

IDEOLOGY, CONSTITUTIONAL CULTURE AND INSTITUTIONAL CHANGE: THE EU CONSTITUTION AS REFLECTION OF EUROPE'S EMERGENT POSTMODERNISM

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“...This paper examines some constitutional anomalies, including the peculiar origin of European citizenship and identity, **the emphasis on positive over negative rights, the predilection for process over result, and the rejection of the American Hobbesian world in favor of a European postmodern paradise of perpetual peace through diplomacy.**”
(p. 26)

“...The length and detail of the document underscore the radically different philosophies of the American and European documents. **Madison's constitution set forth the limits of state action, establishing "islands of regulation in a sea of liberty."** Giscard d'Estaing's constitution, conversely, establishes **"islands of liberty in a sea of regulation"** (see Barnett 1991 and 2004.) **Just as citizenship is granted from the top down, so are rights. Petroni (2003) explains that there are no individual rights under the EU constitution: rights are those given by the constitution to the people. In this top-down spirit, the EU constitution places greater emphasis on (so-called) positive than negative rights – along with the member- and super-state's responsibilities in "guaranteeing" them.**¹

1...**I should make a note here on the distinction between negative rights (life, liberty, the pursuit of happiness) and the fiction of 'positive rights' ('right' to a job, to housing, to happiness, to education, etc.).** Rand (1966, 322-325) explains it best:

“The concept of a “right” pertains only to action – specifically, to freedom of action. It means freedom from physical compulsion, coercion or interference by other men.

Thus, for every individual, a right is the moral sanction of ...his freedom to act on his own judgment, for his own goals, by his own voluntary, uncoerced choice. As

to his neighbors, his rights impose no obligations on them except of a negative kind: to abstain from violating his rights....

[As for so-called “positive rights,”], jobs, food, clothing, recreation (!), homes, medical care, education, etc. do not grow in nature. These are man-made values – goods and services produced by men. Who is to provide them?

If some men are entitled by right to the products of the work of others, it means that those others are deprived of rights and condemned to slave labor.

Any alleged “right” of one man, which necessitates the violation of the rights of another, is not and cannot be a right.

No man can have a right to impose an unchosen obligation, an unrewarded duty or an involuntary servitude on another man. There can be no such thing as “the right to enslave.”

A right does not include the material implementation of that right by other men; it includes only the freedom to earn that implementation by one's own effort....

Any undertaking that involves more than one man, requires the voluntary consent of every participant. Every one of them has the right to make his own decision, but none has the right to force his decision on others.

There is no such thing as “a right to a job” – there is only the right of free trade, that is: a man's right to take a job if another man chooses to hire him. There is no “right to a home,” on the right of free trade: the right to build a home or to buy it. There are not “rights to a ‘fair’ wage or a ‘fair’ price” if no one chooses to pay it, to hire a man or to buy his product. There are no ‘rights of consumers’ to milk, shoes, movies or champagne (there is only the right to manufacture them oneself)...

The presence of positive ‘rights’ in a constitution is problematic (beyond the patent philosophical absurdity). Indeed, it is contradictory at best, and schizophrenic at worst, to commingle the protection of negative rights with positive ‘rights’ (which imply, ipso facto, a violation of the negative rights of those forced to provide the goods or services to which an alleged positive ‘right’ is created). Feeding the hungry is surely a noble goal, and worthy of a societal (and thus perhaps constitutional) aspiration – but to invent a ‘right to eat’ and thus violate property rights is an ill-omened start for constitutional restraints on government.”

(pp. 33-34, and fn#1)