

THE FEDERAL TRUST

for education & research

enlightening the debate on good governance

European Essay No. 45

**Federal Constitutionalism/
European Constitutionalism in
Comparative Perspective**

NICHOLAS ARONEY



March 2009

A Definition of Federalism

Federalism is defined as 'a system of government in which central and regional authorities are linked in an interdependent political relationship, in which powers and functions are distributed to achieve a substantial degree of autonomy and integrity in the regional units. In theory, a federal system seeks to maintain a balance such that neither level of government becomes sufficiently dominant to dictate the decision of the other, unlike in a unitary system, in which the central authorities hold primacy to the extent even of redesigning or abolishing regional and local units of government at will.'

Patrons

Sir Brian Corby
Sir Michael Franklin
Sir Donald Maitland
Baroness Nicholson of
Winterbourne MEP
Rt Hon Sir Michael Palliser
Lord Plumb
Carole Tongue
Sir Brian Urquhart

President

Peter Sutherland KCMG

Chairman

Sir Stephen Wall GCMG LVO

Director

Brendan Donnelly

Council

Andrew Adonis
Anna Arki
David Barton
Professor Iain Begg
Graham Bishop
Professor Michael Burgess
Dr Hywel Ceri Jones
Professor Stefan Collignon
John Cooke
Robert Emerson
Dr Nigel Forman
Maurice Fraser
Baroness Sally Greengross OBE
Claudia Hamill
Jonathan Hoffman
Richard Laming
John Leech
Baroness Ludford MEP
Nicolas Maclean
Dr Richard Mayne
Robert Moreland
Professor Roger Morgan
John Palmer
Lady Joyce Quin
Marie-Louise Rossi
Tom Spencer
John Stevens
Sir Brian Unwin KCB
Professor Richard Whitman
Ernest Wistrich CBE

The views expressed in this *European Essay* are the views of the author only, and not necessarily shared by the Federal Trust.

THE FEDERAL TRUST

for education & research

Federal Constitutionalism/ European Constitutionalism in Comparative Perspective

Nicholas Aroney



Enlightening the Debate on Good Governance

European Essay No.45

About the author

Dr Nicholas Aroney is Reader in Law and Fellow, Centre for Public, International and Comparative Law, TC Beirne School of Law, The University of Queensland, Australia. He is the author of *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009).

Acknowledgement

This is a slightly revised version of an essay first published in *Getuigend Staatsrecht, Liber Amicorum A.K. Koekkoek* (Tilburg: Wolf Legal Publishers, 2005).

Federal Constitutionalism / European Constitutionalism in Comparative Perspective

Nicholas Aroney

Abstract

There has been a long-standing debate over the question whether the European Community is best understood as an international organisation founded upon a series of international treaties, a supranational organisation that is essentially constitutional in nature, or some kind of *sui generis* entity that partakes of both sets of characteristics. In connection with this debate, the European Community has often been compared to a variety of established federal-states, such as the United States, Canada, Germany and Switzerland.

In these comparisons, while a number of similarities between federations and the institutions of the European Community have been observed, a sharp distinction has almost always been drawn between the supposed foundations of federal constitutions in the will of 'the people' and the establishment of the European Community upon the founding treaties. Further, in many of the comparisons, it has been assumed that it is the nature of the European Community that is in question, whereas the nature of the federal-state is straightforward and uncontroversial. For this reason, it is generally supposed that the established federal-states will shed light on the problematic nature of the European Community, and not vice versa.

However, this essay argues that the constitutional foundations of federal-states are far from uncontroversial and in fact display a number of features that are uncomfortably similar to the institutional foundations of the European Community. Given that the problematic and ambiguous relationship between treaty and constitution has been highlighted by the debate over the European Community, it is argued that comparisons between the European Community and the modern federal-state can shed significant light not only upon the former but also upon the latter.

I. Introduction

The *Draft Treaty establishing a Constitution for Europe*, adopted by the European Convention in 2003,¹ contained within its very title an attempt to resolve the fundamental tension that has preoccupied efforts to conceptualise the European legal order. Conventional legal and political philosophy, even today, draws an essential distinction between 'treaties' and 'constitutions', the former belonging solely to the realm of international law and consisting of agreements between sovereign nation-states, the latter in its proper sense belonging to national law and concerning the fundamental law of a particular nation-state. By referring to a treaty which establishes a constitution, the draft treaty attempted to overcome the dichotomy, partly in the belief that the legal order of Europe has already transcended the boundary between treaty and constitution and that the document is merely declarative, but also in the hope that its ratification might be a further step in the progressive constitutionalisation of the Community legal order.² The document remained a 'draft', testifying to the fact that its legal force would depend on it being ratified by the Member States according to all the formalities of international law,³ yet the title of the document aspired to something much more than a mere treaty. Such aspirations were, however, dashed when the *Constitution Treaty* was rejected by French and Dutch voters in 2005. The *Treaty of Lisbon*,⁴ while retaining most of the substantive reforms contained in the *Constitution Treaty*, altogether avoids the language of 'constitution', but even its future is uncertain, following its rejection by

Irish voters in 2008. That a negative response by only one Member State can stall the entire process underscores how far Europe is from boasting a fully constitutional order in this most fundamental sense.

Nonetheless, virtually all commentators acknowledge that, in certain respects at least, the legal order of the European Community⁵ is already constitutional in character. It is not here necessary to recount the well-rehearsed decisions of the European Court of Justice which have asserted that the foundational treaties of the 1950s established a 'new legal order' and, indeed, a 'constitutional charter of a Community based on the rule of law'.⁶ Neither is it necessary to discuss the famous 'transformation' thesis advanced by prominent European scholars,⁷ nor the arguments of those who insist that despite a significant degree of constitutionalisation, the Community legal order remains founded upon principles of international law.⁸ I pass over these arguments in their details, essentially because they are so well-known.

My initial observation, rather, concerns the nature of the questions that have been asked and the way in which those inquiries have been addressed. In the questions that have been posed, the focus of attention has for the most part been the problem of identifying or explaining the nature of the Community. To what extent and in what ways, it is asked, has the Community legal system transcended its origin in a series of treaties to become constitutional in character?⁹ How far has the Community progressed towards becoming a fully-fledged federation?¹⁰ To what extent can the Community now be compared to a 'federal-state', founded upon the constituent authority of 'the people'—or is it 'the peoples' — of Europe?¹¹ When framed in this way, such questions are centrally concerned with the nature of the Community. They take for granted the basic categories of 'constitution', 'treaty', 'federation' and so on, according to which the Community legal system is conceptualised, classified and evaluated.

Against this tendency, it is true, theoretically-oriented scholars have pointed out that such inquiries tend to beg the question of what we mean by these terms and, especially, that they tend to assume that there is a fundamental difference between 'treaty' and 'constitution'.¹² In particular, the conceptually decisive idea of 'sovereignty' has been

interrogated from a number of different angles.¹³ All of this is well and good. Yet the theoretical debate has remained, for the most part, within the orbit of Europe. Our conceptions of 'constitution', 'treaty' and 'sovereignty' have been examined largely with a view to explaining the nature of the Community, particularly as regards its 'internal' relationship to the Member States and its 'external' relations with the International Community. The problem of conceptualising the European Community in this context has set the agenda for theoretical inquiry into the meaning of 'constitution', 'treaty' and so on.

