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WHAT IF EUROPE HELD AN ELECTION AND NO ONE CARED?

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What if Europe Held an Election and No One Cared?

By David Schleicher*

Abstract:

Last June's European Parliament (EP) election was widely recognized to be a failure. Turnout was low across Europe and, as has been the case in each and every EP election since they were introduced in 1979, voters responded exclusively to domestic cues in deciding how to fill the European Union's only directly-elected body. Campaigns were waged entirely on domestic issues outside of the purview of the EP and the popularity of domestic Prime Ministers, who were not on the ballot, was the most important factor in determining the results. The EP is supposed to provide a popular check on the other legislative bodies in the European Union (EU), which are either appointed or controlled directly by Member State governments, and hence reduce the EU's "democratic deficit." Instead, the failure of EP elections to generate popular feedback on EU policy allows the deficit to fester and undermines the EU's separation of powers.

This paper argues that the problem of EP elections is much like problems in a variety of American state and local elections. Election laws ensure that national parties are on the ballot, and both legal limitations and strategic considerations make it difficult for major parties to develop separate localized identities, or in the case of EP elections, Europeanized ones. Rationally ignorant voters who know little about the individual figures in these bodies rely on the party heuristic that is available on the ballot, as it is the only relevant information they have, and do so even though it is unclear how closely preferences on European or local policies track preferences about national issues. The result is that national party preference ends up being reflected in these elections, despite the fact that winners will decide policies at another level of government. Put another way, there is a "mismatch" between the institutional role the EP is asked to play in the EU's separation of powers – the voice of European citizens about European Union policies -- and the level of party competition at which EP elections are contested.

Mismatch problems are endemic in federal systems and are generated by the interaction of constitutional theory about how democratic institutions should function and the actual practices of voters. However, mismatch problems can be solved or at least mitigated with election law tools. Following a procedure used in a variety of developing countries, the EU could pass a law that the EP will only seat members from those parties that both won seats from a given EU country and received a certain percentage of the vote in a quarter of EU Member States. This would force the coalitions formed in the EP – the so-called "Euro-parties" – onto EP ballots, as parties would need to contest elections across Europe. Voters thus would have access to a European, rather than national, heuristic on the EP ballot, which would better allow them to use these elections to express preferences about EU policy.

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I. Introduction: The European Parliament and the “Mismatch” Problem

Elections were held for European Parliament (EP) – the only directly elected body in the European Union (EU) – last June but you can forgive yourself if you missed them. Despite an unprecedented EU-funded media campaign to spur turnout, substantial doubt about the future of EU institutional reforms, and an enormous economic downturn, European voters barely registered that this election was taking place.¹ Turnout hit an all-time low, and the widespread lack of interest allowed parties from the nationalist, xenophobic and just strange fringes of European politics to win seats.² Further, the actual behavior of Members of European Parliament (MEPs) had little to do with the results. Instead, as they have in every EP election since the first one in 1979, voters responded exclusively to domestic cues, with the elections turning exclusively on the popularity of domestic prime ministers and parties.³ Although they determined the composition of an increasingly powerful body that plays an important part of the EU’s legislative process, June’s EP elections played no role in most voters’ eyes greater than a mid-term public opinion poll about people who were not on the ballot.

¹See Marka ta Hulpachova, *Voters still unclear on EU issues*, PRAGUE POST (Czech Rep.), June 3, 2009 at 1 (describing ad campaign); Alain Lamassoure, *Continuation of the European adventure relies on Ireland*, IRISH TIMES (Ir.), December 10, 2008 at 1 (describing doubt about the future of EU reforms following Irish rejection of the Treaty of Lisbon); Martin Wolf, *This Crisis is a Moment, but Is it a Defining One?*, FIN.TIMES, May 19, 2009 at A8 (“Europe ... is not having a good crisis.”).

² Total turnout was 43%, far lower than the turnout for domestic elections and a number that overstates actual interest because it includes turnout numbers from countries where voting is mandatory. See David Charter & Rory Watson, *Far Right gains ground; Voters desert main parties in European elections*, TIMES (U.K.), June 8, 2009 at 1 (discussing turnout); *Swing low, swing right; The European elections*, ECONOMIST, June 13, 2009 (discussing turnout and results); Jonathan Eyal, *EU Parliament on fringe of lunacy; Newly Elected Rightist and Extremist Parties Have Little Clout but Could Undermine Unity*, STRAITS TIMES (Sing.) June 14, 2009 (describing success of xenophobic, nationalist and odd parties, like the Pirate Party of Sweden); *Trouble at the polls; The worrying European elections*, ECONOMIST, June 13, 2009 (same).

³ A model created by three leading European political scientists using national party preferences as its central variable predicted 90% of the seats won in the 2009 elections. Burson-Marsteller, *Predict '09*, June 4, 2009, <http://www.predict09.eu/default/en-us/page2.aspx>. Karlheinz Reif and Hermann Schmitt first diagnosed EP elections as “second-order elections,” or elections with results determined entirely by national party popularity in 1980, following the first EP election. Karlheinz Reif and Hermann Schmitt, *Nine Second-Order Nation Elections: A Conceptual Framework for the Analysis of European Election results*, 8 EUR. J. POL. RESEARCH 3, 4 (1980). This result has held up in studies of each EP election since 1979. See Michael Marsh, *Testing the Second-Order Election Model After Four European Elections*, 28 BRITISH J. POL. SCI. 591, 606 (1999); SIMON HIX, WHAT’S WRONG WITH THE EUROPEAN UNION & HOW TO FIX IT 80-84 (2007) (Hereinafter HIX, WHAT’S WRONG).

It was not supposed to be like this.

In 1979, with great fanfare, European voters were given the power to directly elect their representatives in the EP.⁴ In several successive treaties revising the institutional structure of the EU since then, the EP has been given new and stronger powers, making it a major player in the EU's legislative process, and only slightly weaker than the Council of the European Union, the legislative body in which Member States of the EU vote directly. This process continues: The newly-enacted Treaty of Lisbon further extended the EP's powers, making it a true lower house of a legislature, something like a House of Representatives to the Council's Senate.⁵

The reason why EU leaders have repeatedly increased the powers of European Parliament is clear. Giving power to a directly-elected body was considered a way to cure the "democratic deficit," or the perceived inability of European citizens to influence EU decision-making.⁶ The EP is supposed to provide a popular counter-weight to both the member-state controlled Council and the powerful European Commission, an appointed body that serves as the executive branch of the EU and has important legislative functions, but is intentionally somewhat removed from

⁴ SIMON HIX, ABDUL NOURY, AND GERARD ROLAND, *DEMOCRATIC POLITICS IN THE EUROPEAN PARLIAMENT* 13 (2007) (hereinafter *DEMOCRATIC POLITICS*).

⁵ See Dan Bilefsky and Steven Castle, *Way Is Clear to Centralize Europe's Power*, N.Y. TIMES, Nov. 4, 2009 at 6; Celia Sempol, *Lisbon Treaty: Lisbon Will Strengthen Parliament's Powers*, *Europolitics*, No. 3782, June 29, 2009. The analogy does not hold perfectly. First, member-state governments vote directly in the Council, making state control over the Council far greater than U.S. state control over the Senate, even before the Seventeenth Amendment provided for direct elections. Secondly, voting is weighted by population in the Council, unlike the equal representation given to states in the U.S. Senate. See Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales From American Federalism*, 77 N.Y.U. L. REV. 1612, 1622-1623 (2002).

⁶ The term "democratic deficit" was coined by David Marquand, who argued that an elected and powerful European Parliament was necessary if the rule requiring unanimity among democratically responsive Member States in the Council was removed (as it has been). DAVID MARQUAND, *PARLIAMENT FOR EUROPE* 64-66 (1979). For a discussion of the EP as a solution for the democratic deficit, see Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 673-674 (1999).

popular and national political pressures.⁷ Direct elections to an increasingly-powerful EP were supposed to give European voters an important role in the EU's separation of powers.

These direct elections have never captured the attention of the European populace. Voter turnout in EP elections has fallen in each election since 1979.⁸ More pressingly, it has become what amounts to a social scientific fact that these elections are not responsive to anything actually done by the EP. Instead, EP elections are "second-order," as the results of these supra-national elections are determined by politics at the national level.⁹ As political scientist Simon Hix has noted, "The problem is that European Parliament elections actually have very little to do with 'Europe'! ... Instead, voters, the media, and national parties treat European Parliament elections as just another set of domestic elections, where the dominant issue is how well national governments have performed."¹⁰

Despite this absence of democratic pedigree or retrospective check on their behavior, something odd happens when MEPs arrive in Strasbourg.¹¹ In elections for EP, voters choose between domestic parties. Voters in Britain choose between Labor, the Conservatives and the Liberal Democrats; in France, the UMP and the Parti Socialiste are on the ballot.¹² Once elected, MEPs join coalitions in order to organize the EP. (Continuing the example, Labor MEPs join with the Parti Socialiste and other center-left parties across Europe in the Party of European

⁷ Members of the Commission are appointed by the Council, but they must only consider their "general competence" and their "independence [must be] beyond doubt." The Consolidated Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 155, art. 244, 245. Further, Member States are directed not to try to influence Members of the Commission. *Id.* See also Young, *supra* note 5, at 1697.

⁸ Mattias Kumm, *To Be a European Citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty*, 11 COLUM. J. EUR. L. 481, 512 (2005) (citing voter turnout figures in 2004 EP elections and comparing them to previous EP election turnout and domestic turnout).

⁹ See note 3.

¹⁰ HIX, WHAT'S WRONG, *supra* note 3, at 79.

¹¹ Strasbourg, France is the official seat of the European Parliament, and where plenary sessions are held. *Id.* at 72.

¹² *Id.* at 11-20.

Socialists).¹³ These “Euro-parties” are now legally separate entities, well-organized and funded with EU grants, and are quite unified on ideological grounds – members vote the party line with the same or greater frequency than members of the Democrats or Republican do in U.S. Congress.¹⁴

As a result, the EP looks and sounds like a democratically-elected legislature, with parties organizing votes, predictable ideological splits, lobbyists loitering in the hallways and members making preening speeches. There is one missing element: any semblance of democratic control. Voters have no idea who MEPs are, do not care about what they do, and certainly do nothing to punish their bad behavior.¹⁵ Voter disengagement from the EP has ensured that the decision to give more power to the EP did not confer much democratic legitimacy on the EU as a whole. Polls reveal a collapse in popular support for the EU since the EP was given real power.¹⁶

The European Parliament is now an important body, with the ability to pass on legislation that affects millions of people in an increasing number of ways, and therefore it is both surprising and problematic that voters cannot be bothered to form independent judgments about its policies. And it is equally surprising that, given the flaws of its elections, European states want to give the EP more power, like a nervous gambler doubling his bets after a series of losses. This paper will attempt to explain why voters do not form independent judgments about EU politics in EP elections and will argue that, using the tools of election law, European elections

¹³ See SIMON HIX AND CHRISTOPHER LORD, *POLITICAL PARTIES IN THE EUROPEAN UNION* 55-90 (1997). For a full listing of how each domestic party in Europe relates to Euro-parties in the EP, see the European Parliament’s European Election Results, July 16, 2009, <http://www.europarl.europa.eu/elections2009/default.htm?language=EN>. It should be noted that the name of the parliamentary group related to the legally recognized Euro-party the “Party of European Socialists” is alternatively called the Progressive Alliance of Socialists and Democrats, the Socialist Group or S&D. See PES Web, *The PES in the European Parliament*, <http://www.pes.org/en/about-pes/pes-eu/pes-european-parliament/>.

¹⁴ See DEMOCRATIC POLITICS, *supra* note 4, at 180-91.

¹⁵ *Id.* at 26-29; HIX AND LORD, *supra* note 13, at 55-90

¹⁶ See *id.* at 46 (“There has been a dramatic collapse in the popular legitimacy of the EU since the early 1990s); DEMOCRATIC POLITICS, *supra* note 4, at 12 (Parliament power increased substantially by introduction of the codecision procedure in 1993 and its reform and extension in 1999.)

can be fixed such the EP can play the role envisioned for it under the EU's current separation of powers.

Scholars who have studied the failures of EP elections have argued that the EU should change its broader constitutional or institutional system. They argue either for replacing the EU's current institutional framework with one in which European elections determine the membership of all the EU's institutions, or alternatively, that the failures of EP elections are not really a problem at all, claiming that the EU does not need much direct voter input.¹⁷ These solutions are interesting, but are radical departures from the current, carefully-drawn separation of powers in the EU between directly elected, Member-State representing and insulated bureaucratic bodies.

Instead reforming the EU's institutional structure, one can look at ways to affect the politics themselves. Election law and constitutional law scholars have begun examining what I will call here "mismatch" problems in American elections, where the question an election asks of voters and the tools the election law system gives them to answer it are different.¹⁸ This is what occurs in EP elections – voters are asked their input on EU policies but see on their ballots domestic parties. Rather than focus on changing the allocation of powers between the EP, the Council and the Commission, or giving up on the idea that the EP should provide direct democratic feedback, European policy-makers could attempt to solve the mismatch problem by manipulating the information on election ballots.

It has long been known that voters are generally uninformed about politics, and with good reason – any individual vote is not instrumentally important and the private benefits of

¹⁷ See notes 110-127 and accompanying text. The figures discussed below – Simon Hix and Andrew Moravcsik – do not actually call for treaty amendments, but rather for changes in institutional focus, which amounts to something like a treaty amendment by widespread elite agreement.

¹⁸ See Section V *infra*.

casting an informed ballot are even less clear.¹⁹ The only things that save elections from utter incoherence are political parties. If parties stay roughly consistent in their policies over time, voters can develop “running tallies” of whatever retrospective evaluations they have of different things done or promised by party members.²⁰ If party names appear on the ballot, voters can tie these tallies to voting decisions, and even basically uninformed voters can provide at least some meaningful feedback through voting. The key, though, is that the party name provides a clear and consistent heuristic for voters, who can use it as an informational shortcut.

However, where voters are provided with party heuristics on the ballot that do not match the level at which elections are being held, and preferences for policies at each level do not correlate closely, reliance on those party heuristics will not necessarily lead to informed decision-making. As noted above, voters see only domestic parties (and a few fringe ones) on their ballot. Given how we think voters develop and use political knowledge, it is unsurprising that they use them to comment on the performance of domestic parties – it is what in front of them. The absence of notations on the ballot that refer to voting patterns and behavior in the EU make it impossible for rationally ignorant voters to express preferences about EU policy.

The reason domestic parties and not some other set of choices are on the ballot is that countries use largely the same laws to govern European Parliament elections as domestic ones. Domestic parties are advantaged by these laws and have huge institutional strengths that allow

¹⁹ See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 207-259 (1957); Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255, 260-62 (2006).

²⁰ The “running tally” model was developed by Morris Fiorina. MORRIS FIORINA, RETROSPECTIVE VOTING IN AMERICAN ELECTIONS 65-78, 193-200 (1981). It, and other arguments that voters use party as a shortcut for information, has been criticized for ignoring the full extent of ignorance, as voters give politicians credit for things they had nothing to do with, often do not even know which party is in power and treat party as more of an ethnic or religious affiliation than one based on issues. See notes 155-156 and accompanying text. These criticisms, though, aim at the claim that, with political parties providing heuristics, voters approximate informed rational behavior. They do not suggest that, absent political parties providing relevant heuristics, anything approaching representation is possible.

them to run candidates in EP elections and dominate national discussion. However, given the relative greater importance of national elections to these parties, they have little incentive to develop identities for the purposes of EP elections that are different from the national political identity (it would be risky to the stability of party coalitions and it would not permit them to claim a domestic victory following success in EP elections).

Thus, the problem of EP elections is that the way information is presented to rationally ignorant voters results in voting decision based on issues (i.e. national politics) that are different from those that the EU's framers wanted and expected voters to use (the actual decisions made by the EP). This does not have to be so: the EU could change its election laws so that the heuristics provided to voters on the ballot correlate to the behavior of politicians in the EP.

Specifically, the EU could copy a system used in Nigerian, Indonesian and Kenyan elections that requires candidates to receive a certain percentage of the vote in a number of states as well as winning a certain share of the overall vote in order to receive representation. In EP elections, which are run under a proportional representation system, a party has to receive more than a threshold amount – 5%, often – in any given Member State in order to have any members elected to the EP from that country. Under this proposal, there would be a double threshold. In order for a party to get an MEP elected from any Member State, the party would (1) have to receive a certain percentage in the Member State; and (2) receive a certain percentage in a set a number of other EU Member States. For instance, in order to receive representation in the French delegation to the EP, a party would have to receive, say, 5% of the French vote and 3% of the vote in at least 7 EU Member States.²¹

²¹ The numbers here are not chosen at random – they directly mirror the standards which Euro-parties have to live up to in order to receive funding from the EU. *See* note 200 and accompanying text.

