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The European Constitution: A Requiem?

by Norman Barry

At the end of last year, the much-heralded and grandiose scheme for a European constitution—an impenetrable 330-page document—came to a temporary end when Poland (admitted to European Union last summer) and Spain combined to reject a feature proposed by the European Convention even before detailed provisions of the document could be debated. M. Valéry Giscard d'Estaing, the former French president and chairman of the Convention, had boasted that this was Europe's Philadelphia, an equivalent to America's debate on the country's political future in 1787–88.

The whole enterprise foundered on an apparently technical point on voting rights in the Council of Ministers, the legislative body of the European Union (EU). However, Euroskeptics should not relax. The European constitution seemed doomed until dramatic events in Spain led to its resuscitation. The bombings in Madrid produced the surprising election of the socialists. They are very much "old Europe" and are keen to ally themselves with France and Germany, with their crypto-socialistic, heavily interventionist model. Spain immediately withdrew opposition to the constitution and was quickly followed by Poland. With June's intergovernmental conference out of the way, it's now up to the member states to ratify the constitution. But it will take a long time, and there is every chance it won't happen.

It is opportune then to step back and look at where we are now and examine critically the principles that have driven the European experiment in the last 47 years. As we shall see, from not-unpromising beginnings it has proceeded toward a new superstate at an even faster pace than America departed from its equally auspicious origins.

Originally, the most significant event was the founding Treaty of Rome (1957). European countries, nearly ruined by two world wars, wanted to put all this nationalistic bellicosity behind them, especially the deadly rivalry between France and Germany, and establish an international rule of law to make the world safe for commerce. Equally important, they wanted to face the Soviet menace while not openly conceding they were free-riding on American defense.

The first name for the new venture was the European Economic Community and that is what it was: an attempt to break down trade barriers between European countries. Though Europeans have had little interest in world free trade, it was a step in the right direction. Whatever success it had was due almost entirely to the fact that it did not have a constitution. Also, because of the unanimity rule in the Council of Ministers,

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there could be little centralization of laws and regulations. Any country could veto proposed laws. There was unformulated jurisdictional competition.

But the subsequent history of Europe is the story of inexorable centralization, significantly court driven, under the superficially alluring aegis of "ever closer union." Ironically, some of this had theoretically free-market credentials. In the early years some member states had used jurisdictional competition to hold up the advance to free markets; they had imposed limits on the movement of capital and labor. Apparently, the market had to be promoted by European-wide law, and therefore the Single European Act was adopted by treaty in 1986. At the time, most free marketeers, myself included, were under the illusion that liberty was best advanced by constitutionalism, despite evidence to the contrary from America. And the Single European Act, true to form, so far from freeing the market, licensed the imposition of strict regulations across the continent, and the veto was significantly reduced.

Since then, the centralization of Europe has proceeded apace with the gradual removal of jurisdictional competition. This has reached its apogee with the proposed constitution. A good indication of what its content would be can be found from a glance at the composition of the constitutional convention. The delegates were not in any way representative of the "people," as the men of Philadelphia were, but were European rent-seekers (seekers of wealth through political means). The European Commission (the instigator of European law) was inordinately represented, and there were aging ex-prime ministers, ex-presidents, and ex-ministers of the member states in attendance.[1] All had an interest in greater centralization. They had an agenda before they started their deliberations.

Supreme European Law

The constitution proclaims the supremacy of European law over that of the member states, presaged as long ago as 1964 with the *Costa v. ENEL* decision from the European Court of Justice (ECJ). This, with no authority from the Treaty of Rome, struck down an Italian statute that happened to conflict with an EU regulation on the ground that European law was superior to domestic legislation. It was the beginning of the activism of the ECJ.