Not only this, but the 'European Community problem' has shaped research that has sought to compare the Community with other kinds of legal system. Scholars have spent a great deal of effort comparing the intricacies of Community law with the particular characteristics of various federal and intergovernmental arrangements, primarily in the hope that the comparison might illuminate our understanding of the Community legal system.¹⁴ Relatively little attention, by contrast, has been given to the possibility that the European Community might shed light on the nature of federations and intergovernmental organisations; the information-flow has almost entirely been in the opposite direction. Characteristics of American, or German, or Canadian federalism have been compared to the Community in order to help us comprehend what the Community actually is and to imagine what it might possibly become. The prospect that a study of Europe might illuminate our understanding of America, or Germany, or Canada has much less often been considered.

The tacit assumption in this tendency of comparative research is the lingering belief that established federations, such as the United States, Germany, Canada, Switzerland and Australia, do not present problems of conceptualisation of the magnitude posed by the European Community. As a consequence, while the theoretically-inclined have questioned conventional understandings of 'constitution', 'treaty' and 'sovereignty' in the context of Europe, these challenges have not, in the main, been systematically re-applied to the problem of understanding federal constitutionalism in general, let alone the specific characteristics of particular so-called federal-states.

But as Koekkoek and others have pointed out, the difference between a constitution and a treaty, even in formal terms, is less great than has often been thought.¹⁵ The fundamental, formal difference between a treaty and a constitution is generally supposed to be that a constitution rests upon an exercise of the sovereignty of the nation or people as a whole, expressed through majority rule, whereas a treaty rests upon a unanimous agreement between sovereign nation-states, expressed through the respective heads of the executive governments of each nation. However, when the amending clauses of particular federal constitutions (Koekkoek gave the Canadian Constitution as an example) are compared to the those of international treaties (such as the founding treaties of the European Community), we discover that something less than absolute unanimity can in some cases suffice in the international-treaty context, just as unanimity can in some respects be required within the national-constitutional context.

Notably, Koekkoek's national example was of a federation (Canada). As will be seen, similar examples from other federal-states could have been multiplied. His observation is arresting because it challenges the idea that there is a strict dichotomy, even in formal terms, between the concept of an international treaty and the concept of a national constitution of a federal-state. Notably, Koekkoek's observation was made in the context of a collection of essays concerned with elucidating the nature of the European Community. The potential implication of the observation, however, is that the fracturing of the distinction between treaty and constitution provoked by the *sui generis* characteristics of the European Community can just as easily be applied to our understandings of nation-states that are federal in structure.

What beckons, therefore, is a comparison between the Community and other federations in which the 'information flow' moves in *both* directions.

II. European Constitutionalism

Comparison between the European Community and the various federal systems of the world is a well-established scholarly industry. Most studies have concentrated on the United States, although comparisons with Germany and Canada are also common. One of the earliest major works was the multi-volume study edited by Sandalow and Stein in 1982,¹⁶ soon to be followed by the even more ambitious *Integration through Law* project, edited by Cappelletti, Seccombe and Weiler in the mid-1980s.¹⁷ There has been a near-constant flow of books¹⁸ and major articles¹⁹ on the topic ever since. Almost without exception, however, these studies have accepted as an axiom the idea that there is a fundamental distinction between a treaty and a federal constitution, so that if there is any comparison to be drawn between the Community legal system and the constitutional systems of various federal-states, that is because the Community has moved in the direction of constitutional federalism – and not because federal constitutions in fact have a number of features in common with international treaties.²⁰

Stein has been one of the major pioneers in this area of research.²¹ He is sometimes credited, for example, with having been the first – in 1981 – to have systematically articulated the idea that the European Community legal system had been transformed into a kind of constitutional system, analogous to the constitution of a federal-state.²² Less prominent – but for present purposes more significant – are observations Stein made two years earlier when commenting on a series of lectures delivered by Oliver at the Hague Academy of International Law in 1974.²³ Grasping what Stein characterised as a ‘fistful of nettles’, Oliver had asked, ‘Do federations come into existence through treaties?’²⁴ Or as Stein himself put it, ‘Is there such a thing as a treaty-based federalism?’²⁵ Both Oliver and Stein appeared to appreciate the delicacy and significance of the question – and this may be the reason why, ultimately, they avoided it. Their responses to the question have shaped discussion of the European Community ever since.

Oliver's response was two-pronged. On one hand, he observed, the United States Supreme Court had rejected the idea that the American federation derived its juridical existence from a treaty between the constituent American states.²⁶ On the other hand, he pointed out that 'the partial federation known as the European Communities is firmly based on the relevant constitutive treaties' and that the treaties are the 'sources of norms that are directly applicable within the constituent states'.²⁷ At first glance, Oliver appears thus to have answered the question in the affirmative: the Community legal system *is* an example of a federation which is based on a series of treaties. But notice the qualification: the Communities, he said, represent a 'partial federation' or, as he later put it, an evolving 'federal-like structure', a '*semi-* or, perhaps, *meta-*federal structure', a 'modern, limited, regionalistic, federation of Europe', a 'federative arrangement' (as compared to the 'federal structure' of the United States), a 'transnational' federation (rather than a 'national' one).²⁸ It is true that Oliver simultaneously affirmed significant parallels between the two kinds of system, the most important of these being a respect for the 'rule of law', not merely in the conventional inter-national sense of adherence to the maxim *pacta sunt servanda*, but in the sense of 'sharing of normative hierarchy and of professional conditioning to work in an organic *corpus juris*'.²⁹ Yet this affirmation of parallels was subject to the fundamental qualification that in a genuine federal-state the constitution is founded upon the people of the entire natio – and that this is very different from a treaty entered into by the executive governments of constituent states.

Stein's commentary on Oliver's paper made this last point explicit. He too pointed out that the argument that the American Union had been formed by a 'compact' between States, rather than on the basis of a 'constitution' endorsed by 'the people', had been decisively rejected by the Supreme Court in its famous *McCulloch v Maryland* decision.³⁰ Then, turning to the European Community, Stein argued that although it is 'exclusively treaty-based', the Community may legitimately be viewed as an 'incipient federal structure'³¹, or as a 'federal-type structure', as he put it in his more famous essay of 1982.³² In terms similar to Oliver, Stein thus suggested a distinction between a 'true' federation, founded upon 'the people', and an 'incipient' one, founded upon international

treaties. Also like Oliver, Stein doubted whether it would have made much difference if the 'compact' interpretation of the United States had prevailed, and also affirmed that it in fact makes little difference that the European Community is founded upon treaties rather than a formal constitution.³³ In other words, he suggested that while the distinction between a treaty and a constitution is clear and unambiguous, whether a legal system has a contractual or constitutional foundation does not determine the course of its future evolution. In fact, Stein would later argue that the Community legal system has been transformed and constitutionalised *despite* its foundation upon a series of international treaties.