This rule would force parties to appear on the ballot in many countries, making it likely that the coalitions that the parties are a part of at the European Parliament level – the Euro-parties – would be chosen to appear on the ballot in each country. French voters would see on their EP ballots the Party of European Socialists and the European People’s Party instead of the Parti Socialiste and the UMP. Voters would thus have a ballot notation that would permit them to link observations about the behavior of MEPs (and other EU officials) to voting decisions in a low cost way. This would allow them to develop useful running tallies about the performance of their officials.

Importantly, this is an effort to change the politics of EP elections to match its institutional function, and not an effort to engage in a broader reform of the EU. The proposed rule would not affect the power of the EU *vis a vis* the Member States. It would have no effect on domestic member state elections and hence would not change the politics of the Council or the Commission. It would not even necessarily reduce the influence of domestic parties over the Euro-parties, which could still be governed by whatever internal rules they saw fit. All it would change is the notation on EP ballots. However, this minor change would give voters a better idea of what they are voting for and would change the competitive dynamics of EP elections. Further, it would allow the Euro-party brands to develop identities over time that were separate from those of their domestic partners. That is, this proposed change would create a way for EP elections to be about EU politics. By giving voters better information, this change would allow EP elections to play their intended role in the EU’s institutional system without abandoning the basic structure of that system.

Now, it is quite possible that this would not work entirely as intended. Voters may still use domestic party as their sole criteria for determining their vote, even after the rule is enacted.

This would be the case if it turns out that voters cannot keep two separate party systems in their head at the same time.²² However, even if this reform proposal does not work as intended, it would be an improvement over the status quo. At the very least, it would limit the ability of candidates to make purely nationalistic appeals that would be unpopular in other countries, as candidates from a Euro-party in one country could be held accountable for things said by their co-partisans in another country.²³ Further, it would provide some useful information to some voters. These would be good effects even if the proposed reform did not completely resolve the problems of voter information in EP elections.

Properly understanding what is wrong with the EP is itself important. However, the claims in this paper have a broader reach. The problems of EP elections are basically the same as the problems in a variety of American local and state elections. Voters in these elections use their national party preferences to determine their vote even though those preferences only correspond weakly to policy preferences at the state or local level, and do so because of their general lack of information about politics and the way ballots provide information. These “mismatch” problems are endemic, and thinking systematically about them will be a boon to future constitutional framers, and understanding the range of possible responses – election law changes like the one suggested here are far from the only option – will provide a tool box for solving these problems when they do arise.

²² F. Scott Fitzgerald famously noted that, “the test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.” F. SCOTT FITZGERALD, *THE CRACK-UP* 69 (1936). It is thus a real question whether an ordinary electorate could hold two separate, but not opposed, ideas about two separate sets of political parties.

²³ This happened in the last election. Declan Ganley, the multimillionaire who bankrolled the campaign the defeated the referendum on the Treaty of Lisbon in Ireland in 2007, created a political party *Libertas* that ran candidates across Europe. When two Irish *Libertas* candidates called for closing Irish borders to Eastern European labor, it caused problems for their Polish candidates. *Libertas or freedom?*, *ECONOMIST*, May 23, 2009. Ganley did not win a seat in Ireland, and *Libertas* ended up winning only one seat anywhere in Europe. See *Swing Low, Swing Right*, *supra* note 2.

Finally, looking at mismatch problems has important payoffs for broader election law scholarship. While this burgeoning field has studied virtually every aspect of things like ballot access rules, laws governing political party members, methods of vote counting and the like, one effect of election laws has been ignored: the degree to which election laws serve to educate a poorly informed populace. The political science scholarship on how voters form political opinions shows that the subjects of election law – things like who gets on the ballot, and how internally consistent political parties are – are central to how voters process political information and how voting decision are made. In addition to their other roles, election laws serve as public goods, providing tools to voters that are not provided for by naturally occurring political markets, but that improve social welfare. This paper suggests how those public goods can be provided in a better way.

II. The European Parliament: The Space Between Institutional Intentions and Electoral Practice

This section will provide a brief history of the EP and how European leaders envisioned it would work, and of the history of EP elections. It will establish that problems with EP elections have frustrated the institutional goals behind the decisions to increase the power of the EP over the last 30 years.

a) An Elected European Parliament as a Solution: Bringing a Popular Voice on European Issues into the Separation of Powers in the European Union

The current institutions of European Union did not spring fully formed, Athena-like, from the foreheads of Europe's post-war leaders. Rather, they developed over time in a series of treaties created to enhance the EU's capacity, further European integration and to solve the many problems inherent in building an institution that is somewhat more than an international

organization but something less than a state.²⁴ The history of the Union's development is an oft-told tale, and I will not repeat that history here. However, it is important to explain the history of one of the Union's institutions: The European Parliament.

At the establishment of the European Economic Community (the precursor to the EU) in 1957, legislative and executive power was divided between two entities.²⁵ The first was the European Commission, a multinational body with the power to propose legislation and regulations, with membership selected and provided by each of the member states and with a Chair or President selected by European heads of state.²⁶ The Commission is also the executive body of the EU, responsible for all regulations and administration.²⁷ The other important entity was the European Council, in which each member state was represented.²⁸ The Council signed off on legislation and major policies.²⁹ There was also this odd entity created which called itself the European Parliament (although it was not formally called such until 1985).³⁰ Although the Treaty of Rome (the document that established the EEC's institutional structure) assumed that this body would eventually be directly elected, it was not at first; instead, it was composed of delegates from national parliaments.³¹ It had only two limited powers – the right to be consulted

²⁴ For an abbreviated history of this lurching development, see DAMIAN CHALMERS ET AL., *EUROPEAN UNION LAW: TEXT AND MATERIALS*, 8-49 (2006).

²⁵ See Hon. John P. Flaherty and Maureen E. Lally-Green, *The European Union: Where is it Now*, 34 DUQ. L. REV. 923, 933-36 (1996) (describing the power and make-up of the institutions of the EEC from 1958-1985.)

²⁶ *Id.* at 933. It should be noted that the Commission did not take its full form until 1967, although it existed in large part following the Treaty of Rome. See Note: *The European Union Constitution and its Effects on Federalism in the EU*, 66 OHIO ST. L.J. 615, 621 (2005).

²⁷ Young, *supra* note 5, at 1628.

²⁸ See Flaherty and Lally-Green, *supra* note 25, at 941-42. The European Council is alternatively called the Council of Ministers. It is a distinct body from the Council of Europe, an entity in which heads of state from Europe meet to chart the long-run goals of the EU. *Id.*

²⁹ The Council voted by unanimity at the outset, but since the Single European Treaty of 1986, it has used “qualified majority voting” on some issues, where larger states are given more votes and there is a need to get supermajorities across more than one dimension. SIMON HIX, *THE POLITICAL SYSTEM OF THE EUROPEAN UNION* 83-89 (2d ed. 2005). The Council also has quasi-executive functions that fall somewhere between legislative monitoring of the executive and actual implementation of legislation. *Id.* at 35-38, 52-58.

³⁰ See *DEMOCRATIC POLITICS*, *supra* note 4, at 12.

³¹ See Flaherty and Lally-Green, *supra* note 25, at 941-42.

about legislation pending before the Commission and the right to censure the Commission with a two-third vote if that vote also constituted an absolute majority of members of parliament.³²

From 1958 through 1979, EP slowly gained power, gaining the ability to amend the EU's budget slightly.³³ In 1979, however, the EP was dramatically reformed by the institution of direct elections.³⁴ In successive treaties following 1979, the power of the EP was increased to match its new institutional legitimacy. This power has come in two forms: legislative responsibility and control over the executive, the European Commission.

The EP was first given substantial legislative responsibility in the late 1980s. In 1987 Single European Act, it gained some degree of control over legislation, the so-called "cooperation procedure."³⁵ This gave the Parliament the power to propose amendments and to delay the passage of legislation. Although the cooperation procedure was a major advance for the Parliament, but it was limited in scope – it only applied in some policy areas – and limited in degree, as it did not require EP approval for new legislation.³⁶

In 1993, the EP was given real power as a legislative body. The Maastricht Treaty assigned to EP the power of "co-decision."³⁷ In policy areas covered by co-decision, all legislation must be approved by the EP as well as by the Council.³⁸ Where there are disagreements between the Council and the EP, a conciliation committee is formed, consisting of an equal number of representatives from the Council and the EP and differences are hashed out,

³² See DEMOCRATIC POLITICS, *supra* note 4, at 14.

³³ *Id.*

³⁴ See Flaherty and Lally-Green, *supra* note 25, at 941-42.

³⁵ See DEMOCRATIC POLITICS, *supra* note 4, at 14; Lindseth, *supra* note 6, at 673 n. 199.

³⁶ See DEMOCRATIC POLITICS, *supra* note 4, at 19; Michael H. Abbey & Nicholas Bromfield, *A Practitioner's Guide to the Maastricht Treaty*, 15 MICH. J. INT'L L. 1329, 1351 (1994).

³⁷ See Lindseth, *supra* note 6, at 673-674; DEMOCRATIC POLITICS, *supra* note 4, at 14, 19.

³⁸ See *Id.*; Note: *Environmental Effects of Codecision Under the Maastricht Treaty*, 21 B.C. INT'L & COMP. L. REV. 247, 252-54 (1999); Abbey & Bromfield, *supra* note 36, at 1351-53.

much like conference committees in U.S. Congress. The final legislation must be passed by the both bodies.³⁹ That is to say, Maastricht, and subsequent changes made in the Amsterdam Treaty, made the EP into something that looks something like an ordinary house of a legislature.⁴⁰

These changes to the EU's institutional structure have allowed the EP to become a central player in the EU's legislative process. In the last EP term (2004-2009), it was particularly active in single-market and environmental legislation – both of which effectively regulate all European businesses – rendering it one of the world's most powerful and important economic regulators.⁴¹ From legislation over regulation of service providers to an expansion of a cap-and-trade carbon emissions system, it has played a major role in determining how liberal, how common and how green European policy is.⁴²

The EP has also made its presence felt through its power to reject appointments to the European Commission. The President of the Commission is nominated by the Council, and President then, in consultation with the Member States, chooses the rest of the Commission and assigns each Commissioner her portfolio in the Commission's Cabinet-like system.⁴³ In 1993, the Maastricht Treaty expanded the EP's control over the selection of the Commission,

³⁹ *Id.*

⁴⁰ Under the Maastricht Treaty, the bodies were not true equals even in those areas covered by co-decision. Where the EP and Council could not agree, the Council was empowered to propose a version of legislation that could not be amended by the EP – they had to vote up or down. Because the EP tended to vote yes on legislation when given this “take it or leave it” choice, its power to truly effect legislation was limited. Some argued that introducing co-decision without the power to propose amendments actually weakened the EP. See DEMOCRATIC POLITICS, *supra* note 4, at 20. However, in 1999, following a decision by the EP to vote no on a Council-proposed piece of legislation on voice telephony, the Amsterdam Treaty removed this structural advantage for the Council. “The Parliament is now a powerful legislator, coequal with the Council under the reformed codecision procedure.” George Tsebelis and Geoffrey Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, 55 INT'L. ORG. 357, 359 (2001).

⁴¹ See *At A Glance: Key EU Laws*, BBC News, May 12, 2009, <http://news.bbc.co.uk/2/hi/europe/7959853.stm>.

⁴² *Id.*

⁴³ See HIX, THE POLITICAL SYSTEM OF THE EUROPEAN UNION, *supra* note 29, at 41-43, 59-60. Before 1993, the Member States nominated the President of the Commission by unanimity, but since 1993, the Council does so by qualified majority vote. *Id.*

effectively gaining the power to vote up or down on the appointment of the Commission President (a power which was formalized in 1999).⁴⁴ The EP also retained a power it had since the outset of the EU, the ability to censure or effectively remove the Commission by double majority vote (a majority of all members of parliament as well as two thirds of those voting).⁴⁵ The threat of censure led the Jacques Santer-led Commission to resign in 1999 following an EP report alleging corruption and nepotism.⁴⁶ The full realization of the EP's power, though, was not felt until 2004, when it refused to support a newly appointed Commission because of the appointment of Rocco Buttiglione, a very conservative Italian politician who declared homosexuality to be a sin, as Justice and Home Affairs Commissioner.⁴⁷ The EP now has substantial control over the appointment of the President of the Commission, the choice of Commissioners and the ability to remove the Commission in the case of misconduct.

The proposed EU Constitution would have made the Parliament even more powerful, expanding co-decision to all areas, granting the EP greater control over the EU budget, and formally declaring it "first" among European institutions.⁴⁸ Although the Constitution was rejected by voters in several European countries, the substantive changes it proposed to the EP's power (like much of the rest of the Constitution) was included in the Reform Treaty, or the Treaty of Lisbon, which was just ratified by all European state in October 2009.⁴⁹ In addition to

⁴⁴ See CHALMERS ET AL., *supra* note 24, at 115; DEMOCRATIC POLITICS, *supra* note 4, at 14; HIX, THE POLITICAL SYSTEM OF THE EUROPEAN UNION, *supra* note 29, at 59-60.

⁴⁵ See DEMOCRATIC POLITICS, *supra* note 4, at 14-17.

⁴⁶ See HIX, THE POLITICAL SYSTEM OF THE EUROPEAN UNION, *supra* note 29, at 61.

⁴⁷ See David Gow, *Grateful Barroso offers MEPs a say on EU reform*, GUARDIAN (UK), Nov.19, 2004 at 1; DEMOCRATIC POLITICS, *supra* note 4, at 1-3.

⁴⁸ Treaty Establishing a Constitution for Europe, I-19, 20, 32-33, Dec. 16, 2004, 2004 O.J. (C 310) 18-20. See Stephen C. Sieberson, *The Proposed E.U. Constitution – Will it Eliminate the EU's Democratic Deficit?*, 10 Colum. J. Eur. L. 173, 208-209 (2004)

⁴⁹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 14, 15; Bilefsky and Castle, *supra* note __, at 6. See Youri Devuyt, *The European Union's Institutional Balance After the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed*, 39 GEO. J. INT'L L. 247, 306-09 (2008) (describing powers of EP after Treaty of Lisbon); Valery Giscard D'Estaing, *The Treaty is the Same as the Constitution*, INDEPENDENT (U.K.) October 30, 2007 at 30.

its new powers over the EU budget, co-decision has been renamed the “ordinary legislative procedure” and was expanded to cover agriculture and virtually all other areas of EU policy-competence.⁵⁰

This too-brief history should make two things clear. First, the EP’s power – both as a legislative body and as a body with direct control over the executive branch – has consistently increased over the period 1979 to 2009. Second, it is now an important institution, with direct control over legislation affecting hundreds of millions of people and billions of dollars of business and through its influence with the Commission, indirect effect on the execution of the laws.

There is little question *why* the power and influence of the EP has increased. As the EU developed, it gradually took over responsibility from Member States governments over an increasing number of areas. Further, successive treaties limited the ability of the democratically-elected governments of Member States to veto legislative action in the Council, as the Council moved in most policy areas from an unanimity voting rule to Qualified Majority Voting, a system in which a super-majority of votes are needed and the weight of each country’s vote is determined by its population.⁵¹ In response, politicians, scholars and the news media developed a clear and deadly critique of its institutional apparatus: that the EU was making policy that affected people’s lives with little direct democratic input.⁵² In David Marquand’s classic term, the EU suffered from a “democratic deficit” – it was increasingly powerful, but its legitimacy

⁵⁰ Treaty of Lisbon, 2007 O.J. (C 306) 49-62. *See also* Sempol, *supra* note _.

⁵¹ *See* HIX, WHAT’S WRONG, *supra* note 3, at 4, 19; HIX, THE POLITICAL SYSTEM OF THE EUROPEAN UNION, *supra* note 29, at 67-89.

⁵² Lindseth, *supra* note 6, at 673-674; Young, *supra* note 5, at, 1697 (“The primary response to concerns about a “democratic deficit” has been a call to enhance the role of the European Parliament - the only directly elected institution in the Community system.”)

was undercut by how removed its decisions were from the European polity.⁵³ While the Commission served as a bureaucratic enforcer of common European interests and the Council served to protect the interests of Member States, there was no tribune for the voice of the people.

Giving power to the Parliament has been the EU's regular response to arguments that it has become too bureaucratic, too decentralized or insufficiently democratic. However, it is important to note that giving power to the EP was supposed to be an incremental change. The EP is an additional check in the EU's complex system of checks-and-balances, a body that could check the technocratic impulses of the bureaucratically-appointed Commission and the centripetal nature of the Council, in which Member States voted. In 1978, a key EP official described the role of the European leaders envisioned for the Parliament after direct elections: "With the Commission representing the Community interest, and the Council the national interests, it is just as well that the Parliament exists as a balancing element...the elected Parliament will receive its mandate directly from the peoples of the Community. It will be independent and autonomous with respect both to governments and states, deriving its legitimacy from the popular vote."⁵⁴ Volken Robben, as quoted by Ernest Young, makes a similar point: "each of these ... is thought to represent a certain constituency, the Commission the common interest, the Council the Member States and the Parliament the peoples."⁵⁵

Although the EP was seen as just a piece of the broader EU puzzle, it was seen as increasingly important one, as the EU's expanded reach came with extreme pressure to resolve the "democratic deficit." Peter Lindseth notes that increasing the power of the EP has been perceived among European leaders as an imperative in the face of perceived democratic

⁵³ MARQUAND, *supra* note 6, at 64-65.

