

Citizen Participation in the European Union's Political Structures: Intersections between Legitimacy and Democracy

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Abstract: Representative democracy is losing some of its gloss and citizens are turning away from conventional forms of political participation. At the same time the emergence of a de-territorialised economic order is overseeing the decline of state decision-making power in many fields of life. There are doubts as to whether democracy can be customised to the realities of a globalising world.

In this paper I critically re-examine the EU's purported 'democratic deficit' and question whether it has continued relevance as a 'de-legitimizing' force. I consider the emerging norms of governance (openness, participation, accountability, effectiveness and coherence), as identified by the Commission in its White Paper on Governance, by which civic participation in European governance may be stimulated. These norms may be viewed, simultaneously, as potential markers of legitimate EU legislative activity according to performance criteria and, more ambitiously, the precursors of a re-conceptualised understanding of democracy.

These norms, or versions of them, are now encapsulated within Part 1, Title VI, Article 1-46 and 1-47 of the Constitutional Treaty, which articulate certain forms of representative and participatory democracy. While the path to ratification appears to have been obstructed, the specific provisions in Article 1-47 of the treaty nonetheless invite discussion as to whether the norms may contribute to the theoretical and functional development of democracy beyond an institutionalised conception of representative democracy and whether they can in turn contribute to the legitimation of supranational lawmaking.

1. Introduction

Arguably, the single-most important threat to EU governance today is that European publics will exercise the electoral voice they acquired pursuant to the Constitutional Treaty ratification process to deal the EU one blow after another. This can obviously have a detrimental effect on the EU's legitimacy if we accept Schmitter's definition that 'legitimacy converts power into authority', establishing 'simultaneously an obligation to obey and a right to rule'.¹ I believe the EU and the member states need to do more to explain the EU's legitimacy and for this to happen there needs to be a better understanding of whether the EU is legitimate and why. The difficulty of this endeavour is compounded by lack of agreement as to the EU's legitimate objects and by the fact that legitimacy itself is a contested, shifting concept. Its assessment may differ across different issue arenas. Legitimacy needs to be understood, constantly assessed and justified.

Scholars have for some time been advocating a wide-ranging constitutional debate as to what the EU is, what it does and why. A constitutional debate in the EU can draw attention to a range of interrelated questions – questions of polity, democracy and legitimacy. The constitutional debate can provide a forum for the 'discursive legitimation'² of EU governance. In this paper I recognise democracy (understood in terms of representation) as a key indicator of legitimacy, although I question its salience as the sole determinant of EU legitimacy. I argue that the legitimacy of EU lawmaking depends, in large measure, on effective dialogue between the governed and the governing institutions and ultimately upon effective public participation in the political processes of the EU. This invites discussion of civil society, its make up, its representativity and the avenues for participation – issues of some complexity. The provisions in Article 1-47 of the Constitutional Treaty have set out a blueprint for participatory democracy at EU level. These provisions need to be assessed for their

¹P.C. Schmitter (2001) 'What is there to Legitimize in the European Union . . . and How might this be Accomplished?', *Jean Monnet Working Paper* No. 6/01 Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance, 1.

²J. Steffek (2000) 'The Power of Rational Discourse and the Legitimacy of International Governance', *EUI Working Paper* 2000/46, RSC, European University Institute, 18.

potential to contribute to the democratic functioning of the EU and, accordingly, to its legitimacy.

The progress of the Constitutional Treaty towards ratification has halted following its rejection by French and Dutch voters. Nevertheless, the specific provisions in Article 1-47 of the Treaty – titled *The principle of participatory democracy* – merit discussion as to whether they may contribute to the theoretical and functional development of democracy beyond an institutionalised conception of representative democracy and whether they can in turn contribute to the legitimation of supranational lawmaking. The stalling of the Constitutional Treaty should not stymie discussion of its provisions. Even if the Treaty is never ratified, many of the institutional prescriptions will probably see light in the form of treaty amendments. This may, depending on the manner in which amendments are ratified, perpetuate claims of illegitimacy and reinvigorate the perennial criticisms of elite decision-making. Perhaps more than ever before, there is a need to ascertain and achieve some consensus as to the sources of EU legitimacy in order to avoid painting the EU into a corner whereby public approval for further constitutional development is demanded yet the conditions for informed public deliberation are withheld.

In this paper I will therefore briefly address the nature of EU legitimacy³ and some of the intersections between democracy and legitimacy. I will then outline some differing conceptions of democracy, focusing on participatory democracy against a backdrop of the norms of governance (*viz.* openness, participation, accountability, effectiveness and coherence) and the pertinent provisions of the Constitutional Treaty.

