the added opportunities that market integration has offered them, such is not necessarily the case with the large continental economies of France, Italy and, in particular, Germany (with its persistent burden of integrating the new *Länder* and its liability of a still basically Bismarckian social security system). In this latter group of countries, and given the new mobility in the context of vastly diverging labour costs, there are increasingly vocal groups of 'integration losers' (which come by country, by region, by sector of industry, by trade, by occupation, by size of enterprise) who relate to their more fortunate foreign neighbours with a sense of economic fear, intense rivalry, resentment, distrust and jealousy. These sentiments are bound to lead to demands for better protec-

tion and more lenient constraints for ‘us’ and fewer European subsidies for ‘them’. It also leads to the spread of the strategic pattern of the ‘competition state’ that is constantly searching for ways to make conditions more attractive to foreign and domestic investors by lowering taxes and the costs of employing labour relative to conditions that prevail in neighbouring countries.

The tensions that are generated by the Single Market do not just affect integration at the international (that is, European) level; they also impact on national integration and the cohesion of national societies and economies. Political parties and movements within the wealthier regions of member states (in the South West of Germany, the North and East of Spain, the North of Italy, the North of Belgium and elsewhere) have obvious interest-related reasons to turn to their national governments, as well as to their regional constituencies, with pleas backed by powerful regional interests to relieve them from the burdens of interregional fiscal redistribution within their nation states, so that they can compete more effectively within an environment of denationalized markets.

Both European political elites and academic Europeanists have for a long time been aware of Europe’s Achilles’ heel of lacking a demos that is remotely equivalent in its internal coherence and its compliance-generating potential to the various national demoi. Numerous efforts have been made by European elites to alleviate this perceived defect, to build and promote through symbols the awareness of a European identity, and to stimulate the public’s imagination of a Europe-wide political community. Eight types of approaches to strengthening an all-European sense of identity, belonging and common interest will be briefly mentioned here.

First, many EU documents and legal texts try to provide assurances that thinking of oneself as a ‘European’ need not interfere with, let alone overrule, narrower identities of a national or regional kind, as Europe is supposed to be committed to the recognition of cultural (linguistic, religious, ethnic, historical) diversity and legitimate pluralism.

Second, there are philosophical and educational initiatives that probe into the common heritage of traditions and values that may potentially overarch diversity. These include Greek antiquity, Christianity and Judaism, the Enlightenment, and the lessons from the disasters of totalitarianisms and international warfare which marked Europe’s ‘short twentieth century’. These references, together with the visionary assertion that European states and peoples aspire ‘to build a common future’ (TCE I–1) and the refer-

ence to the distinctiveness of European values and visions, may help establish an affective dimension for European identification.

Third, a common European cultural space has been created to bridge cognitive distances between European citizens. It includes well-funded programmes for transnational scientific collaboration and student exchange programmes, including the emergence of a European scene in the 'high' as well as popular arts, entertainment and sports.

Fourth, there are the major economic programmes of structural, regional, agricultural and cohesion subsidies designed to boost the competitiveness of member states and regions and to facilitate the process of their upward harmonization.

Fifth, there is the legal framework of secondary European law with its emphasis on creating a Europe-wide 'level playing field' of fair competition, through the protection of labour, consumers, and the environment that is made binding on all producers or employers. For the euro zone, the EMU is the main framework of denationalized monetary policy. Sixth, there is the promise of prosperity through integration. The Treaty of Rome already lists among the 'fundamental objectives of the European Community' the constant improvement of the living and working conditions of the European peoples'. Seventh, there is a dimension of integration that is abstractly referred to as 'the European social model' (ESM), comprising the combined objectives of prosperity, dialogue and inclusion in matters of social policy. The latter, however, remains firmly under the control of member states and has increasingly become a factor in member states' strategies to bolster national competitiveness. Eighth and finally, we come to the TCE, whose intended ratification by 2006 looks highly unlikely in mid-2005. As commented upon above, the TCE's integrative potential is limited, and its content undertakes to 'Europeanize' democratic principles and values, rather than creating new rights beyond what is presently constitutional law within member states. It would serve, *inter alia*, to specify and expand the stipulations of the Maastricht Treaty on the European Union (TEU Art. 17–22) concerning the rights attached to the status of European citizenship.