⁵⁴ Jan-Joseph Schwed, *The Parliament and the Constitution*, 440 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 35 (1978).

⁵⁵ Young, *supra* note 5, at 1625-26.

illegitimacy. “The official strategy here has centered on a further increase in the role of the Community's elected body, the European Parliament - in effect, to make it the legitimate, hierarchical political superior in the Community system. According to the European Court of Justice, the growing importance of the Parliament is an expression of ‘the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.’”⁵⁶

The EU’s current institutional structure is premised on the theory that the EP will serve as a popular counterweight to the bureaucratic Commission and the Member-State run Council. Further, the Member States and European leaders generally have considered enhancing the EP’s role as a necessary component of enhancing the EU’s legitimacy, based on the theory that giving more power to a directly-elected body will reduce the “democratic deficit.” Both of these, however, are just theories. And, as will be discussed in the next section, there are reasons to doubt that either is true.

b) European Parliament Elections as a Problem: European Parliament Elections Track Preferences About Domestic Policies and Not European Union Policies

As discussed in the last section, what makes the EP different from other EU institutions is the fact that its members are directly elected, and it is this fact that has spurred EU leaders to assign the EP more and more power over the last thirty years. As a directly elected body, the EP is supposed to provide a different perspective on EU policy from the bureaucratic Commission and the Member State run Council. Thus, the quality and type of elections is a necessary component to determining whether the EP fulfills its institutional role.

⁵⁶ Lindseth, *supra* note 6, at 673-674 (quoting Case 138/79, *SA Roquette Freres v. Council*, 1980 E.C.R. 3333, 3360 para. 33).

When elections for the EP were first announced in 1979, European leaders either expected or hoped that mass pan-European political parties would develop.⁵⁷ Pan-European parties were supposed to be an important part of European integration – a popular political response to the fact that power had shifted from Member States to the EU and one that would push integration along. Later EU treaties declared that “political parties at the European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.”⁵⁸ Pan-European parties were seen as an inevitable reaction to the establishment of a pan-European legislature, and their development would be key to its success.

Suffice to say, this did not come to pass. Major parties in each country dominated elections in 1979, and have done so in each election since.⁵⁹ Only the Green Party has ever won a seat in more than one country, and it is debatable whether to classify it as a pan-European party or a collection of related domestic parties.⁶⁰ In this year’s election, an anti-European leader, billionaire Declan Ganley who had led the successful “No” campaign against the Treaty of Lisbon in Ireland, founded a new political party, Libertas, which ran candidates for EP across Europe.⁶¹ It only won one seat anywhere in Europe, and Ganley went down to defeat in Ireland.

⁵⁷ See HIX AND LORD, *supra* note 13, at 12-16; DEMOCRATIC POLITICS, *supra* note 4, at 51 (noting Walter Hallstein, former President of the European Commission, and David Marquand both believed that direct elections would generate pan-european political parties).

⁵⁸ EC Treaty art. 138a. See Stephen Day and Jo Shaw, *Developing Political Parties in the European Union: Towards a European Party Statute?*, in PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE 293 (K.D. Ewing and Samuel Issacharoff eds. 1993).

⁵⁹ See DEMOCRATIC POLITICS, *supra* note 4, at 51. For a full set of EP election results by country by year, see Europe Politique, available at <http://elections.online.fr/>.

⁶⁰ In 2004, a variety of disparate national Green parties formed the European Green Party. They did so to contest European Parliament elections with a common platform. See Green Party/EFA Alliance in European Parliament, History, <http://www.greens-efa.org/cms/default/rubrik/6/6648.history.htm>; Peter Ford, *Greens seek pan-European political clout*, CHRISTIAN SCI. MON, March 1, 2004, at 6.

⁶¹ See *Swing Low, Swing Right*, *supra* note 2.

Further, major political parties largely contest them in their own names and without reference to their Euro-party affiliations.⁶²

Candidates for EP range from non-descript party politicians to notable national celebrities, but are usually not major politicians. Under EU law, Member States must now use proportional representation or a single transferable vote system to fill their seats.⁶³ Domestic parties choose the lists of candidates, and their selections are often criticized as being more based on the desire to give sinecures to faithful party supporters and ex-politicians than on choosing popular candidates who can lead campaigns.⁶⁴ When well-known politicians run for EP, it is usually because they have become political liabilities in domestic politics, as was the case with Rachinda Dati, the former Justice Minister in France who ran to become an MEP in 2009 after a rocky period in the French government.⁶⁵ When candidates are well-known, it is often not for their political successes. Candidate lists for the EP frequently feature celebrities; in 2009, candidates included a Prince from the House of Savoy, Lithuania's leading talk show host, a Finish rally car driver and someone known as "Romania's Paris Hilton."⁶⁶ This reached its apex in Italy this year. Silvio Berlusconi selected as candidates for his party a group of female celebrities with no political experience, including a former reality television star, a soap opera actress and beauty pageant winner, as EP candidates for his People of Liberty Party, before

⁶² Michael Marsh and Mark Franklin, *The Foundations: Unanswered Questions from the Study of European Elections, 1979-1994* in CHOOSING EUROPE? THE EUROPEAN ELECTORATE AND NATIONAL POLITICS IN THE FACE OF UNION 10 (Cees van der Eijk and Mark Franklin eds, 1996). There are a few exceptions to this – for instance, the Irish party Fine Gael has used its membership in the European People's Party in its campaign literature. *Id.*

⁶³ See Council Decision of 25 June and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, 2002 O.J. (L283) 1.

⁶⁴ See Simon Hix, *Parliamentary Behavior with Two Principals: Preferences, Parties, and Voting in the European Parliament*, 46 AM. J. POL. SCI. 688, 691 (2002) (national parties choose candidate lists); *Record abstention in Euro-elections*, Charlemagne's Notebook June 7, 2009,

http://www.economist.com/blogs/charlemagne/2009/06/record_abstention_in_euroelect.cfm; *An Unloved Parliament*, ECONOMIST, May 9, 2009 ("Leaders decry the practice of packing the European Parliament with failed politicians and cronies.") *Shaken in Strasbourg*, ECONOMIST, January 16, 1999.

⁶⁵ See *An unloved parliament*, ECONOMIST, May 9, 2009; Matthew Saltmarsh, *What next for a French meteor?: The political downfall of former justice minister is no straightforward tale*, INT. HERALD TRIB., June 11, 2009 at 2.

⁶⁶ Paolo Totaro, *Struggling for poll position*, SYDNEY MORNING HERALD (Austl.), June 5, 2009 at 8.

backing down after his wife called the candidates “shameless rubbish” who were only chosen for their looks, and filed for divorce.⁶⁷

Despite the inclusion of these celebrities, turnout has continued to drop in EP elections. After 63% of European voters turned out for the first EP election in 1979, turnout has continued to drop.⁶⁸ Turnout in 2009 was 43%, more than 20 percentage points lower than the average turnout in national elections.⁶⁹ Further, this overstates the turnout as it includes data from countries like Belgium, where voting is mandatory, and other countries which held local elections at the same time.⁷⁰ The low turnout in some countries is astounding – under 20% in Slovakia, 21% in Lithuania, and only 35% in the UK despite having local elections on the same day.⁷¹ European voters generally turnout in high numbers, but cannot be bothered to do so in EP elections.

Even more problematic for the theory of what the EP is supposed to do than who votes and who wins is *why* certain parties win. If the EP is supposed to provide the EU with popular input about EU policy-making, at the very least two things are required: (1) that EU policy is considered when voting decisions are made; (2) the positions of the parties on EU policies have an effect on who wins. Neither turns out to be true.

⁶⁷ Richard Owen, *Silvio makes beauty contest of Euro poll*, AUSTRALIAN (Austl.), April 24, 2009 at 9; Peter Popham, *The Last Days of the Court of King Silvio*, INDEPENDENT (U.K.), June 27, 2009 at 30.

⁶⁸ Alexander C. Pacek and Benjamin Radcliff, *Voter Participation and Party-group Fortunes in European Parliament Elections, 1979-1999: A Cross-National Analysis*, 56 POL RESEARCH Q. 91 (2003); HIX, WHAT’S WRONG, *supra* note 3, at 80.

⁶⁹ HIX, WHAT’S WRONG, *supra* note 3, at 80; *Turnout at the European Elections*, Official Site of European Parliament Election 2009, http://www.elections2009-results.eu/en/turnout_en.html.

⁷⁰ Belgium and Luxembourg had turnout was over 90%. *Id.* Matthew Taylor, *Flying the Flag for Apathy*, GUARDIAN (U.K.), June 9, 2009 at 5; Judy Demspey, *For East Europeans, the E.U. election was a big yawn; Third of eligible voters bothered to turn out for Parliament contests*, INT.HER.TRIB., June 10, 2009 at 2 (Latvia’s turnout was 30% higher than Lithuania’s, largely because of local elections).

⁷¹ See *Turnout at the European Elections*, *supra* note 69.

It is relatively clear that neither the campaigns for EP nor the results have much to do with the work of the institution. Campaigns are largely waged around domestic issues.⁷² The University of Sussex Institute's European Parties, Election & Referendums Network had scholars study the content of each of EP campaign in 21 of the 27 Member States in 2004.⁷³ Their reporters found that EU issues played virtually no role in 15 of the 21 campaigns. In three others – Denmark, Britain and Sweden – there was campaigning built around major (and minor) party stances that were simply either pro- or anti-EU.⁷⁴ Only in three countries – France, Ireland and the Netherlands – was there substantial campaigning about the substance of European Union policy.⁷⁵ Even in these six elections, domestic issues dominated.

The 2009 election does not appear to be different. In the UK, a scandal caused by expenses taken by members of the national parliament dominated election campaigns.⁷⁶ In Italy,

⁷² See CHALMERS, ET AL., *supra* note 24, at 112.

⁷³ Sussex University European Parties, Elections & Referendums Index, *European Parliament Elections*, available at <http://www.sussex.ac.uk/sei/1-4-2-2.html>. For instance, their German analyst, Dan Hough, wrote, "The election held to elect 99 German representatives to the European Parliament was always likely to be hijacked by affairs specific to the national arena. European themes played, at best, an occasional role in the campaign – at worst they were completely insignificant." Dan Hough, *The European Parliament Election in Germany*, June 13 2004, available at *id*. The Polish analyst, Aleks Szczerbiak, wrote "European issues played a secondary role in a dull and lifeless campaign to which the main parties and media gave a very low priority and that was overshadowed by a government formation crisis and possibility of an early parliamentary election." Aleks Szczerbiak, *The European Parliament Election in Poland*, June 13 2004, available at *id*.

⁷⁴ See Paul Taggart, *The European Parliament Election in the United Kingdom, June 10 2004* at *id*; Nicholas Aylott and Magnus Blomgren, *The European Parliament Election in Sweden, June 13 2004* at 1; Ann-Christina L. Knudsen, *The European Parliament Election in Denmark, June 13 2004* 1, in *id*. The studies reveal that in countries where EU issues play virtually no role, the only EU-centric content is centered around competing claims that parties can get more money from Brussels. For instance, in the largely-European-issue devoid German EP elections of 2004, the Free Democratic Party used the slogan "We can do Europe better." Hough, *supra* note 73, at 7. The only European issue mentioned in the EP campaign in Hungary was the claim, made by all four major parties, that they would maximize transfer from Brussels to Budapest. Agnes Bagtory, *European Elections in Hungary, June 13 2004* in European Parties, Election & Referendums Network, 2004 EP Elections, *supra* note 73. This is common throughout the reports.

⁷⁵ See Sally Marthaler, *The European Election in France*, June 13, 2004, 9-10 & Robert Harmsen, *The European Election in the Netherlands*, June 10, 2004 at 10-14 in *id*; Michael Holmes, *The European Election in Ireland, June 11, 2004* 3-6 in *id*.

⁷⁶ Ben Quinn, *European elections pound Britain's Brown*, CHRIST. SCI. MON., June 8, 2009 at 6 (quoting political scientist Nick Temple as saying "In my lifetime there has been never been an election so dominated by one issue to the of extent of the expenses issue.")

the fight between the Prime Minister and his wife was the top campaign issue.⁷⁷ The German elections were seen and treated by the parties as a dress run for the next year's domestic elections.⁷⁸ The Sussex Institute studies for 2009 show the same results – their in-depth campaign reviews show that, in all but a few countries, European issues either were not featured at all or received extremely little attention relative to domestic issues.⁷⁹ EU policy is simply not very important in EP election campaigns.

Similarly, the results of EP elections also have little to do with voter opinions about European policy. The central finding of the last 25 years of studying EP elections is that these elections are “second-order” elections.⁸⁰ That is, voters use these elections to comment on their current domestic government, or put another way, EP elections are a referendum on a country's Prime Minister.⁸¹ This effect is stronger in some places – e.g. in countries with histories of alternating government rather than governing by grand coalition – but in all European countries domestic politics is the largest determinant of voting in European elections.⁸² This effect is

⁷⁷ “[Italy’s] electoral campaign, which started quite late (at the beginning of May), did not focus on EU-related issues, but was mainly characterised by scandals, personal attacks and gossip, widely publicised by the media both at national and international level.” Burson-Marsteller, *The New EP – National Impact*, July 16, 2009, available at <http://thenewep.com/national-state-of-play/>.

⁷⁸ *Id.* (“There was low interest in the European elections among German voters and consequently an historically low voter turnout of 43%. As in the past, campaigns mostly focused on national issues and national politicians.”)

⁷⁹ See European Parties, Election & Referendums Network, *European Parliament Elections*, *supra* note 73. Even in those countries where European issues did feature in the campaign, they were not decisive. For instance, in the Netherlands, where there was a great deal of pro- and anti-European rhetoric in the campaign, domestic issues determined the results nearly entirely. See Stijn van Kessel, *The European Parliament Election in the Netherlands*, June 4 2009, available at *id.* In Finland, “defending national interests” was the major theme and in Malta, Sussex’s analyst noted that it was difficult to determine what is a European policy and what is a domestic policy, as the two are substantially intertwined. See Roderick Pace, *The European Parliament Election in Malta, June 6 2009*, available at *id.*; Tapio Raunio, *The European Parliament in Finland*, June 7 2009, available at *id.*

⁸⁰ HIX, *THE POLITICAL SYSTEM OF THE EUROPEAN UNION*, *supra* note 29, 193-196.

⁸¹ *Id.*

⁸² Marsh, *Testing the Second-Order Election Model After Four European Elections*, *supra* note 4, at 591.

extremely robust. That EP elections are “second order” is the central and probably only generally-agreed upon finding in the much disputed literature on EU politics.⁸³

Moreover, there is no evidence that the votes, speeches and promises made by MEPs affect EP elections at all. While it is possible that there might be some small exceptions to this rule – some observers give credit for the Greens strong performance in EP elections in France to the personality and politics of Daniel Cohn-Bendit, the former 1968 radical who leads the party in the EP – it is certainly the case that virtually nothing that happens in Strasbourg matters in the voting booth.⁸⁴

The only way the results of EP elections differ systematically from national ones is that that nationalist parties and the Green Party do slightly better in EP elections than they do in domestic elections. “[A]nti-EU parties and green parties on average do better in European elections than in national elections. But these ‘European effects’ are minor. Hence, despite the growing powers of the European Parliament, neither positions on matters regarding European integration, nor on matters regarding ‘normal’ left-right policy, have much of an effect on electoral outcomes.”⁸⁵ All evidence shows that voters are unaware of any European issues in these elections and polling shows that few voters found that EP campaigns helped them decide how to vote.⁸⁶

⁸³ *Id.* See also Simon Hix and Michael Marsh, *Punishment or Protest? Understanding European Parliament Elections*, 69(2) J. POL. 295 (2007); HIX, WHAT’S WRONG, *supra* note 3, at 79-80.

⁸⁴ John Lichfield, *Danny the Green*, INDEPENDENT (U.K.), June 13, 2009 at 36; Archie Bland and Toby Green, *How Europe Voted and What it Means*, INDEPENDENT (U.K.), June 9, 2009 at 12 (crediting Greens’ French success to Cohn-Bendit).

⁸⁵ Hix and Marsh, *supra* note 83, at 297. The best explanation for the success of small parties is that some voters feel free to cast a protest vote when there is little chance that the popular vote will affect the composition of domestic government. See Erik Oppenhuis, Cees van der Eijk and Mark Franklin, *The Party Context: Outcomes in CHOOSING EUROPE*, *supra* note 62, at 288-89.

⁸⁶ Marsh and Franklin, *supra* note 62, at 24-28.

