# Reading the Others: American Legal Scholars and the Unfolding European Integration

Giuseppe Martinico*

## Abstract

The aim of this paper is to analyze the perspective of American comparative lawyers with regard to the first steps of European integration. Between the 1950s and 1970s, a substantial debate on the 'strategies' of legal/political integration used by European political actors arose in several comparative legal reviews and journals. During those years, many authors from both sides of the Atlantic compared their perspectives on the comparability of American and European integration.

The general influence of the United States on the rise of the European Communities was deeply studied by scholars. For example, the well-known essay by Lundestad, *Empire by Integration*, demonstrates the great length and breadth of the studies in this field. Nevertheless, these analyses do not exhaustively cover the influence of 'American ideas' on the destiny of European integration.

This paper analyzes the earliest articles written by American scholars, such as Peter Hay and Eric Stein, in order to identify their possible influence on the activity of the following 'actors': the European Court of Justice (ECJ), the European Federalist Movement and, finally, scholars in the field of European legal studies.

## A. American Comparative Lawyers

As recent research in the legal field has demonstrated, European studies "should pay more attention to the legal discourse that sustains the conceptions of law and legal politics underlying European law."[1] In fact, legal scholars played a very important role in European scholarship, especially American ones, who contributed by providing a common vocabulary for the language of the European integration.

In some places in this paper, the term 'legal scholars' inevitably also includes scholars belonging to adjacent disciplines, such as political scientists. The best example of this is Carl Joachim Friedrich.[2]

It should be emphasized that American comparative lawyers – including Peter Hay (one of the most important and eclectic legal scholar in the United States)

* Lecturer in Law at the University of Pisa; PhD, Sant'Anna School of Advanced Studies, Pisa. I would like to thank Emanuele Pollio for his comments and Andrea Serafino and Alberto Montagner for their help in preparing a preliminary version of this work.

1 H. Schepel & R. Wesseling, *The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe*, 3 European Law Journal 165 (1997).

2 Despite this terminological premise, the focus will be on 'pure' legal scholars.

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– did not doubt that the European integration process could be interpreted in the light of 'federalism'. Such an interpretative approach is very clear in Hay's articles and essays:

> How the Court exercises its function in cases pending before national courts (the referral problem) and in what way the supremacy of the substantive, 'federal' Community law can be assured in national legal system (the supremacy problem).[3]

Hay writes about certain 'federalizing features'[4] of the Common Market treaty system, thus participating in the spreading of the 'comparative language' shared by several American lawyers.

He is also the author – with Ronald Rotunda – of several pieces on the techniques of integration viewed from national (American) and comparative perspectives.

However, the pioneer of such a comparative approach was undoubtedly Eric Stein, who was born in Czechoslovakia in 1913. After the Second World War, he became Professor of International Law and Organization and Co-Director of International and Comparative Legal Studies at the University of Michigan Law School, beginning a splendid career that sent him around the world (Uppsala, Brussels, Florence, London and Stanford), finding academic proselytes on both sides of world and becoming a point of reference for both European and American legal scholars.

As Weiler said: "he has used this distance to maintain a constant overall synthetic view of the Community."[5] His essays on Europe and America in a comparative perspective have been collected in the book *Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism*. The first part of this work contains the article *Lawyers, Judges and the Making of a Transnational Constitution*[6] which became a classic of European studies with its very famous incipit:

> Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with the benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe.[7]

Stein's studies on the ECJ have been a point of reference for many generations of scholars and students. In 1982, he and Sandalow edited the multivolume study *Courts and Free Markets: Perspectives from the United States and Europe*,[8] which was the first example of the 'integration through law' scholarship. In short,

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3 P. Hay, *Supremacy of Community Law in National Courts. A Progress Report on Referrals Under the EEC Treaty*, 16 American Journal of Comparative Law 524 (1968).

4 *Id*., at 524-551.

