

# EUROPEAN CONSTITUTIONALISM

## proposals for an agenda of debate

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CENTRAL THEME; THE RELATION BETWEEN THE CREATION OR THE SUPPRESSION OF POSSIBILITY AT THE UNION LEVEL AND THE CREATION OR SUPPRESSION OF POSSIBILITY AT THE NATIONAL AND LOCAL LEVELS.

1. **THEME ONE: THE SPECIFICITY OF THE MAIN PROJECT OF EUROPEAN CONSTITUTIONALISM.** Begin with an effort to characterize the contours and direction of the predominant constitutional project in the European Union: the project that has in fact been carried out and that is now to be further advanced through a constitution.

In the emerging Union, the definition of basic social entitlements and endowments remains predominantly national: a responsibility of the member states. Economic as well as foreign policy, however, are placed under increasing constraint by the Union institutions. Economic policy is led by the European Central Bank, while foreign policy follows, at variable distance, the United States. The implicit tendency appears to be (a) to keep the vast majority of distributive conflicts about taxes and social entitlements local while (b) entrenching a particular model of economic, political, and social institutions and (c) inhibiting a broad range of possible challenges to the present policies and the established arrangements, including challenges that plausibly claim to represent deepenings of both the liberal and the social democratic traditions.

The evolution of the Union up to the present constitutional moment has aggravated the regulatory and macroeconomic restraints on the ability of national governments to ensure the economic and social security of their citizens. At the same time it has failed to create a Union structure capable of undertaking, in the place of national governments, those frustrated responsibilities. Is the emerging constitutional design of the Union unrelated to these tendencies? Or does it risk entrenching them, both by giving constitutional force to the restraints and by narrowing the constitutional opportunities available to the possible challenges?

2. **THEME TWO: THE RELATION OF THE PRESENT VERSION OF EUROPEAN CONSTITUTIONALISM TO THE "THIRD WAY" LINE.** The emerging approach to the allocation of powers and responsibilities between the Union and the member states is not neutral among alternative directions in political

economy or in the more general development of forms of life and of consciousness. It is biased toward the "third way" line.

The project in political economy that underlies the developing constitutional plan is to allow Europe "to have it all": Rhineland-model style social protection and American-style economic flexibility. Step by step, many of the historical features of social democracy have been abandoned, in the name of the imperative of flexibility, in the hope or in the name of better preserving the essentials of liberal social democracy: the arrangements of social partnership and a high level of redistributive social spending (typically funded by the regressive, transactions-based taxation of consumption).

The "modernizing" reforms can be justified for the sake of economic renewal, prudent management of public finance and, above all, attenuation of barriers separating insiders and outsiders in the labor market. Nevertheless, the result has not been flexibility to the benefit of all. It has more often been the generalization of economic insecurity, and the concentration of resources and opportunities in the hands of an elite oriented to the world economy.

What kind of Union structure would one want for the purpose of making Europe safe for the perpetuation of this program? The very structure that is likely to be further entrenched by the future European constitution? And what kind of Union structure would one prefer for the purpose of either permitting or encouraging progressive alternatives to this project?

**THEME THREE: ALTERNATIVE DIRECTIONS FOR EUROPEAN CONSTITUTIONALISM.** Imagine as a goal the creation of a Union structure that is disentangled from any pre-commitment to the "third way" line, although capable of including it as a possibility.

Thought experiment A. Consider a direction of progressive change in contemporary European conditions along the following lines. (1) Emphasis on basic social endowments for every individual, financed through a modicum of asset redistribution rather than through traditional tax-and-transfer; (2) heavy investment in a program of educational reform designed to strengthen a core of conceptual and practical capabilities throughout the working life of the individual; (3) radicalization of competition by both negative means (e.g., antitrust) and affirmative means (e.g., public venture capital in support of start-up enterprise); (4) deepening of the national cycle of saving and productive investment through combination of high levels of mandatory saving with the development of new linkages between saving and production outside traditional capital markets; (5) development of a broader repertory of forms of decentralized, experimental partnership between government and private initiative going beyond the choice

between the American model of arm's-length regulation of business by government and the northeast Asian model of formulation of trade and industrial policy by a centralized bureaucracy and requiring the construction between government and firms of an intermediate level of funds and support centers; (6) resolute effort to bridge the gap between the production system and the caring economy (the service activities by which the more capable take care of the less capable): in principle every able-bodied person should have responsibilities in both the caring economy and the production system; (7) independent organization of civil society through neighborhood associations, civic organizations based on shared concerns (e.g. education, healthcare and crime prevention), and forms of unionization that suit temporary workers as well as workers who are also entrepreneurs; (8) combination of traits of representative and direct democracy in the organization of local as well as of national government; (9) expansion of opportunities to try out at the local level counter-models to the dominant national policies and arrangements.