The norms of governance, or versions of them, are now encapsulated within Article 1-47 of the Constitutional Treaty. Paragraph 1 of the Article directs the EU's institutions to 'give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.' The Union Institutions must 'maintain an open, transparent and regular dialogue with representative associations and civil society (Para 2)'. The Commission is urged to 'carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent (Para 3).' Perhaps most significant of all is the provision

³This discussion is amplified in Longo (2006) *Constitutionalising Europe: Processes and Practices*, Ashgate.

contained in paragraph 4 which authorises the so-called ‘citizens’ initiative’, whereby ‘no less than one million citizens coming from a significant number of Member States may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required *for the purpose of implementing the Constitution.*’ Importantly, the formulation ‘for the purpose of implementing this Constitution’ ensures that citizens cannot, through this initiative, invite the Commission to initiate a legal process for constitutional amendment or for the abolition of a fundamental right recognised by the Constitution.

The instruments of participatory democracy need to be constantly evaluated to ensure broad participation by members of the communities that make up the polity. As drafted the provisions may be seen to encourage participation by citizens and their representatives. However, there appear to be few mechanisms in place by which the most marginalised and least recognised and empowered members of the community may directly contribute to dialogue and participate within the political structures of the EU. In particular, non-citizens are excluded. These are the nationals of third countries who do not have the citizenship of an EU member state. The norms in Article 1-47, while a very welcome initiative, may fail to respond to contemporary challenges of multiculturalism and do little to redress the lack of recognition and marginalisation of those who do not enjoy the rights of member state (and thus EU) citizenship.

2. Legitimacy through means other than representative democracy

The term ‘legitimacy’ is capable of many meanings, which alter according to the context. Legitimacy within state polities tends to be defined in democratic terms, requiring ‘representative links between government and the governed’,⁴ such that we have increasingly come to assume that only democratic decision-making is legitimate. However, even in state polities non-democratic decision-making takes place (e.g. pursuant to judicial review) and is deemed legitimate. Still we need to look beyond state-bound conceptions of legitimacy for inspiration and nuance. In the international sphere legitimacy is defined as ‘the quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being with right

⁴T. Banchoff and M.P. Smith (1999) ‘Conclusion’ in Banchoff and Smith (eds) *Legitimacy and the European Union: The contested polity*, Routledge, 212, 215.

process’,⁵ with a complementary focus on the ‘substantive justice of outcomes’⁶ and consensus as to competence. The EU’s openness to the form of the state and of the international organisation potentially expands its legitimacy. Arguably, the EU has available to it the sources of legitimacy that nation-states rely on (‘common values and culture’, ‘real and imagined community’, ‘citizenship’ and ‘the will of the people expressed through representative institutions’) in combination with the rational legitimating sources available to international entities (‘an agreed scope of competence, fairness of procedures, and justice of outcomes’⁷).

The legitimacy discourse was broadened with the rise of empirical social science in the 20th century to encompass not only the normatively-oriented conception of legitimacy which focuses on structures of governance but also the empirically-oriented conception which sees legitimacy as a social fact (i.e. ‘the belief in legality’⁸). This has spawned alternative hypotheses of legitimacy as self-perception and self-legitimation⁹ by institutional actors as well as citizen perceptions of legitimacy based on economic performance and related indicators.¹⁰ Moreover, such broadening has introduced a strongly discursive dimension (drawing on the language of Habermas¹¹) permitting recourse to rational argumentation to justify a *range* of governance arrangements as legitimate.

Thus, existing constitutional arrangements might be regarded as legitimate if, according to empirical observation, they are *believed* to be legitimate, that is there is a

⁵T. Franck (1988) ‘Legitimacy in the International System’ 82 *American Journal of International Law* 705, 706. See also, T. Franck (1992) ‘The emerging right to democratic governance’ 86 *American Journal of International Law* 46, 51 where the author refers to the four indicators of legitimacy: ‘pedigree, determinacy, coherence and adherence’. He states that ‘pedigree refers to the depth of the rule’s roots in a historical process; determinacy refers to the rule’s ability to communicate content; coherence refers to the rule’s internal consistency and lateral connectedness to the principles underlying other rules; and adherence refers to the rule’s vertical connectedness to a normative hierarchy, culminating in an ultimate rule of recognition, which embodies the principled purposes and values that define the community of states’.

