THE JEAN MONNET PROGRAM

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Altneuland: The EU Constitution in a Contextual Perspective

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Philip Pettit

Europe's Constitutional Momentum and the Search for Polity Legitimation

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Commentary for NYU-Princeton Meeting, Friday 30 April.

Philip Pettit

Reply to Neil Walker

Europe's Constitutional Momentum and the Search for Polity Legitimation

Neil begins his discussion with some general, deeply engaging questions about the process of constitution-making. The bottom line that he reaches in addressing these questions is that there is no principled basis for deciding who is to decide: in particular, for deciding who is to decide who are the subjects and what is the domain of a polity. Yet in practice a line will have to be drawn somewhere; else we face an infinite regress. A paradox materializes, then: 'any such line will itself involve a particular group of people, whose identity cannot be self-legitimating, making particular decisions, whose content cannot be self-legitimating', p.9.

This problem can be solved relatively straightforwardly in the case of the self-renewing state or the state that is appearing for the first time on the basis of a national push, perhaps even a national struggle. But can it be solved for an entity like the EU? There is an epistemic or conceptual problem. 'How to conceive of the subjects and domain of a novel type of political community where neither territory nor population is exclusive or predominant to the community?'And there is, of course, a related motivational issue.

Neil emphasizes these problems in two ways. He decuments the resistance within the community to what the idea of a constitution symbolizes: at the limit, an unwelcome

pretension to state-like authority — 'the paradigm case of the kind of entity suitable for constitutional treatment is the state', p. 24. And he details the variety of schools of thought within the community about a constitution: he speaks of their strategies as respectively 'denial, truncation, materialism, stealth, vindication and projection', p.39.

But he does not despair, for he holds out the prospect that perhaps the very enterprise of seeking to build consensus around a constitution, with the public debate it engages, can create the conditions required to overcome the constitutional paradox. Perhaps it can help to define the subjects of the projected community and the domain of authority to be enjoyed by EU institutions. As he puts it: 'in response to the prompts of the self-conscious constitutional debate, the circular process of mutual reinforcement of civil society, public sphere and common culture should gradually take over, develop its own separate momentum, and so escape and transcend the deliberative confines of the original constitutional phase', p.47.

The idea here is that the very enterprise of constitution-building may be self-supporting: it may have effects that make success easier, if not guaranteed. In particular, the process may have side-effects that facilitate the achievement of the outcome to which it is oriented. The process may get people thinking about who they are, about what the EU represents for them, and may lead them to the point where they constitute a sufficiently unified grouping to make it natural for them to think: yes, 'we' should indeed think of defining ourselves in this document, and

'we' should seek in the EU a dispensation that has such and such a reach in our lives.

The argument that he is putting forward might be persuasively explicated in the following steps:

- let people be led to debate what 'we' should do in some respect and, while they may not come to agreement on the matters under discussion, the discussion will at least generate a repertoire of considerations that pass muster amongst them as relevant to the debate;

- these considerations will assume the status, as a matter of potentially common awareness, of reasons related to public policy that all are ready to countenance within the group — they are not merely of sectional interest — even if not everyone gives them the same weight;

- the emergence of such a repertoire of common valuations will provide a basis on which members of the group can vindicate the sociological sense of 'we' — the sense of belonging to a single community — that is presupposed to the debate;

- it will also give them a political basis on which they can posit common interests — these will be the interests supported by shared valuations — where those interests may relate to the pursuit of determinate ends or the adoption of certain procedures for determining various ends to be pursued;

- and so it will make it reasonable for them to require, or to acquiesce in others requiring, that the group assume an institutional form under which those common interests can be formulated and furthered, in contestatory interaction with the membership itself.

Spelled out in this way, the line that Neil is proposing connects closely with one that has been mooted more recently by the British commentator, Will Hutton (Observer, 25 April 04). He suggests that the process of debate can have the hugely important effect of making members of the EU realize just how much they have in common; it may let them see that they have common interests as Europeans.