Debate over the myriad of issues generated by this question of treaty vs constitution has been shaped, indelibly it seems, by the moves made by Oliver and Stein in these seminal articles.³⁴ While individual interpretations of the Community differ quite radically, the idea that the constitution of a federal-state is founded upon the consent of 'the people' has not been doubted. Indeed, as will be seen, this is as much the case with the various 'treaty-oriented' interpretations of the Community legal system as it is with the 'constitution-oriented' interpretations.³⁵ And although writers who seek to find some kind of 'third way' between these two extremes have made important steps towards rethinking the issues, the sharp conceptual lines drawn by Oliver and Stein continue to shape the discussion.

Proponents of a treaty-oriented interpretation of the Community have particularly been influenced by the distinction between the Community as an 'association of states' founded upon a series of treaties and the United States as a paradigmatic 'federal state' founded upon the consent of 'the people'. Space does not permit a detailed account of these arguments, but brief reference can be made to the writings of Hartley, Schilling, Grimm and Kirchhof in this respect.³⁶ Despite important differences between these authors, all of them hold that the Community legal system was originally, and remains, 'dependent' upon both international law and the legal systems of the Member States for its validity and effectiveness.³⁷ This means, it is argued, that the Member States are masters of the treaties and retain the capacity to withdraw unilaterally from the Community. Embedded in the argument, however,

is the assumption that a constitution 'in the fullest sense of the term' is founded upon a constitutive act of a sovereign people, acting as an original *pouvoir constituant* or constituent power.³⁸ Within a liberal-democratic nation-state, it is said, this constitutive power is ascribed to 'the people' of the nation as a whole – and this is the case whether the nation-state is unitary or federal in structure.³⁹ It follows that, if the European Community is one day to possess a constitution of this character, it will have to be derived from 'the people of Europe', exercising an original constituent power.⁴⁰ But what has been created so far, it is insisted, is an 'association of states' or mere 'confederation'; the Community is not yet a 'federal state' precisely because there is as yet no European *demos*.⁴¹ In this way, the dichotomy between treaty and (federal) constitution, first applied to the Community legal system by Oliver and Stein, is preserved.

In contrast to those who emphasise the continuing international law character of the Community, those who adopt a constitution-oriented interpretation place the emphasis on a gradual transformation of European Community law. Because this transformation, according to the standard account, has chiefly been effected by the Court of Justice, the absence of a written constitution founded upon the people of Europe is not critical to the argument. But even among these writers, the view generally remains that the constitution of a genuine 'federal-state' rests upon the sovereignty of the people, understood as a unitary constituent power. Again, space does not permit a detailed account, but Mancini and Piris may be taken as examples.⁴² While arguing forcefully that the Community has been progressively constitutionalised into a form 'reminiscent of a federal state', Mancini insists that the Community is still founded upon a treaty between peoples, rather than a constitution based on the people of Europe.⁴³ There is a threshold, therefore, to be crossed before the Community becomes a federal-state.⁴⁴ But unlike Grimm and Kirchhof, Mancini argues that a European federal-state, consisting of 'a plurality of nations and yet founded upon a [singular] demos' is indeed conceivable, feasible and desirable.⁴⁵ By contrast, Piris foresees practical problems with the suggestion of a constituent assembly preparing a constitutional text which is put to the peoples of Europe for ratification.⁴⁶ Yet in so arguing, he also assimilates 'the state' with 'the federal state',

both of which are said to be founded upon 'a people' understood 'in the singular'. He thus accepts the reference to 'We the People' in the Preamble of the United States Constitution at face value, and contrasts this with the European Union, which is made up of several nations and refers to 'an ever closer union among the peoples of Europe'.⁴⁷ In both Mancini and Piris, therefore, the treaty-constitution dichotomy continues to operate.

As between constitution and treaty, several writers have striven for a 'third way', which avoids the dichotomy. Despite significant differences between them, MacCormick, Weiler, Nicolaïdis and Wind may serve as examples of this general point of view.⁴⁸ According to these authors, the crux of the dichotomy lies in the idea of the sovereign nation-state, and the way forward lies in the abandonment of the idea of abstract category of sovereignty and of 'statal' conceptions of the European Community: a sovereign *Demos* or *Volk*, and the categories of *Staat*, *Staatenbund*, *Bundesstaat* and *Staatenverbund*.⁴⁹ Conventional conceptions such as these, it is said, have generated the standard dichotomy between an intergovernmental, international, treaty-oriented account of the Community, and proposals for a European federal-state founded upon 'the people'.⁵⁰ But Europe, according to these authors, does not have a unitary *demos*, and its future must not lie in the direction of a European federal-state founded upon an 'all-European *pouvoir constituant*'.⁵¹ The constituent treaties, it is argued, constitute a *Verfassungsverbund*⁵² – an arrangement which is simultaneously an 'agreement among states' and a 'social contract' among the nationals of Europe, founded not upon a European *demos* but upon 'a plurality of *demos*', the *Völker* of Europe.⁵³ The way forward, it is said, is to build upon the conception of a constitutional 'demosi-cracy', founded upon 'co-existing multiple *demos*' and 'distinct peoplehoods'.⁵⁴

'Third way' arguments such as these, whatever they may mean in concrete legal terms, perform an important function in the debate over the nature and future of the European Community. But it is not only in respect of European-oriented debates that their significance lies. Embedded in these analyses of the European legal order is a critique of the conventional theoretical frameworks which have long undergirded the classification of constitutional systems into the standard categories

of 'unitary', 'federal' and 'confederal'. Theoretical reflection on the nature of the Community has led, not only to scepticism about the idea of 'sovereignty', but also to a reconsideration of the empirical foundations of the so-called federal-state. For example, MacCormick, Lenaerts and Desomer have observed that, notwithstanding the language of its Preamble (viz., 'We, the People'), the United States Constitution was in fact ratified by a series of conventions held in each of the American states—a process very different from a national convention or referendum in which the entire body of people of the United States are represented and decide by simple majority vote.⁵⁵ And Koekkoek, as noted, has likewise drawn attention to the requirement of unanimity for certain categories of constitutional change in Canada.

Observations such as these may be a sign that the sharp dichotomy which Oliver and Stein drew between the United States Constitution and the European Community Treaties may be beginning to break down. While this is, of course, of great significance for the debate over the future of Europe, it also has very radical implications for the way in which we understand federal constitutionalism in general, particularly as regards our understanding of what is called the 'federal-state'. For it is at this point that the information flow, as I suggested earlier, could and should flow in *both* directions. However, there has not as yet been a complete rejection of Oliver and Stein's dichotomy. Even the proponents of a 'third way' usually continue to distinguish between the Community treaties and the constitutions of 'federal-states' on the basis that the latter are founded upon the entire 'people' of the state concerned.⁵⁶ Weiler, for example, says that there remains 'one huge difference' between the European legal system and the constitution of the federal-state. Federations, he argues, presuppose 'the existence of a "constitutional demos", a single *pouvoir constituant* made up of the citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority the specific constitutional arrangement is rooted'.⁵⁷

This is a conventional assumption, no doubt: but it stands in the way of a closer and more careful comparison between the empirical foundations of so-called 'federal-states' and the foundations of the European Community.