5 J. Weiler, *Eric Stein: A Tribute*, 82 Michigan Law Review 1160, at 1161 (1984).

6 E. Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 American Journal of International Law 1 (1981).

7 *Id*., at 1.

8 T. Sandalow & E. Stein (Eds.), Courts and Free Markets: Perspectives from the United States and Europe (1982).

as Trevor Hartley also recognized in Europe,[9] Stein was the common master in the field of comparative studies of the European Communities and the United States.

## B. The Court of Justice of the European Communities

It is very difficult to identify American comparative lawyers' influence on the Court of Justice of the European Communities (ECJ). As Lasser has pointed out, in fact, the style of the ECJ's first judgments followed that of French judges, who are known for writing 'short' and essential judgments. This is apparent, for example, from the decisions of the *Cour de Cassation*, which are less than one page long.

Although the ECJ's judgments are longer than those of the *Cour de Cassation*, they are "still relatively short, deductive and magisterial judgments rendered in an unsigned and collegial manner without concurrences or dissents."[10]

This feature must be pointed out because it makes an attempted analysis more difficult. The style of the earliest judgments is 'dry' and implies the absence of every reference to the scholarship. Perhaps something more can be found in the conclusions of the Advocates General. In fact, these conclusions provide, at the same time, a scholarly commentary on the ECJ's decisions and the presentation of the multiple interpretative choices open to its judges.[11]

Nevertheless, from a very simple comparison of *Van Gend Loos*[12] and *Brasserie du Pêcheur*,[13] it is possible to note an evident shift in style, despite the maintenance of an authoritative tone.

Over the years, in fact, the ECJ has abandoned the pure French model of the single-sentence syllogism, acquiring a more discursive nature, testing its reasons with a more thoughtful motivation and exposing itself to the controversial debate of scholarship. This stylistic 'earthquake' was caused by the need to communicate with national judges (of ordinary and constitutional courts) through the vehicle of the preliminary ruling offered by Article 234 of the EC Treaty. This procedural tool has permitted the ECJ to build up the core of EU legal principles (direct effect, supremacy, fundamental rights and the liability of member states).

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[9] T. Hartley, *Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community*, 34 American Journal of Comparative Law 229 *et seq*. (1986).

[10] M. Lasser, *Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de Cassation and the United States Supreme Court*, Jean Monnet Working Paper 1/03, at 8 (2003), available at: http://www.jeanmonnetprogram.org/papers/03/030101.html.

[11]
> As can readily be seen, the ECJ resorts, in the end, to a fundamentally similar interpretive and argumentative approach as its AGs, but in a condensed, axiomatic, deductive, and authoritative style. This public display of methodological convergence thus marks a significant departure from the radical French discursive bifurcation.

*Id*., at 47.

[12] *Case 26/62, Van Gend en Loos,* [1963] ECR 3.

[13] *Case C-46/93, Brasserie du Pêcheur,* [1996] ECR I-1029.

Although something has changed, the ECJ's collegial decisions continue to be written in a "cryptic, Cartesian style,"[14] and they are still unsigned and monolithic (without dissenting or concurring opinions).

That being said, the possible influences of American scholars on the ECJ can be seen in two ways: first of all, by investigating the cryptic elements provided by the commentators' terminology in the first judgments of the ECJ, and, secondly by analysing the academic profile of the judges in their capacity as experts on EC law. In this context, one might refer especially to the work of Pierre Pescatore,[15] Andreas M. Donner,[16] Robert Lecourt,[17] Lord Mackenzie Stuart[18] and Hans Kutscher.[19]

Classic examples of this linguistic influence are provided by the use of terms such as 'supremacy' and 'direct effect', which are used by Anglophone commentators in reviews like the *Common Market Law Review*.