Let us briefly turn to an assessment of the empirical outcome of these various initiatives to integrate the populations of member states into something that approximates an equivalent of a European citizenry or *demos*. In doing so, we use the summary and analysis of Eurobarometer surveys provided by Sylke Nissen (2004). When EU-15

citizens are asked whether or not they think EU membership of their country is a 'good thing', the answers are roughly 50 per cent 'Yes' and 50 per cent 'No' for 2003. This is the same distribution that was found in 1983, while in the early nineties it was 70 per cent 'Yes' against 30 per cent 'No'. Support for and identification with the EU can be either of an affective or of an instrumental (or functional) kind. The latter is based on an assessment of the perceived costs and benefits of membership whereas the former values EU membership as part of one's own identity. As far as the 'sense of European identity' is concerned, one robust finding stands out: identification becomes stronger with the duration of membership, with the EU-6 countries leading the field. However, as far as utilitarian motivations ('membership is advantageous for the country') are concerned, it is equally evident that much depends upon whether one's country is a net recipient of EU funds or a net contributor to them. All the major net contributors (Germany, Austria, Sweden, the UK) are to be found at the lower end of the scale of utilitarian supporters (close to or in the cases of Sweden and the UK, substantially below 40 per cent), whereas all the 'cohesion countries' (Greece, Ireland, Portugal, Spain), with the substantial net benefits they are enjoying, turn out to be utility enthusiasts with positive answers of above 60 per cent.

The policy implications of these findings are rather clear, as stated by Nissen (2004, p. 29). First, the sustained efforts of the EU to cultivate a sense of European identity by cultural, symbolic and educational strategies have not been significantly successful. Countries still differ according to their identification with Europe, and the variable that explains these differences is duration of membership, or habituation. Obviously European elites cannot administer identity any more than anyone else. Second, utilitarian support for the EU is fluctuating and is largely contingent on the perceived distributional impact of EU policies and finances. As a rule of thumb, the EU has to buy support through its allocation of costs and benefits, rather than being able to rely on robustly entrenched normative orientations. What holds European citizens together is the systemic integration of interests, interdependence and exchange, and much less so – and in markedly asymmetrical ways – the social integration of shared norms, identities and solidarities (Delhey 2004a). This imbalance of the two kinds of integration is widely expected to increase in the aftermath of the transition from EU-15 to EU-25.

What makes the incomplete and unsystematic list of the integration approaches and initiatives so far undertaken in the EU interesting is what is not included in it. First, Europe does not have a foreign policy capacity, the ambitious proclamations of a 'Common Foreign and Security Policy' and the debates on a 'European security identity' notwithstanding. As the war in Kosovo of 1999 and the other post-Yugoslav conflicts have amply demonstrated, Europe has neither the military resources nor the resolve to conduct an autonomous and coherent foreign and security campaign of its own. The EU is often, in our view, wrongly credited (cf. Beetham and Lord 1998, p. 102) with being an institutionalized guarantor of international peace between its member states. That peace is guaranteed in Europe is surely no small accomplishment, but it is an accomplishment not of the EU, but of NATO (under its US leadership), to which the majority of member states belong. Also, a lacuna in the security capacities of the EU is its failure to address open or latent separatist civil wars within member states (Northern Ireland and the Basque country respectively), as these are left to the exclusive authority of the latter. Any attempt by the EU leadership to unify Europe by the conduct of an autonomous foreign policy would immediately backfire by deepening the divide between the 'old European' West of the continent and much of the 'new European' East that was so effectively invoked by the US administration on the eve of the American attack on Iraq.

Second, Europe does not have a consistent and reasonably promising policy on employment and social security, in spite of the increasing ESM rhetoric and the European Employment Strategy (EES) inaugurated at the Luxembourg (1997) and Lisbon (2000) summits. While these problems are themselves partly caused by the competitive conditions of the single market and negative integration, the EU largely leaves it, in the name of 'subsidiarity', to member state governments to cope with unemployment and social security finance. The policy choices for dealing with these problems in effective ways, however, are severely constrained by the monetary and fiscal regime governing the euro zone. To be sure, a rich variety of innovative and promising policy proposals for coming to terms with ever more pressing problems of poverty, exclusion and marginalization (proposals such as basic income schemes designed to raise all European citizens beyond the poverty line by entitling them to an unconditional and tax-financed minimum income, or Schmitter's proposal for a 'Euro-stipendium' (2000a, pp. 44–46))

have been advocated. Yet it is in the nature of open economies that member states that adopt such policy innovations unilaterally will immediately find themselves in the ‘sucker’ position, that is of an actor who provides uncompensated advantages to others. Meanwhile the political costs of forming a policy consensus across all or a significant number of member states appear prohibitive. If the EES, to date hardly a success story, can be taken as an indicator, it signals the growing awareness of European policy elites that issues of employment, social security and poverty will either be resolved at the supranational European level – and by policies of ‘positive integration’ that would have to trump or bypass existing ‘subsidiarity’ reservations – or they will not be resolved at all.

