

TREATY-BASED FEDERALISM, A.D. 1979:  
A GLOSS ON COVEY T. OLIVER AT THE  
HAGUE ACADEMY

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It is next to absurd for one not more than a few months Oliver's junior to participate in a tribute for a man who willfully—without any apparent reason—chose to retire early from teaching, an act tantamount to desertion under fire. Still, it is comforting that I am asked to praise, not to bury, a close professional associate and an even closer friend of some thirty years. A scholar, teacher, diplomat, Oliver has been a commanding figure, combining superb erudition and unique professional experience with a warm, outgoing personality and an irresistible, down-to-earth sense of humor.

While profoundly concerned with the "universal normative order" as the underpinning of the global system, Oliver has been attracted by the emerging regional subsystems and their regional orders: Latin America, the backyard of his youth to which he returned as his country's envoy, and Western Europe. He has been interested in post-World War Europe for two reasons: first, as a target of the American entrepreneur and his legal advisor, because, to quote his inimitable yet typical remark at the 1977 ABA National Institute, "[I]t is not perfect, but the European Economic Community area is still the best piano player United States direct foreign investment can find, this little old world 'round"; and second, because he has recognized the evolving new public law of Europe as the most advanced transnational legal order, an inspiration—despite its serious tensions and contradictions—if not a model, for other regions of this planet.

I should like to reflect here briefly on this latter interest in Europe, relying on the lectures that Oliver delivered at the Hague Academy of International Law, entitled *The Enforcement of Treaties by a Federal State*.<sup>1</sup>

Although this attractive bouquet of lectures focused on a comparative analysis of federal treaty enforcement systems, it raised some fundamental questions about the status of modern federalism. Specifically, Oliver explored whether or not federalism is "declining," whether there is such a thing as a treaty-based federation and

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<sup>1</sup> Oliver, *The Enforcement of Treaties by a Federal State*, in I RECUEIL DES COURS 331 (1974).

whether it is legitimate to classify the European Community as "an incipient," or "semi- or, perhaps, meta-federal structure for governance"? These questions were asked—and answered—more than five years ago, a substantial segment of time in our era of change. Have Oliver's answers stood the test of time?

### *A. Federalism Declining?*

Out of some 140 (now some 160) entities recognized as states, Oliver observes, not more than a dozen are federal in form. "[N]o independent observer has been found who would classify the Soviet Union as a functioning federalism,"<sup>2</sup> and there is "substantial doubt" on this score concerning the Federal Republic of Brazil and other socialist and non-socialist federations which are also essentially "*de facto* unitary States."<sup>3</sup> The list of formally federal states that do have realistic claims to being functioning federal structures is thus reduced to a handful: Australia, Austria, Canada, the Federal Republic of Germany, India, Malaysia, Switzerland, and the United States. Oliver suggests, however, two additional dimensions: "(i) the partial federation known as the European Communities and (ii) the possibilities for federalism as the road to regionalism elsewhere."<sup>4</sup> While federalism "may not be growing—indeed may be declining—in national State systems, it is growing and probably will continue to grow in regional systems and thus to be a major means for evolution beyond the present structure of the world community."<sup>5</sup>

Today, the diagnosis of the state of federalism must be, if anything, even more tentative. Admittedly, the trend toward increased centralization has continued in the Federal Republic of Germany and—it has been generally assumed—in the United States as well. However, federal revenue-sharing legislation has increased the financial clout of the states, and the current political rhetoric directed against the remote central government and its bureaucracy has brought about some loosening of federal controls over regulated industries. There has also been a certain resurgence of regional feelings and solidarity, and some support for allowing the states a greater margin of freedom in matters of strong local or regional interest. In 1976, for the first time since the early New Deal era, the Supreme Court of the United States invalidated the application

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<sup>2</sup> *Id.* 346.

<sup>3</sup> *Id.* 347.

<sup>4</sup> *Id.* 348.