Is the broadly experimentalist style of social democracy evoked by this thought experiment compatible with the main direction of constitutional evolution and design in the Union? Or are the Union and the member states being made weak and strong in precisely the wrong respects to accommodate such a program -- **OR ANY OTHER PROGRAM THAT, LIKE THIS ONE, CROSSES THE BOUNDARIES OF THE PRESENT INSTITUTIONAL AND IDEOLOGICAL SETTLEMENT.**

Thought experiment B. Now consider the problem from the opposite angle, of Union constitutionalism itself. Imagine a Union constitution defined by the following central commitments among others: (1) strong definition of basic social endowments and protections, funded if necessary by redistributive transfers within the Union, giving a focused afterlife to the device of the structural funds; (2) legal guarantees -- justiciable in the national courts -- enabling citizens to gain redress against the governments of the member states for failures to comply with these social minima; (3) maximum room for maneuver for national, regional, and local governments to try out new forms of production, organization, and association, subject only to the constraints of the universal individual endowments and protections but not subject to any other substantial regulatory and macroeconomic constraints such as those now imposed by the sound-finance doctrine of the European Central Bank; (4) effort to combine at the European as well as at the national levels traits of direct and representative democracy.

Is not such a Union constitutional plan the inverse of the design that has tended to prevail (weak on universal social endowments but strong on macroeconomic and regulatory limits to national, regional, and local innovation)? But is not such a European constitution a more plausible expression of the

professed commitment to the social model that supposedly stands (together with the commitment to perpetual peace) at the center of the new European identity? And is not such a constitutional alternative more receptive to a broader range of future alternatives that Europeans can develop within their countries and communities? And is it not therefore more responsive to what should be a fundamental shared concern of liberals and social democrats -- to make it possible to discover, by experiment and experience, what works best?

**THEME FOUR: OPEN COORDINATION IN ECONOMY AND GOVERNMENT.** A case has been made that a new form of work and cooperation is emerging in the most advanced sectors of production and learning throughout the world. The global network of these advanced sectors, exchanging ideas, practices, and people as well as services, resources, and technologies, has now become the commanding force in the world economy.

These advanced sectors are characterized by the attenuation of rigid contrasts between supervisory and executory roles, by the fluid mixture of cooperation and competition (as in regimes of cooperative competition among small and medium-sized firms), by the quest for permanent innovation, and by the willingness openly to redefine interests and identities in the very process of attempting to realize them. The emergence of this form of "open coordination" in many areas of practical life, within and outside the production system, is accompanied by an insistence on the preeminence of horizontal links over vertical ones. Experimentation -- for its moral and social consequences as well as for its practical economic ones -- is the rallying cry of this view.

In Europe lip service is paid to this view: less than a program but more than a fashion. Every European country wants to have and to multiply its Silicon Valleys. And public administration itself, at both the national and the Union levels, has responded with alacrity to the new slogans.

What would taking such an orientation seriously imply for the future of European constitutionalism? The vulgar, technocratic realization of this attempt to reshape European economies and governments in the image of the open method of coordination has found its favored terrain in "comitology": the empowerment of the mid-level Union and national bureaucracies negotiating regulatory, policy, and tax deals in the name of flexible coordination. It is a reading of the experimentalist ideal that remains well within the limits of the "third way" line and of its conservatism about institutional change.

What would a bolder and fuller realization of that ideal require? Would it not be precisely a line of constitutional change such as in imagined in thought experiment B and a line of change in the direction of national policy such as

represented in thought experiment A?

#### THEME FIVE: THE RELATION OF AN ALTERNATIVE EUROPEAN CONSTITUTION TO THE AMERICAN ASCENDANCY.

A strong constitutional alternative at the Union level -- one designed to favor the creation, coexistence, and rivalry of alternatives within Europe -- requires a will to develop such alternatives. It also means that Europe must fight for a global order that is friendly to the deepening of diversity on the basis of democracy and of experimentalism -- diversity of institutions, of national strategies of development, of forms of life and consciousness. A Europe cowed by the United States will lack the practical and spiritual resources with which to undertake such an effort.