Europe – un objet politique non-identifié

What can these and similar efforts to integrate European societies transnationally and to create some approximate equivalent to the demos within the nation state conceivably result in? The answer cannot possibly be that the European Union will assimilate itself to the familiar pattern of the European nation state – which, as we have argued before, is the necessary precondition for political democracy and the legitimacy that flows from it. We know that the EU is a ‘non-state and non-nation’ (Abromeit 1998; Schmitter 2000a). This negative classification does not tell us what kind of legitimation is both appropriate and feasible for this fabulous entity which Jacques Delors allegedly once called *un objet politique non identifié*. In fact, its combination of territorial and functional elements is puzzling and defies unequivocal classification. As an ‘ever closer union among the peoples of Europe’ that develops ‘a single institutional framework which shall ensure the consistency and the continuity’ of its activities and that has established the status of citizenship for the nationals of its member states, the EU is equipped with some of the basic features of a territorially defined polity. At the same time, the EU is hardly more than a bundle of partial regimes with varying participants, such as the internal market pursuant to Articles 3, 14 and 95 TEC, the currency union pursuant to Articles 105ff., or the common defence policy of those EU member states which are also members of the WEU (Article 17 paragraph 2 TEU).

One of the most creative attempts at a classification of the institutional particularities of the EU so far Philippe Schmitter’s distinction between *stato/federatio*, *confederatio*, *condominio* and *consortio* (1992, 1996). These types represent different com-

binations of territorial and functional dimensions of political entities. The *condominio* is the one which comes closest to the EU in that it combines the same variants of functions and of territorial units. If we try to translate Schmitter's typology into the conceptual framework and the terminology of state and constitutional theory, the *stato/federatio* is the federal state (*Bundesstaat*), the *confederatio* is a confederation (*Staatenbund*), arguably the *consortio* can be understood as a pattern of intensified intergovernmental cooperation (like the EU's common defence and security policy), and a *condominio* is an entity which unites elements of a federal state (*Bundesstaat*) and of a confederation (*Staatenbund*) without strictly conforming to either of them. According to the conventional legal distinction, federal states are based upon a constitution and have a direct legal relationship to the citizens of the federal units (states, cantons, provinces, *Länder*). In contrast, confederations come into being through the conclusion of international treaties, and a legal relationship exists only between the federal entity and its member states and does not extend to the citizens of the latter. The EU combines both of these elements: it is based upon a multilateral international treaty (which does not lose this character even if its most recent version [October 29, 2004] is to serve as a 'Constitutional Treaty' after its hoped-for ratification in all of the 25 member states by November 2006). At the same time, because of the principle of direct effect as well as the institution of union citizenship, there is also a direct legal relationship between the EU and the citizens of the member states. To underline the hybrid nature of this political entity, the German Federal Constitutional Court has invented the untranslatable German term *Staatenverbund*.⁵

Unfortunately, the new term does not necessarily help us to understand the genuinely political character of the EU, nor does it provide us with a new concept. Without a minimal degree of conceptual clarity about the EU, the criteria by which we can determine the requirements for the legitimation of this polity and its policies remain vague at best. In what follows we suggest an understanding of the EU as a political entity for which a wide variety of names would fit, ranging from union, federal union or confederacy through confederation, community and system of states to perpetual league, *république fédérative* and *Bund* (Forsyth 1981, p. 1). Whatever the appropriate term, what constitutes the particular character of the EU is its origination in a treaty which not only creates a distinct political entity – the union or the *Bund* – but which at the same time

transforms the political status of the parties to this treaty, the member states. In the following we will elaborate on this.