What proves to be more difficult is establishing the existence of such an influence in the earliest judgments. In *Costa/ENEL*,[20] for example, the ECJ did not use the term 'supremacy' but the words 'primacy' or 'precedence' (with a few exceptions).[21]

Despite this terminological absence in the text of the ECJ's judgments and the Treaties, the notion of supremacy has entered the common language of lawmakers and scholars. The best example of this trend is confirmed by the debate about Article I-6 of the Constitutional Treaty, which would crystallize the so-called 'supremacy clause'.

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[14] J. Weiler, *The Judicial Après Nice*, *in* G. de Búrca & J. H. H. Weiler (Eds.), The European Court 215-226, at 225 (2001).

[15] P. Pescatore, The Law of Integration: Emergence of a New Phenomenon (1974); P. Pescatore, *L'application judiciaire des traités internationaux dans la Communauté européenne et dans ses États membres, in* Etudes de droit des Communautés européennes: mélanges offerts à Pierre-Henri Teitgen 355 (1984); P. Pescatore, *La carence du législateur communautaire et le devoir du juge, in* G. Luke, G. Ress & M.R. Will (Eds.), Rechtsvergleichung, Europarecht und Staatenintegration: Gedächtnisschrift für Leontin-Jean Constantinesco 559 (1983); P. Pescatore, L'ordre juridique des Communautés européennes: étude des sources du droit communautaire (1975).

[16] A. M. Donner, *The Court of Justice as a Constitutional Court of the Communities*, Lasok lecture at the Centre for European Legal Studies, University of Exeter (1977); A. M. Donner, *The Constitutional Powers of the Court of Justice of the European Communities*, 11 Common Market Law Review 127 (1974); A. M. Donner, *Droit national et droit communautaire: points de rencontre*, *in* R. M. Chevallier *et al*. (Eds.), Le juge national et le droit communautaire 9 (1966).

[17] R. Lecourt, L'Europe des juges (1976); R. Lecourt, *Quel eût été le droit des Communautés sans les arrêt de 1963 et 1964*, *in* Mélanges en hommage à Jean Boulouis 349 (1991).

[18] A. J. Lord Mackenzie Stuart, The European Communities and the Rule of Law (1977); A. J. Lord Mackenzie Stuart, *Problems of the European Community*, 36 The International and Comparative Law Quarterly 183-197 (1987).

[19] H. Kutscher, *Alcune tesi sui metodi di interpretazione del diritto comunitario dal punto di vista d'un giudice (I)*, 1976 Rivista di diritto europeo 283; H. Kutscher, *Alcune tesi sui metodi di interpretazione del diritto comunitario dal punto di vista d'un giudice (II)*, 1977 Rivista di diritto europeo 3.

[20] *Case 5/64, Costa/ENEL,* [1964] ECR 1141.

[21] *See Case 14/68, Walt Wilhelm*, [1969] ECR 1 and *Case 93/71, Leonesio,* [1972] ECR 287.

The term 'supremacy' is borrowed from the American Constitution and presumes the existence of a perfect federal model and of a normative 'monism'. The secret of the European Communities lies in its 'constitutional tolerance',[22] and the consequence of such a premise is the impossibility of resolving the antinomies in terms of invalidity, as the constitutional courts have maintained for many years.

The distinction between supremacy and primacy (in the French version of its judgments, the ECJ used the term *primauté*) was recently recalled by the Spanish *Tribunal Constitucional* in Declaration no. 1/2004 concerning the compatibility of the Spanish Constitution with the Constitutional Treaty.

Overcoming the terminological question, it may be recalled that Weiler and other scholars use such a terminology (e.g. direct effect, supremacy and implied powers) in their description of the ECJ's activity, especially with regard to the judgments of the 'foundational period'.[23]

In (*The European Court of Justice as a Federator*)[24] Donna Star-Deelen and Bart Deelen emphasize the analogies between the strategy of the two courts (the US Supreme Court and the ECJ), starting from the very important writings of Lenaerts[25] (currently a judge at the ECJ) and Bermann[26] about federalism in the United States and the European Communities.