<sup>5</sup> *Id.*

of a regulatory act of Congress to state government activities as an unconstitutional intrusion on state sovereignty.<sup>6</sup> But it would be most improvident to view this five-to-four decision as a swallow heralding a new summer for judicial federalism in this country. In fact, persistent demands for additional health, education, and welfare services, for consumer and environmental protection, and for industrial subsidies have resulted in still further centralization and more bureaucracy. Apart from the exasperation with the overgrown central bureaucracy, the primary issue of the day in the American federal system has been the power contest between the federal Congress and the post-imperial Presidency, rather than a question of federal against state power. Overbureaucratization, we may note in passing, is perhaps accentuated by, but is certainly not confined to, federal structures. In the neighboring Canadian federation, putting aside the worst-case scenario of disintegration, the trend surely does not point away from some form of federalism if the country is to remain a viable nation-state.

In Europe, remarkable mutations are taking place in some of the archetypal unitary states which may portend a greater role for federalist patterns in the future. In Italy, the "regions," which until recently were little more than a constitutional mirage, have now been given a firm statutory basis, and regional assemblies have been elected whose legislation is subject to review by a central judiciary. Belgium is galloping toward a federal framework that is apparently viewed as the only system capable of containing the linguistic problem. In France, the Napoleonic centralism is subject to considerable stress by regional interests ranging from Brittany to Corsica, and by a growing demand for increased local participation in governance—a trend manifested not only in politics, but also in economic life and in education. Evidence of similar pressures has appeared in the new Spain as well. However, perhaps the most unexpected developments have occurred in the United Kingdom, where the Dicey-fostered (if not manufactured) myth of "parliamentary sovereignty" has been under some stress in the face of new realities. No lesser authority than Lord (then Lord Justice) Scarman has raised the need for a "new constitutional settlement" that would assure in Britain the continued observance and normative superiority of the European Community legal order and also the enforcement of the European Bill of Rights, accepted by the United Kingdom in the European Convention on Human Rights with its transnational institutions, the Commission and the Court of Human

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<sup>6</sup> National League of Cities v. Usery, 426 U.S. 833 (1976).

Rights. Last but not least, the currently debated "devolution" of power from Westminster to Scotland and possibly to Wales may mark the end of the classic United Kingdom structure and would require an umpiring function between the central and regional authorities. Lord Scarman's solution would include "entrenched provisions (including a Bill of Rights)" and a "Supreme Court of the United Kingdom charged with the duty of protecting the Constitution."<sup>7</sup>

If federalism in mature federations reveals a continuing accretion of central regulatory authority, it is in a sense paradoxical to see in the United Kingdom, as well as in Belgium and Italy, a re-allocation of power from national governments to subnational regions. The just mentioned European transnational arrangements also reduce or restrain national power, in favor, however, of the new transnational institutions. Clearly, complex and often conflicting forces are at work here. It should become clearer by the end of this century whether, in this tri-level perspective, the traditional "sovereign" nation-state system will be replaced in Europe by a structure of a still undetermined shape, marked by a heavier reliance on the ethnically, linguistically, or economically based regions on one hand, and the transnational institutions on the other.

### *B. Treaty-Based Federalism*

Another fistful of nettles grasped by Oliver is the question whether there is such a thing as a treaty-based federalism. For whatever it may be worth, one may recall the argument that, concurrent with the separation from Great Britain, the thirteen states in North America were "in a state of Nature toward each other," and the Union was formed by a "compact" among them rather than by a constitution written by the "people." The Supreme Court rejected the "compact" doctrine in *McCulloch v. Maryland*,<sup>8</sup> and later again in the context of Justice Sutherland's fanciful theory of external sovereignty.<sup>9</sup> One may speculate, however, whether the course of federalism in the United States would have been significantly different—all other factors remaining equal—if the "compact" view of the formation of the Union had been generally accepted.

A more fruitful line of inquiry is the problem whether the European Community, which is exclusively treaty-based, may be

<sup>7</sup> LORD SCARMAN, *ENGLISH LAW—THE NEW DIMENSION* 27, 81 (1974).