⁶Steffek (2000), 25.

⁷Ibid, 28.

⁸M. Weber (1978) *Economy and Society: An Outline of Interpretive Sociology*, Vol. 1, University of California Press, 37.

⁹See L. Holmes (1997) *Post-Communism: An Introduction*, Duke University Press.

¹⁰Ibid.

¹¹J. Habermas (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by W. Rehg, Polity Press.

‘subjective *belief* in the validity of the order which constitutes the valid order itself’.¹² This is a form of ‘permissive societal consensus’,¹³ so familiar to the EU. Legitimacy may be logically and rationally deduced from institutional conduct or action. For instance, it may be tied to the expert and effective performance of EU functions or the character of its policies. The Commission has traditionally perceived legitimacy in these terms, as evidenced by various instruments and communications such as the ‘Commission Communication on the principle of subsidiarity’, where it stated that ‘Community action must be made more effective – ‘do less, but do it better’.¹⁴

Despite the possibility of legitimising the EU by numerous means, the force of democracy dominates the discourse. There are valid reasons for this. As the EU functions as an autonomous political system within the range of its expanding capabilities, whose legal instruments impact on the lives of ordinary citizens, popular approval is considered indispensable to authorise its actions.¹⁵ A constitutional process and its outcome are capable of securing such approval – a point not lost on EU political elites – although success may not be assured. The focus of the rest of this paper will be democracy.

3. What kind of democracy?

A broad theoretical approach to legitimacy has implications for the claim that the EU has ‘democratic deficits’ which renders it illegitimate. However, the existence of the ‘democratic deficit’ in legislative decision-making is itself a point of contestation. EU legislation has to receive the approval both of elected representatives of the European Parliament (EP) and of the Council of Ministers, constituted by elected members of

¹²Weber (1978), 33; Steffek (2000), 3.

¹³Banchoff and Smith (1999) ‘Introduction ...’ in Banchoff and Smith (eds), 6 referring to E. Hass, (1958) *The Uniting of Europe: Political, Social and Economic Forces, 1950-1957*, Stanford University Press. See also M. Franklin, M. Marsh and L. MacLaren (1994) ‘Uncorking the bottle: popular opposition to European unification in the wake of Maastricht’, 32(4) *Journal of Common Market Studies*, 455-72.

¹⁴Bull EC 10-1992 116, 125.

¹⁵Hix postulates that ‘if economic and political integration is to proceed much further, the EU is likely to need a greater state-capacity as well as genuine democratic contestation to legitimize this state power.’ S. Hix (1999) *The Political System of the European Union*, Macmillan Press, 364.

national governments.¹⁶ Therefore, both the EP and the Council participate in EU decision-making. Should we view them as halves, which together constitute a whole, or does this method provide double the accountability, twice as much democracy effectively? This is a futile inquiry as democracy defies simple quantification. The real issue is not the degree but rather the nature of EU democracy.

It may be instructive at this point to identify different conceptions of representative democracy and their applicability to the EU. As noted by Patmore, representative democracy may be understood as conforming to three distinct models – a protective model, an elite model and a participatory model.¹⁷ The protective model focuses on the elected representatives. The quality of this democracy depends on ‘the choice of good representatives’,¹⁸ which highlights the necessity for public exposure to political discussion. The roles of the electors, the elected and the media are pivotal to the proper functioning of this system, the preservation of the public interest being the primary objective. The related elite model of representative democracy, minimalist by definition, sees democracy as a method by which citizens select representatives and ‘produce a government’.¹⁹ According to elite theorists, democracy is an ‘institutional arrangement “for arriving at political ... decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote”.’²⁰ Elite theorists readily acknowledge the departure of this model from classical definitions of democracy as ‘rule by the people’, but they seek and often find support in realist and empirical accounts of the democratic process.²¹ Such accounts contemplate ‘rule by

¹⁶G. Grevi (2002) ‘Beyond Europe’s democratic deficit: overcoming cultural failure’, The European Policy Centre, 25 May 2002, <http://www.theepc.be/challenge/topdetail.asp?SEC=documents&SUBSEC=issue&REFID=805>, 2.

¹⁷G. Patmore (1998) ‘Making sense of Representative Democracy and the Implied Freedom of Political Communication in the High Court of Australia: Three possible models’ *Griffith Law Review* Vol. 7 No. 1, 97.

¹⁸C. Pateman (1970), *Participation and Democratic Theory*, Cambridge University Press, cited in Patmore (1998), 100.