Obviously many differences also exist. For example, it may not be correct to compare the American implied powers doctrine with the expansion of competencies that has taken place in the European Communities, since the principle of subsidiarity has been more relevant than Article 308 of the EC Treaty to improve EC jurisdiction. Moreover, it must also be stressed that the EC Treaty does not make a real distinction between jurisdictions, unlike the US Constitution.

Concerning the academic profile of the judges in their capacity as experts of EC law, it is not difficult to find express references to American authors in their academic writings. However, little evidence can be gleaned from an analysis of celebrative or introspective essays written in the capacity as a member or former member of the ECJ.[27] As Rasmussen has pointed out, the real aim of such publications might be to "exorcise the spectre of government by the Court and its judges."[28]

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[22] J. H. H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, Harvard Jean Monnet Paper 13 (2000), available at: http://www.jeanmonnetprogram.org/papers/00/001001.html.

[23] J. Weiler, *The Transformation of Europe*, 100 Yale Law Journal 2403, at 2422 (1991).

[24] D. Star-Deelen & B. Deelen, *The European Court of Justice as a Federator*, 1996 Publius 81.

[25] K. Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 The American Journal of Comparative Law 205 (1990).

[26] G. A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Columbia Law Review 331 (1994).

[27] The best example is Lecourt (1976), *supra* note 16, at 305:

> On s'égarerait cependant à vouloir discerner si le destin de la Communauté doit être plus fédéral que confédéral. Les deux traits coexistent – avec d'autres – dans les traités. Il est donc vain de se laisser guider par un tel préalable.

[28] H. Rasmussen, The European Court of Justice 353 (1998).

From this point of view, the most outspoken judge is undoubtedly Andreas M. Donner, Professor of Public and Administrative law at Amsterdam University. In his works he openly writes about the ECJ as a constitutional court, as a body with constitutional powers and as the guardian of a system that is not federal but shares some elements with the federal system, as the comparison between EC law and federal law shows:

> L'application de cet (177 TCEE) article suscitera sans aucun doute des difficultés et des malentendus. Triepel aurait déjà dit autrefois que les états fédéraux ne connaissent jamais une entière paix juridique, mais au mieux un armistice entre le droit des Etats et le droit fédéral.[29]

If Donner seems to be the judge most accustomed to the comparison with foreign federal systems (although readers cannot trace the scholarly sources in his writing due to a poverty of footnotes), few references to the 'comparative vision' of the ECJ with other federal courts can be found in the essay *La Cour de justice de la Communauté européenne du charbon et de l'acier* written by Louis Delvaux. However, in the introduction the author admits that:

> Cette Cour est tout à la fois la juridiction administrative de la Communauté et, à certain égards, une juridiction internationale … on peut même la considérer comme l'embryon d'une Cour fédérale.[30]

Going beyond the research of express references to American scholars, one can argue that the constitutional reading of European integration may be connected to the comparative perspective assumed by the first members of the Court. The link between a comparative perspective and the constitutional mission of the Court was emphasized by one of the strictest critics of the Court – Hjalte Rasmussen[31] – and more recently by Ole Spiermann.[32]

The latter has pointed out that, behind the concept of direct effect (*Van Gend en Loos*), there was a 'certain idea'[33] of European integration that suggests reluctance towards the European Communities' existence as an international organization. This issue is very interesting, but it should be recalled that in Pescatore, for example, the awareness of a 'certain idea' of Europe does not correspond to a federal vision of the European Communities. In fact, in his works (e.g., *Law of Integration*),[34] Pescatore reasserted the idea that the European Communities were different from a state or a federation.

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[29] Donner (1966), *supra* note 16, at 11.

[30] L. Delvaux, La Cour de justice de la Communauté européenne du charbon et de l'acier 11 (1956).

[31] Rasmussen, *supra* note 28.

[32] O. Spiermann, *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order*, 10 European Journal of International Law 763 (1999), available at: http://www.ejil.org/journal/Vol10/No4/art5.html.