<sup>8</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>9</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

legitimately viewed as an incipient federal structure. Although the final returns obviously are not in as yet, it is probably safe to say—at the risk of ruffling some positivist-formalist feathers—that from a strictly normative viewpoint it has made little difference that the Community was established by a network of treaties rather than by a formal constitution. This is due primarily to the impact of the Court of Justice whose case law was adumbrated by Oliver and brought up to date most recently by Professors Casper, Bridge, and Riesenfeld.<sup>10</sup>

From its inception, the Court of Justice has construed the European Economic Community Treaty in a constitutional mode rather than employing the international law methodology of treaty interpretation. The Treaty, the Court held, is more than an ordinary international agreement creating mutual obligations between states parties: it created “a new legal order” in which members have limited their sovereignty, and it conferred rights and imposed obligations, not only on the member states, but also directly on nationals of the member states which national courts must enforce.<sup>11</sup> Article 189 of the Treaty mandates that Community “regulations,” a form of legislation enacted by Community institutions, are “directly applicable” law in national courts and administrative agencies.<sup>12</sup> The Court has, however, progressively expanded the concept of directly applicable Community law to comprise all provisions in the constitutive Treaty itself and all Community acts that do not require further implementation by either the national or the Community institutions, and thus are capable of being given direct effect.<sup>13</sup> As a consequence, the question whether an individual party is able to enforce a right derived directly from a given Community law provision has turned increasingly on issues such as the purpose of the provision (whether it purported to create a “private cause of action” in addition to its regulatory purpose), on standing to sue before the Court of Justice itself, or on the selec-

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<sup>10</sup> Casper, *Remarks, The Emerging European Constitution*, 1978 *Proc. AM. Soc'y INT'L L.* 169; Bridge, *Remarks, The Emerging European Constitution*, 1978 *Proc. AM. Soc'y INT'L L.* 176; Riesenfeld, *Remarks, The Emerging European Constitution*, 1978 *Proc. AM. Soc'y INT'L L.* 183.

<sup>11</sup> Case 26/62, *N.V. Algemene Transport—en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, [1963] *E.C.R.* 1. See also Case 6/64, *Costa v. ENEL*, [1964] *E.C.R.* 585.

<sup>12</sup> Treaties establishing the European Communities, Office for Official Publications of the European Communities 171 (1973); Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 *U.N.T.S.* 3.

<sup>13</sup> See, e.g., P. PESCATORE, *THE LAW OF INTEGRATION* 92-93 (1974); E. STEIN, P. HAY & M. WAELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* 185-201 (1976).

tion of a proper remedy before national tribunals, which under article 177 of the Treaty must certify questions of Community law to the Court of Justice for a "preliminary ruling."<sup>14</sup> The way the Court of Justice has defined the scope and, as we shall see below, the effect of a "directly applicable" provision has little similarity to Chief Justice Marshall's definition of a "self-executing" treaty provision.<sup>15</sup>

In a companion line of cases, reflecting at times a spirited dialogue with the highest national tribunals, especially the Italian Constitutional Court, the Court of Justice established the rule that in the event of a conflict between Community law and national law, national courts must apply Community law over prior, subsequent, and even constitutional national law. In the latest of this group of cases, the Court held in 1978 that an Italian court must disregard national law conflicting with Community law as soon as it is faced with the conflict in a case before it, and may not wait for an adjudication by the Constitutional Court as would have been required by the Italian procedure.<sup>16</sup> Commenting on this latest exuberant decision, two British constitutional experts exclaimed: "This may be good Community Law, but I submit that it is not good British Constitutional Law,"<sup>17</sup> and "[T]his is exactly what our most fundamental constitutional rule forbids."<sup>18</sup>

The European Economic Community Treaty contains no supremacy clause but the Court of Justice discovered one in the interstices of the new legal order. Moreover, the Court turned its relatively slim jurisdictional base into a procedure approximating appellate review of national law for conformity with Community law. The result is reminiscent of John Marshall's combined creations in *Marbury v. Madison*,<sup>19</sup> *McCulloch v. Maryland*,<sup>20</sup> and *Gibbons v. Ogden*.<sup>21</sup>

<sup>14</sup> See note 12 *supra*.

<sup>15</sup> *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

<sup>16</sup> *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, [1978] E.C.R. 629; for a collection of Italian comments on this case, see *IL PRIMATO DEL DIRITTO COMMUNITARIO E I GIUDICI ITALIANI* (F. Angeli ed. 1978).