But this did not establish unequivocally the priority of European law. There was the problem, for example, of the sovereignty of parliament in Britain and the binding constitution in Germany. Thus in *Macarthys v. Smith* (1979) the British courts held that since Britain's accession in 1973, the country's laws were subservient to Europe, but Lord Denning also said that if parliament deliberately and consistently breached European law, "it would be the duty of our courts to follow the statute."[2] In 1994, although the German constitutional court upheld the (centralizing) Maastricht Treaty, it also said that Europe was a *confederation* of autonomous legal systems and that European law was subordinate to the Basic Law (Germany's constitution).

One might have thought that classical liberals would favor the superiority of the burgeoning international law of the European Union. Hadn't unlimited parliamentary sovereignty been the principle by which socialism was introduced in Britain? But that would be a naïve view of politics and indicative of an unwarranted faith in constitutionalism to constrain the excesses of democracy. Of course, it would be acceptable if a written constitution, embodying property rights as well as civil rights, were to be consistently and accurately interpreted by a dependable judiciary. But we know from American experience that this does not happen. Written documents are no more than "parchment protections" subject always to the fashionable whims that appeal to the judiciary. Americans now have a "living Constitution" in continuous creation by the Supreme Court.

The first victim of this ineluctable process is economic liberty. In a proper federal system, with considerable power devolved to the component units, competition would generate less-restrictive laws and lower

taxes. But since 1986, successive European treaties have reduced the effectiveness of the veto at the Council of Ministers, and the proposed constitution carries this process further. Some Euro-fanatics would eliminate the veto altogether and make everything subject to simple majority rule.

The European constitution aims at eliminating legal autonomy, as in Britain and Germany, by making the changes a matter of an international treaty that binds everybody. They also wish to create a Europe with its own legal personality and recognized in international law as a "state." As we shall see below, it is by no means a minimal state. Sovereignty has not been eliminated, it has simply shifted its venue—to Brussels, the "capital" of Europe.

When we come to the substantive content of the constitution, our worst fears are confirmed. The major problem in a federal system is the division of responsibilities between the center and the component units. As the anti-federalists in America rightly feared, once you create a central authority, no matter how limited its powers might be on paper, it will inevitably swallow up the member states. But at least the Founding Fathers made an attempt. The Tenth Amendment of the American Constitution explicitly says: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or the people."

We all know that that limitation on federal power has been emasculated, culminating in *Garcia v. San Antonio Metropolitan Transit Authority* (1985), but a strict delineation is not even attempted in the European constitution. It is true that a few basic powers are reserved exclusively to the central institutions, but instead of the rest going to the member states, the constitution-makers have invented something called "shared competencies." They, in fact, cover a wide range of public policy and leave the European Commission the freedom to initiate laws binding on all member states. If there is any dispute between the Union and the member states over which has authority to regulate, it will be settled by the ECJ, hardly a reliable protector of economic rights and liberties. The constitution is replete with all sorts of emollient phrases, such as the Union's competence to "coordinate economic and employment policies of the Member States" and the general power to supervise "all objectives set by the Constitution."[3] This will undoubtedly include labor-market regulation precisely because the bigger member states, especially Germany, wish to impose their heavy non-wage labor costs on all the Union. There is also an extremely costly Charter of Fundamental Rights.

What Is a Constitution?

It is important to distinguish here between two concepts of a constitution—it can be understood as a *constraint* or a *license*. If it is the former, it puts specific limits on what the government, or one branch of it, can do. The first ten amendments to the U.S. Constitution embody constraints. It is important to stress that the constraints here apply to the *majority*. In the modern world, the imprimatur of the word "democracy" around any public-policy proposal has allowed an escape route from most constraints.[4] Traditionally, amendments to a constitution require supermajorities. However, if a constitution is interpreted as a license it becomes a document that permits governments to do things. And with activist courts, the list of permissions becomes endless; they can always find something in the wording that allows governments to act.