¹⁹J.A. Schumpeter (1943) *Capitalism, Socialism and Democracy*, Allen & Unwin, 269 cited in Patmore (1998), 105.

²⁰Ibid, 242, 269 cited in Patmore (1998), 105.

²¹Patmore (1998), 100.

politicians',²² moderated by an informed electorate capable of 'keeping the bastards honest'.²³

The participatory theory of representative democracy holds, as a core value, accountability through large-scale public participation in political decision-making. To participatory theorists the virtue of a political system depends on two things:

1. The nature and quality of political decisions; and
2. Whether the elected government promotes the wellbeing and personal development of individuals.²⁴

According to this theory, democracy has both a *protective* and a *developmental* function. The development function is concerned with the promotion of 'the virtue and intelligence of the people themselves'.²⁵ According to Pateman, opportunities for individuals to participate in political decisions should be maximised because such participation enables the development of the 'qualities and capacities to enable them to assess the activities of representatives and hold them accountable'.²⁶

In the contemporary world, a disconnection has been observed between the individual and the public administration. Much scholarly attention has been devoted to identifying the reasons for this phenomenon and redressing the problem.²⁷ It seems that 'rational and informed citizens are less interested in democratic politics' than they used to be.²⁸ This is often attributed to the emergence of supranational law and to the fact that large economic actors have eaten into the capacity and independence of national governments, which depend for their fiscal existence upon the continuing viability of business. Both developments are said to have placed significant constraints on national decision-making. The methods of 'voting and discussion',²⁹ thought to be all that was required to generate the conditions conducive to the

²² Ibid, 105.

²³ A phrase famously coined by former leader of the *Australian Democrats*, D. Chipp.

²⁴ J.S. Mill (1975) *Three Essays*, Oxford University Press, 167-8 cited in Patmore (1998), 101-2

²⁵ Mill (1975), 167 cited in Patmore (1998), 102.

²⁶ Pateman (1970), cited in Patmore (1998), 103.

²⁷ See for example S. Ringen, 'The message from Norway' *The Times Literary Supplement*, February 13, 2004.

²⁸ Ibid, 4.

²⁹ See Patmore (1998).

functioning of elite and protective models of representative democracy, are no longer considered sufficient to foster the development of a ‘community-minded citizen’³⁰ capable of holding politicians accountable. Active involvement in political decision-making – the central tenet of participatory democracy³¹ – is now generally thought to be necessary, at least in the EU.

It is generally accepted that a fully functioning model of representative democracy requires ‘a considerable amount of freedom of discussion for all and freedom of the press’,³² a common interest in political decision-making and the capacity of electors to exercise supervision over elected politicians in the sense that they may vote them out at the next election as an expression of the common will and thus keep them accountable. Arguably, the EU does not conform to any established model of representative democracy. Europeans do not directly produce a European Government. There are no transnational politics. Most issues are still viewed through a national lens. There is no European media; no Europeanised party system; no European civil education program. The principle of representative democracy, however, takes pride of place in Article 1-46 of the Constitutional Treaty.

In its version of representative democracy, EU citizens are directly represented in the EP and are represented indirectly in the European Council and the Council of Ministers through their Member States (Article 1-46 (Para 2)). The provisions of Article 1-46 seek to open the lines of communication and accountability and to encourage citizens to better engage with EU political processes. With its emphasis on ‘open decision-taking as close as possible to the citizens’, the ‘formation of a European political awareness’, the ‘will of the citizens’ and ‘transparency’, Article 1-46 adopts the language of the participatory model of representative democracy. This is despite the historical inclination of EU elites towards the protective or elite model. The growing dissatisfaction with the elite model of representative democracy within most western polities suggests that the EU has no choice but to embrace more

³⁰Ibid.

³¹Ibid, 103.

³²Schumpeter (1943), 271 cited in Patmore (1998), 106.

participatory models. This is clearly part of the formula for the achievement of 'democracy beyond the state'.³³

If the personal development function of representative democracy is encouraged through broad participation, such participation can take the form of 'citizen involvement with social justice issues and in various organisations'.³⁴ Prime sites of activity include local government and the workplace. The Economic and Social Committee (ESC) and the Committee of the Regions (CoR) – lesser EU institutions³⁵ – being composed of employer and employee groups and sub-national units of government respectively, can potentially guide citizen participation in the development of initiatives and programs that impact positively on local organisation and social justice – with democracy enhancing effects. The promise may, however, be lost if opportunities for participation are restricted or the Committees exercise a purely consultative function.