The 2009 EP elections appear to have followed the usual script. Burson-Marsteller, the large public relations and lobbying firm, hired several prominent political scientists to design a model to predict the EP elections. Their model started with preferences about national parties without any reference to the EP.⁸⁷ The reason for this was simple: “Opinion polls for European Parliament elections are less accurate than opinion polls for national elections. This is because voters are usually thinking about national elections when answering European election polls.”⁸⁸ The model then overweighted the responses that suggested support for nationalist and other small parties because “opinion polls are reasonable predictors of party performance, but tend to overestimate support for large governing parties, and underestimate support for small parties and anti-European parties.”⁸⁹ This model was a resounding success – predicting 98% of the seats by Euro-party, and 90% of the seats won by each national party.⁹⁰

In 2009, center-right parties won in most of the larger European countries, including Britain, France, Germany, Italy and Spain.⁹¹ However, this was not a result of increased support for center-right parties – support for major center-right parties barely changed – but instead, center-left parties lost voters to far right, liberal and green parties throughout Europe.⁹² Most notable was the success of small parties. The radical anti-European United Kingdom Independence Party won two MEPs in Britain, the Greens nearly outpolled the Socialists in

⁸⁷ Burson-Marsteller, *Predict '09 Methodology*, June 4, 2009, <http://www.predict09.eu/default/en-us/page2.aspx>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ The reason the numbers are different is that there was some tradeoff. For instance, the model’s prediction was low by one seat the support for the conservatives in Finland, but was high by one in Germany. Burson-Marsteller, *Predict '09 Executive Summary*, June 16, 2009, <http://www.predict09.eu/default/en-us.aspx>.

⁹¹ See *Swing Low, Swing Right*, *supra* note 2.

⁹² See Ian Traynor, *Election aftermath: Centre-left meltdown: Defiant or in denial?*, GUARDIAN (U.K.), June 9, 2009 at 6 (quoting Simon Hix as saying “The centre-right won the election, but it (their vote) did not really go up,” said Hix. “It’s the centre-left that has gone down, in government or in opposition” and noting that “[w]herever the centre-left collapsed, the extreme right frequently scored its most spectacular gains - in Hungary, Austria, the Netherlands and Britain. But pro-EU left liberals and Greens also did well.”); *Swing Low, Swing Right*, *supra* note 2 (“Support for mainstream centre-right parties held steady or fell slightly.”).

France, anti-Muslim and immigration parties won seats in the Netherlands and Belgium, an anti-Roma party did well in Hungary, and a pro-internet piracy party won a seat in Sweden.⁹³

Although center-right parties did well across Europe, it is hard to understand this as a common position on what the EU should do. National issues dominated EP election campaigns and center-right parties across Europe (and center-left parties) have diverged tremendously on the major questions of the day, like how much intervention into the economy governments should engage in following the economic crisis.⁹⁴ Further, even if European voters have common preferences about what their national governments should do, it is unclear why or whether these translate to preferences about European regulation. EU legislation generally replaces or stands in for national regulations, meaning that an EU regulation that is relative pro-market in France may involve more regulation than currently exists in the UK. Finally, it is clear that all sorts of things affect EP elections – like the UK expenses scandal – that have nothing to do with what the EP does. As such, it is hard to understand the results of these elections as reflecting much about what voters think about EU policy.

As campaigns have little impact on who is elected, it is unsurprising that they have little effect on what MEPs do once they are elected. European issues do not figure much in EP campaigns, and when they do, it is the national interest, and not ideologies about European

⁹³Stephen Castle, *Disaffection Dominates European Parliament Vote*, N.Y.TIMES, June 8, 2009 at 5; *Trouble at the polls; The worrying European elections*, ECONOMIST, June 13, 2009.

⁹⁴ See Arthur Sinodinos, *Pragmatists, not social democrats, the voters' choice*, AUSTRALIAN (Austl), June 12, 2009; Katrin Benhold and Stephen Castle, *Sarkozy and Merkel Meet, but Agreement Is Elusive*, N.Y.TIMES, November 25, 2008 at 7 (center right leaders in France and Germany disagree on proper European response to economic crisis.) Patrick Wintour, *Brown and Sarkozy nudge Germans towards fresh economic measures*, GUARDIAN (U.K.), December 9, 2008 at 11 (center-left British PM, center-right French President and center-right European Commission President all agree on stimulus but disagree with center-right German PM).

regulation that are mentioned.⁹⁵ However, when in voting in the EP, MEPs toe ideological party lines about EU policy, and national issues are muted.

Members of European Parliament (MEPs) of like-minded domestic parties join in common caucuses. In the first elected EP, there were three major coalitions – a Christian Democratic coalition called the European People’s Party and the Socialists, a Social Democratic coalition, and a somewhat smaller coalition of Liberal parties.⁹⁶ Several other groups formed over time – some were “coalitions” that actually comprised one or two national parties, others were odd pairing of non-ideologically aligned groups, and others were true groupings⁹⁷ These caucuses grew into real organizations – separate legal entities with substantial budgets provided by the EU.⁹⁸ There are now eight major Euro-parties: the European People’s Party, which has most mainstream center-right parties in Europe, the Party of European Socialists, the Alliance of Liberals and Democrats for Europe (Liberals and centrist parties) and parties representing Far Leftists-Nordic Greens, Regionalists, Greens, hard right anti-Europeans, and a new bloc consisting of anti-European mainstream conservative parties from the UK, the Czech Republic and Poland and others.⁹⁹

Given their lack of electoral mandate, these Euro-parties are remarkably ideologically coherent. Simon Hix, a leading scholar on the European Parliament, studied roll call data in the EP and has shown that Euro-party cohesion – i.e. common voting among party members has increased even as the number of different countries represented in each party has increased.¹⁰⁰

⁹⁵ See note 79 and accompanying text.

⁹⁶ See DEMOCRATIC POLITICS, *supra* note 4, at 21-29.

⁹⁷ *Id.*

⁹⁸ See Day and Shaw, *supra* note 58, at 296-97.

⁹⁹ DEMOCRATIC POLITICS, *supra* note 4, at 23. For the full results of the 2009 EP elections, see Results See Nicholas Watt and Ian Traynor, *Tories Head New Rightwing Fringe Group in Europe*, GUARDIAN (U.K.), June 23, 2009 at 13 (discussing new Euro-party).

¹⁰⁰ DEMOCRATIC POLITICS, *supra* note 4, at 104.

Further, the main division among the parties is left-right ideology, not national competition.

“Left-right politics explains an overwhelming proportion of voting in the European Parliament.

In contrast, national interests, independent of national party positions, have very little systematic influence on voting in the European Parliament.”¹⁰¹ This is particularly odd given that, when European issues are raised in EP elections, it is almost always parties making claims about their superior ability to bring home resources or to make the EU work better for their home country.

Thus, ironies abound in the operation of the EP. Campaigns for a pan-European legislature are run almost solely on domestic issues, and to the extent that European issues are mentioned, parties claim they can better represent their country at the EU. When MEPs arrive in Strasbourg, however, pan-European ideological coherence trumps national interests.¹⁰² The EP is supposed to serve as a popular check on the Council, in which the Member States vote, but the results of EP elections are based almost exclusively on domestic politics, and thus are just an off-cycle replication of domestic elections (the same domestic elections which decide who represents Member States in the Council). MEPs behave as if voters care that they toe an ideological line even though there is no connection between their behavior in parliament and their electoral performance.

It is little wonder that voters do not show up or that the introduction of elections to the EP does not confer much democratic legitimacy on the EU as a whole. The EU funds the highly respected Eurobarometer polls, which study popular opinion across Europe by conducting 1000

¹⁰¹ *Id.* at 180-181.

¹⁰² One of the oddest parts of MEP behavior is that they sometimes act as if voters care how they vote. Votes inside Euro-parties are more consistent during the middle of MEPs term, but when elections near, MEPs consider national party interests. This is despite voters not appearing to be responsive to any EP votes. Rene Lindstadt, Jonathan B. Slapin and Ryan J. Vander Wielen, *Balancing Competition Demands: Position-Taking and Election Proximity in the European Parliament*, draft paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1441899.

interviews in each member state.¹⁰³ In 1979, before the introduction of direct elections to the EP, support for the EU – as measured by the answer to the question whether people think membership is a good thing for their country – was 59%.¹⁰⁴ By 1991, it had risen to 70%.¹⁰⁵ However, between 1991 and 1996, the period during which the EP's power grew most dramatically following the Maastricht Treaty, support dropped to just over 50%, where it has, with a few bumps and drops, remained until today.¹⁰⁶

Some scholars have claimed that the failures of EP elections caused this drop in legitimacy.¹⁰⁷ They claim that, before the EP was given substantial power, European citizens believed that Member States controlled the EU, but as the EP became a symbol of an independent EU, citizens became disappointed with the absence of democratic accountability. However, there are reasons to doubt this causal story. In Eurobarometer polls, European citizens report that they trust the EP slightly more than they do other EU institutions.¹⁰⁸ However, at the very least, empowering the EP has not increased the amount of the degree to which EU citizens support their country's continued membership in the EU. The EP certainly has done nothing to stop complaints about a democratic deficit. Yves Meny has noted that “the democratic deficit argument never raged as much as it did after the election of MEPs by universal suffrage.”¹⁰⁹

¹⁰³ There are only a few exceptions to the 1000 interviews per country rule. They do 2000 interviews in Germany, 1300 in the UK and 600 Luxembourg. *Standard EuroBarometer 70* 1(November 2008), available at http://ec.europa.eu/public_opinion/archives/eb/eb70/eb70_en.htm. See HIX, WHAT'S WRONG, *supra* note 3, at 51.

¹⁰⁴ *Standard EuroBarometer 11* 44 (May 1979), available at http://ec.europa.eu/public_opinion/archives/eb/eb11/eb11_en.htm.

¹⁰⁵ *Standard EuroBarometer 35* 3 (June 1991) available at http://ec.europa.eu/public_opinion/archives/eb/eb35/eb35_en.htm.

¹⁰⁶ *Standard EuroBarometer 70*, *supra* note 103, at 31

¹⁰⁷ Cees van der Eijk and Mark Franklin, *The Problem: Representation and Democracy in The European Union in CHOOSING EUROPE?*, *supra* note 62, at 7-8.

¹⁰⁸ In the last *Standard EuroBarometer* poll, 51% “tended to trust” the EP while only 47% “tended to trust” the European Commission and 48% the European Central Bank. *Id.* at 38-44. This small but real difference has persisted over the past decade.

¹⁰⁹ Yves Meny, *De la démocratie en Europe: Old Concepts and New Challenges*, 41 J. COMMON MKT. STUD. 1, 8 (2003). See also Siebers, *supra* note 48, at 204-05.

The problems of EP elections have left the EP unable to fulfill its role in the EU institutional structure. The EP is supposed to be a popularly-elected pan-European body that checks the influence of the bureaucratic Commission and the Member-State-controlled Council. Instead, it is a not-particularly popularly elected, highly bureaucratic body selected on the basis of Member State politics without any reference to EU issues. The goal of creating a three-part balance of powers is a failure. And EP elections are the cause of that failure.

III. Existing Reform Ideas: European Parliament Elections as an Institutional Problem

The problems of the EP and with the EU's "democratic deficit" more generally have generated much debate, and many proposals for how they might be solved. The literature on the democratic deficit is vast and varied, perhaps the most studied subject in European politics in the last thirty years. Rather than address the entirety of this literature, it makes more sense to look at the two leading, and characteristic, entrants in the debate over the democratic deficit.¹¹⁰ Although they differ substantially in prescription, both from each other and from the existing efforts of the EU to respond to the problems of EP elections, they have something central in common.

Simon Hix and Andrew Moravcsik have developed opposing analyses of the problem (or lack thereof) of democracy in the EU. Each of them promotes a very different vision of what the EU should do about the fact that EP elections do not provide much democratic input into EU decision-making. Moravcsik thinks that European citizens are wrong to worry about democratic input in the EU, effectively rejecting the importance of the EP's stated role. Hix goes entirely in

¹¹⁰ See Luciano Bardi, *Parties and Party System in the European Union: National and Supranational Dimensions*, in *POLITICAL PARTIES IN THE NEW EUROPE: POLITICAL AND ANALYTICAL CHALLENGES* 293 (Kurt Richard Luther and Ferdinand Muller-Rommel eds. 2002) (describing Hix and Moravcsik as having "revitalized the theoretical debate" about the study of democracy in the EU).

other direction, suggesting that much, if not all, of EU governing structure should be determined by European elections, with the composition of the Commission turning on EP results and the Council dividing along partisan grounds as well. Although neither proposes changes to the treaties that give the EU its institutional form, both call for agreement among political elites that would effectively nullify the separation of powers envisioned by European leaders when they designed the EU's institutions. Thus, both arguments are effectively calls for amending the institutional arrangements of the EU by widespread elite agreement.

These arguments in favor of tacit amendment rely on a common assessment that the current system is not achieving the goal of a separation of powers. This same belief is inherent in the EU's repeated decisions to allocate more power to the EP which were intended to make it powerful enough that people cared about it. This section will show that current debates over the EP assume that the failures of its elections make reform of the separation of powers necessary. The next section will argue that this assumption is not necessary.

After writing about his views about democracy in the EU over the course of a decade, Moravcsik concentrated them into a remarkable article, "In Defense of the 'Democratic Deficit': Reassessing Legitimacy in the European Union."¹¹¹ Its central argument is that the impression common among European citizens that Europe lacks democratic legitimacy is simply wrong. "Concern about the EU's 'democratic deficit' is misplaced."¹¹² When the issue areas that the EU handles, the size of its budget and the degree of influence state governments have on the operation of its operations, it is as democratic as other institutions.

¹¹¹ Andrew Moravcsik, *In Defense of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40(4) J. COM. MARKET STUD. 603 (2002).

¹¹² *Id.* at 604.

Critics of the EU's democratic legitimacy first error, he argues, is that they ignore what the EU does. Unlike the undemocratic super-state it is sometimes painted as, the EU only makes policy in a few areas, mostly in those areas where there are cross-border economic effects.¹¹³ It does not implement most of its own regulations, leaving that to Member States. Further, the EU has a small budget, only equal to 1.3% of the EU's GDP, rendering it incapable of either redistributing incomes or engaging in many of the ordinary activities of a modern regulatory state.¹¹⁴ The areas in which it does make policy – e.g. international trade, anti-trust and consumer protection – are low salience, and governments often make these decisions at some level of remove from voters.¹¹⁵ When the nature of the issues addressed by EU policy is taken into account, the EU's democratic practices look less bad. The EU “simply specializ[es] in those functions of modern democratic governance that tend to involve less direct political participation.”¹¹⁶ Particularly because of the integrated nature of the European economy, the possibility of beggar-thy-neighbor policies and distortions created by the ease of mobilizing narrowly concentrated interest groups at the expense of broad groups of consumers in the policy areas like international trade or antitrust, removing these decisions from elected politicians can be seen as improving democratic representation at the Europe-wide level.¹¹⁷

Second, Moravcsik notes that there is a great deal of democratic input into European decision-making. EU policy-making requires a great deal of consensus. There are huge variety

¹¹³ “[M]ost analysts view the EU in isolation, and thus fail to appreciate fully the symbiotic relationship between national and EU policy-making – a division of labour in which commonly delegated functions tend to be carried out by the EU, while those functions that inspire and induce popular participation remain largely national. This gives observers the impression that the EU is undemocratic, whereas it is simply specializing in those function of modern democratic governance that tend to involve less direct political participation.” *Id.* at 606.

¹¹⁴ *Id.* at 610.

¹¹⁵ One might quibble with his determination that international trade is a low-salience issue, but the point generally holds. *Id.* at 616.

¹¹⁶ The strongest EU institution, the European Central Bank, is a perfect example of his point. After all, in almost all countries, central banks are independent and without democratic input. *Id.* at 606

¹¹⁷ *Id.* at 614.

of checks and balances imbedded in the various majorities and super-majorities needed to get legislation through the Commission, the Council and the EP. This mitigates that EP's failings.

“Whereas one might criticize the absence of clear programmatic elections, the EP nonetheless has an effective system of party cooperation, with votes most often splitting along party lines and in which recognizable ideological cleavages shape voting patterns. Among the most relevant differences between the European Parliament and national parliaments appears to be the tendency of the EP to reach decisions by large majorities. Yet this tendency underscores the tendency of the EU to reach decisions by consensus—unsurprising given the high level of support required in the Council of Ministers—and should give us reason for confidence that it is legislating in the “European” interest.”¹¹⁸

Finally, and most importantly, all policy must be favored by a large majority of democratically elected state governments. The Council represents the ability of the people to reject EU policies.

Moravcsik's argument is a powerful defense of the EU as an institution. However, it does not address the narrower question of how to solve the problem of the EU's seeming-democratic deficiency. Unless simply telling voters that they are wrong to be worried about the democratic legitimacy of the Union is an effective strategy, something else must be done if the EU wants to garner greater popular support. Further, and more importantly for our purposes here, Moravcsik's argument for doing nothing in the face of the failure of EP elections to produce direct democratic input is effectively a call to revise the normative underpinnings of the separation of powers in the EU. If the EP is supposed to provide a balance to the role of the Council and Commission and it not doing so, then claiming that there is no problem is a suggestion that the theory of separation of powers in the EU is flawed.

