

Europe's Constitutional Future

IEA READINGS

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INTRODUCED BY GRAHAM MATHER

EUROPE'S CONSTITUTIONAL FUTURE

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Introduction by
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INTRODUCTION

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EUROPE IS IN THE MIDST of its most profound period of change since the end of the last World War. The return of nationhood, political freedom and the market economy to Central and Eastern Europe marches alongside the achievement of a single market in the European Community. Now the agenda broadens and lengthens as the Community considers its shape and structure for the next phase of its development.

In Britain this process has been the cause of political tension and a debate that seems repeatedly to misfire. Britain seems cast in a negative, passive and reactive role in its European relations. A confused and unsatisfactory domestic debate is accompanied by clear under-performance as an effective influence on European development. To what can this lamentable position be attributed? Its consequences are as debilitating for this country's political economy as they are a loss to Europe as a whole.

In part it may have been the absence of a clear constitutional framework for the emerging Europe which has been the chief cause of tension and misunderstanding. In the common law tradition of limited powers, strict construction and well-understood divisions between broadly matching executives and legislatures, with a judiciary fulfilling a role of well-understood independence, the very dynamism of

European development on a different model may seem to pose a major challenge.

And, arguably, given the vested interests and political pressures which constantly confront market-opening and liberalisation, the dynamic opportunism of the European Commission's approach—most especially under the controversial, but clearly effective, leadership of President Delors—is both inevitable and necessary if progress is to be achieved.

It seems increasingly clear, however, that the structures which were fashioned for that phase of the Community's development are not appropriate for Europe's present and broader agenda. Because Economic and Monetary Union, however defined, involves a significantly greater role for Community institutions its constitutional and institutional structure is of paramount importance; indeed, it overshadows the purely economic debate.

More broadly, a Community which has influence or power over a wider agenda, and which is itself about to broaden its membership—for can it be doubted that a number of EFTA countries and former Communist nations will be in membership before the end of the century?—must address the more sophisticated checks and balances which become necessary.

If the 1980s were the years of the rediscovery of market economics, the 1990s will be the decade of constitutional and institutional development and reform. The opportunity to embark upon constitution-building is hugely exciting. It can draw from all the lessons of Britain's own political development, as well as the insights of modern understanding of the economics of politics, the critical role of sharply defined property rights, and a developed understanding of the relationship between economic choice and political freedom.

Given the rich resources of international constitutional and economic scholarship it is disappointing that so little work has been devoted to the models for a European constitutional settlement. The Institute of Economic Affairs is delighted in this pioneering volume to redress the position, and that the Nobel Laureate, Professor James Buchanan, should have agreed to set out in this book his vision of the benefits of an appropriate constitutional framework—benefits which, he argues, may draw from and improve on the American constitutional model.

In the context of Economic and Monetary Union, Dr Karl Otto Pöhl addresses in this book the extraordinarily difficult issue of how to achieve a non-inflationary European monetary policy capable of

withstanding political pressures to loosen monetary discipline and which is nonetheless compatible with perceived requirements of democratic accountability.

It is notable that much of the EMU debate has focussed on monetary issues—the no less important economic considerations have been pushed to one side. Professor Victoria Curzon Price makes a most useful contribution to discussion by examining the competing economic philosophies which may come to fill this void, and her clear analysis illuminates an issue which will come to the forefront as the monetary debate is concluded.

For British readers Frank Vibert's thoroughgoing analysis and imaginative new proposals may provoke particular interest and discussion. He sets out the opportunities for building a vigorous and decentralised Europe based on co-operation in the European Council and Council of Ministers, using to the full the parliamentary frameworks of the member-states and moving away from the concept that Europe depends for its momentum on bureaucratic initiatives from the European Commission.

Britain does have the opportunity to equip herself quickly with a positive and constructive rôle in the new European structures. Britain can be the voice of free trade, the opponent of protectionism and trade blocs. Britain can be the bridge with the United States and its commercial and legal systems, and with Australasia and the dynamic new economies of the Pacific. For the EFTA countries and the re-emerging nations of post-Communist Europe, Britain can be spokesman, tribune and friend. For market liberals Britain can be a voice, and for pragmatists Britain can offer assistance in getting on with the practical job of building European systems that work.

To fulfil this role Britain will need to change. To be prepared to meet European methods of thinking and philosophical approaches halfway would help. But more important is the need for a pro-active approach: so that ideas compatible with market principles inform European debate early. Britain must be a year ahead of the debates, rather than six months behind at every stage. Civil servants must be re-programmed from reluctant implementers of German-derived directives to vigorous exporters of liberal free-market plans and policies. The many sources of intellectual and practical advance: think tanks, business organisations, professional bodies, learned societies, regulatory bodies, all will need to redouble their efforts to play an effective part in European policymaking if Britain's chronic under-

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representation of people and ideas in the European systems is to be corrected.