> There are strong reasons for Britain to want more than a common market like the rest of Europe, and <u>to try, in the process, to create the European public realm we currently lack</u>. We share, despite a multiplicity of languages and histories, the same core values - a belief in the social contract, an adherence to the idea of the importance of the public realm and shared views that capitalism must be fairly run. In an era of globalisation these can best be defended collectively. We have common interests, not least in each other's prosperity (on which our own is often dependent). The European street, as has been vividly demonstrated over Iraq, has similar attitudes and interests in foreign policy - a commitment to the rule of international law and a suspicion of American unilateralism. We are all Europeans now - we just don't yet have ways of expressing it.

I am sympathetic to the picture that I see latent in Neil's argument and that is perhaps even more explicit in these observations by Will Hutton. But I have one reservation that I should register in concluding this brief remark. I agree with the general line of argument that the very process of seeking constitutional agreement, like the process of resolving any common issue, can help to shape a grouping into the sort of community for which it is

appropriate to have a common constitution. It can amount
to a sort of community-building. But I believe that one
condition that is important for a process of constitution-
making to be able to achieve this effect is that the
process not be required to generate an early, final
determination. Let the determination required be set at a
stage in the process where the side-effect of community-
building has not yet be fully achieved — let it be that
early — and the determination is likely to be negative. Let
it be negative and it can have a detrimental effect on the
community-building required.

Consider by analogy the process in Australia that
looked certain, just under a decade ago, to lead the
country into asserting its identity as a republic,
independent of the British monarchy. The proposal had
enormous support in the population, and the debate
attracted a great number of people to take part, leading to
a growing sense of common, more or less republican values.
The Prime Minister, John Howard, an opponent of the
republican proposal, steered the debate in such a way,
however, that an early determination was required among
republicans as to which sort of republic they wanted: a.
one with a popularly elected president, or b. one with a
president elected by a special majority of the houses of
parliament. That determination split republican ranks and
meant that in the referendum between retaining the monarchy
and going over to the republican proposal chosen — type b
— a majority voted for retaining the monarchy. The result?
The republican proposal has been shelved and probably won't
come back on the agenda for another decade or so.

My reservation about the optimism displayed by Neil Walker and Will Hutton is that if the constitution proposed for the EU is rejected, especially if it is rejected in one or another national referendum, then that will set back the cause of community-building in the EU, not advance it. And the fact is that as things look at the moment, it is very likely that the constitution will be rejected, at least in Britain, if it is put to referendum. The precedents with the Maastricht treaty may suggest that if the constitution goes down in one referendum, it can be altered and put to a second referendum within a short time. But I think that this suggestion does not hold up. There is likely to be such intense feeling mustered in the course of an initial referendum that no government would be willing to respond to rejection by making an early, second attempt to achieve acceptance.

Neil does not address the possibility of rejection directly, though he notes that 'it remains remarkable how little open political or public discussion there has been about the possibility of failure of ratification'. Will Hutton thinks that, short of Tony Blair being replaced by Gordon Brown, there is little chance of ratification in Britain. But he thinks that even in the event of failure, there is room for optimism:

> we pro-Europeans must put up the best fight we can, but in the spirit of the doomed defenders of Dunkirk knowing a winnable battle may lie years ahead. Perhaps this is the way we build Europe - losing battles, winning others later - and the process being the route to construct a European public realm and deeper European roots. Any which way, let's roll.

I think that this optimism is misconceived, because it does not reckon with the effect that the rejection of the constitution would have. If the leaders of Europe really want to advance the sort of community-building that will make the EU fit for a common constitution, then they should probably slow down the process, not rush to seek ratification. It may be that success at this stage would be very beneficial for the cause of community-building. But it is surely the case that failure could set back the cause by a generation or more. I think that in the circumstances it would be reckless for European leaders to go ahead at this point and expose the constitution to national referenda. They would do better to follow the old Fabian line: festina lente; hasten slowly.