Hix approaches this problem from a very different perspective but similarly calls for a revision in the EU's basis for the separation of powers.¹¹⁹ He argues that the EU currently

¹¹⁸ *Id.* at 612.

¹¹⁹ Hix developed this ideas in a series of articles as well, one of them notably written directly in response to Moravcsik's paper, as well as his recent book. See, e.g., HIX, WHAT'S WRONG, *supra* note 3, Andreas Follesdal and Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44(3) J. COMMON

suffers from two problems – gridlock and a lack of electoral competition. The increased size and ambit of the EU, due to the addition of new members and the increased number of areas in which it is allowed to set policy, have created problems for its current decision-making apparatus.¹²⁰

Further, as Section II(b) discusses, European Parliament elections are not truly European, but are instead national.¹²¹ This means that the only true way voters have of expressing beliefs about Europe is through their domestic governments, and European Union issues only make up part of the domestic agenda. The result is that voters are unable to express opinions about the future of the EU. This lack of voice in the EU is what is driving the desire for exit, and is why, Hix claims, popular support for the EU has fallen.¹²²

Hix argues that neither the EU nor the EP will function well until there is true pan-European partisan political competition. To support these claims, Hix invokes the standard (and extremely persuasive) arguments about partisan competition in all contexts. Introducing partisan competition would (1) promote policy innovation, as parties would have an incentive to develop new ideas in order to get votes; (2) permit the formation of cross-institutional coalitions, which is particularly important for solving gridlock in the EU; (3) generate media coverage; (4) give citizens a heuristic for expressing policy views, which would encourage the development of opinions about European politics; (5) create a mandate for policy change.¹²³ Hix also makes an EU-specific claim that “perhaps most profoundly, democratic politics leads to the formation of

MARKET STUD. 533 (2006); Simon Hix, *Elections, Parties and Institutional Design: A Comparative Perspective on European Union Democracy*, 21(3) WEST EURO. POL. 19 (1998); Simon Hix, *Parties at the European Level and the Legitimacy of EU Socio-Economic Policy*, 33(4) J. COMMON MARKET STUD. 527 (1995).

¹²⁰ HIX, WHAT’S WRONG, *supra* note 3, at 31-49.

¹²¹ *Id.* at 76-86.

¹²² *Id.* at 65-66. Hix does not expressly use Albert Hirschman’s terminology of exit and voice, but the idea is the same. See ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRM, ORGANIZATIONS AND STATES 40-41 (1970).

¹²³ HIX, WHAT’S WRONG, *supra* note 3, at 98-107.

new political identities.”¹²⁴ Europeans will become more European in their understandings of politics and self-identity (and correspondingly less French, German, British etc.) if they engage in the type of collective democratic decision-making that having common parties would enable.

Creating such competition would not require formal changes in the treaties that give the EU its organizational shape. Hix proposes two reforms. The first is minor. The EP currently divides things like Committee chair positions among all parties, and Hix argues that if you whichever party formed the majority of EP more power to name officials in the Parliament, it would encourage more aggressive electoral politicking.¹²⁵ Acknowledging that this is unlikely to do much, he proposes a much more dramatic solution: using the current system to create an effective direct election for the Presidency of European Commission.¹²⁶ This could be achieved if the Euro-parties (and their national party members) agree on candidates for Commission President before the election. If these candidates then behaved like American Presidential candidates, they would create enough media and public support to get voters interested in European elections and to consider candidates based on pan-European issues. Agreement by national party leaders, who, when in government, vote in the Council and hence have the power to nominate the Commission President, and Euro Party groups could permit this even without any revision to the governing treaty.¹²⁷

Hix’s proposal is intriguing, despite being full of practical problems. For instance, his proposal calls for widespread agreement from all the component parties of the pan-European parties about Commission President candidates without explaining what their incentives for doing so are. Further, his system would recreate the some of the problems of the United States’s

¹²⁴ *Id.* at 105.

¹²⁵ *Id.* at 137-65.

¹²⁶ *Id.* at 155-178.

¹²⁷ *Id.* at 160.

electoral college because small countries are overrepresented in the EP and, as a result, the popular vote winner would not necessarily be elected.¹²⁸

More importantly, Hix rejects the current separation of powers between entities in the EU. Hix is certainly right that true mass membership pan-European parties would be a powerful force for integration, would make the EU more dynamic on policy (both because of idea generation and by creating cross-governmental coalitions), and would make elections clearer for voters. Further, he may be right that pan-European parties would help create a pan-European “demos.” However, it is unclear that this is what anyone in Europe wants. The proposal would largely undo the current separation of powers in the EU. By making the Commission turn on EP elections, and making the Council more partisan, it would remove the balance at the heart of the EU’s institutional structure. Rather than having different interests represented in different parts of the government, Hix would have representative democracy at the European level decide all EU policy.

One might agree with either Hix or Moravcsik, but it ultimately requires a determination about the relative importance of pan-European popular representation and political identities versus protecting Member State autonomy and national political identities. What both presuppose is that the current system of allocating power, in which the EP is supposed to play a real popular democratic role but where that role is only part of a complex separation of powers, is flawed and cannot be fixed.

¹²⁸ See Marcus G. Puder, *Constitutionalizing Government in the European Union: Europe’s New Institutional Quartet Under the Treaty Establishing a Constitution for Europe*, 11 Colum. J. Eur. L. 77, 92 (2004) (describing over and underrepresentation by population in the EP). Germany is particularly underrepresented by population in the EP. For instance, there is one German MEP for every 829,000 inhabitants, while there is one MEP from Luxembourg for every 72,000 inhabitants. *Id.*

I disagree, or at least think there is no reason yet to believe that this is so, as the next section will make clear.

IV. European Parliament Elections as a Mismatch Problem: Using Election Law to Make the European Parliament Play its Institutional Role

Whereas Hix, Moravcsik and European leaders all see the failures of EP elections and move directly to the question of why the separation of powers in the EU is flawed, there is another way to respond. Rather than responding to the failure of elections by changing the institutional structure of the EU (or at least, the institutional concerns), EU leaders could attempt to change the way elections are contested to bring them into line with the institutional goals of the EU.

Election systems are not neutral. The laws that govern elections in many ways dictate the way elections are contested, if not the results directly. For instance, elections systems that use single-member districts and “first-past-the-post” vote counting (like all federal and almost all state and local elections in the United States) trend towards having only two political parties. Political scientists call this Duverger’s Law.¹²⁹ Because voters and supporters hate to waste their votes and efforts, they abandon third party candidates to focus on the two most viable. By using a first-past-the-post system, we ensure a clear choice between two centrist alternatives.

¹²⁹ It is called Duverger’s Law following the classic work of Maurice Duverger. See Maurice Duverger, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* (Barbara North and Robert North, trans. 2d ed, 1959); William H. Riker, *The Two-Party System and Duverger’s Law: An Essay on the History of Political Science*, 76 *AM. POL. SCI. REV.* 753, 764 (1982). There is substantial debate about the degree to which Duverger’s claim is deterministic, probabilistic and/or causal. See William H. Riker, *Duverger’s Law Revisited*, in *ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES* 19-41 (Bernard Grofman and Arend Lijphart, eds, 1986). For a discussion of Duverger’s Law and an argument that it has a normative component, see David Schleicher, *‘Politics as Markets’ Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 *S. CT. ECON. REV.* 163, 168-170 (2006).

Similarly, the voting system for used for EP elections ensures that the elections will be “second-order,” where domestic politics will matter more than European politics in determining who wins elections. More specifically, the interaction between the election laws used, rationally ignorant voters and the competitive state of play among domestic parties explain why EP elections are second order. EP ballots do not provide voters with heuristics that track performance in the EP, and leave voters, who have little direct knowledge of individual MEP voting patterns, without the ability to cast ballots that track their preferences on European issues. The result is elections that do not achieve the goals underlying the decision to hold EP elections.

This does not have to be so. The EU could change the election law system to make EP elections turn on European issues. By requiring political parties to get a certain threshold amount of the vote in a majority of EU countries in order to get any members elected from any country, the EU could force campaigns to be waged at the European, rather than Member State, level. Further, by doing so, it could give voters the means of determining whom in Europe to hold responsible for EU actions, something that the current system does not permit.

a) Why Again Are European Parliament Elections About Domestic Politics? The Problem of Mismatch and European Parliament Elections

The EU clearly intended for EP elections to provide European voters with the ability to comment directly on EU policy. They do not do so. The problem of EP elections is similar to one that has been diagnosed in several places in the American context: a “mismatch” between the constitutional or institutional goals for holding elections for certain types of office and how elections actually operate. By understanding the problem of EP elections as a “mismatch” problem, rather than as a problem that can only be solved through changing the EU’s

institutional structure, we can understand better how we might make European elections work better.

This section is divided into two parts. The first part lays out a basic model explaining how “mismatches” can develop.¹³⁰ The second section discusses the fit between this model and EP elections.

i) A Model of Mismatch: Why Sub-National or Super-National Elections Track National Party Preference

Ordinarily, it seems safe to believe that election results are a product of voter preferences. Following Anthony Downs’s classic work on parties, political scientists assume that political parties behave much like business firms, but instead of maximizing profits, they maximize vote share.¹³¹ In order to do so, they offer a program of policies that appeal to voters along the dimension they making over which they making their voting decision.¹³² In a first-past-the-post and hence two-party system, this leads to the median voter hypothesis. If voter preferences about policy can be arrayed in a single dimension (say left to right), the two parties will position themselves in order to appeal to the median voter, as getting her vote will mean winning the election.¹³³ In proportional representation systems, the predictions of the model become more complicated, as the optimal strategy in a multi-party election (including how many parties contest the election) depends on a number of factors, including the legal standard for what

¹³⁰ This basic model was first developed in David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J. L. & POL. 419, 422-27 (2007) (hereinafter Schleicher, *City Council Elections*).

¹³¹ DOWNS, *supra* note 19, at 114-49. Schleicher, *City Council Elections*, *supra* note 130, at 428-30.

¹³² DOWNS, *supra* note 19, at 139.

¹³³ *Id.* at 141; Schleicher, *City Council Elections*, *supra* note 130, at 429. There has been a great deal of research examining the effects of relaxing the extreme assumptions of the Downsian model. DENNIS C. MUELLER, PUBLIC CHOICE II: A REVISED EDITION OF PUBLIC CHOICE 180 (1989). However, the basic concept of the model – that competitive pressures cause parties to propose popular policies – remains robust. *See* Schleicher, *City Council Elections*, *supra* note 130, at 429, n. 38.

percentage of the vote is necessary to get a seat in Parliament, the cost of a new party entry and distribution of preferences.¹³⁴ For the purposes here, the exact strategy is not particularly important, just the idea that parties are seek to maximize their vote share by appealing to voters and that voters reward parties that appeal to their preferences or provide good results. Just as competition leads to efficient results in markets, Downsian analysis leads us to believe that competition leads to parties proposing policies favored by voters.

What is true for a single-level national election – say a Presidential race or an election for a national parliament – is not necessarily true in less well-publicized elections at other levels of government. For instance, partisan general elections in American big cities are notoriously and permanently uncompetitive.¹³⁵ The vote in city council races in these cities mirrors the vote for President of the United States almost entirely, and, because in most major cities, one party dominates Presidential races, they also dominate local races.¹³⁶ This is true despite substantial evidence that voter preferences about local issues do not track preferences about national issues particularly closely.¹³⁷ One can tell similar stories about statewide races for offices like Secretary of State, in which voting is completely unrelated to performance or policies.¹³⁸

In a simple Downsian world, a situation in which one party permanently dominates elections with a huge share of the vote at a level of government is impossible. If the majority party proposes policies that are not favored by most voters, the minority party (or a new local

¹³⁴ DOWNS, *supra* note 131, at 123-27; Gary W. Cox, *Centripetal and Centrifugal Incentives in Electoral Systems*, 34 AM. J. POL. SCI. 903, 920-22 (1990); DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* (2d ed., 1971).

¹³⁵ Schleicher, *City Council Elections*, *supra* note 130, at 419-421.

¹³⁶ *Id.* at 424, 457-59. Where national elections are close, so are local elections. For instance, Indianapolis is closely contested between the national political parties, with the vote for Democratic Presidential candidates rising over the last ten or so years. Just as this occurred, Democratic candidates for both Mayor and City Council won for the first time since Indianapolis established its current borders. *Id.* at 424, n.24.

¹³⁷ *Id.* at 437-47.

¹³⁸ *See* notes 212-214 and accompanying text.

entrant) should position itself on issues at that level of government to peel off support from the majority party, reintroducing competition.¹³⁹ However, in big city and a number of state elections, the process by which the minority party becomes competitive by proposing policies designed to attract the median voter does not occur.¹⁴⁰

The explanation turns on voter ignorance and the content of election laws. Take big city elections. The rules governing American big city local elections, specifically campaign financing, ballot access and candidate selection in local elections play an important role in the lack of partisan competition. First, as a matter of Constitutional law, states cannot bar national parties from using their financial and organizational muscle in local elections.¹⁴¹ Second, state election laws guarantee ballot access to the two major parties, usually by guaranteeing ballot

¹³⁹Id. at 428-29. Notably, this should be true even if preferences on national issues track preferences on local issues perfectly. As long as the minority party can position itself differently in national and local races, it should compete in a Downsian framework.

¹⁴⁰ Recently, Kristen Badal and Jessica Trounstein have found that a large number of voters split tickets between county elections and Presidential elections, with as many as 35% of counties having different parties win at the county and national level. Kristen Badal and Jessica Trounstein, *Local versus National Partisan Representation*, (available at http://faculty.ucmerced.edu/jtrounstine/Local_partisanship_August09_2.pdf), Although this seems to conflict with other available data on city elections, when examined more closely, it does not. In their regression analyses, they found that counties with large populations had far less split representation than less populated counties. “Increasing the population from the smallest county [in their sample] to the largest county decreases the probability of split representation from 68% to 8%.” *Id.* at 18. They also found that the percentage of residents who lived in cities, the number of councilors per 1000 persons, and the percentage of Blacks and Latinos in the population, had strongly negative effects on split representation. *Id.* at 17. (Along with percentage registered and regional variables, these are the most strongly negative variables they employ.) That is, counties that look like big cities have little split representation, and counties that are primarily rural or suburban have a far much more. Their data on Mayoral voting backs this up. Although they do not analyze the data this way, this is completely consistent with an argument offered by William Fischel and modified in my work on City Council elections. Fischel argued that smaller local governments were highly responsive to the interests of “home voters,” who, due to the effect of local policies on the variation in their housing values, were extremely involved and active in local politics. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES* 15-16 (2001). Fischel suggests elections in localities of over 100,000 (the number is a rough estimate) will operate like the state or federal elections, in which individuals are largely passive actors in politics. *Id.* I argue that city elections are, in fact, far worse, because party information does not provide voters with the same type of information that it does in federal elections, and hence blind reliance on party information does not promote representative outcomes. See Schleicher, *City Council Elections*, *supra* note 130, at 445-52. Although other variables are quite important in determining where ticket splitting occurs – particularly education, wealth and local diversity – it is relatively clear that the dynamics of big cities (and big urban counties) are such that little ticket splitting occurs.

¹⁴¹ *Id.* at 451, n. 110; *Cal. Democratic Party v. Lungren*, 919 F. Supp. 1397, 1399 (N.D. Cal 1996) (holding that California could not bar parties from endorsing candidates in non-partisan elections); *Eu v. San Francisco Cty. Democratic Central Committee*, 489 U.S. 214 (1989) (holding that California could not bar political parties from making endorsements or support candidates in their own primaries).

access on the basis of election results in gubernatorial campaigns.¹⁴² Third, election laws make it extremely difficult for those parties to establish localized identities that are different from their national party brand. They do this by limiting the ability of people to switch parties for the purposes of local election only and by requiring primary elections. If individuals make party affiliation decisions on the basis of national and not local issues, preferences about local issues do not track preferences about national issues very closely and people do not switch parties between elections, the primary electorate for local offices will not have consistent preferences on local issues.¹⁴³ Primary elections across a city will thus result in standard bearers from the same party with very different preferences about local issues, making the developing of a local party identity impossible.¹⁴⁴

Put together, these laws ensure that local voters have access to national party heuristics on their ballots but these heuristics are only slightly useful. The heuristics – i.e. the information that a local candidate is the candidate of a national party – tells local voters some things about a candidate, but not much.¹⁴⁵ However, if voters have little information about individual candidates in local races, relying on national party heuristics is a rational strategy.¹⁴⁶ The reason is relatively simple: if voters know nothing about a local candidate and the only information they

¹⁴² See Schleicher, *City Council Elections*, *supra* note 130, at 450, n. 108.

¹⁴³ *Id.* at 450-51.