For its part, the Institute of Economic Affairs will continue to develop informed debate and discussion. It has already announced a programme of discussion meetings in Brussels designed to allow intellectual discussion of market-related issues before an audience of journalists, officials, Parliamentarians, business figures and other opinion formers. *Whose Europe?*, the Institute's most recent volume on European issues, has attracted wide and favourable attention and is in its second printing. *Europe's Constitutional Future* is a powerful and innovative addition to this work. The Institute never expresses a corporate view and must dissociate itself and its Trustees, Directors and Advisers from the views of the authors of this volume; it commends it as a particularly informed and imaginative contribution to debate and thanks the distinguished authors most warmly.

November 1990

GRAHAM MATHER

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SUMMARY

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EUROPE'S CONSTITUTIONAL OPPORTUNITY

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I. INTRODUCTION

AT A 1986 CATO INSTITUTE CONFERENCE, I commended Professor Peter Bernholz for opening up a previously unexplored area for constitutional inquiry, an area that involves neither comparative analysis of alternative ideal designs nor attention to current constitutional change (Bernholz, 1986; Buchanan, 1986). Bernholz focussed on the potential for examining the characteristics of political régimes in the course of their historical development with a view towards identification of circumstances that might bring constitutional reform more closely to the realm of the politically possible. Bernholz suggested that there may exist phases in an historical sequence where a temporary convergence of interests makes a constitutional reform possible, settings that the political economist may identify and exploit in normative discourse.

Bernholz was directly concerned with prospects for reform in the monetary constitution, and I shall return to his more recent proposal in Section V. But my reason for reference to the earlier discussion is by way of introduction to the central thesis of this paper. I shall argue that Europe is now presented with an historically unique opportunity to achieve that greatness which has so long remained unrealised. Quite

literally, the 1990s offer Europe a *once-in-history* opportunity, which, if seized, can promise greatness as defined in a mutually agreed-on dimensionality, but which, if missed, must promise disaster. I do not use the 'once-in-history' appellation carelessly. And it is because of the descriptive accuracy of this appellation that I am optimistic about Europe's future. The opportunity is so clear that the folly reflected in failure to seize it is not included even within my public choice perspective on politics and politicians.

A *constitution* that will embody the terms of the contract that the peoples of Europe must make, one with another, individually and as members of separate national-cultural communities, is a *sine qua non* of the whole enterprise. But there are constitutions and constitutions, and the terms of the contract must match the corresponding historical realities. The contract must be such as to ensure mutual gains-from-trade, the ultimate test for which is voluntary agreement on the terms. And such agreement will be forthcoming only if the parties to the contract (individually, both separately and in groups) are effectively guaranteed or protected against exploitation during periods subsequent to ratification.

Europe has a history of conflict among separately identified nation-states, each of which has commanded the loyalties of individual members. It is folly to expect a simple transference of these loyalties to 'Europe', conceptualised and romanticised as a supra-nation-state. The only constitutional structure that is consistent with the historically-constrained setting of the 1990s is that of a *federal union*, within which members of the separate units co-operate for the achievement of widely recognised and commonly shared objectives, those of internal (intra-European) peace and economic prosperity, within political arrangements that ensure individual liberties and, at the same time, allow for the maximal practicable achievement of standards of justice.

Lessons for Europe from US Experience

The Europe of the 1990s can learn lessons from the doomed experience of the USA, as Section II sets out in more detail. Europe can, under properly designed and historically relevant constitutional guarantees, ensure that the continuing advantages of the American structure are implemented and preserved while protecting against the tragically originated sequence of events that have undermined the attainment of the American ideal. In order to accomplish this grand design, which is available to Europe at this historical moment,

individual participants must rethink and reformulate their public political philosophy. They must recapture something of the mind-set of the 18th century. They must shed off all semblance of the Hegelian mythology in which the individual realised himself/herself fully only in the specific political community defined by the collectivity. This fountainhead of ideas for the socialist century, which spawned the 'fatal conceit' (Hayek, 1989) that socialism represented, must be categorically refuted, repudiated and rejected.

Fortunately, and here again the circumstances of current history must command attention, the momentous events of the 1980s in Eastern Europe and, indeed, throughout the world have served to shift public attitudes toward the philosophical reversals that seem required here. Section III sets out the argument in somewhat more detail.