There are three basic forms of relationship between sovereign states, namely hegemony, balance of power, and those composite entities the potential terms for which we just mentioned and which we prefer to call union or, in German, *Bund* (Forsyth 1981, p. 204). Unions originate from treaties between sovereign states. In order to understand their particular character it is helpful to distinguish between three general classes of contracts. When actors have complementary interests and enter into a voluntary legal relationship under which they exchange valued items (goods, services, ideas and so on) this legal bond is what we call an exchange contract. When actors have identical interests and enter into a voluntary legal relationship, the contract which they conclude is what we call a purposive contract (*Zweckvertrag*). Finally there is a third kind of contract which is intended to transform, confirm or nullify the status of at least one of the parties (one dramatic example being the German Unity Contract, which stipulated that at the moment it became effective one of the two contracting parties, the GDR, would cease to exist). The marriage contract between two people is typical of what some authors call a status contract (Greber 2000, p. 175). For those familiar with Henry Sumner Maine's famous statement in his 'Ancient Law' that 'the movement of the progressive societies has hitherto been a movement *from Status to Contract*' (Maine 1986 [1864], p. 165, emphasis in original), the notion of a 'status contract' must appear oxymoronic. In fact, an act by which the existential conditions of a person are changed is normally not an act of the same character as a contract affecting a thing which he or she can forfeit or contribute. A status contract differs from the two other types of contract in that it is an existential contract in which a person with a particular identity enters into a new legal relationship with another person or persons, for the purpose of changing this identity in a new way. The ensuing union does not absorb the partners; but it mutually obliges them in an ongoing relationship that is basically intended to be indefinite. Note that this kind of contract is often the legal confirmation of a pre-legal relationship, such as the relationship of love in the case of a marriage contract. Such a pre-legal relationship consists in a relationship of trust between the partners and requires diffuse mutual duties of loyalty and the shared expectation of irreversibility.

The EU as a 'republican empire'

Status contracts are also concluded between states,⁶ the relevant category for our discussion being treaties that constitute a union (or a *Bund*) between them. A union is different from a mere alliance between independent states that pool certain resources but retain their independence and identity. What is required for the creation of a union is the readiness of the parties to the status treaty to enter into mutual ties of solidarity. Tocqueville, analysing the conditions of durable confederations, emphasized 'a uniformity of interests' and the 'same stage of civilization, which almost always renders a union feasible' (Tocqueville 1990 [1835-40], ch. VIII, pp. 169f.). Similarly, John Stuart Mill claimed that federal unions between foreigners are workable only if, among other requirements, there is 'a sufficient amount of mutual sympathy among the populations' (Mill 1991 [1861], ch. XVII, p. 320). Others have referred to this requirement as that of homogeneity (Schmitt 1965 [1928], pp. 375ff.; Forsyth 1981, p. 116, 207). But such similarity does not necessarily lead states to enter into a union. Similarity is not even sufficient to hold an existing union together. The dissolution of the union of Norway and Sweden in 1905 is a striking example, the dissociation of Libya and Egypt in the seventies of the past century another one. Even more unlikely is the formation of a union between foreign nations. But it is precisely this that is constitutive of the EU. We do not deny that the majority of the European nations which are members of the EU share a cultural heritage (as based upon the cultural tradition of Greek and Roman antiquity, the Christian-Jewish religious sources of their culture, and the ideas of the Enlightenment). However, there are strong empirical indications that their populations perceive themselves mutually as foreigners, because they do not speak the same language, have different national histories and myths, have developed different concepts for understanding their political identity and, last but not least, harbour strong national prejudices, sometimes even resentments, against each other.

It is against this historical background of perceived mutual foreignness that the peculiarity of the EU must be assessed. Having been established for the purpose of 'an ever closer union among the peoples of Europe' (Article 1 para 2 TEU), the European Union is the first – by definition voluntary – federation in the history of mankind that recognizes the dissimilarity of its constituent parties. The EU is a political body which is committed to respecting the distinctive national identities of its member states and

citizens, yet at the same time subjects them in many significant areas to the jurisdiction of a common government. In the history of political formations, most cases in which distinct peoples have been subsumed under a common regime are those in which integration is accomplished through the hegemonic prevalence of an imperial centre and the coercive power originating from that centre.

Due to their coercive mode of integration, empires can extend themselves, depending upon the military resources at their disposal, over huge geographical areas. By doing so, they come to incorporate an increasing number and variety of peoples, tribes and nationalities. In contrast, and up to the end of the eighteenth century, republics – polities based upon the voluntary participation and the active involvement of their citizens in common affairs – had existed only at the local level of relatively small city states, and their citizenries were usually highly homogeneous in terms of their origin, language, religion and culture. Both the Federalists and Tocqueville observed that the federal system of the United States had overcome the small-scale character of the traditional republic and, for the first time in history, established a republic that resembled an empire in its spatial extension. This became possible because what Tocqueville speculated upon in his prophetic last two pages of the first volume of *Democracy in America* did come to pass:

A time will come when one hundred fifty millions of men will be living in North America, equal in condition, the progeny of one race, owing their origin to the same cause, preserving the same civilization, the same language, the same religion, the same habits, the same manners, ... imbued with the same opinions. (1961 [1835], p. 521)