III. Federal Constitutionalism

The strict dichotomy between treaty and constitution to which attention has been drawn received its most systematic exposition in the mid- to late-nineteenth century in the work of several highly influential German, Austrian, French and American jurists. Among the most prominent of these, Jellinek and Story may be mentioned.⁵⁸ Anxious to sure up a particular approach to interpreting the legal fundamentals of their respective countries,⁵⁹ these writers insisted on a very firm distinction between treaty and constitution, and used this distinction to drive a wedge between treaty-based arrangements in the form of 'alliances' and 'confederations' on one hand, and the constitution-based arrangements of 'unitary-states' and 'federal-states' on the other.⁶⁰ A 'confederation' (*Staatenbund*), it was stipulated, is an arrangement under which the constituent states retain their respective sovereignties, whereas in a 'federation' or 'federal-state' (*Bundesstaat*), sovereignty has been irrevocably been transferred from the constituent states to the larger federal-state of which they have become a part.⁶¹ It was, of course, acknowledged that federal-states are indeed 'federal' as regards the division of power or allocation of competences between 'federal' (central or national) and 'state' (cantonal or provincial) organs of government.⁶² However, it was insisted that federal-states possess precisely the same structure of sovereignty as unitary nation-states, both as a matter of international and national law. Thus as a matter of national or domestic law, the location of sovereignty within a unitary-state was in principle said to be no different from its locus within a federal-state. If a state is democratic in its foundations, sovereignty is vested in the people of the nation as a whole – and this is the case whether the state is unitary or federal in governmental organisation. The result, for these writers, was a sharp line between essentially treaty-based arrangements (international alliances, organisations and confederations) and constitution-based arrangements (federal-states and unitary-states).

In order to draw such a sharp distinction between confederations and federations, however, it was necessary to overlook a number of continuities between them. To begin with what might seem only a matter

of semantics, it is worth recalling that the word 'federal' (*Föderativ, federaal*) is derived from a Latin root (*foedus*) which in Roman Law referred to an international treaty,⁶³ and in wider usage extended to concepts of 'covenant', 'compact' and 'agreement'. The Germanic *bund* has a similar semantic range; and both the Old Germanic and Latin terms are derived from reconstructed Indo-European roots which, although linguistically distinct, are likely to have evoked a parallel range of concepts.⁶⁴ Our modern usage of the terms 'federal' and *bund*, particularly in some of their more specific constructions (eg, federation, *Bundesstaat*), have drifted from this root sense of treaty, covenant and compact. But this specification of meaning, this drift from treaty to constitution, is largely a result of the developments in nineteenth-century political and legal thought to which reference has been made. If those dogmas are set aside for the moment, it can at least be seen that words such as 'federal' and *bund* testify to a much older association with ideas and practices, not only of covenant and compact, but of treaty and international agreement.

The point is not only semantic, however. The fact is that the foundational, formative processes by which the major recognised 'federal-states' of the world have come into existence are in important respects strikingly similar to the formal procedures by which international treaties typically come into being. It is often said, as has been noted, that federal-states rest upon the consent of the people of the nation as whole, whereas treaties rest upon the unanimous agreement of entire nation-states expressed through their respective executive governments. However, when the formation of federal constitutions is closely examined, a much more complicated picture emerges. Unanimity of agreement among the constituent states is generally required (or at least sought), and this agreement is dependent upon consent being expressed not only by the voting public, but also by the respective executive governments and legislatures of each state. The concrete processes by which federations and international organisations come into being are in these respects very similar; it is largely the interpretive frameworks that differ.⁶⁵

Taking the United States Constitution as an example, it is vital to note that the ratification of the Constitution was dependent on the

unanimous consent of the constituent states – not in the sense that every member of the old confederation had to agree before the new constitution would come into force,⁶⁶ but in the sense that the new constitution would bind only those states which in fact ratified it.⁶⁷ Thus, although ratification involved popular deliberation through representative conventions,⁶⁸ this was conducted on a state-by-state basis and was dependent upon state legislative and executive action to support it.⁶⁹ Thus when Chief Justice John Marshall famously held that the Constitution derived its force from ‘the people’ of the United States, it is significant to note that he very specifically acknowledged that the people had ‘assembled in their several States’, and denied that anyone was so foolish as to suggest that there could have been a ‘compounding’ of the people ‘into one common mass’ for the purposes of ratification.⁷⁰ Further, it should be noted that Marshall was responding to a very specific argument: that rather than ‘emanating from the people’, the Constitution was the act of ‘sovereign and independent states’.⁷¹ While it is true that Marshall clearly denied that the Constitution was ultimately in the nature of an international treaty or compact between sovereign states, he could not and did not claim that conversely, the Constitution emanated from the entire people of the nation compounded into an undifferentiated whole.⁷²

The point can be amplified by reference to the Australian experience.⁷³ The federation which came into effect in Australia in 1901 occurred within the wider context of the British Empire and the overarching sovereignty of the Imperial Parliament at Westminster. In 1901, the constituent political entities remained British colonies and could not claim to have the status of independent, sovereign nation-states. Nonetheless, the British Parliament had conferred upon them very wide powers of local self-government, and they were careful to assert this independence when negotiating and ultimately agreeing to federation. As such, the process by which the Australian Constitution came into being, from the beginning through to its conclusion, was predicated upon the unanimous consent of the Australian colonies. The initial arrangements were first agreed to by the executive governments of each participating Australasian colony and formalised through legislation passed by the several colonial Parliaments. The process of deliberation and drafting was then conducted within a convention at which the

colonies were equally represented, and the resulting draft constitution did not go forward to the Imperial Parliament for formal enactment until the electors in each colony, voting on a colony-by-colony basis, agreed by referendum to the proposal. Like the United States, but in a more elaborate, deliberative and directly democratic fashion, the federal constitution of Australia was thus premised, at least in terms of its legitimacy, on the separate consent of the peoples of each of the constituent states.