¹⁴⁴ There is a growing amount of evidence that party affiliation explains either little or nothing about local politicians. Fernando Ferreira and Joe Gyourko have found that the party of the winning candidate in Mayoral elections does not affect the size of local government, the allocation of local spending or crime rates, in stark contrast with federal and state election results that have dramatic effects on government policies. Fernando Ferreira and Joseph Gyourko, *Do Political Parties Matter? Evidence from U.S. Cities*, 124 Q. J. Econ. 349 (2009). Using a similar methodology (which looks at the effects of the results of close elections), Elizabeth Gerber and Daniel Hopkins found that Mayoral party does affect spending on local police and fire fighting (Republican and Independent Mayors spend more than Democratic Mayors) but not any other public policy variables. Elizabeth Gerber and Daniel Hopkins, *When Mayors Matter: Estimating the Impact of Mayoral Partisanship on City Policy*, (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475237). At best, political party tells us very little – but not nothing – about local politicians.

¹⁴⁵ See *id.* How much depends on the degree to which local and national preferences correlate. See Schleicher, *City Council Elections*, *supra* note 130, at 450.

¹⁴⁶ *Id.*

have is her national party membership (that is, voters know whether a candidate is a Democrat or a Republican), it is better to use this information than no information at all.¹⁴⁷

Further, local-only third parties do not enter even though there is little competition.¹⁴⁸ The reasons for this are that they cannot gain organizational muscle and strong candidates without prying organizers and ambitious potential politicians from the major parties, something discouraged by the laws making party switching difficult. The use of first-past-the-post elections and the financial muscle of the two major parties make such entry even more difficult. As a result, local ballot feature national parties and not important local-third party entrants. Because people choose which party they prefer on the basis of national politics, and because in most cities one party dominates national elections, local elections are extremely uncompetitive.

This result can be generalized. If voters have strong allegiances to parties at the national level and know little about individual politician behavior at another level of government, it is rational for voters to vote their national party preference in elections at the other level of government as long as there is some correlation between party and preferences about policies for the office in question. However, where laws and/or strategic concerns mean that existing parties do not have incentives or ability to differentiate themselves on policy grounds at the non-national level (and/or provide barriers to entry for new parties), elections do not necessarily provide popular feedback on policies and politicians at the level at which the election is being held.

¹⁴⁷Using interviews with voters from three cities that held Mayoral, Gubernatorial and Senatorial elections on the same day, Kevin Arceneaux has shown that voters can link issues to the level of government that decides them, but only link those assessments of responsibility to their voting decision for the most salient issues (and, interestingly, where the voter is correct in her assignment of functional responsibility.) Kevin Arceneaux, *The Federal Face of Voting: Are Elected Officials Held Accountable for the Functions Relevant to Their Office?*, 27 Pol. Psych.731 (2006). The failure of local (or state) parties to provide clear platforms on local issues suggests that this is a rational response. Unless a voter can determine where candidates stand on local issues, a determination that a local government is responsible will not affect her vote, and local parties do not provide a way for voters to attribute differing positions to candidates except where the issue is extremely salient.

¹⁴⁸ *Id.* at 452-54. There is only one local only third party in a major American city, the Charter Party of Cincinnati, and the reasons for its existence are somewhat anomalous. *See id.* at 447.

Thus, absent election laws that lead parties to provide voters with clear office-relevant heuristics, low-information campaigns featuring voters who are rational but not particularly well-informed will not produce representative results at the non-national level. If there is a mismatch between the level for which the heuristic was created and the level at which it is being used (i.e. a national party heuristic being used in local elections), elections may express voter preferences about something other than the office being contested.

Everything political scientists have learned about how party influences voting behavior backs up this result. It has long been known that voters have little incentive to show up at the polls – the odds of their vote mattering are vanishingly thin and the costs of showing at the polls are real (if small).¹⁴⁹ Further, voters have even less incentive to become informed about politics, as the costs of learning a politician’s position on issues and whether those positions are good are far higher than simply showing up at the polls.¹⁵⁰ As a result, voters know very little about politics.¹⁵¹

The only known solution to this problem are political parties, and specifically political party labels. In Morris Fiorina’s well-known model, voters use whatever information they pick up here or there about politicians – for instance, when they see a politician doing something on the news while flipping channels to get to *Dancing With the Stars* -- and add it to a “running

¹⁴⁹ The classic treatment of this is DOWNS, *supra* note 131, at 36-50.

¹⁵⁰ *Id.* at 238-76. See also Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1325-26 (2004).

¹⁵¹ That voters know little about politics – little about the policies politicians enact, little about what expert opinion on policies is and not enough about who is to blame – is perhaps the most basic finding of American political science. See, e.g., ROBERT S. ERIKSON, MICHAEL B. MACKUEN, AND JAMES A. STIMSON, *THE MACRO POLITY* xvii (2002) (“The story of unmotivated, ill-informed, and inattentive voters is as old as the first examinations of individual voters, and it confirmed answer by every subsequent voting study. Looked upon as individuals, most Americans care little about politics and possess a level of knowledge of the details of political life that is consistent with not caring”); Somin, *supra* note 150, at 1304 (“The most important point established in some five decades of political knowledge research is that the majority of American citizens lack even basic political knowledge.”)

tally” of partisan preference.¹⁵² When a politician does something they like, or when they notice something is going well, they add it to their tally for the party in power, and they update their tally in a Bayesian manner.¹⁵³ This running tally provides voters with a guide about how to vote. Further, as long as parties are roughly consistent in their policy positions over time, this can lead to roughly rational decision-making – particularly when counted across a population, stray observations can lead to a broadly logical voting decisions.¹⁵⁴

Fiorina’s model has been heavily criticized. However, these critics have attacked it for not proving enough – they argue that the voting population, even with party heuristics and retrospective evaluations, cannot actually assess the quality of policies particularly well. Critics claim that voters often do not know enough to attribute successes or failures to the right politicians or parties, do not assess facts in a neutral way, develop partisan affiliations without respect to issues and often punish or reward politicians for things outside of their control, like bad weather or high oil prices.¹⁵⁵ Whether party heuristics and retrospective evaluations are effective in making otherwise rationally ignorant voters behave as if they were fully informed is not important to the claims of this paper. What is important, though, is that absent useful party

¹⁵² See MORRIS FIORINA, *RETROSPECTIVE VOTING IN AMERICAN ELECTIONS* 83 (1981).

¹⁵³ See Christopher H. Achen, *Parental Socialization and Rational Party Identification*, 24 *POL. BEHAVIOR* 151, 152-54 (2002) (creating formal Fiorina-like model with Bayesian updating).

¹⁵⁴ Fiorina, *supra* note 152, at 198-200 (“our analysis supports the view of the voter as a relatively rational fellow). See also ERICKSON, MACKUEN AND STIMSON, *supra* note 151, at 119-35 (arguing that party identification, which is developed in a number of ways, can lead to macropolitical rational behavior); Achen, *supra* note 153, at 165-66 (noting that Bayesian models can explain group behavior even if they are not particularly believable with respect to individuals).

¹⁵⁵ See, e.g., Larry Bartels, *Beyond the Running Tally: Partisan Bias in Political Perceptions*, 24 *POL. BEHAVIOR* 117 (2002) (Democrats and Republicans understand political phenomena differently, biasing running tally decision-making); DONALD GREEN, BRADLEY PALMQUIST & ERIC SHICKLER, *PARTISAN HEARTS AND MINDS* 8-14, 89-139 (2002) (party identification is primarily social and evidence of macroresponsiveness of voting to events is flawed); Somin, *supra* note 150, at 1325-28 (retrospective voting models flawed because of lack of voter knowledge about whom to blame for policy failures); See Ilya Somin and Neal Devins, *Can We Make the Constitution More Democratic?*, 55 *DRAKE L. REV.* 971 (2007) (same); Justin Wolfers, *Are Voters Rational? Evidence From Gubernatorial Elections*, available at [http://bpp.wharton.upenn.edu/jwolfers/Papers/Voterrationality\(latest\).pdf](http://bpp.wharton.upenn.edu/jwolfers/Papers/Voterrationality(latest).pdf) (arguing that voters are only partially capable of sorting out responsibility for things that are in politicians control and things, like global oil prices, that are not).

heuristics, it is hard to imagine that rationally ignorant voters can make even partially informed decisions. Even Fiorina's critics would agree that party heuristics are essential if voting decisions are going to have any substantive issue-based content to them whatsoever.¹⁵⁶

Where such heuristics are absent, voters will largely be asea. If such heuristics are available, but are not closely related to the issue being decided in the election, voters will use them anyway.¹⁵⁷ As we will see, this model can also explain, with some modifications, EP elections.

ii. Applying the Mismatch Model to EP Elections

Just like American local elections, EP elections do not provide voters with useful heuristics and hence do not achieve any competition about the issues which they are intended to cover. The explanation for why is similar, although there are some differences.

As discussed above, there are three basic predicates for the "mismatch" model. First, national parties have to be guaranteed ballot access on some other type of ballot – local or in this case, supra-national. Second, there must be some reason why those parties do not adapt to contest the election on issues related to the office in question, and why new entrants do not enter and dominate these elections. Third, voters must have little direct knowledge of the behavior of

¹⁵⁶ See, e.g., Somin and Devins, *supra* note 155, at 979 ("Shortcuts can sometimes partially alleviate the problem of rational ignorance. But they are not a complete solution for it...").

¹⁵⁷ Further, the development of such long-term associations inhibits the ability of local-only third party entrants. If voters make associations on the basis of retrospective evaluation, new entrants without much a record will have an uphill climb. Further, if voters know more and care more about national than local elections, local entrants can only develop a relevant record by contesting national elections, which are competitive and hence provide no opportunity for local entrants. See Schleicher, *City Council Elections*, *supra* note 130, at 452-53.

politicians in the local or supra-national body. If these three conditions are met, then it is unlikely that the election will produce results that relate to the office in question.

The rules about ballot access in EP elections vary substantially country to country and it is thus difficult to make general statements about them. However, they do have in common several things. First, member states choose the election law system used in EP elections, giving incumbent parties an advantage.¹⁵⁸ Second, national parties are often given large financial subsidies by national governments.¹⁵⁹ Most importantly, national parties are in a strong institutional position from domestic elections – the money raised, their membership – and this makes it easy to get on the EP ballot. In the last EP election, the major parties in each country contested the election.¹⁶⁰

The presence of national parties on the EP ballot, on its own, does not ensure that these “brands” will mean the same thing to voters in EP elections as they do in national elections. A party theoretically could attempt to stake out a separate identity for national elections and for EP elections. However, all evidence is that they do not. Whereas the driving reason why American parties do not stake out differentiated local identities was legal, in EP elections, it seems that the issue is strategic.¹⁶¹

¹⁵⁸ See Jurij Topolak, *European Parliament Elections and the Uniform Election Procedure* 15-16 (working paper, available at <http://www.enelsyn.gr/papers/w3/Paper%20by%20Jurij%20Toplak.pdf>).

¹⁵⁹ See COMPARATIVE POLITICAL FINANCE AMONG THE DEMOCRACIES 29-40, 97-144 (Herbert E. Alexander & Rei Shiratori eds., 1994) (surveying public financing regimes).

¹⁶⁰ Compare European Elections, *The Results of the 2009 European Elections*, available at http://www.elections2009-results.eu/en/index_en.html (listing 2009 EP election results by country by party) with Parties and Elections in Europe, Election Results by Country, available at <http://www.parties-and-elections.de/countries.html> (showing last parliamentary election result in each European country)

¹⁶¹ These strategic concerns also likely affect local elections in the United States. Political parties may be afraid to take stances on local issues for fear of harming the national coalition. For instance, taking a stance on some controversial education issues (e.g. the teaching of creationism) might cause harm to unity inside major political parties.

National political parties that care more about national politics than the EU may get more benefit out of fighting an EP election on domestic grounds than on European ones. By campaigning exclusively on national issues, parties can claim victory in an important symbolic national election, a “marker” of things to come.¹⁶² Second, campaigning on European issues can carry a substantial cost – if the party is divided on some European issue, fighting a campaign on European issues could create fissures that would last until the next general national election.¹⁶³ (This happened famously in the British EP campaign of 1989, where EP campaigning caused a rift between pro- and anti-EU forces in the Conservative Party that helped bring down the Thatcher government.¹⁶⁴) Further, in countries where there are strong legal limitations on the ability of parties to engage in campaigning activities, EP elections give parties a chance to compete for public affection on national issues.¹⁶⁵ These add up: there is substantial empirical evidence that political parties do not create separate platforms in EP elections for these reasons.¹⁶⁶

Moreover, it is unclear that parties could develop EP separate identities even if they wanted to. Where parties are able to develop identities that are separate from their national identity – for instance, Southern Democrats – they usually are able to do so over the course a whole series of elections in which they are able to win some and exercise some power, allowing

¹⁶² Oppenhuis, van der Eijk and Franklin, *The Party Context: Outcomes*, *supra* note 85, at 288-89. This explains a major difference between EP elections and big city local elections. In local elections, most candidates talk about local policies, even if national politics is going to dominate voter decision-making. In EP elections, parties do not even both talking about EP votes, and the difference is due to the desires of candidates. Local politicians – particularly given the candidate-centric nature of campaigns in the U.S. – want to take credit for a local mandate, as it will give them power in a local legislature. EP campaigns are waged by national parties, and they want credit for a national political mandate.

¹⁶³ *Id.* at 290-95.

¹⁶⁴ See Mark Franklin and John Curtice, *Britain: Opening Pandora's Box* in CHOOSING EUROPE, *supra* note 62, at 94-95.

¹⁶⁵ Cf. Navraj Singh Ghaleigh, *The UK's Political Parties, Elections and Referendums Act 2000*, in PARTY FUNDING AND CAMPAIGN FINANCING IN COMPARATIVE PERSPECTIVE, *supra* note 58, at 47 (noting time limits on Britain's campaign expenditure limit).

¹⁶⁶ See Mark Franklin, Cees van der Eijk and Michael Marsh, *Conclusions* in CHOOSING EUROPE, *supra* note 62, at 370-71.

voters to develop locally-based running tallies. EP elections happen only once every five years and are the only type of pan-European election. Also, no one domestic party controls the EP, making running tallies based on retrospective evaluations of party performance difficult to come by. Domestic parties do not have the tools for differentiating themselves at the European level.

EP elections do not have the high barriers to entry for pan-European or issue specific parties that exist in American local elections.¹⁶⁷ The absence of these limits is why we see the flourishing of small parties in EP elections, ranging from xenophobes to groups in favor of internet piracy.¹⁶⁸ However, these small parties still lack name recognition and track record of service about which voters can develop a running tally and hence positive associations. Thus, there are limits to the degree to which new EP-election only parties can succeed.¹⁶⁹

EP voter behavior fits the model. Most voters know little about where MEPs or Euro-parties stand or about their performance in office.¹⁷⁰ Given this, and given the existence of their national parties on the ballot, voters rely on their existing running tallies about domestic issues. Again, in the absence of other information, this is rational – a voter who prefers Labor in Britain is more likely to prefer the policies of Party of European Socialists in the EP than those of other parties, even if the connection is not very strong. However, voting based on domestic preferences will mean that things that do not (and could not) matter to a voter's preferences about EU policy will be reflected in the vote. For instance, the EP elections in Britain in 2004 were largely treated by voters as a referendum on Tony Blair's support for the war in Iraq,

¹⁶⁷ EP elections are required to use either proportional representation or single-transferable vote, both of which create lower barriers to entry than does a first-past-the-post single-member-district system.

¹⁶⁸ See note 2 and accompanying text.

¹⁶⁹ This is a parallel to the problems local parties face in American big city elections. See Schleicher, *City Council Elections*, *supra* note 130, at 452-53.

¹⁷⁰ “[T]he media, the public and even most domestic political elites are unaware of the new politics in Brussels. For example, few TV news editors or national MPs, let alone private citizens, realize that political parties dominate politics in the European Parliament...” HIX, *WHAT’S WRONG*, *supra* note 3, at 137.

leading to losses for the Party of European Socialists in the EP, despite the fact that most members of that party opposed the war (and despite the fact that the EP had no power at all over the war.)¹⁷¹

Because domestic parties are on the ballot and because voters have little other information, voters use their preferences about domestic parties in European Parliament elections, even though the connection between how voters feel about domestic issues and how they feel about what policies should predominate in the EU is unclear.

There is one more wrinkle. For some set of preferences, it is possible that EP elections would look the same even if voters were very well informed. If voters care much more about national politics, they might value the opportunity to use EP elections as a way of sending a message to domestic politicians more than they care about getting policies out of the EP that they like. However, it is unclear what social value is achieved by this type of publicly funded opportunity to complain through the voting process.¹⁷² It is an odd election indeed that is intended to give voters the opportunity to express functionally meaningless preferences.