The first spatially extended republic in history was built upon, as Tocqueville foresaw (and considered the indispensable precondition for a durable federation), the ethnic, linguistic and cultural uniformity, or at least similarity, of citizens. If anything, this melting-pot vision of a homogeneous empire-sized republic is being trumped today by the EU polity, in that the latter has not only achieved the territorial expansion of an empire, but also allows for and consistently encourages the maintenance of national and regional diversity. The massive presence of entrenched, ineradicable, sub-territorially based and legally recognized diversities makes up the most significant difference between the EU of the twenty-first century and the US of the eighteenth and nineteenth

centuries. Even though the ‘melting pot’ of US society has turned into a proverbial ‘mosaic’ in the twentieth century, the latter refers to individual and group differences, not territorially entrenched and localized ones.⁷ The European Union is first spatially extended union of a great number of highly distinctive peoples that is governed as a republican regime. It reconciles the main attribute of an empire – multinationality – with an essential quality of a republic, political freedom, the latter resulting from the voluntary character of the former. To put it oxymoronically: the EU is a republican empire.

Legitimacy in a ‘republican empire’ with redistributive policies

But that oxymoron makes the question of legitimacy even more puzzling. What is conceivably the normative basis of rule (and as such the equivalent to either the force of imperial coercion or the bond of Tocquevillian ‘similarity’) that might keep the Union together? Can the absence of coercion quasi-automatically produce feelings of ‘mutual sympathy among the populations’ which Mill claimed is an indispensable condition of durable federations, or is the voluntary decision to join the federation in itself a sufficient warranty for its durability? Is it the republican form of government – political freedom – which is strong enough to bind a union of foreigners together, as suggested by Habermas’ vision of a rise of supranational ‘constitutional patriotism’?

Note that there is a European tradition for dealing with a situation in which groups are alien to or even have hostile feelings towards each other. Europeans have found a way of coping with their mutual distinctiveness within the relatively narrow and densely populated geographical boundaries of the European continent. Here we refer, of course, to the principle of toleration, which developed in Europe during the second half of the seventeenth century as a first step towards religious peace. After the disasters that plagued the first half of the twentieth century and as a consequence thereof, nationalist collective feelings of grudge and hatred have largely faded away, although national stereotypes, prejudices and a certain degree of distrust between the populations of the EU member states clearly remain. Still, this has not prevented the EU from becoming a closer union of European peoples, if perhaps only in terms of its system of governance. This is aptly grasped in Joseph Weiler’s statement:

“In political terms, this Principle of Tolerance finds a remarkable expression in the political organization of the Community which defies the normal premise of

constitutionalism.... A majority demanding obedience from a minority which does not regard itself as belonging to the same people is usually regarded as subjugation... And yet, in the Community, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to accept to be bound by precepts articulated not by 'my people' but by a community composed of distinct political communities: a people, if you wish, of others." (2001, pp. 67f.)

The – admittedly sometimes disgruntled – acceptance of EU policies of gender equality and anti-discrimination, which impose severe constraints upon some member states and their political cultures, shows that the idea of constitutional tolerance is a real European phenomenon and not the offspring of constitutional idealism. We should not overlook the fact that tolerance is not an inherently democratic argument for legitimizing public policies (cf. Forst 2003); in the political history of Europe it evolved as a pre-democratic disposition of the absolutist state towards religious diversity. Modern democracies, under the impact of a 'politics of difference', have become increasingly responsive to their citizens' demand for recognition of their identity and respectful coexistence of their mutual otherness. Thus the respect for 'otherness' has become an inherent element of the democratic cultures of (most of the) current EU member states and can be extended relatively easily across national boundaries, which in many respects have lost their exclusionary function. Although there is always some danger of backlash, the values of toleration and respectful coexistence seem to be firmly rooted in contemporary European political culture. In that sense, Europe can be described as a political community of ethnic, religious, linguistic, historical and other communities (Kraus 2005).