The problem of an alternative European constitution remains bound up with the construction a more genuine global multilateralism. It requires an active response to the problems produced by the American hegemony. Europe cannot solve the problem alone. No solution, however, is likely to come about without European engagement.

Consider thought experiment C. A political-diplomatic initiative outside the now blocked United Nations system. The basic partners are: the internationalist current of opinion inside the United States, the European Union and at least some of the continental peripheral countries (China, India, Russia, Brazil, Indonesia). The basic principles of the regime are these. First, major issues of international security and redesign of international institutions are decided by consensus among the multilateral partners. Consensus is defined as agreement by the United States, by the European Union and by a plurality of the peripheral continental countries. Second, the partners of the United States acknowledge the fact of American ascendancy, without affirming its ultimate legitimacy or perpetuity. The practical implication is that no threat to the vital security interests of the United States can be tolerated by the entente. Third, the United States recognizes that it must not act in defiance of the consensus within the entente except in extreme circumstances. The decision about what threatens the vital security interests of the United States is only in the last instance a decision for the United States. It is in the first instance a decision for the entente. As the de facto hegemonic power, interested in escaping the dangers of anarchy and the burdens of empire, the United States serves as the guarantor of the multilateral regime. Fourth, the United States may at the limit act on an understanding of its vital security interests and of their requirements that is not shared by its partners within the entente. However, in so acting, it pays a price: confronted with an assertion of unilateralism, America's partners in the entente distance themselves from the United States and tend (other things being equal) to be drawn more closely together by their interest in containing the hegemonic

power. Thus, the regime benefits from a built-in stabilizing mechanism: defiance of the entente increases the prospect that American foreign policy has been most concerned to prevent: the ganging up of lesser powers against the United States.

Such a construction represents an attempt to escape the dangerous contrast between the brute fact of American hegemony and the juridical ideal and fantasy of equality among states. It is neither legal nor extra-legal, but proto-legal, like the classical European system of the concert of powers. Its temper is Bismarckian rather than either Metternichian or Wilsonian. Unlike the fossilized arrangement of the Security Council, it remains flexible and in touch with the changing correlation of forces. It therefore has a vital attribute: it can evolve in the light of experience and under the pressure of reality.

At the heart of such a regime lies a bargain. Through the voices of the lesser powers the world recognizes the fact, not the right, of the American ascendancy in exchange for an advance toward multilateralism. The United States, in return, accepts a regime that raises the price for any unilateral American action in defiance of the multilateral entente. Thus, the United States acquiesces in the regime in exchange for the reconciliation of core American material and moral interests with an arrangement that the lesser powers can come to accept, to defend and to develop.

Consider the following thesis. Although it may not at first seem so, the development of a strong European project, defined as one capable of promoting both the European difference and difference within Europe, is inseparable from the forging of a new multilateral order in the world. For such an order to come to existence the European Union must take the initiative of developing a regime like the one described in thought experiment C. An alternative European constitution and a new global multilateralism amount to parallel, reciprocally reinforcing undertakings. Both require a difficult alliance of statecraft and vision.

**THEME SIX. WHAT'S THE POINT? THE EUROPEAN CONSTITUTION CAN AND SHOULD HELP ENERGIZE EUROPEAN SOCIETIES, NOT JUST HELP COORDINATE THEM.** A European constitution can strengthen the conditions for creating new and divergent forms of initiative in economic, social and political life within the member states. Only by the development, rivalry, and testing of such national and local experiments can European societies hope to reconcile social solidarity and gains in efficiency in ways that offer more of both rather than (as in the "third way") a little of each. The essential requirement for such an achievement is a predisposition to institutional innovation in the Union as well as in the member states. The promise of such an achievement is to break the demoralizing rhythm of European history.

Either being shaken up by war and economic depression or surrendering in peacetime to small pleasures and ambitions -- enthusiasm amid suffering and slaughter or security with narcolepsy -- this choice is the burden to escape. So the central question raised by the constitutional moment is an old European, and human, puzzle: how to wake up, and remain awake, without the prodding of crisis and catastrophe. Peace without belittlement is the point. The emerging constitution of the European Union has been part of the problem. But it could become part of the solution.

The basic requirement for such an accomplishment is the marriage of a vision of unrealized opportunity in Europe with a new set of practical institutional ideas and arrangements.