[33] P. Pescatore, *The Doctrine of Direct Effect: An Infant Disease of Community Law*, 8 European Law Review 155-177 (1983).

[34] Pescatore (1974), *supra* note 15.

Moreover, there are some elements in the Treaties (Arts. 234 and 249 EC, for example) that offer a good basis for overcoming the more international features of the Communities by integrating the non-written 'spirit' of the European Communities' fundamental documents.

Coming back to the works of judges, it can be recalled that Mackenzie Stuart (President of the ECJ from 10 April 1984 to 6 October 1988) explicitly refers to American scholars in his essays, denying a possible comparison between ECJ and US Supreme Court but recognizing the utility of the American experience for the European scholars and operators. Another example of face-to-face confrontation between the American and EC experiences is that of Pescatore – a judge at the ECJ from 1967 to 1985 – who edited (with McWhinney) a very interesting collection of essays about the idea of federalism in European integration, based on papers presented in a summer seminar at the International University of Comparative Studies in Luxemburg in 1972.[35] Some of the papers were written by American scholars such as Friedrich.[36] In this work, Pescatore confirmed his opinion about the 'peculiarity' of the EC experience.

## C. The European Federalist Movement

The general influence of the United States on the rise of the European Communities has been studied thoroughly. For example, the well-known essay by Lundestad, *Empire by Integration*,[37] demonstrates the great length and breadth of the studies in this field. Nevertheless, these analyses do not exhaustively cover the influence of 'American ideas' on the destiny of European integration.

The European Federalist Movement (EFM) was founded by Altiero Spinelli and a group of anti-fascists between 27 and 28 August 1943. The aim of the movement was the creation of a European federation. The EFM is an independent political organization rather than a political party and represents the Italian section of the European Union of Federalists (EUF) and the World Federalist Movement.

As can easily be inferred, there were some contacts between the EFM and the American scholars. One example was the collaboration on the constitutional project of the EDC, which was sponsored by Spinelli. The outcome of this project was a large book edited by Friedrich and Bowie: *Studies in Federalism*.

*Studies in Federalism* was conceived in order to provide material and information for the members of the so-called *ad hoc* Assembly, which was established on the basis of the EDC Treaty. It was charged with writing the constitution of the Federation or Confederation of Europe, which was meant to serve as the legal basis for a common European army.

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35 P. Pescatore & E. McWhinney (Eds.), Federalism and Supreme Courts and the Integration of Legal Systems (1973).

36 C. Friedrich, *The Political Theory of Federalism*, *in* P. Pescatore & E. McWhinney (Eds.), Federalism and Supreme Courts and the Integration of Legal Systems 18 *et seq*. (1973).

37 G. Lundestad, Empire by Integration: The United States and European Integration, 1945-1997 (1998).

This collection of studies was commissioned by the *Mouvement européen* and consisted of several short essays examining the constitutional architecture of the main federal countries from a comparative perspective.

*Studies in Federalism* itself was translated and published in seven countries, with a foreword by Henri Spaak, who presented the studies to the *ad hoc* Assembly.

The volume was the outcome of a collaborative project that started in 1951 when Frenay and Kogon – members of the European Federalist Union – built the basis for such collaboration at the request of Henri Spaak and General William Donovan, President of the American Committee on United Europe. In 1952, the European Movement set up the Study Committee for the European Constitution, which comprised personalities like Piero Calamandrei, one of the most important Italian constitutional lawyers, and Altiero Spinelli.

The work was carried out in July, August and September 1952 with the financial support of the Ford Foundation and scientific support granted by Harvard University's Faculty of Law.

Bowie, after coming back from his experience as a legal advisor to the American High Commission in Germany, started to take part in the committee's meetings together with Friedrich.

Spinelli was mainly a politician (or rather a 'man of action'), but he also maintained contacts with the academic world, writing many forewords for scholarly studies and taking courses at several universities.[38] It appears from his *Diario europeo (1948-1969)*,[39] moreover, that he had a friendly relationship with Friedrich.[40]

Unfortunately, for the purpose of this paper, his writings are dry, succinct and without references. These factors make it impossible to identify, among other things, whether such authors contributed to Spinelli's thought.