As the discussion which follows in Section IV indicates, however, more is needed than the attainment of something akin to the 18th-century scepticism about the efficacy of politicised achievement of individuals' values. Such scepticism, standing alone, opens the door to interest-driven exploitation of the historically developed institutions of modern politics, to the epoch of 'politics without principle' or, in de Jasay's terminology, 'the churning state' (de Jasay, 1985). A public rediscovery of the romance of *laissez-faire* might suffice, but in Western Europe and America such a shift in attitudes seems beyond the possible. (Eastern Europe is an altogether different matter, and, indeed, the new-found faith in the efficacy of markets, defined in the negation of politicised direction, may well prove sufficient to ensure dramatic threshold leaps in economic well-being.) Again, however, appropriate constitutional design for a federal union can allow the predicted working of interest-driven utilisation of political agency to proceed so long as the limits to damages are constrained by effective competition among the separated polities of the inclusive federation.

In Section V, I illustrate the whole argument by reference to a European monetary constitution, and here I again build on the suggestions advanced by Bernholz. Section VI addresses some of the more general issues in summary, and, specifically, those that are involved in the German question. Finally, Section VII concludes the chapter with a defence of the prediction that Europe will, in the 1990s, establish an effective federal union.

The idea of *federalism*, of diversity among separate co-operative communities, of shared sovereignty, of effective devolution of political authority and, perhaps most importantly, of the *limits on* such

authority—this idea, enforced within credible *constitutional* guarantees, can be the European source of a fabulous century.

II. UNITED STATES, 1787—EUROPE, 1990¹

Europe in 1990 finds itself historically positioned in a setting analogous to the United States in 1787. There are, of course, major differences as well as similarities, and analogies can always be overdrawn. But if attention is placed on the comparison between the unrealised opportunity that is (was) within the possible and the alternative future that failure to seize the opportunity would represent, the similarities surely overwhelm the differences.

In 1787, the citizens of the separate states in the American confederation shared the common experience of successful conflict with a colonial ruling government and, also, the failed effort at economic integration by the independent sovereign polities. To James Madison and his compatriots at Philadelphia, the confederation among the separate states was not enough, and the future prospect was one of continuing interstate economic conflict, described by economic autarky in a setting of increasing vulnerability of the separated states to external enemies. What was needed was a *constitution*, a set of rules that would restrict the sovereign authority of the states over citizens, and, at the same time, would establish a *central government* that would also command, directly, the loyalties of citizens.

Madison's grand design for the American federal union succeeded in its objective of creating and maintaining an open economy over the whole territory of the several states. The American economy, the effective extent of the market, came to be co-extensive with the external boundaries of the central government. Freedom of trade in goods, freedom of migration of persons, freedom of movement for capital, a common monetary unit—these characteristics ensured that the division of labour would be exploited to an internal maximum. And America, predictably, became rich.

But Madison's grand design for the federal union failed in its less recognised but ultimately much more important objective, that of limiting the range and scope of political authority over the liberties of citizens. In 1787, concern was centred on the potential abuses of authority by the separated states; the anti-Federalists were unsuccessful

¹ For a paper that treats the subject matter of this section at length, P. Aranson (1989).

in raising effective concerns about the potential authority of the central or federal government. After all, citizens of the states were creating a new government, the delegated powers of which were to be severely circumscribed. And, further, even as it exercised these delegated powers, Montesquieu's separational scheme was expected to provide further checks on over-extension. Madison's philosophy of federalism did not allow him even to dream of a federal Leviathan.

Right to Secede Implied in US Constitution

To the Founders in 1787, the fact that the citizens of the separate states were involved in creating a central government that would itself commence to share sovereignty with these creating states more or less carried with it the ultimate right of citizens in the separate units to secede from the federal union so established. And, indeed, had the question of secession been raised at all in the initial debates on the formation of the union, representatives of all the states would have dismissed it since the answer was, to them, self-evident. Without an implicit acceptance of an ultimate right to secede, to opt out, to exercise the exit option, the constitutional agreement hammered out in Philadelphia in the hot summer of 1787 would never have come into being at all.

If the advantages of economic union are so great, why should secession ever come to be in the interests of citizens of particular states in the federation? The potentiality of a viable secessionist threat could emerge only if the central government, through its internal decision structure, should take action that differentially damaged citizens of the separate states or regions within its territory. Should the central authority remain within the limits of actions defined by the 'general interest' of all its citizens, an effective argument for secession could never emerge from considerations of economic interest. This relationship may be stated obversely: the threat of potential secession offered a means of ensuring that the central government would, indeed, stay within those boundaries of political action defined by the general interests of all citizens in the inclusive territory.²

We may ask the hypothetical question: If the American constitutional agreement of 1787 should have included an effective

² For a technical argument, J. Buchanan and R. Faith (1987); for a general philosophical treatment, A. Buchanan (1989).