Similar observations can be made about the origins of the Canadian and Swiss Constitutions, albeit with important qualifications. In Canada, the principle of provincial equality was compromised in favour of regional equality, and the people of the provinces were not called upon in any direct sense to ratify the Constitution.⁷⁴ But notably, these characteristics, and others related to them, led many commentators at the time to deny that the Canadian arrangement was genuinely 'federal' in nature.⁷⁵ In Switzerland, likewise, the Constitution of 1848 was introduced without the consent of absolutely all of the constituent cantons.⁷⁶ Yet subject to these qualifications, the need for provincial or cantonal agreement was otherwise generally acknowledged in these countries.⁷⁷

The ideal of unanimous agreement of the constituent states, expressed through executive, legislative and popular institutions and processes thus underlies the logic of the American and Australian Constitutions. Even if unanimity and equality were somewhat compromised in Switzerland and Canada, the principle of cantonal or provincial consent was to a large extent still maintained. For late nineteenth- and early twentieth-century political scientists and jurists who wished to place an interpretation on these constitutions which favoured national power over provincial rights, however, the process by which they came into being posed very serious difficulties. A typical response was that of Burgess who, following Jellinek, argued that the legal force of a constitution of a 'federal-state' did not derive from the agreement of the constituent states (their governments or their peoples), but from an implied act of legal revolution by which sovereignty was (mysteriously) transferred to the people of the entire nation.⁷⁸ Federation and federal-state were in this way radically distinguished from confederation and alliance. But the distinction depended upon a theoretical commitment, first, to the idea

that sovereignty is in its nature a unitary and indivisible thing and, second, that sovereignty must therefore be located either in the constituent states (a confederation, based on a treaty) or in the nation as a whole (a federation, based on a constitution).⁷⁹ Moreover, to maintain this distinction the very obvious points of continuity between confederations and federations – such as the consent of the constituent states – had to be excluded as strictly irrelevant to the inquiry.

Other factual anomalies also had to be dealt with. In typical federations, the constituent states (ie, their peoples or governments) are generally represented, often on the basis of equality, in at least one of the chambers of the federal legislature.⁸⁰ More significantly, amendment procedures, as Koekkoek pointed out, often reflect the fact that the federation was originally, and continues in certain significant respects, to be based upon the unanimous agreement of the constituent states. Thus, even though the Canadian Constitution was much more 'nationalist' in its design than the American, the Swiss and the Australian, the amending clauses adopted in 1982 recognised the need to protect the principle of unanimity in at least some respects.⁸¹ This is most emphatically the case in the United States and Australia, where the representation of each state within the federal legislature cannot be altered unless (the people of) the state concerned express their particular agreement to the proposal.⁸² Likewise, while the competences or powers of the federal legislatures are limited to specific topics in these countries, there is always scope for one or more states to refer powers or to cooperate in some other manner with the federal organs of government⁸³ – a possibility that continues to presuppose the character of the states as originally independent self-governing entities which have an inherent capacity to enter into arrangements with other political bodies (including the federal government itself) in order to secure some collective objective.

Features such as these were serious anomalies for the theories of Jellinek, Story and Burgess. If the people of the nation as a whole possess ultimate sovereignty, why is the consent of the people of a particular state or all of the states required for certain categories of constitutional amendment? However, motivated by the desire to reinterpret their federations in nationalistic terms, they insisted that a 'federal-state' is somehow founded upon 'the people' of the nation as a whole.

Noting the unique circumstances of their formation and evolution, the post-war federations of Germany and Austria, as well as the later devolutionary federal systems of Belgium and Spain, understandably in their constitutions continue to ascribe ultimate sovereignty to the people of the nation.⁸⁴ But the classic integrative federal constitutions of the United States, Switzerland, Canada and Australia do not,⁸⁵ and it is to these latter cases that the European Community, being itself integrative in character, is analogous. Yet the idea that a federal-state is founded on the people as a whole – a proposition more appropriate to devolutionary, rather than integrative, federations – has been the tacit assumption, until recently, in most analyses of the European Community. The problem of conceptualising the Community, however, has begun to focus attention on the theoretical and empirical limitations of conventional state-theory as it applies to federations. In this way, comparative reflection on the European Community has the potential not only to illuminate the Community itself, but to shed light on our understanding of the so-called 'federal-state'.

IV. Conclusions

The specific characteristics of federal constitutions have long presented challenges to theories of federalism that are enamoured of the idea of state sovereignty. But although the anomalies were always there to be seen, even down to our own day political scientists and jurists have continued to assume that the distinction between a confederal treaty and a federal constitution is as pointed as nineteenth-century theorists thought that it was. Thus, at a critical point in the debate over the nature of the European Community, Oliver and Stein perpetuated the idea that the line between a federation like the United States and a 'treaty-based' organisation like the Community was a particularly sharp one – the reason being that the foundation of the United States Constitution did not in any significant sense resemble an international treaty. Ever since this step was taken, while endeavours have been made to draw particular

and important parallels between 'federations' and the European Community, commentators have tended to assume that the formative basis of a 'real' federation is of a fundamentally different nature to that of the European Community. The possibility for comparison at the most fundamental of levels has thus been short-circuited. This has meant that the so-called constitutionalisation thesis has developed along the lines that the Community legal system, although founded upon treaties, has been transformed into a constitution-like structure. The conceptual movement, on this account, has been from the Community as an originally treaty-based international organisation to the Community as a kind of quasi-federation. However, as I have tried to indicate in this essay, the difference between treaty and federal constitution is not so great as has traditionally been thought – and this, not simply because treaties can be interpreted and operated in a manner that makes them resemble federal constitutions, but because federal constitutions are a lot more like treaties than has commonly been acknowledged.

The upshot is this. In the search for external models that might help to explain the nature of the European Community, scholars have repeatedly looked to the established federations of the world for comparative guidance. Moreover, when reflecting on the *sui generis* character of the European Community, scholars have argued that the Community legal system has come to exhibit features which make it look more and more like a federal constitution. In this way, federal constitutionalism has shed a great deal of light on the Community. However, in tracking the conceptual movement from treaty to constitution, theoretically-minded scholars have begun to reinterrogate a whole range of conventional nineteenth-century ideas represented by words such as 'state', 'sovereignty', 'treaty' and 'constitution'. The old ideas no longer seem to do justice to the forms and patterns of European law and politics; what is happening in Europe seems to be unique, original, novel; and a new conceptual apparatus is therefore required. However, this conceptual shift from treaty to constitution, together with the deconstruction of sovereignty and state that it involves, has the potential to shed new light on a much *older* problem:⁸⁶ the nature of the 'federal constitution'. Nineteenth-century definitions of state, sovereignty, treaty and constitution have until now dominated conceptual discussion of both

the European Community and the constitutions of the established federations of the world. The challenges posed by the European legal system have, however, led to a radical rethinking of these ideas. It is now time to apply this radical thinking to our conceptions of the so-called federal-state.

Notes:

¹ *Draft Treaty Establishing a Constitution for Europe* (Luxembourg, 2003) (hereafter the 'Constitution Treaty').

² Compare P. Craig, 'The Hierarchy of Norms' in T. Tridimas and P. Nebbia, *European Union Law for the Twenty-First Century* (Oxford, 2004), 90-92; B. de Witte, 'Simplification and Reorganization of the European Treaties,' (2002) 39 *Common Market Law Review* 1255, 1281-3; K. Lenaerts and D. Gerard, 'The Structure of the Union According to the Constitution for Europe: The Emperor is Getting Dressed' (2004) 29 *European Law Review* 289, 290-98; P. Eleftheriadis, 'Constitution or Treaty?', The Federal Trust, Online Paper 12/04 (July 2004); N. Walker, 'After the Constitutional Moment', Federal Trust, Online Paper 32/03 (November 2003).