<sup>17</sup> Professor Hood-Phillips, quoted in Ganshoff van der Meersch, *L'Arrêt du 9 Mars 1978 de la Cour de Justice des Communautés Européennes et la Règle de l'Application Directe du Droit Communautaire dans le Droit Interne des États Membres*, 55 *REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ* [R.D.I.D.C.] 24, 39 n.55 (1978).

<sup>18</sup> Professor Wade, quoted in Ganshoff van der Meersch, *supra* note 17, at 39 n.55.

<sup>19</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>20</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>21</sup> 22 U.S. (9 Wheat.) 1 (1824).

In a third line of cases of significant constitutional import, also noted by Oliver, the Court dealt with the Community's status in international law. International law, the Court held, is supreme in the Community, and therefore a national court must apply a "directly applicable" provision of a treaty between the Community and a third state even if it should conflict with Community law.<sup>22</sup> Relying again not just on the text of the Treaty, but on its "esprit" and "economie," the Court refused to limit the Community's power to enter into international agreements with third states to instances expressly authorized in the Treaty and proceeded to define the Community's treaty-making power as paralleling in subject matter its internal law- and policy-making competence.<sup>23</sup> This definition, although aptly termed as "the exact reverse of *Missouri v. Holland*,"<sup>24</sup> has had a similar effect of extending the central treaty-making power, and it has been broadened still somewhat further in cases handed down since Oliver's lectures.<sup>25</sup>

The extent to which judicial authorities in the member states have accepted the Court's jurisdiction and rulings is nothing short of remarkable, all the more so because the opinions called for important adjustments in national constitutional practice, including the introduction of judicial review of national legislation in those member states where it was unknown.

The exceptions to the general acceptance which Oliver describes as "discontinuities" have until most recently proved less serious than one might have anticipated. In the *Internationale Handelsgesellschaft*<sup>26</sup> case that Oliver analyzes in this context, the German Federal Constitutional Court did not reject the principle of Community law supremacy, nor did it invalidate a Community act that the Court of Justice earlier upheld. The Constitutional Court indicated, however, with three justices dissenting, that "in an exceptional case" it may refuse enforcement of a Community law if it finds that the law deprives an individual citizen of one of the fundamental rights enumerated in the German Basic Law (Constitution). This position—echoed also by the Italian Constitutional Court—is justified, the German Court explained, "by the present

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<sup>22</sup> Joint Cases 21-24/72, *International Fruit Co. N.V. v. Produktschap voor Groenten en Fruit*, [1972] E.C.R. 1219.

<sup>23</sup> Case 22/70, *Commission of the European Communities v. Council of the European Communities*, [1971] E.C.R. 263.

<sup>24</sup> Riesenfeld, *supra* note 10, at 185.

<sup>25</sup> See, e.g., Cases 3/76, 4/76, 6/76, *In re Kramer*, [1976] E.C.R. 1279.

<sup>26</sup> *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, 37 BVerfGE 271 (1975), [1974-2] Comm. Mkt. L.R. 540.

state of integration of the Community.”<sup>27</sup> At this stage, the majority opined, the Community lacks appropriate institutions for resolving a conflict of this nature: the lawmaking is in the hands of the executive (the Council of Ministers with the executive Commission) rather than a democratically elected parliament, and no “codified catalogue of fundamental rights”<sup>28</sup> exists in the Community law.

Responding, as it were, to this reservation of national judicial power, the Court of Justice reaffirmed the rule of an unqualified supremacy of Community law, but indicated that it will itself protect basic individual rights as a “part of the general principles of law,”<sup>29</sup> taking account of “constitutional traditions common to the Member States”<sup>30</sup> and “international treaties for the protection of human rights on which Member States have collaborated.”<sup>31</sup> In a later case, the Court of Justice referred to the European Human Rights Convention to which all nine member states are parties as an appropriate source, suggesting a link between the two, thus far separate, aspects of the emerging European constitutional system.<sup>32</sup>