In America, the constraints are now interpreted as licenses. The original commerce clause (granting Congress the power to regulate interstate commerce) was designed to prevent the states' imposing tariff barriers against one another, but it eventually became the license for the federal government to regulate *intrastate* commerce, that is, to impose common standards across America (see especially, *Wickard v. Filburn*, 1942). Also, the Fourteenth Amendment, although it looks like a constraint, became a license to enforce highly controversial things, such as affirmative action. Perhaps

the most permissive license ever known to political man is the phrase "ever closer union," appended to all European treaties. It has become the legal means by which the centralization of Europe has proceeded.

The ostensible reason for the collapse of the European constitution in 2003 was the proposed reduction of the qualified-majority rule at the Council of Ministers from 72.3 to 60 percent. (The rule is fixed according to the populations of the member states.[5]) The rule had been originally introduced in the Single European Act for good public-choice reasons. Under the then-prevailing unanimity rule some member states had resisted the introduction of much-needed free-market reforms.

But the attraction of that original rule change was only superficial because it led to a mania for the "harmonization" of regulations. Harmonization was not used to overcome the holdout tactics of some member states (its original rationale), but to impose uniform standards across the whole of the Union. Poland, in its opposition to the constitution, in effect spoke for all the former communist countries whose only possibility of catching up with the richer European countries was to offer much less restrictive regulations. Some countries, especially Germany, were anxious not to give a competitive advantage to the new states.

In fact, the constitution was unlikely to succeed for other reasons. Britain had already laid down certain "red lines"—mainly to do with tax, social-security, and foreign policy—which could not be crossed. Furthermore, a number of the member states had constitutions that required referendums if the European constitution were to be adopted. In fact, resentment against the European Union had been building up for some time: the pay and other emoluments of politicians and officials were blatant examples of rent-seeking. There were serious allegations that these common political practices had slipped into corruption and crime. The European Commission had been forced to resign *en masse* in 1998 for its failure to clamp down on, and its possible involvement with, dishonesty.

But despite the new confidence of the constitution-makers following events in Spain, they are unlikely to succeed. At least seven member states have referendum provisions, and these have now been joined by Britain. Despite his early trenchant opposition to a plebiscite, Prime Minister Tony Blair has dramatically bowed to public opinion; one will now be held, and he is most unlikely to win it. If one member state rejects the constitutional treaty, it is inoperative. Denmark and Ireland have already rejected treaties by referendum. It is true that the referendums have been rerun until the benighted people got it right, but Blair has already said that the first vote would be decisive. However, it would be unwise to trust politicians.

The Democratic Deficit, Referendums, and Federalism

There is repeated talk in Europe about the "democratic deficit," and indeed, in many areas decisions are made by non-elected bureaucrats. But in present circumstances, the deficit is to be welcomed: at least what remains of the veto can be used to resist the anti-market policies that, ultimately, emanate from the European Commission. And it is absurd to suppose that the European Parliament can control the executive. With a future population approaching 450 million, the "rational ignorance" of the electorate will guarantee that the European institutions—the Council of Ministers, the Commission, and the ECJ—will have virtually a free hand. They will be dominated by pressure groups.

This was a point picked up by the anti-federalists in their objections to the new American constitution.[6] They realized that the new, extended powers given to the federal government would not solve the problem of factions, James Madison's name for pressure groups. His much vaunted "extended republic" proved to be even more vulnerable to them than the several states. Who can say the anti-federalists were wrong given what now goes on in Washington?

In Europe the only way to get round this is by the restoration of decision-making to

the member states and repeated use of the referendum. The best hope for the free market is a system of competitive jurisdictions where law and regulation are chosen in the way that soap and cars are. If implemented, the new constitution will more or less eliminate what remains of legal competition in Europe.