³ See the *Treaty on European Union*, Art. 48 and the *Draft Treaty*, Art. IV-8.

⁴ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, signed at Lisbon, 13 December 2007.

⁵ I refer here to the European Community bearing in mind the original existence of three separate Communities (ECSC, EEC and Euratom) and the later development of the European Union.

⁶ *Van Gend en Loos v Nederlandse Administratie Der Belastingen* [1963] ECR 1; [1963] CMLR 105, para [12]; *Parti Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339, 1365; [1987] 2 CMLR 343, para [23].

⁷ See P. Pescatore, 'International Law and Community Law—A Comparative Analysis' (1970) 7 *Common Market Law Review* 167; E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 74 *American Journal of International Law* 1; F. Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review* 595; J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

⁸ Compare D. Wyatt, 'New Legal Order, or Old?' (1982) 7 *European Law Review* 147; T. Hartley, 'The Constitutional Foundations of the European Union' (2001) 117 *Law Quarterly Review* 225; T. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 *Harvard International Law Journal* 389; B. de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order' in P. Craig and G. de Búrca, *The Evolution of EU Law* (Oxford University Press, 1999). See also *Manfred Brunner v European Union Treaty* [1994] 1 CMLR 57.

⁹ See the articles cited in notes 7 and 8 above.

¹⁰ See, eg, T. Hartley, 'Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community' (1986) 34 *American Journal of Comparative Law* 229; K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205; F.E. Dowrick, 'A Model of the EC Legal System' (1983) 3 *Yearbook of European Law* 169, 234-7; W. Wallace, 'Europe as a Confederation: The Community and the Nation-State' (1982) 21 *Journal of Common Market Studies* 57.

¹¹ Compare J.H.H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (Cambridge, 2003).

¹² P. Eleftheriadis, 'Begging the Constitutional Question' (1998) 36(2) *Journal of Common Market Studies* 255.

¹³ Most prominently in N. McCormick, *Questioning Sovereignty: Law, State, and Practical Reason* (Oxford, 1999); M. Wind, *Sovereignty and European Integration: Towards a Post-Hobbesian Order* (London, 2001); N. Walker (ed), *Sovereignty in Transition* (Oxford, 2003).

¹⁴ See the sources referred to in notes 7 and 8 above and notes 16-18 below.

¹⁵ A.K. Koekoek, 'Inleiding', in A.K. Koekoek, (ed.), *Bijdragen aan een Europese grondwet* (Deventer, 2000), 3-4. (Translation: 'Yet the differences in form between a constitution and a treaty are not as great as prima facie appears. A treaty is altered only through an agreement between states, but likewise a constitution is created through an agreement between the organs having the competence to revise the constitution. The alteration of a treaty requires unanimity, but through a protocol to a treaty, a partial number of the member countries (still by unanimity) can decide to cooperate in respect of further matters. As well, constitutions can in certain instances only be altered by the agreement of all the constituent states, as is the case under the Canadian Constitution in respect of any change to the monarchical form of government [Constitution Act, 1982, Art 41]. The [Canadian] Constitution also allows provinces to 'opt out' of constitutional alterations which concern the limits of their competences [Art.38(3)].'. See also K. Lenaerts and M. Desomer, 'New Models of Constitution-Making in Europe: The Quest for Legitimacy' (2002) 39 *Common Market Law Review* 1217, 1221, n 17; Sergio Fabbrini, 'Is the EU Exceptional? The EU and the US in Comparative Perspective', in Fabbrini (ed), *Democracy and Federalism in the European Union and the United States* (Routledge, 2005), 10-11.

¹⁶ T. Sandalow and E. Stein (eds), *Courts and Free Markets: Perspectives from the United States and Europe* (Oxford, 1982).

¹⁷ M. Cappelletti, M. Secombe and J.H.H. Weiler (eds), *Integration Through Law: Europe and the American Federal Experience*, 6 vols (Berlin, 1986-).

¹⁸ M. Tushnet (ed), *Comparative Constitutional Federalism: Europe and America* (Greenwood, 1990); M. Burgess, *Federalism and European Union: The Building of Europe, 1950-2000* (Routledge, 2000); K. Nicolaidis and R. Howse (eds), *The Federal Vision: Legitimacy and Levels of Government in the United States and the European Union* (Oxford, 2001); L.F. Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Johns Hopkins 2001); D. McKay, *Designing Europe: Comparative Lessons from the Federal Experience* (Oxford, 2001); Andreas Heinemann-Grüder (ed), *Federalism Doomed? European Federalism Between Integration and Separation* (Berghahn, 2002); Sergio Fabbrini (ed), *Democracy and Federalism in the European Union and the United States* (Routledge, 2005); Søren Dosenrode (ed), *Approaching the European Federation?* (Ashgate, 2007). See also C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity?: Responses to Joschka Fischer* (Jean Monnet Center, 2000).

- ¹⁹ Most notably, the articles by Hartley and Lenaerts cited in note 10 above.
- ²⁰ For an account which places the many similarities as well as the important differences into perspective, see D.J. Elazar, 'The United States and the European Union: Models for Their Epochs' in Nicolaidis and Howse, *The Federal Vision*.
- ²¹ See E. Stein, *Thoughts on a Bridge: A Retrospective of Writings on New Europe and American Federalism* (Ann Arbor, 2000).
- ²² Stein, 'Making of a Transnational Constitution'. For recognition of the significance of this essay, see J.H.H. Weiler, *The Constitution of Europe* (Cambridge, 1999), 225-6; A. Stone Sweet, 'Constitutional Dialogues in the European Community', in A.M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds), *The European Court and National Courts—Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford, 1998), 306, n 2. But also see J.H.H. Weiler, 'Supranationalism Revisited—Retrospective and Prospective: The European Communities After Thirty Years' (1981) 1 *Yearbook of European Law* 267.
- ²³ E. Stein, 'Treaty-Based Federalism, A.D. 1979: A Gloss on Covey T. Oliver at the Hague Academy' (1979) 127 *University of Pennsylvania Law Review* 897, discussing C. Oliver, 'The Enforcement of Treaties by a Federal State' (1974) 1 *Recueil Des Cours* 331.
- ²⁴ Covey, 'Enforcement of Treaties', 343-4.
- ²⁵ Stein, 'Treaty-Based Federalism', 900.
- ²⁶ Oliver, 'Enforcement of Treaties', 343, citing *United States v Curtiss-Wright Export Corp.* 229 U.S. 304 (1936); *United States v California* 332 U.S. 19 (1947); *Zschernig v Miller* 389 U.S. 429 (1968).
- ²⁷ Oliver, 'Enforcement of Treaties', 344.
- ²⁸ Oliver, 'Enforcement of Treaties', 344, 390-94.
- ²⁹ Oliver, 'Enforcement of Treaties', 394.
- ³⁰ Stein, 'Treaty-Based Federalism', 900, citing *McCulloch v Maryland* 17 U.S. 316 (1819) and *United States v Curtiss-Wright Export Corp.* 229 U.S. 304 (1936).
- ³¹ Stein, 'Treaty-Based Federalism', 900-901.
- ³² Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 1.
- ³³ Stein, 'Treaty-Based Federalism', 900-901.
- ³⁴ For a similar, early reliance on *McCulloch v Maryland*, see, eg, S. Krislov, C.-D. Ehlermann and J.H.H. Weiler, 'The Political Organs and the Decision-Making Process in the United States and the European Community', in Cappelletti, Seccombe and Weiler, *Integration Through Law*, Vol. 1, Bk. 2 (1986), 13-16. See also in the same volume: M. Cappelletti and D. Golay, 'The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration', 306-309.
- ³⁵ For example, Stein's essay is cited on this point by Hartley, 'Federalism, Courts and Legal Systems', 231, n 12, and both Hartley and Stein are subsequently cited by Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 208, n 9.
- ³⁶ Compare also the 'treaty-oriented' interpretations of Wyatt, 'New Legal Order, or Old?' and O. Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Legal Order' (1999) 10 *European Journal of International Law* 763, and see A. Dashwood, 'States in the European Union' (1998) 23 *European Law Review* 201.