More importantly, whether voters use EP elections to comment on domestic politics because they are uninformed, or because they really like sending messages to domestic governments in different ways, EP elections do not serve the goals EU leaders set out for them if EP elections are only referendums on domestic governments. Further, it is clear that the system

¹⁷¹ John Daniszewski and Tracy Wilkinson, *Anti-EU Factions Gain in Europe Polls*, L.A. TIMES, June 15, 2004 at A3. The EU obviously has no control over the United Kingdom's military decisions. To the extent that any EU body would have influence over this question, it would be the Council through the Common Foreign and Security Policy, which seeks to coordinate Member State foreign policies. The EP's only relationship with this body is that it may put questions to or make recommendations to this body.

¹⁷² European elections are sometimes defended, at least partially, for giving domestic voters a way to "put in the boot," and scare sitting governments into action between elections. See Oppenhuis, van der Eijk and Franklin, *The Party Context*, *supra* note 85, at 305. In a world with constant public polling, where politicians can determine their popularity on a regular basis, this benefit seems small relative to the harm to the EU system.

of elections – the election laws and their interaction with the state of party competition inside countries – either promotes this failure or simply does nothing to ensure that EP elections serve their intended goal. That is, the election system and the constitutional system do not promote the same ends. There is a mismatch.

The question is whether this dynamic can be changed. The next section will argue that it can.

b) Making European Issues Matter in European Parliament Elections: A Proposal

As noted above, election law rules are never purely neutral and, instead, structure the types of competition in elections. In order to respond to the problems of emerging democracies – and particularly the problem of group representation in ethnically divided societies – political scientists for at the least the last forty years have been dreaming up new and more complex constitutional and institutional systems designed to reduce tensions and aid democratic development.¹⁷³ Electoral systems are considered by these scholars to be “by far the most powerful lever of constitutional engineering for accommodation and harmony in severely divided societies...”¹⁷⁴ As such, these political scientists and political reformers propose different types of “electoral engineering,” different voting systems that adapt election system to the problems faced by new democracies, particularly those with sharp ethnic and regional cleavages.¹⁷⁵

¹⁷³ For a brief history of this scholarship see BENJAMIN REILLY, *DEMOCRACY IN DIVIDED SOCIETIES: ELECTORAL ENGINEERING FOR CONFLICT MANAGEMENT* 12 (2001). Giovanni Sartori is generally considered to have pushed the creation of this subfield. See Giovanni Sartori, *Political Development and Political Engineering*, 17 *PUB. POL.* 261 (1968).

¹⁷⁴ DONALD HOROWITZ, *A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* 163 (1991).

¹⁷⁵ See REILLY, *DEMOCRACY IN DIVIDED SOCIETIES*, supra note 173, at 12.

Current EP election rules effectively track one popular form of electoral engineering – “consociationalism” – which, by using proportional representation and giving multiple vetoes, ensuring that territorial minorities have representation and that policy cannot be made without widespread agreement. Consociationalism is a perfectly valid goal of EU policy, but it conflicts with the goal of having the EP be a direct popular check on the Commission and Council. Using the tools of a rival school of electoral engineering – usually referred to as “centripetalism” – EU officials could create EP elections that allow the EP to serve its institutional purpose.

After reviewing these two understandings of how election laws can be engineered to achieve certain types of results, I will lay out a concrete proposal for reforming EP elections: a requirement that, in order to receive any MEPS from any country, a party must receive a certain percentage of the vote in more than 7 European countries. This would force Euro-parties onto the ballot, thereby giving rationally ignorant European voters some means of connect what MEPs do to their voting decisions and would also encourage pan-European campaigning.

i) Electoral Engineering: A Primer

The most famous efforts at electoral engineering are European in both origin and most notable execution. Arent Lijphardt used the term “consociationalism” to describe the political systems developed in parts of Europe as a way beyond the social cleavages occasioned by the end of World War II.¹⁷⁶ Four political features characterize consociational democracy: proportional representation (PR) of different groups in the distribution of legislative seats; grand coalition governments in which all significant groups are represented; federalism or similar devices for dividing authority for local policies along geographic or ethnic lines; and a power of

¹⁷⁶ See ARENT LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* (1977).

veto over key decisions by minority groups.¹⁷⁷ The idea is that by giving each ethnic or social group in a country a say in government, some degree of veto power, and control over their own affairs, groups with generally incompatible goals and desires will buy into a government that protects their interests. The key role is played by elites, who represent these incompatible groups but are assumed to be better able to reach consensus and agreement inside their grand coalitional governments.¹⁷⁸

It has been argued that the EU, like a number of European nations, is governed in an effectively by a consociational model.¹⁷⁹ Moravcsik's argument that the EU governs by consensus, with each major group or country able to effectively veto EU policy, is effectively a claim that it is a consociational system.¹⁸⁰ The EP incorporates into itself many consociational elements – for instance, control over committees is shared among all the parties.¹⁸¹ Critics of consociationalism make points similar to Simon Hix's criticism of the EU's brand of democracy. First, consociational arrangements have been criticized for creating policy deadlock, as consensus is required to make policy.¹⁸² Second, elections under the arrangements create centrifugal forces – in which the parties try to maximize their own group representation, thereby emphasizing their differences with the rest of the government.¹⁸³ Third, and most relevantly for this study, consociational arrangements devalue representation on the basis of ideological position in favor of representation on the basis of group or nationality. Under consociational

¹⁷⁷ See *id* at 25-44. See also Matthijs Bogaards, *Electoral Choices for Divided Societies: Multi-Ethnic Parties and Constituency Pooling in Africa*, 41(3) COMMONWEALTH AND COMP. POL. 59 (2003); DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 569-70 (2d. ed. 1985).

¹⁷⁸ See BENJAMIN REILLY, *DEMOCRACY AND DIVERSITY: POLITICAL ENGINEERING IN THE ASIA-PACIFIC* 81, 88 (2006).

¹⁷⁹ See Matthijs Bogaards, *The Consociational Analogy of the EU: A Rejoinder to Crepez with a Comment on Kaiser*, 3(4) EURO. UNION. POL. 501 (2002).

¹⁸⁰ See notes 117-**Error! Bookmark not defined.** and accompanying text.

¹⁸¹ See HIX, *WHAT'S WRONG*, *supra* note 3, at 138-145.

¹⁸² Cf. REILLY, *DEMOCRACY AND DIVERSITY*, *supra* note 178, at 90-91

¹⁸³ See HOROWITZ, *A DEMOCRATIC SOUTH AFRICA?*, *supra* note 174, at 172-74.

arrangements, the people as a whole do not ever really have the opportunity to express clear views on national policy matters.¹⁸⁴

Whether the EU as a whole is a consociational system or whether that is a good thing is beyond the claims of this paper. However, the EP was not intended to be consociational – it was supposed to provide clear guidance about the beliefs of European voters about EU policies. The question is whether electoral engineering can provide a tool for making it achieve that goal.

Other experts have pushed an alternative theory of electoral engineering in divided societies – centripetalism.¹⁸⁵ Donald Horowitz notes that centripetalism’s “principal tool is ... the provision of incentives, usually electoral incentives, that accord an advantage to ethnically based parties that are willing to appeal, at the margin and usually through coalition partners of other ethnic groups, to voters other than their own.”¹⁸⁶ Rather than divide power among ethnic parties and strive for general consensus, which can lock in the primacy of ethnic identities in politics, centripetalists seek to give an advantage to groups that move beyond ethnic or territorial boundaries and generate national majoritarian electoral competition along some other axis.¹⁸⁷

¹⁸⁴ See REILLY, DEMOCRACY AND DIVERSITY, *supra* note 178, at 79-80.

¹⁸⁵ See, e.g., *id.* at 83-91; Bogaards, *Electoral Choices for Divided Societies*, *supra* note 177, at 65. The term was coined by Timothy Sisk. TIMOTHY D. SISK, DEMOCRATIZATION IN SOUTH AFRICA: THE ELUSIVE SOCIAL CONTRACT 17-55 (1994).

¹⁸⁶ Donald L. Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WM. AND MARY L. REV. 1213, 1217 (2008)

¹⁸⁷ In an important contribution to this discussion, Richard Pildes has called for constitutional arrangements with time limits. Richard H. Pildes, *Ethnic Identity and Democratic Institutions: A Dynamic Perspective* in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMODATION? 157-58 (Sujit Choudhry ed. 2008). He argues that consociational arrangements may be important at the outset of new democracies, but that a move to centripetal laws is often good. He suggests, following the example of the South African Constitution, that centripetal arrangements be given a time limit to phase out, allowing their replacement (and avoiding their calcification) with policies designed to create post-ethnic societies. A similar idea might be useful in EP elections, although in the opposite direction. The distribution requirement I propose *infra* has an unattractive quality, the throwing out of votes for parties that do not successfully compete across Europe. Perhaps the requirement could be used to apply to only two elections, and then abandoned, giving pan-European parties a leg up but avoiding a long-term rule in which votes are thrown away.

One policy suggested by centripitalists is a “distribution requirement,” or withholding any representation from candidates or parties that fail to receive a certain percentage of the vote in a majority of provinces.¹⁸⁸ Distribution requirements are used in Nigeria, where they have created truly national Presidential elections since 1979 (albeit ones that have on several occasions been overturned by military coups).¹⁸⁹ In Nigerian elections preceding the Biafran War, voting was divided rather neatly by party and ethnic group, with each the nation’s three major ethnic groups – the Hausa-Fulani, the Yoruba and the Igbo – controlling different territorial areas and represented by different parties.¹⁹⁰ The Biafran War was largely seen as a result of having this ethnic-geographic division being the salient division in politics, generating an incentive to create a system that did not permit ethnic block voting.¹⁹¹ In the election code introduced in 1979, Presidential candidates were required to receive a plurality of the voters but also needed to get a 25% of the vote in at least 2/3 of the federated states.¹⁹² The first election under the system was, at least by Nigerian standards, a success – the winning candidate, Shehu Shagari, came extremely close to meeting the regional requirements (and was declared to have done so) running what was the country’s first truly national campaign.¹⁹³ Although Nigerian Presidential elections since 1979 have had a large number of other problems, they have largely consisted of competitions between candidates that have run national campaigns, not targeted local and ethnic ones.¹⁹⁴

¹⁸⁸ See Bogaards, *Electoral Choices for Divided Societies*, *supra* note 177, at 59-68 for a full discussion of the idea.

¹⁸⁹ Larry Diamond, *Nigeria: The Uncivic Society and the Descent into Praetorianism*, in *POLITICS IN DEVELOPING COUNTRIES: COMPARING EXPERIENCES WITH DEMOCRACY*, 417, 466 (Larry Diamond et al. eds., 2d ed. 1995).

¹⁹⁰ *Id.*

¹⁹¹ Bogaards, *Electoral Choices for Divided Societies*, *supra* note 177, at 69-73

¹⁹² HOROWITZ, *A DEMOCRATIC SOUTH AFRICA?*, *supra* note 174, at 184.

¹⁹³ See Bogaards, *Electoral Choices for Divided Societies*, *supra* note 177, at 69-73.

¹⁹⁴ See *id.* at 69-76; HOROWITZ, *A DEMOCRATIC SOUTH AFRICA?*, *supra* note 174, at 184-87; Peter M. Lewis, *Endgame in Nigeria? The Politics of Failed Democratic Transition*, 93 *AFRICAN AFFAIRS* 327 (1994) (noting that the 1989 election in particular “suggested an historic merger of northern and southern populist interests, superseding the ethnic faultlines which have traditionally structured Nigerian electoral politics.”).

Nigeria's system has been copied by two countries. Indonesia has a two-round majority run-off system, but for a candidate to be elected on the first round, she must not only poll an absolute majority of votes cast but also meet a distribution requirement of 20 per cent of the vote in at least half the provinces.¹⁹⁵ In Kenya, presidential candidates must receive at least 25% of the vote in a minimum of five out of eight provinces.¹⁹⁶ (Admittedly, it has been less than a success there – regional and ethnic conflict broke out after the last Kenyan election despite the distributional requirement.¹⁹⁷)

Regional requirements come in weaker versions as well. A large number of countries have requirements that parties are registered and have membership in a number of states in order to qualify for representation.¹⁹⁸ Romania, which is an EU Member-State, has quite extensive registration requirements. In order to register with Court of Justice and to run for parliamentary elections, it must gather at least 700 signatures in 18 of the country's 42 regions (and 25,000 total) and must run candidates in 21 regions in order to stay registered.¹⁹⁹

There is even a regional requirement in the EU's law on Euro-parties. In order to qualify for an EU grant, a party on the European level must "be represented, in at least one quarter of

¹⁹⁵ Anthony Ellis, *Indonesia: Continuity, Deals and Consensus*, ACE Electoral Knowledge Project Encyclopaedia March 14, 2006, http://aceproject.org/ace-en/topics/es/esy/esy_id.

¹⁹⁶ See CONSTITUTION, Chapter 2. Sec. 5(3f) 1998 (2001) (Kenya). For a discussion of the regional requirements, see ELECTORAL POLITICS IN KENYA 41-42 (Ludeki Chweya ed. 2002).

¹⁹⁷ See European Union Election Observation Mission, *Kenya – Final Report General Elections 27 December 2007*, April 3, 2008, http://ec.europa.eu/external_relations/human_rights/election_observation/kenya_2007/final_report_en.pdf.

¹⁹⁸ Ten countries have regional distribution requirements for political parties running in national elections for the lower representative chamber, and three countries -- India, Nigeria, and Romania -- have regional distribution requirements for political parties running in national elections for the upper representative chamber. For example, in Turkey, where there are 81 provinces, a qualifying party has to be fully organized in at least half of the provinces and one-third of the districts within these provinces. The Ace Electoral Knowledge Network, *Comparative Data: What are the Registration Requirements for Political Parties Running in National Elections*, <http://aceproject.org/epic-en/CDMap?question=pc>.

¹⁹⁹ See Vera Stojarová, Jakub Šedo, Lubomír Kopeček and Roman Chytilík, *Political Parties in Central and Eastern Europe: In Search of Consolidation* 62-63, International Institute for Democracy and Electoral Assistance Report (2007)

Member States, by Members of the European Parliament or in the national Parliaments or regional Parliaments or in the regional assemblies, or it must have received, in at least one quarter of the Member States, at least three per cent of the votes cast in each of those Member States at the most recent European Parliament elections.”²⁰⁰ These requirements apply to the domestic parties that join together to support a single Euro-party. Eleven separate parties received EU funding by meeting these targets in 2005.²⁰¹

ii) *A Proposal: Using Distribution Requirements to Make EP Elections About European Issues*

The basic logic of Nigeria’s Presidential voting system, and the Euro-party funding system, could be applied to EP elections. EP elections all use proportional representation or single transferable vote.²⁰² Proportional representation systems usually have a “threshold” requirement.²⁰³ A party must receive a certain percentage of the vote in order to receive any seats. For instance, in German elections, a party must receive at least 5% of the vote to receive any representation in the national parliament, the Bundestag.²⁰⁴

The EU could require parties to meet a Europe-wide threshold as well as one in any given country.²⁰⁵ For instance, using the existing rules for funding Euro-parties, the EU could pass legislation that stated that, in order to receive any seats from any country in the EP, a party must

²⁰⁰ Commission Regulation 2004/2003, Regulations Governing Political Parties at European Level and The Rules Regarding Their Funding, 2003 O.J. (L 297) 1.

²⁰¹ The amount of and the recipients of money under Eur. Reg. 2004/2003 for 2005 is available at http://www.europarl.europa.eu/tenders/subventions_2005.htm.

²⁰² See Topolak, *supra* note 158, at 16.

²⁰³ See Michael Gallagher, *Comparing Proportional Representation Electoral Systems: Quotas, Thresholds, Paradoxes and Majorities*, 22 BRIT. J. POL. SCI. 469, 485 (1992).

²⁰⁴ Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENTARY 51, 62 (2001)

²⁰⁵ I have only seen one reference to a similar idea. Mark Franklin, Cees van der Eijk and Michael Marsh, although supportive of pan-European ideological competition, dismiss the possibility of such a legal requirement as not “practical.” Franklin, van der Eijk and Marsh, *supra* note 166, at 379. They do not explain why they think it is not practical, though.

receive directly at three per cent of the votes cast in a quarter of the Member States. The Euro-parties could not, however, count votes for domestic parties that are allied together towards meeting this requirement. Labor in the UK could not receive any EP seats unless it also won – under its own banner – 3% of the vote in 8 European countries.

All major European parties are purely domestic. None could win any percentage of the vote in another country. As the domestic parties would be unable to win EP seats on their own, they would be forced to put the Euro-party names on the ballot. Voters in the UK, thus, would not see a ballot consisting of candidates from Labor, the Conservatives and the Liberal Democrats (the domestic parties), but would instead see the Euro-parties: the Party of European Socialists, the European People's Party and Alliance of Liberals and Democrats for Europe.

The immediate effect of this regulation on who runs for a seat as an MEP would be small. Nothing about the rule would require national political parties to lose the power to appoint candidates, nor would it make the domestic parties reduce their influence inside the Euro-parties.²⁰⁶ Efforts to enhance the power of the Euro-parties have traditionally focused on their funding and their organizational independence from domestic parties and from legislative groups in the EP.²⁰⁷ However, the analysis in this paper suggests that these are the wrong tools. Rather than focusing on the institutional apparatuses of parties and candidates, the EU should make the names of Euro-parties available to voters on EP ballots. Instead of trying to change the behavior of elite politicians, this change would directly affect what voters know. And voter knowledge is the main problem of EP elections.