The venerable and haughty French Conseil d'Etat, which in an early notorious case refused to certify a genuine question of Community law to the Court of Justice,<sup>33</sup> has subsequently followed the proper procedure, as did the courts in the other member states. However, in a 1978 decision, the Conseil refused to give direct effect in French law to a Community act (a “directive”) which the Court of Justice held to be self-executing despite the fact, relied upon by the Conseil, that according to the letter of the Treaty any “directive” required implementation by national institutions.<sup>34</sup> The Conseil's decision, rendered in what was essentially a moot case, constitutes the first act of open defiance of the Community Court's authority as an umpire between Community and national power, and a rejection of the Court's basic approach to the constitutive Treaty. The Conseil d'Etat has added its voice to the still sporadic but strident criticism of the Court in certain French political and

<sup>27</sup> [1974-2] Comm. Mkt. L.R. at 550. For the Italian Constitutional Court case, see *Frontini v. Ministero delle Finanze*, [1974-2] Comm. Mkt. L.R. 372.

<sup>28</sup> *Id.* 551.

<sup>29</sup> Case 4/73, *Nold v. Commission of the European Communities*, [1974] E.C.R. 491.

<sup>30</sup> *Id.* 507.

<sup>31</sup> *Id.*

<sup>32</sup> Case 36/75, *Rutili v. Minister for the Interior*, [1975] E.C.R. 1219.

<sup>33</sup> *In re Société des Pétroles Shell-Berre*, [1964] Comm. Mkt. L.R. 462 (Conseil d'Etat, France).

<sup>34</sup> *Minister of Interior v. Cohn-Bendit*, No. 11604, Dec. 22, 1978.

journalistic quarters, not unrelated to the electoral campaign for the European Parliament. There is no indication thus far that the Community Commission will want to stage a confrontation with the French Government by making use of its authority to hold France responsible before the Court of Justice for violating Community law.

This brief glance at the Community's living law readily reveals—behind the veil of the indigenous nomenclature and jargon—distinct federalist elements that meet the criteria suggested by Oliver for the phenomenon of treaty-based federalism. An inquiry into treaty-based transnational structures outside Europe, in Latin America and Africa, is beyond the confines of this gloss. Suffice it to say, however, that none of these structures possesses a judicial tribunal organized and functioning in a way comparable to the Court of Justice. It is appropriate at this point to cite Oliver's own conclusion:

Further reflection shows that the strongest parallel between successful national federations and the European "transnational" one is that in all of them judicial resolutions of issues of federalism by the highest judicial organ of the federation are accepted without resistance by the constituent State judicial organs. In a very real sense, the unifying force is respect for the "rule of law"—not merely in the conventional "inter-nation" sense of adherence to *pacta sunt servanda* as a basic principle of the international law of treaties—but of something more: a sense of sharing of normative hierarchy and of professional conditioning to work in an organic *corpus juris*. One might say of the partial federation of Europe: it exists and it functions because all the European judges involved live and work on that assumption and the politicians do not intervene against what the judges do.<sup>35</sup>

### C. The Caveats

This sunny view of the judicial role in Community building and, more generally, any positive appraisal of the Community as an incipient federal structure, calls for a series of caveats. First, the federal-type pattern functions only in areas of the customs union, free movement of factors of production, agriculture, aspects of social policy, competition, harmonization of legislation and of technical standards, and foreign commercial policy. In these areas the Com-

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<sup>35</sup> Oliver, *supra* note 1, at 394.

munity competence is delineated in the Treaty in more or less express terms. Beyond this, the Community organs were able, within limits and subject to some criticism (particularly in Great Britain), to invoke the "necessary and proper" powers in article 235 as a legal basis for expanding their legislative competence to new fields not mentioned in the Treaty, such as environmental and consumer protection. However, the federal-type pattern has not extended to the important "second generation" problems, such as the projected economic and monetary union, common energy, industrial research and development, and general regional policies. These are subject to a process of difficult and protracted intergovernmental negotiations with limited results thus far. These negotiations will not become any easier with the accession of Greece, Spain, and Portugal. The recent decision to launch a new "European Monetary System," backed up by a multi-billion credit fund, may prove a milestone on the road toward a common European currency, if the governments in fact take the planned progressive steps. Although the national governments are no longer able to use a variety of traditional instruments of national economic policy, they have been unwilling—due to domestic pressures—to transfer the additional economic and monetary policy powers to the Community and thus help create the necessary Community instrumentalities. Ernst Haas, whose "spill-over" theory of integration enjoyed great popularity in the heyday of the European unification movement, has invented a new, equally poetic term to describe the present state of affairs: the Community is, he writes, in a state of "asymmetric overlap."<sup>36</sup>