The EU is not placing all of its eggs in the one basket, preferring to take a multifarious approach. Thus, apart from institutional reforms, it seems to be committed to strengthening the direct mechanisms of participatory democracy to counter accusations of illegitimacy. In its 2001 White Paper on Governance, the Commission identified the emerging norms of governance, derived from a liberal conception of democracy and democratic accountability – openness, participation, accountability, effectiveness and coherence³⁶ – as markers of legitimate action. A mixed bag of instruments pertaining to representative and/or participatory democratic processes, the emerging norms were identified as the means by which civic participation in EU decisional processes and representative structures might be stimulated. Article 1-46 and 47 of the Constitutional Treaty are intended to effectuate such participation. They clearly seek to address the purported democratic deficit from institutional as well as non-institutional perspectives. This represents a departure from

³³M. Th. Greven and L.W. Pauly (eds) (2000) *Democracy beyond the State? The European Dilemma and the Emerging Global Order*, Rowman and Littlefield.

³⁴J. Lively (1975) *Democracy*, Blackwell, 140-1, cited in Patmore (1998), 103.

³⁵These are consultative bodies consisting of 222 representatives of employer, employee groups and independents and sub-national units of government respectively. Members are appointed for a 4-year term by the Council acting unanimously and must be consulted by the Commission or Council in accordance with the EC Treaty. The Committee of the Regions provides a formal mechanism through which the regions can express their views on proposed legislation.

³⁶White Paper on Governance, COM (2001) 428 final, 10.

the traditional approach, which seeks to overcome democratic deficiency by boosting the supervisory and parliamentary powers of the EP. Schmitter has cogently argued that ‘the rules and practices of an eventual Euro-democracy will have to be quite different from those existing at national level’.³⁷

4. Article 1-47 Constitutional Treaty: The principle of participatory democracy

The norms of governance, transformed into specific prescriptions for the enhancement of participation in the political life of the EU, can add to the legitimacy of EU legislative activity. Participatory elements are intended to complement the political processes that give legitimacy to the EU including representative democracy.

The obvious question arises: who can participate? It is customary to speak here of civil society. Civil society assumes that actual people are involved in their communities, but there is no consensus as to what it is.³⁸ Does the term refer to citizens? If so, there is going to be a large group of people who live in Europe who are excluded from voting rights (at local and/or national elections) because they are not citizens. If this is the chosen point of reference then how can it add value to the ideal of *representative democracy*, which already draws a connection between voters and their governing institutions?³⁹ Does it include public authorities and educational institutions? As Beger notes, there are dangers in appealing to participation by civil society and limiting the elements of society which can participate.⁴⁰ It is true that Europeans often ‘choose to organise themselves *en masse* around interest groups’.⁴¹ The common vehicle for political advocacy work (the provision of social services to women, immigrant groups, the disabled, consumers, international and development aid, the protection of the environment) is the NGO, which has roots to local activity. NGOs usually represent members of society who do not have a voice. Increasingly they seek an address in Brussels to add value to their local, regional and national

³⁷Schmitter (2001), 4.

³⁸N. Beger, ‘Participatory Democracy: Organised Civil Society and the “New” Dialogue’, *The Federal Trust Online Paper* 09/04, 3.

³⁹Ibid.

⁴⁰Ibid.

⁴¹Ibid.

work.⁴² Traditionally, the Commission and the EP have been responsive to dialogue with NGOs even without a legal basis mandating it.⁴³ NGOs and interest groups are major players in terms of civil dialogue, but this is not where participation begins and ends. Most commentators would acknowledge the need for opportunities for direct participation.

Civil society, governance and democracy became the catchphrases of the Prodi Commission, the term civil society finding its way into the Laeken Declaration in 2001 and winning favour with the Convention on the Future of Europe. The Constitutional Treaty in Article 1-47 seeks to provide a legal basis to civil dialogue to ensure that communications are not subject to ‘grace and favour’ by institutional actors.⁴⁴ It represents a significant innovation in terms of the processes by which decisions are made – that is with direct involvement of civil society and representative associations. The public exchange of views, consultation, direct action, petitions and political events exemplify civil dialogue. Moreover, the citizens’ initiative in Article 1-47 (Para 4) offers a partial answer to the ‘democratic fatigue’ in Europe.⁴⁵