What interests us here is the fact that this achievement is not primarily one that can be attributed to the regime quality of liberal democracy. Apart from the value of toleration being older than democracy, the latter, at least in its majoritarian variants, does not inherently foster toleration. Liberal democracy, on the other hand, has always been advocated and defended in terms of historical projects that were related to other emancipatory values, namely individual freedom vs. authoritarianism, national unity and self-determination vs. princely prerogatives and imperial rule, social progress vs. the rule of capital, or international peace vs. belligerent dictatorship. In terms of these and similar oppositions, there has always been in the history of democratic thought and practice a

compellingly plausible answer to the question: What is democracy good for? This plausibility, we submit, has to some extent faded away in Europe, partly because its opposites (imperial rule, authoritarianism, the denial of national self-determination) have disappeared from the scene, and partly also because we see that large and persistent problems of social justice defy the democratic method of rule, as the ubiquitous and, it would seem, democratically irremediable crisis and decline of welfare states indicate. Democracy is being separated from the social project, the national project and (after the demise of state socialism) the anti-totalitarian project as well. Also the verb 'to democratize' has lost some of its normative appeal as it has turned from a reflexive verb ('doing something to yourself') into a transitive verb ('doing something to others'), meaning that foreign states and their populations are made, in the name of their 'democratization', objects of wars, such as in the current American war in Iraq. Others have argued that democracy is essentially a domestic national regime form that loses much of its appeal and potential under the prevailing conditions of globalization and denationalization (Zürn 1995; Leibfried and Zürn 2005).

Thus, in response to the question raised in the sub-title of the present essay, democracy does not appear to be the answer to many, and arguably the most pressing, of our contemporary problems. For the basic notion inherent in any concept of democracy is a 'vertical' one: we, the people, want to make sure that our rulers 'up there' do the right thing (the social democratic version) or at least make sure that they do not do the wrong thing (that is, interfere with our liberty – the ever more popular libertarian version); and for this we need the political resources afforded by democratic institutions. We are certainly far from a situation in which these two versions of the failure of rule have become irrelevant, and democratic antidotes obsolete. But there are other categories of problems which are, so to speak, outside the reach of national forms and scales of democracy.

What is the nature of these other problems? We think that they are located in a horizontal dimension and thus do not affect the relation between the ruled and their rulers, but instead involve border-crossing relations between the ruled plus the rulers 'here' and 'there'. While constitutional toleration is a norm that encourages difference-bridging and coexistence-enhancing practices 'here', what is called for in border-crossing relations is solidarity, perhaps best defined as an attitude of practical non-

indifference towards the needs and rights of others who do not belong to 'our' national citizenry. While national citizenship has been defined as the 'right to have rights', solidarity within the 'republican empire' of the EU can only mean the denationalization of rights. While democracy, as we have demonstrated, is inevitably tied to the demos of a nation state, solidarity as the endowment of others with rights and claims is an achievement that supranational agencies specialize in and derive their legitimacy from. To the extent that the EU (as a special case of a supranational agency) is able to free rights, including social and economic rights, from their national containers and make them available to all Union citizens, it gains access to the same kind of legitimacy.

Border-transcending solidarity based upon the recognition of the rights of others is no doubt a demanding and risky policy. Its proponents must have institutional means at their disposal with which they can condition the willingness of Union citizens to share not just 'respect' but also resources with others, who are foreigners. It is one thing to recognize 'the other' as an equal, but it is much harder to share with him or her parts of one's income. For instance, a Belgian steel worker must be prepared to accept income losses in favour of, say, a Greek olive grower and the EU must be able to control political resources that induce him to do so. Democratizing Europe after the model of the nation state will not increase but undermine the capacity of the Euro-polity to allocate rights and claims in a 'nation-blind' manner. Even the most robust national democracy (or, rather, precisely the most robust national democracy) does not help here, as it will function as an obstacle to, rather than a promoter of, such an institutionalized form of solidarity.

So far European citizens have been called upon to believe that negative integration through market creation will trigger an ongoing positive-sum game of Pareto optimality. As many Europeans, including entire European countries and regions, are still awaiting the onset of this game, an equivalent effect can be achieved through the carefully designed endowment of all Europeans with social and economic rights. After the most recent enlargement by the ten predominantly post-communist countries of Eastern and Central Europe, the number of recipients of EU subsidies has considerably increased; hence the sacrifices required by the populations of the relatively wealthy few net contributors to EU funds may become so painful that their national governments are likely to limit their share, lest they fall victim to anti-European popular movements.

Thus constitutional tolerance is a necessary but in all likelihood insufficient condition of the domestic legitimation of transnational redistributive EU policies. The EU, in order to gain legitimacy through a 'nation-blind' and rights-based policy of solidarity among all Europeans needs to acquire the political resources that emancipate it from the transnational repercussions of national democracy.