Second, because the Community's powers are confined in principle to the economic and social sectors, other vital areas remain within the exclusive competence of the "sovereign" member states—and therein lies another source of tension inherent in partial integration. Foreign commercial policy, traditionally an important tool of national foreign political policy, has come within Community orbit; however, foreign political policy itself remains within the exclusive competence of national authorities, subject only to voluntary consultation procedures in a system of committees of national diplomats, organized outside the Community framework.

The last caveat concerns the role of the Court of Justice itself. It is next to axiomatic—and the experience in the United States provides ample supportive evidence—that if a federal tribunal arrogates to itself judicial authority to define the line between federal

<sup>36</sup> E. HAAS, *THE OBSOLESCENCE OF REGIONAL INTEGRATION THEORY* 84 (1975).

and state power on the basis of more or less general constitutional language, it will invariably incline toward increasing the reach of the federation, with a concomitant increment in its own authority. This, as we have seen, has been happening—*mutatis mutandis*—in the Community as well. The critics of the Court have articulated two related concerns. First, it has been said that “in less than twenty years, the constitutionalization of European Community law has led to the point where, as in the United States, the supremacy of law seems to mean the supremacy of judges” with the “specter of substantive due process” looming over the Community and the “judges using very vague and general provisions to make policy decisions of great magnitude according to their own preference.”<sup>37</sup> In fact, although as Oliver points out, the Court did assert its power to apply “principles” such as “reasonableness” (or “proportionality” or “equality”) in adjudicating the compatibility of Community regulations with the constitutive Treaty, it has used this power sparingly; the number of Community legislative acts struck down as invalid has been minimal, and they were of little long-term importance. It cannot be seriously argued that the Court has thwarted or challenged the Community legislator. Of greater impact in this respect were the Court’s rulings bearing upon the validity of member states legislation and curtailing the competence of the member states, particularly in the fields of trade and marketing regulation, foreign relations, and sex discrimination in employment. In my judgment, however, the record is far from one justifying alarm. A more legitimate concern than judicial activism is the current slowdown in the integration process. The Court has constructed, as we have seen, a bold, over-arching doctrine which provides an effective base for a federal-type structure. On the other hand, the legislative process of shaping common policies from divergent national policies has not progressed significantly beyond the customs-union/common-market state. If anything, national economic policies in this decade have been drifting even further apart, thus blocking progress toward an economic unity. It is this contradiction that raises a legitimate apprehension that the Court may assume an excessive role in solving questions requiring political solutions, and that it may attempt to carry forward the process of integration beyond the basic political consensus on which its legitimacy depends. If the Community institutions were to be completed in the federal pattern, common policy decisions would logically be made in the European Parliament. That body, however, plays today only an advisory role

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<sup>37</sup> Casper, *supra* note 10, at 175.

in Community lawmaking, and the plan for direct elections by universal suffrage scheduled for June, 1979, does not contemplate a change in its formal powers. A lively debate has centered on the question whether the elected Parliament will succeed in increasing its authority in fact, if not in law. The very fact that the major political parties have been organizing and campaigning at the "European" level is of historic political significance.

The European federalism will remain "incipient"—and the integration partial—for some time to come, with no certainty whatsoever as to the ultimate form of transnational governance in Europe. Surely the accession of the three additional members, Greece, Spain, and Portugal, with different legal systems and relatively low levels of economic development, will not make things easier.

The events in the five years since Oliver completed his lectures confirm that where he chose to read the tea leaves of the institutional evolution in Europe, he read them well. It is my fervent hope that he will continue reading them in good health and with equal perspicacity for many years to come.