- ³⁷ See T. Hartley, *Constitutional Problems of the European Union* (Oxford, 1999), chs 7-9; Schilling, 'Autonomy of the Community Legal Order'; D. Grimm, 'Does Europe Need a Constitution?' (1995) 1 *European Law Journal* 282, 288-91; P. Kirchhof, 'The Balance of Powers Between National and European Institutions' (1999) 5 *European Law Journal* 225, 226-7. For critiques, see P. Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7(2) *European Law Journal* 125, 130-34; J. Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution"' (1995) 1 *European Law Journal* 303; J.H.H. Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1 *European Law Journal* 219.
- ³⁸ Grimm, 'Does Europe Need a Constitution?', 287, 290; Schilling, 'Autonomy', 391.
- ³⁹ Hartley, *Constitutional Problems*, 129. See, likewise, B. de Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition' in Slaughter et al, *The European Court and National Courts*, 302.
- ⁴⁰ Schilling, 'Autonomy', 395.
- ⁴¹ Kirchhof, 'The Balance of Powers', 229-30, 238. For a discussion, see Weiler, 'Does Europe Need a Constitution?', 224-31; de Witte, 'Sovereignty and European Integration', 299-300.
- ⁴² F. Mancini, 'The Case for Statehood' (1998) 4 *European Law Review* 29; Mancini, 'Making of a Constitution'; J.C. Piris, 'Does the European Union Have a Constitution? Does it Need One?' (1999) 24 *European Law Review* 557. For contrary views, see J.H.H. Weiler, 'Europe: The Case Against the Case for Statehood' (1998) 4 *European Law Review* 43; P. Craig, 'Constitutions, Constitutionalism, and the European Union'. Compare also J. Habermas, 'So, Why Does Europe Need a Constitution?', European University Institute, Robert Schuman Centre of Advanced Studies (2001).
- ⁴³ Mancini, 'Making of a Constitution', 595-6; 'Case for Statehood', 29-31.
- ⁴⁴ Mancini, 'Case for Statehood', 31.
- ⁴⁵ Mancini, 'Case for Statehood', 35, 39-42. Compare J. Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration', in Joerges, et al, *What Kind of Constitution*, 19-30.
- ⁴⁶ Piris, 'Does the European Union have a Constitution?', 575-6.
- ⁴⁷ Piris, 'Does the European Union have a Constitution?', 566-7.
- ⁴⁸ See, in particular, MacCormick, *Questioning Sovereignty*; N. MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1; Weiler, *Constitution of Europe*; Wind, *Sovereignty and European Integration*; Weiler and Wind, *European Constitutionalism*. See also S. Weatherill, 'Is Constitutional Finality Feasible or Desirable? On the Cases for European Constitutionalism and a European Constitution' in M. Andenas and J. Usher (eds), *The Treaty of Nice* (Oxford, 2003); K. Nicolaidis, 'We, the Peoples of Europe ...' (2004) 83 *Foreign Affairs* 97.
- ⁴⁹ Compare MacCormick, *Questioning Sovereignty*, 118-121; Weiler, 'Does Europe Need a Constitution?', 238, 248, 251; *Constitution of Europe*, 233-4, 271, 338-9, 270-71.
- ⁵⁰ Weiler, *Constitution of Europe*, 269, 271, 341.
- ⁵¹ Weiler, 'In Defence of the Status Quo', 10-11; 'Against Statehood', 54.
- ⁵² See Lenaerts and Desomer, 'New Models of Constitution-Making', 1220-21; Lenaerts and Gerard, 'Structure of the Union', 294-5, drawing on I. Pernice, 'Multilevel Constitutionalism

and the Treaty of Amsterdam: European Constitutionmaking Revisited?' (1999) 36 *Common Market Law Review* 703.

⁵³ Compare J.H.H. Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*', in Weiler and Wind, *European Constitutionalism*, 10; J.H.H. Weiler and J. Trachtman, 'European Constitutionalism and Its Discontents' (1997) *Nw. J. Int. L. & Bus.* 354, 384.

⁵⁴ Nicolaïdis, 'We the Peoples of Europe ...', 10; N. MacCormick, 'Democracy, Subsidiarity, and Citizenship in the "European Commonwealth"' (1997) 16 *Law and Philosophy* 331, 341-2.

⁵⁵ MacCormick, 'Democracy, Subsidiarity, and Citizenship', 335; Lenaerts and Desomer, 'New Models', 1252, n 133.

⁵⁶ See, eg, Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 209-10; Lenaerts and Desomer, 'New Models', 1222; Lenaerts and Gerard, 'Structure of the Union', 313-14; Pernice, 'Multilevel Constitutionalism', 709.

⁵⁷ J.H.H. Weiler, 'A Constitution for Europe? Some Hard Choices' (2002) 40 *Journal of Common Market Studies* 563, 566-77; 'In Defence of the Status Quo', 8; *Constitution of Europe*, 328.

⁵⁸ See G. Jellinek, *Die Lehre von den Staatenverbindungen* (Wien, 1882); *Allgemeine Staatslehre* (1st ed., Berlin, 1900); J. Story, *Commentaries on the Constitution of the United States*, (1st ed., Boston, 1883). See also L. Le Fur, *Etat fédéral et confédération d'Etats* (Paris, 1896); *Chisholm v Georgia* 2 US (2 Dall) 419 (1793), 453-7 (Wilson J).

⁵⁹ See, eg, Story, *Commentaries*, Bk. III, ch. 3.

⁶⁰ See O. Beaud, 'La notion de pacte fédératif. Contribution à une théorie constitutionnelle de la Fédération', in J-F. Kervégan and H. Mohnhaupt (eds), *Liberté sociale et lien contractuel dans l'histoire du droit et de la philosophie* (Frankfurt, 1999); N.T. Aroney, 'A Commonwealth of commonwealths: Late nineteenth century conceptions of federalism and their impact on Australian federation, 1890-1901' (2002) 23(3) *The Journal of Legal History* 253; S. Mogi *The Problem of Federalism: A Study in the History of Political Theory* (London, 1931).