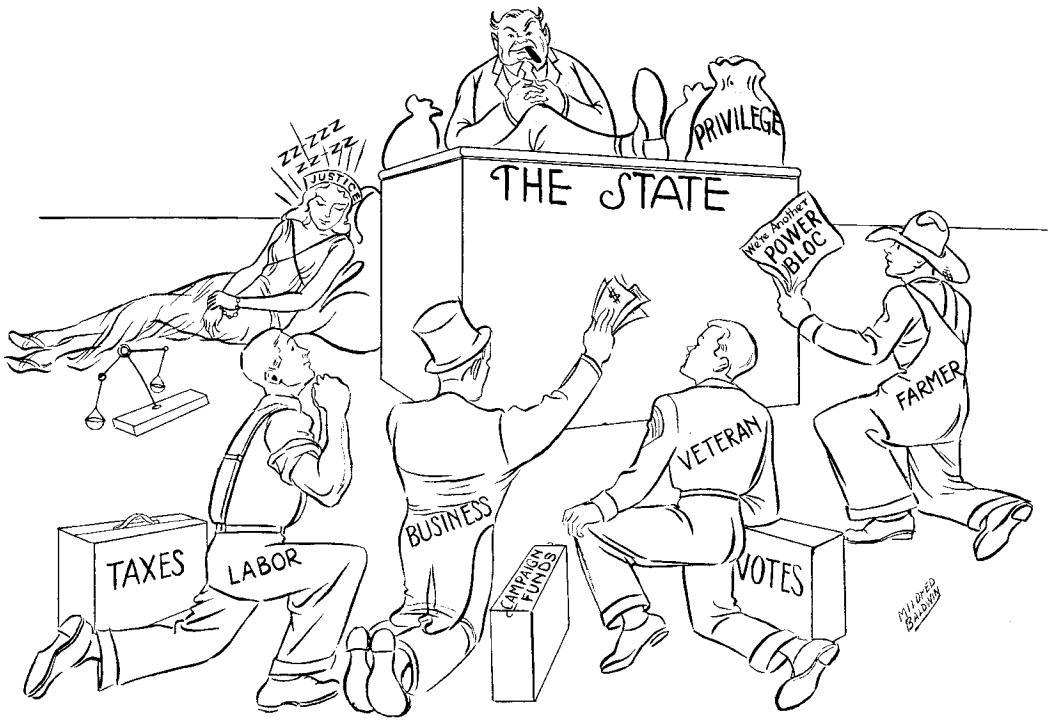
In fact, the solution to Europe's problems was right in front of the constitution makers' eyes—Switzerland. It is perhaps the most prosperous and civilized country in Europe, and it is outside the Union. It is the only genuine federal country in the world, with considerable powers retained by its component units, the cantons. They still spend more than the federal government. The achievement of Switzerland in preserving localism is almost entirely due to repeated use of direct voting at the cantonal and the federal level: for example, it requires only 100,000 signatures to challenge a federal law by referendum. The Swiss have resisted every move toward closer involvement with Europe, despite the blandishments of their federal politicians who are no doubt motivated by the rents they will capture if the country were to join the European Union.

It is remarkable, but not surprising, that the Swiss experience had absolutely no influence on the European constitution makers. The Swiss system for closing the democratic deficit will not be at all welcome to the Euro-fanatics; it is not the sort of popular control that they have in mind. □

1. See Paul Robinson, "Historical Lessons for Europe's Future in the Wake of the EU Convention," *Economic Affairs*, March 2004, p. 14.
2. Quoted in Norman Barry, "Sovereignty, the Rule of Recognition and Constitutional Stability in Britain," *Hume Papers on Public Policy,* vol. 2, 1994, p. 19.
3. See Roland Vaubel, "The Constitutional Proposals of the European Convention: an Appraisal and Explanation," *Economic Affairs,* March 2004, p. 29.
4. See Norman Barry, "What's So Good about Democracy?" *Ideas on Liberty*, May 2003, pp. 44–48.
5. See Vaubel, p. 29.
6. For a discussion of Europe in the context of the American debate, see Norman Barry, "Constitutionalism, Federalism and the European Union, *Economic Affairs,* March 2004, pp. 5–10.

"The state is the great fictitious entity by which everyone seeks to live at the expense of everyone else."

—FREDERIC BASTIAT, "The State"



Adapted from a cartoon that appeared in *analysis,* December 1946