²⁰⁶ Ernest Young argues that one of the main protections of the powers of Member States is the absence of representative democracy in the E.U. *See* Young, *supra* note 5, at 1705. The lack of programmatic parties, he claims, makes the E.U. less legitimate and hence less likely to take power from Member States. This may be true, although it is equally true of other things that would contribute to the EU's legitimacy, like conducting policy well. However, some degree of competition for legitimacy is built into the EU system, and this reform – if it worked-- would only introduce that type of competition to the level envisioned by the EU's existing treaties.

²⁰⁷ *See* Day and Shaw, *supra* note 58, at 295-320.

Putting the Euro-parties on the ballot would have the effect of giving voters a more accurate heuristic about MEP voting practices. They could track the voting behavior of both members of the Euro-parties from their country, and from others, and could do so whenever they did something interesting in the running tally style. At first, the effect of this might be small. Voters may well just equate the Euro-party with its domestic partner. However, this is unlikely to last over time. As voters would be able to make connections between Euro-party performance and their voting decisions, at least some voters will develop opinions about them independent of their opinions about the domestic performance of their partner party. The Euro-parties themselves would have incentives to build their brand names. Whenever their domestic partners were unpopular, they would turn to pan-European appeals in order to rally support.

The basic models we use to understand voting decision – like Fiorina’s running tally model – suggest that the existence of a heuristic on the ballot will lead to its use by voters. Further, even if the effect is small and only a few voters develop preferences about Euro-parties that are distinct from their preferences about national parties, this would still be significant. The organization of the EP is usually quite close, and even a small Europe-wide shift could change that balance in overall EP elections even if its effect is drowned out by domestic factors in any individual Member State (assuming, of course, that the domestic factors throughout Europe cut in different and offsetting directions).²⁰⁸

Putting the Euro-parties on the ballot also would encourage campaigning on Europe-wide issues. Domestic parties that thought they could be successful in EP elections by bringing up European issues, but were worried that doing so might prove harmful later in domestic elections, would face changed incentives. Because the blame – or the credit – would go to the parties

²⁰⁸ No party has ever had 50% of the seats in Parliament necessary to organize it. Nor has any combination of two parties aside from the two major parties, the PES and EPP. See DEMOCRATIC POLITICS, *supra* note 4, at 21.

running, and not necessarily to the domestic party, parties would have less worry about “blowback” in later domestic elections. Similarly, it would reduce domestic party incentives to campaign on domestic issues, as the credit (or blame) would not run to them for winning or losing.

The regulation would also limit beggar-thy-neighbor campaigning. There is currently no check on the desirability of making nationalistic claims in EP elections, and parties sometimes claim that they will choose policies that will disproportionately help their home country (even though left-right politics determines MEPs voting patterns far more than nationality). Parties can make these claims because they are not held accountable in other countries for them. If the Euro-parties appeared on the ballot, parties that run exclusively on their ability to get more money for one country could be held accountable by the press or other parties in other countries. Candidates in the United States often use famous figures from other states in their campaigns (e.g. Republicans from the South often put Ted Kennedy in their campaign ads). Although this effect does not eliminate claims that candidates will bring home pork, it certainly limits more aggressive versions of regional campaigning.

Finally, the proposal would also limit the ability of even-informed voters to use the EP ballot to comment on domestic politics.²⁰⁹ A vote against the Party of European Socialists would not be read as clearly as a comment on domestic politics as, say, a vote against the Labor Party. The diminished utility of the EP vote as a method of commenting on domestic politics would

²⁰⁹ To the extent that one of the major critiques of the Fiorina model is correct, and political party identification is more determined by tribal-like personal identification than by assessment of possible policy outcomes, *see* GREEN, PALMQUIST AND SHICKLER, *supra* note 154, at 8-11, this reform will be particularly attractive. As there will be no group on the ballot with which to identify, voters will have to make an assessment of policies in order to determine whom to vote for and not merely rely on their group identification.

lead to the diminished use of it among informed voters. This reform would thus make EU issues more prominent in EP voting decisions among both informed and uninformed voters.

Thus, proposal would have the effect of making EP elections serve their intended purpose in the EU's institutional structure. That is, they would give voters the ability to use EP elections to provide feedback about EU issues. Notably, it would do so without undermining or changing the basic structure of the EU. Member states would still have representation in the Council, and that would still be done on the basis of domestic election results, which would be unaffected by this legislative change. If the reform worked, and voters were able to separate their commitment to a domestic party from their beliefs about what the EU should do, the EU's current system of the separation of powers system would be saved. Even if it did not work as intended, it would still serve to limit beggar-thy-neighbor campaigning in EP elections.

V. Conclusion: The Mismatch Problem in America and Europe

The problems of EP elections are not unique. They look a great deal like the problems of American local elections, only in reverse. Whereas in big American cities, national party preference determines the vote for local office with no reference to local performance or conditions, in EP elections, national party preference determines the vote for a supranational legislature with no reference to the performance of politicians at the supranational level. Both American local governments and the EP fail to reflect the preferences of voters about the issues these entities decide.

Further, the goals of having elections for these offices and the repeated practices of voters are in tension.²¹⁰ Just as EU leaders decided to have direct elections for EP in order to have

²¹⁰ In an important new essay, Paul Edelman argues that the "institutional dimension" of electoral design is extremely understudied. Paul H. Edelman, *'And the Winner is...'* *The Oscars and the Institutional Dimension of*

direct voter comment on EU policies, American states presumably decided to hold local elections in order to ensure cities are governed according to the preferences of local people about local policies. In both cases, the fact that national party preference determines almost the entirety of voting is a problem for these goals.

The clear lesson from both American local elections and EP elections is that a Constitution that calls for elections for a type of public office will not necessarily result in the type of political competition that the Constitutional framers wanted. This is largely a product of rational ignorance. Voters are asked to provide their opinions on various issues of governing, but they have little incentive individually to get the answers right. Absent the proper tools to overcome their rational ignorance along the proper dimensions, allocations of power to elected entities often will not achieve constitutional ends.

In most modern elections, the most relevant tool voters have for overcoming their ignorance of politics is the heuristic provided by a political party. In national elections, this works well. When people vote for a unitary national parliament or a national President, political parties provide clear signals about the policy proclivities and past responsibility for policies.

Election Design, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1456529. Edelman argues “that elections are about more than just preference aggregation. Elections are organized by institutions, and those institutions may have interests that are distinct from the preferences of voters.” Instead, vote counting systems can achieve specific institutional goals (his central example is that the voting rule used to determine Best Picture might be chosen to generate higher ratings for the Oscars, rather than merely translate the preferences of voters about the best movie of the year). Further, his analysis of vote counting systems in democracies shows that the methodology of how preferences are tabulated will necessarily involve different institutional goals and theoretical ideas about what constitutes a democratic result, and that rather than thinking of election methods – proportional representation, first-past-the-post, instant run-off – as better or worse than the other, they should be analyzed by how well they achieve specific institutional goals, of which accurate tallying of pre-existing preferences is an important but by no means the only value. This paper argues that EP vote counting system should attempt to fit the institutional interests expressed in the Treaties establishing the EU and its separation of powers.

Further, in these major elections, voters pay sufficient attention – or at least some voters, although certainly not all – and can develop independent preferences about their policy ideas.²¹¹

In other types of elections, though, the party heuristic is effectively the only tool voters have and it is not necessarily a particularly useful one. If political party competition does not produce a relevant heuristic along the same dimension as the issues the official or legislative body decides, or the goals the Framers had for the body, the goals of the constitutional system likely will not be met. That is, there will be a “mismatch” between constitutional or institutional goals and electoral reality.

Both American local elections and EP elections fall into the mismatch trap. But they are not the only examples. For instance, Heather Gerken has shown that a similar dynamic occurs in elections for Secretary of State and other officials at the state and local level in charge of election administration.²¹² In most states and many localities, the officials that decide how to run elections – which voting machines to use, where to locate voting booths, how to organize a recount, etc. – are elected themselves, but the same *mélange* of voter ignorance and the availability of party heuristics that determines the results in local elections makes decision-making in these elections purely partisan.²¹³ Voters, bereft of information about the actual performance of Secretaries of State as election administrators, vote exclusively on the basis of which official is most likely to help out their preferred candidates in other elections. Thus, there is no real competition to make election administration better, which is presumably why states require elections for these offices in the first place.

²¹¹ This is why some big city Mayoral general elections are competitive. *See* Schleicher, *City Council Elections*, *supra* note 130, at 445.

²¹² HEATHER GERKEN, *THE DEMOCRACY INDEX* 11-16 (2009)

²¹³ *Id.*

Mismatch problems frequently occur in situations where there are nested elections, or where individual voters are asked to make choices about officials at different levels of government. The reasons why such problems occur have been laid out above – EP elections, American big city local elections, and Secretary of State elections all have similar characteristics. However, it is not necessarily the case that nested elections will develop mismatch problems. To the extent that national political parties can develop distinct local identities (or international ones, for the purposes of EP elections), there can be ordinary Downsian competition. Further, if mainstream independent local parties can be established, they can create competition. If candidates can become well known enough, that too can introduce competition, something we see when prominent Gubernatorial candidates are able to win elections in states where their party does not do well. Finally, to the extent preferences on national issues track closely preferences on whatever the body decides, the lack of competition becomes a not-particularly costly problem, as the results of elections end up in roughly the right place.²¹⁴

However, nested elections will create mismatch problems if the political parties that contest local (or international) elections are national in scope, the individual candidates are not particularly well-known, and preferences about local (or international) issues do not track national preferences very closely. Where this occurs – and it occurs frequently -- merely holding local, state or international elections is not the same thing as getting public input on local, state or international issues. Absent competition along these dimensions, there is little reason to believe that such elections produce representative results about the issues the elected official will decide.

²¹⁴ Even in this situation, these elections may have the problem of not providing much of a check on abuse by officials, as corrupt officials can continue in office by function of maintaining support from their major party and from voters who vote the party line.

Finally, mismatch problems are not limited to nested elections. Mismatch problems can occur between entities at one level of government. Daryl Levinson and Rick Pildes have shown that the Framers of the U.S. Constitution's goal of having Congress check the power and ambition of the Presidency does not occur during periods of one-party governance.²¹⁵ One reason for this is how Congressional elections operate and the incentives they create for members of Congress.²¹⁶ Members of Congress do not get electoral benefit by checking the power of the President if the President is likely to define the popularity of the party to which of the Congressman is a member. Blocking the President from the same party will also often make it harder for the Congressman to achieve specific policy goals or provide local benefits that help them electorally.²¹⁷

Examining mismatch problems together provides a benefit, as they suggest a menu of options to respond to mismatch problems. Thus, there is the beginning of typology of responses as well as a common identification of a problem. The scholarship has identified three possible solutions for mismatch problems.

My work on American urban elections and this article suggest electoral engineering solutions. States could pass laws barring national parties from contesting local elections, or at least removing the limitations on developing distinct local identities, with the goal of developing locally-meaningful parties and party heuristics.²¹⁸ The EU, as is suggested in Section IV(b), could pass laws that require parties to get votes in multiple countries, forcing the developing of pan-European parties and party heuristics.

²¹⁵ See Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006).

²¹⁶ *Id.* at 2323-2324.

²¹⁷ *Id.* at 2323-27. See also Daryl Levinson, *Empire Building*, 118 HARV. L. REV. 915, 936-931 (2005).

²¹⁸ Schleicher, *City Council Elections*, *supra* note 130, at 468-73.

Gerken suggests an alternative, less intrusive response, the development of an alternative heuristic. She argues that private groups, with the aid of the national government, should develop a ranking system, a Democracy Index, that would rank state electoral systems along widely-agreed upon metrics, like time spent waiting to vote or lost ballots.²¹⁹ Among other benefits, this would give voters a clear, easy-to-understand heuristic when they vote for Secretaries of State.²²⁰ This would provide voters with the ability to achieve the ends behind having Secretary of State elections.

On the other side of the ledger, Levinson and Pildes suggest a final type of response, changing institutional arrangements. If Congress does not check the Presidency during periods of one-party rule because majority party members have no incentives to do so, the minority party in Congress should be given certain powers – like the power to investigate – so there is a check on the Presidency.²²¹ Further, supermajority rules and increased judicial skepticism of laws passed during one-party governance might be justified to ensure a healthy check on Presidential power.²²² These institutional arrangements incorporate an understanding of the incentives of elected officials given how voters actually make voting decisions. Rather than seeking to make politics fit institutional goals, they seek to make institutions fit political reality. This is, in many ways, the opposite response to a similar type of problem.

It is not clear what type of response will be best in any given mismatch problem, whether it will be best to change institutions or types of political competition. Little is known about how any of these possible responses would do, as they are largely untried. However, it is clear that, to

²¹⁹ GERKEN, *supra* note 212, at 5-6, 26-37.

²²⁰ *Id.* at 66-80.

²²¹ Levinson and Pildes, *supra* note 215, at 2368-71.

²²² *Id.* at 2372-75

the extent we care whether our constitutions work, we need to think about how elected institutions interact with political party competition and realistically poorly informed voters.

The view of election law in this paper is somewhat different from the form it takes in most of the scholarship on the subject. Election law scholars have grown used to studying things like ballot access rules and question of internal party governance in a variety of ways – to see whether they are ways for incumbent politicians to entrench themselves, for one political faction to gain advantage over another, how they affect specific political rights, or even to see what they say about broader questions about the meaning of representation in a democratic polity.²²³ These are, of course, important ways of looking at these policies and crucial to assessing the quality of these rules and how they should be reviewed by courts or independent bodies.

However, here the focus is on something different: how election rules provide information to a bored and disinterested populace.²²⁴ The work of scholars like Fiorina shows that things that the content of a nation's election laws (e.g. the availability of party heuristics on the ballot) are essential to the process of how voters develop preferences.²²⁵ When voters base their decisions on which policies will be enacted by the officials for whom they vote, even if only partially or imperfectly, it results in better democratic outcomes under virtually all possible

²²³ See generally Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 603 (2007); Heather K. Gerken, *A Third Way For the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 748 (2006).

²²⁴ Saying that election laws have a major affect on how voters form preferences is a very different thing from saying election campaigns do. James Gardner has recently written an excellent book attacking the notion that much persuasion happens during campaigns, and noting that much political discourse (and legal thinking) that is built around the idea that campaigns are true deliberative debates is flawed. JAMES A. GARDNER, *WHAT ARE CAMPAIGNS FOR? THE ROLE OF PERSUASION IN ELECTION LAW AND POLITICS* 1-7 (2009). However, this does not address whether the laws that structure politics give voters tools that allow them to develop informed opinions. For instance, election law rules are crucial to ensuring that parties are consistent in their ideological positions over time. Decisions like *Duke v. Massey*, 87 F.3d 1226 (11th Cir 1996), in which the Republican Party was allowed to expel David Duke for ideological apostasy, give political parties greater control over their own ideological brand. Parties that are consistent ideologically over time allow voters to develop useful running tallies based on retrospective evaluations of how politicians behave while in office. The legal rule is hence relevant to the voting decision. However, none of this requires that anything happens during an election campaign.

²²⁵ See notes 152-154 and accompanying text.

theories of what democracy is supposed to accomplish.²²⁶ However, the ability of rationally under-informed voters to do this relies on the availability of clear, consistent, office-relevant heuristics and political markets will only sometimes and under some conditions provide them. The social value of such heuristics is higher than their cost. Rather than serving as a tool for deciding which type of representation voters should get or as a weapon for incumbent politicians, election law in this view is a public good.²²⁷ It is up to the governments that regulate elections to ensure that these public goods are provided and provided properly.

Looking at election laws as public goods allows us to see the difference between the investment we put in democratic governance and the demands our Constitution (and state Constitutions and the EU's institutional structure) puts on voters. If our Constitutional systems are going to achieve their visions of self-governance, the public good of election law needs to be provided in a way that respects the limitations of the selves who are asked to do the governing. Otherwise, we will be left with legislatures and officials who win elections for reasons entirely unrelated to their performance and with constitutions that do not work. That is to say, we will be left with the problem of mismatch.

²²⁶ A primer on democratic theory is not necessary here. It is hard to imagine any theory of democracy that suggests a polity will be better off if voters are more confused about what they voting for.

²²⁷ A public good is traditionally defined as a good that is both non-rival and non-excludable, or something that consumption of the good by one person does not bar consumption of the good by the other, and that no one can be barred from using. Public goods are underprovided by markets because the producers of the good do not capture the full benefits of consumption of the good. See Abraham Bell and Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 10-12 (2003). Information is generally considered to be the purest of all public goods. Relevant heuristics for a level of government are exactly the types of public goods that are underprovided by political markets – they are valuable to voters, but not necessarily in ways that translate into votes for the parties that would bear the cost of developing them.