Embryonic structural and institutional elements are visible within the present set-up of the EU which hold out some hope for the project of a solidarity-based type of legitimacy. As Karl W. Deutsch pointed out a generation ago, there are constellations among political units which may be conducive to transnational solidarity, namely mutual interdependence and mutual responsiveness (1970, pp. 34ff.; cf. Delhey 2004b). In both cases, political units interact: in the former case due to a particular division of labour, in the latter as a consequence of the capacity to 'perceive one another's sensitive spots or "vital interests", and to make prompt and adequate responses to each other's critical needs' (Deutsch 1970, p. 37). Mutual responsiveness is largely experienced through transactions, that is, the exchange of information, ideas, capital, goods, services and people. According to Deutsch, not only states but also individuals and populations can be integrated through transactions and this also applies to the European Community (1972, pp. 133ff., 185ff.). While transactions do not necessarily create solidarity and the willingness to share one's income with one's partners, a high volume and frequency of economic, cultural or political transactions may have 'an assimilatory impact upon people' (Delhey 2004b, p. 12) and eventually create trust among them. Whether this causality has materialized already within the EU is far from clear, though. It is a matter of further empirical research to explore the correlation of these data with the transactions among the populations of the member states.

There are also embryonic institutional patterns that might be able to develop into a culture of 'mutual responsiveness' (Deutsch), both among the citizens and member states. These would have to cultivate the capacity for role-taking and self-distantiation, both based upon the demanding insight that 'your' interests and values are as strange to me as inversely 'my' interests and values are to you, while there is no standard by which one trumps the other. We will conclude with a brief discussion of the nature and potential of Union citizenship.

If the citizens of the Union, rather than member states, can advance to the status of a constituent factor of the Union, this may be a step towards a kind of democracy without a demos. This seemingly oxymoronic phenomenon would mean that people who do not form one particular body of associates on the basis of their (national and other) similarities, but rather share the characteristic of being alien to each other, are still able to make collectively binding decisions. We consider the formation of a post-national collective agency as the core problem of European democracy.

While the component elements of the EU are (i) member states and (ii) citizens, under the present rules there is no corporate body which represents the 'citizenry of the Union' per se. The European Parliament is the representative body of the peoples of the member states,⁸ that is, national subcollectivities of European citizens. However, the right of the citizens of the member states to stand as candidates in elections to the European Parliament and in municipal elections in their state of residence under the same conditions as nationals of that state is indicative of the fact that the voters in the member states do not have to be represented by their fellow nationals; non-nationals, too, may run and win in national elections to the EP. In other words, democratic representation in the European Parliament and in the municipalities of the member states has already marginally overcome the 'nationality principle' and tends to allow for the representation of diversity. A French citizen who has been elected to the EP on a German party list represents neither German nor French citizens; his status is explicitly detached from his national origin as the necessary condition of his taking the role of a representative. What he represents, in a way, is the multinational character of the Union, and citizens voting for him or her would thereby express their commitment to the trans- or supranational character of European politics. On the other hand, and for the time being, the dominant interpretation (and reality) is of course that nationals of member states, not European citizens, are represented in the EP.

However, an increased significance of the nationally 'de-coloured' EU citizen might be implied by the TCE coming into effect. It envisages that the citizens of the Union 'are directly represented at Union level in the European Parliament'.⁹ The qualification 'directly' suggests that they are so far only indirectly represented through their affiliation to a member state. So far, the national coding of representation stands in the way of the formation and strengthening of forces that can act independently of national

affiliation. The unique trait of the notion of Union citizenship is the dissociation of nationality and citizenship. This status connects people who are strangers by conventional legal, political and cultural standards to an abstract and overarching community of citizens. The recognition of the 'foreigner' as a fellow citizen, and the solidarity out of which 'foreign' representational needs are catered to, is clearly a fundamental challenge to the Europeans' entrenched tradition of regarding only co-nationals as fellow citizens.

It is this embryonic form of non-nation-based citizenship which suggests an entirely new construction of the 'we' in the field of political action. This construction would only be a further step in the long and multifaceted history of the idea of citizenship.¹⁰ Might Union citizenship define a new political identity, a new 'we' which is able to shape the fates of people in a new manner?

To conclude, the problem of European democracy is not that there is no European demos. The demos presupposes the fusion of the many into one body whose coercive character requires homogeneity of the rulers and the ruled in order to legitimize the necessity of obedience. This is not the political vision of the European Union. The vision is, rather, the idea of solidarity grounded in the mutual recognition of otherness. This vision, it appears to us, derives its legitimacy from being appropriate to a world where people have become neighbours and still remain strangers to each other. This genuine political and institutional innovation is the contribution of Europe to the problems of our world at the beginning of the twenty-first century.