The citizens’ initiative looms as the most significant achievement of Article 1-47. By requiring one million citizen signatures proportional to the number of member states, the provision represents an important means by which individuals may directly participate in political decision-making. However, the requirement as to citizenship excludes the large number of non-citizens resident in EU member states (third-country nationals and gypsies) whose personal interests may not be adequately represented by the representative associations and NGOs who do participate in civil dialogue. This represents a loss of opportunity. The EU, with its ‘thin’ identity founded on an emerging European consciousness of ‘rights protection’ and the values of non-discrimination and equality, and importantly the absence of an ethnic majority, holds interest for many non-citizens resident in the EU. At the same time these individuals may, for various reasons, have little affective attachment to the state in which they reside. Non-citizen residents, often victims of social exclusion, are excluded from voting rights and are therefore precluded from influencing democratic

⁴²Ibid.

⁴³Ibid, 4.

⁴⁴Ibid, 5.

⁴⁵Ibid, 6.

processes within existing representative structures of democracy. They are further precluded from participating under the novel modes of participation proposed under the Constitutional Treaty. This impacts adversely on democratic legitimacy as people who work, pay taxes and contribute to the economic and cultural life of a state are excluded from participation for political reasons. They continue to be subject to discrimination.

Indeed, the EU has taken a restrictive approach to the question of alien suffrage, committing EU member states to establishing voting rights only as regards municipal and European elections and *only for citizens of the Union*. This covers a national of a member state who resides in the territory of another member state (e.g. a Portuguese national in Germany) (Article 1-10, Constitutional Treaty). The EU provides no legal basis for the enfranchisement of non-citizens residing in the EU. Citizenship and nationality are matters reserved to the member states, a point readily acknowledged by the Commission in its 2001 proposal for a Council Directive concerning the status of third-country nationals who are long-term residents.⁴⁶

There is extreme heterogeneity of non-national resident voting rights among the member states of the EU. Some permit resident aliens voting in municipal or local elections (e.g. Ireland, Sweden, Denmark, Finland, the Netherlands, Spain, Hungary) but not national elections; others have discriminatory nationality requirements so that immigrants of some nationalities are given the vote and others not (e.g. UK, Portugal). Some member states have traditionally refused to enfranchise aliens of any description, but have been forced to revise their voter eligibility laws to comply with EU requirements, modest as they are.⁴⁷

The EU has sought to harmonise the citizenship laws of the member states to a standard low enough to avoid popular backlash and claims of improper interference with national conceptions of citizenship. In doing so, the EU has largely avoided the politics of citizenship. It has perpetuated the position of dependency between EU and national norms of citizenship. It stops short of giving non-citizens that which some

⁴⁶Com(2001) 127 final 2001/0074 (CNS).

⁴⁷See generally, D.C. Earnest, 'Noncitizen Voting Rights: A Survey of an Emerging Democratic Norm'. Paper prepared for delivery at 2003 annual convention of the American Political Science Association, Philadelphia, Pennsylvania, August 29, 2003.

member states have seen fit to give. It does not stray far from the most conservative of statist scripts. Yet, there is a mismatch between reality and rhetoric. While treading a politically safe path alongside powerful member states it proclaims the arrival of EU citizenship.⁴⁸ EU citizenship is however used as an instrument of exclusion, perpetuating a conception of polity that sees membership as an ethnic or cultural construct. Despite this, post-national EU citizenship has the potential to be transformed into a political space that includes everyone. While I prefer to highlight what it may become rather than what it currently is, there is no escaping the fact that at present, there is little to speak of. The EU can profitably work towards harmonising national laws of citizenship or it can differentiate the EU political space from that of many national polities by extending participation within the EU to non-citizen residents. This would take it a step closer to achieving the core ideals of non-discrimination and equality.

5. Conclusion

The norms of democratic governance, concretised in the form of Constitutional Treaty provisions on representative and participatory democracy facilitate the EU's further development as a legitimate polity. Perhaps inevitably the EU's legitimacy will continue to be questioned as it expands its capabilities and engages in activities once reserved exclusively to nation states. While acknowledging that there are divergent conceptions of citizenship and legitimacy, which resist simple answers, the current provisions relating to EU citizenship are fatally tied to 'historically contingent'⁴⁹ constructions of nationhood to adequately guide future development. The discriminatory policies towards non-citizen residents are inimical to the norms of participatory democracy. Therefore, democratic legitimacy demands the redefinition of the body politic to encompass citizens and non-citizens.

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⁴⁸EU citizenship is additional to national citizenship, but does not replace it.

⁴⁹Earnest (2003), 21.

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