⁶¹ Compare H. Kelsen, *General Theory of Law and State* (New York, 1961), 303-327; *Principles of International Law* (New York, 1952), 168-174, who restricted the distinction to the question whether the member states were recognised as sovereign nation-states at international law. See C. Leben, 'Hans Kelsen and the Advancement of International Law' (1998) 9 *European Journal of International Law* 287.

⁶² See, likewise, A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (5th ed., London, 1897), 130-55; K. Wheare, *Federal Government* (4th ed., New York, 1967), 1-3, 10-14.

⁶³ A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia, 1953) at 474; W. Kunkel, *An Introduction to Roman Legal and Constitutional History* (Oxford, 1973) at 38.

⁶⁴ J.A. Simpson and E.S.C. Weiner, (eds), *Oxford English Dictionary* (2nd ed.; Oxford, 1989), sv 'federal'; J. Pokorny, *Indogermanisches Etymologisches Wörterbuch* (Bern, 1951), 117; S.E. Mann, *An Indo-European Comparative Dictionary* (Hamburg, 1984), 70-71, 90.

⁶⁵ Undoubtedly, the standard interpretive framework of international law locates sovereignty in the nation-state, with the capacity to represent the state ordinarily vested in the executive government of the state (see Vienna Convention on the Law of Treaties (1969), Art. 7(2)), whereas domestic interpretative frameworks, particularly since the nineteenth century, have conventionally located sovereignty in 'the people' of the nation as a whole.

- ⁶⁶ See the United States Articles of Confederation (1781), Art. XIII.
- ⁶⁷ United States Constitution (1789), Art. VII.
- ⁶⁸ The Articles of Confederation and the Constitution were different on this point. Other significant differences concerned the composition, powers and voting rules of the federal legislature, as well as the amendment formula.
- ⁶⁹ On the question of state and federal sovereignty, compare F. McDonald, *States' Rights and the Union: Imperium in Imperio, 1776-1876* (Lawrence, 2000); J.N. Rakove, *The Beginnings of National Politics* (New York, 1979), 164-73; G.S. Wood, *The Creation of the American Republic, 1776-1787* (New York, 1993), 354-63; M. Jensen, J.P. Kaminski and G.J. Saladino, (eds) *The Documentary History of the Ratification of the Constitution* (Madison, 1976-), 1:52-7, 79-86.
- ⁷⁰ *McCulloch v Maryland*, 17 U.S. 316 (1819), 403.
- ⁷¹ *McCulloch v Maryland*, 17 U.S. 316 (1819), 402.
- ⁷² For a recent decision in which this question was considered, see *US Term Limits, Inc v Thornton* 514 US 779 (1995). A compactual interpretation of the Australian Constitution was also rejected in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, but the 'federative' foundations of the system continue to influence constitutional interpretation, as for example in *McGinty v Western Australia* (1996) 186 CLR 140. The decisions of the Supreme Court of Canada referred to in note 74 below suggest a similar pattern.
- ⁷³ See N.T. Aroney, *The Constitution of a Federal Commonwealth* (Cambridge, 2009), chs 5 and 6.
- ⁷⁴ See G.P. Browne (ed), *Documents on the Confederation of British North America* (Toronto, 1969); *Reference re: Amendment of the Constitution of Canada* [1981] 1 SCR 753; *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.
- ⁷⁵ See *Attorney-General (Australia) v Colonial Sugar Refining Co* [1914] AC 237, 252-4; K.C. Wheare, *Federal Government* (Oxford, 1947), 22; J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney, 1901), vii.
- ⁷⁶ J.F. Aubert, *Traité de Droit Constitutionnel Suisse* (Neuchâtel, 1967), 34-8. See also J.F. Aubert, *Petit Histoire Constitutionnelle de la Suisse* (Bern, 1974); N. Schmitt, *Federalism: The Swiss Experience* (Pretoria, 1996).
- ⁷⁷ For more detail, see Aroney, *Constitution of a Federal Commonwealth*, chs 1-2.
- ⁷⁸ See J. Burgess, *Political Science and Comparative Constitutional Law* (Boston, 1890), 1:51-5, 57-8, 72-6, 88, 101; II:4-9, 184.
- ⁷⁹ For a later statement of this view, see J. Austin, *The Province of Jurisprudence Determined* (London, 1954), 245-6.
- ⁸⁰ See Burgess, *Political Science*, I:90, 107, 142-5, 151-4; II:49, 115.
- ⁸¹ See P.W. Hogg 'Formal Amendment of the Constitution of Canada' (1992) 55 *Law and Contemporary Problems* 253.
- ⁸² United States Constitution, Art. V; Australian Constitution, s. 128. See H.P. Monaghan, 'We the People[s], Original Understanding, and Constitutional Amendment' (1996) 96 *Columbia Law Review* 121.
- ⁸³ See, eg, Australian Constitution, s 51(37) and compare s 51(38) with the unanimity requirement in the *Australia Acts 1986* (UK and Cth), s 15. See Aroney, *Constitution of a Federal Commonwealth*, chs 11 and 12.

⁸⁴ German Basic Law, Preamble, Art. 20; Austrian Basic Law, Art. 1; Belgian Constitution, Arts. 1, 33; Spanish Constitution, Arts. 1, 2. On integrative and devolutionary federalism, see Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 206-7.

⁸⁵ The Preamble to the United States Constitution must be read with Arts. V and VII as well as with the Tenth Amendment. Compare the Preambles to the Swiss, Canadian and Australian Constitutions, as well as, in particular, the Swiss Constitution, Arts. 1 and 3.

⁸⁶ See H.J. Powell, 'The Oldest Question of Constitutional Law' (1993) 79 *Virginia Law Review* 633.

THE FEDERAL TRUST

for education & research

enlightening the debate on good governance

The Federal Trust is a think tank that studies the interactions between regional, national, European and global levels of government. Founded in 1945 on the initiative of Sir William Beveridge, it has long made a powerful contribution to the study of federalism and federal systems. It has always had a particular interest in the European Union and Britain's place in it. The Trust works to achieve its aims through conferences, study groups and publications.

The Federal Trust has no allegiance to any political party. It is registered as a charity for the purposes of education and research.

Recent publications include:

A More Coherent and Effective European Foreign Policy? Working Group Report

A Federal Scotland Within a Federal UK, by Andrew Blick

Federalism and the British, edited by S. Henig, ISBN 978-1-903403-88-4

Towards a Global Sharing of Sovereignty (European Essay No. 44), by M. Corner

Altiero Spinelli's European Federal Odyssey (European Essay No. 43), by J. Pinder

Publications, and details of how to order them, as well as information about forthcoming events are available on our website at:

www.fedtrust.co.uk

Published by:

The Federal Trust for Education and Research

31 Jewry Street
London EC3N 2EY
United Kingdom
Tel: 020 7320 3045
info@fedtrust.co.uk

Registered Charity No. 272241

Company Registered in London No. 1269848

www.fedtrust.co.uk