Endnotes:

¹ Pursuant to Article 201 TEC, however, the European Parliament can introduce a motion of censure on the activities of the Commission. If it is carried by a two-thirds majority of the votes cast, representing a majority of the Members of the European Parliament, the Commission has to resign as a body. The same rule is stipulated in Articles I-26 paragraph 8 and III-340 of the 'Treaty Establishing a Constitution for Europe' (TCE), signed in Rome on 29 October 2004 and due to enter into force by 1 November 2006, provided that all signatory states have ratified the treaty by then (Article IV-447). Given the fact that the EP is not organized along the government-opposition divide, this high quorum for the motion of censure can hardly be fulfilled. In fact, no motion of censure against the Commission has ever been successful.

Even the Santer Commission, which resigned on 15 March 1999 after an investigation into allegations of corruption, had easily survived a vote of no confidence on 17 December 1998.

² In this respect a major change is envisaged by the TCE in that the national parliaments will be empowered to enter into the political arena of the EU and to play an important role there. Protocol No. 1 to the TCE (which will be no less binding than the Treaty itself after ratification) recognizes the significance of national parliaments for the particular constitutional organization and practice of each member state and encourages their greater involvement in the activities of the EU. For instance, parliaments are entitled to be provided with more thorough information from the Commission. All relevant documents and draft legislative acts of the EU are therefore to be forwarded to them, and they may send to the President of the European Parliament, the Council and the Commission reasoned opinions on whether a draft legislative act complies with the principle of subsidiarity laid down in Article I-11 para 3 TCE. Second, pursuant to Protocol No. 2 they are involved in the supervision of the application of the principles of subsidiarity and proportionality (the latter being laid down in Article I-11 para 4). Any draft legislative act must contain a detailed statement as to its implications for the principles of subsidiarity and proportionality. If the aforementioned reasoned opinions are put forward by one third of the national parliaments, that act must be reviewed. Moreover, each national parliament has the right to appeal to the European Court of Justice on grounds of infringement of the principle of subsidiarity. These rules, although purely procedural, force the Commission to take the political particularities and problems of member states into account and to respect the need of their parliaments and governments to legitimize their policies. Admittedly, this falls short of the stimulating proposal of uniting the national parliaments of Europe and assigning them an active role as a European political actor suggests (Grözinger 2003).

³ In order to become, say, a legitimate member of parliament in the nation state X, a person must not only win a mandate on the basis of fair, clean and contested elections, but must also hold the national citizenship of X. How could it be otherwise? The virtual self-evidence of this norm shows how deeply legitimation is rooted in the notion of demos and demotic identity. This demotic principle applies also to the members of the EP, who are elected by the citizens of their country of citizenship, and whose number of seats corresponds (in somewhat modified ways) to the size of population of their country of citizenship.

⁴ Although, admittedly, it does not even aspire to this goal.

⁵ This conceptual ambiguity was already captured by Toqueville when he anticipated a polity (actually, quite similar to the EU) which would be a ‘form of society ... in which several states are fused into one with regard to certain common interests, although they remain distinct, or only confederate, with regard to all other concerns. In this case the central power acts directly upon the governed ..., but in a more limited circle’. Short of using the *sui generis* formula, he adds that ‘the new word which ought to express this novel thing does not yet exist’ (Tocqueville 1961 [1835], pp. 158f.).

⁶ The status treaty is a well-known institution of public international law. Such a treaty is present if ‘a group of Great powers, or a large number of States ... assume a power to create by a multipartite treaty some new international régime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence’ (Int. Court of Justice, Reports of Judgments, Advisory Opinions and Orders, Int. Status of South-West Africa, Separate Opinion of Judge McNair, pp. 146–163 [153f.]; see also Dahm 1958, pp. 23ff.; Klein 1980).

⁷ It is not by accident that the Afro-Americans as ‘beings of an inferior order’ (as the Supreme Court decreed in the Dred Scott case of 1857) were legally excluded from the polity until the 14th Amendment (1867) and socially until the Supreme Court’s decision in *Brown v. Board of Education* (1954).

⁸ Articles 189, 190 TEC [Treaty of Nice]; pursuant to Article I-20 TCE, the EP shall be composed of representatives of the Union’s citizens. Since the number of seats is apportioned according to the population size of the member states, the representatives remain essentially representatives of their peoples.

⁹ Article I-46 para 2.

¹⁰ Cf. Riesenberg (1992)

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