As Albertini points out,[41] Spinelli had studied British federalists like Robbins[42] and Beveridge[43] during his imprisonment, and such influences were studied by

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[38] His works include: A. Spinelli, Come ho tentato di diventare saggio (1999); E. Rossi & A. Spinelli, Il manifesto di Ventotene (1991); A. Spinelli, Una strategia per gli stati uniti d'Europa (1989); A. Spinelli, The Eurocrats: Conflict and Crisis in the European Community (1966); A. Spinelli, Diario europeo (1976-1986) (1992); A. Spinelli, L'avventura europea (1972); A. Spinelli, L'Europa non cadde dal cielo (1960); A. Spinelli, L'Europa fra ovest e est (1990); A. Spinelli, La mia battaglia per un'Europa diversa (1979). *See also* his introductions and forewords to many scholarly writings and essay collections, for example, J. Lodge (Ed.), European Union: The European Community in Search of a Future (1986); R. Bieber, J. P. Jacqué & J. Weiler, L'Europe de demain: une union sans cesse plus étroite: analyse critique du projet de traité instituant l'Union européenne (1985).

[39] A. Spinelli, Diario europeo (1948-1969) 83, 96, 129, 132, 148, 149, 152, 156, 182, 243, 262, 263, 264, 280, 285, 314, 372, 387 and 463 (1989).

[40] *Id.*, at 285.

[41] M. Albertini, *L'Unificazione europea e il potere costituente*, *in* L. Levi *et al.* (Eds.), Il difficile cammino dell'Europa unita. Convegno Italia-USA 33, at 45 (1985).

[42] L. Robbins, Economic Planning and International Order (1937); L. Robbins, The Economic Causes of War (1940).

[43] W. Beveridge, The Price of Peace (1945).

Pinder.[44] Among the 'Americans', the only author mentioned by Spinelli seems to be Carl Friedrich, for his work *Europe as an Emergent Nation?*.[45] As stated above, Spinelli had good relations with Friedrich and noted in his *Diario europeo (1948-1969)*[46] that he had written a review of *Studies in Federalism* edited by Friedrich and Bowie.

All this appears normal, because the EFM waited for active support for its struggle, but it is remarkable to look at the meaning of the concepts used by such actors (which are formally the same). Unfortunately, when explaining what federalism is, the EFM (including Spinelli) usually referred to the American debate on the Constitution without mentioning other sources.

If Spinelli had further developed his project in order to write a book about the theoretical premises of his reasoning, more details would probably have been established.[47]

In this section of the paper, I will try to underline the differences between the American scholars' and the federalists' concepts of federalism.

The notions of state and sovereignty are at the heart of the vision that Friedrich himself referred to as 'static'. Thanks to Friedrich, a dynamic approach to the federalist issue has developed. According to Friedrich, studying federalism did not mean studying the federal state as other authors suggested. Moreover, the federal process surpasses the distinction between the historical forms of the federal state (*Bundesstaat*) and the confederation (*Staatenbund*), as Friedrich explicitly and strongly stressed in his works.[48] The classic vision of federalism is founded on a very static approach and based on ideas of state and sovereignty, which Friedrich strongly criticized: "No sovereign can exist in a federal system; autonomy and sovereignty exclude each other in such a political order."[49]

As La Pergola emphasizes,[50] the relationship between federalism and the state in Friedrich's thought is ambiguous. Sometimes it seems that Friedrich substituted the idea of the state with the concept of 'community',[51] but – despite his polemical fervour – the state continued to cast a shadow over his argumentation.

This criticism of the two pillars of constitutional law is very relevant today. In the European context, in fact, it is very difficult to understand who is the holder of the power, that is to say, who is the sovereign (the Emperor or the Leviathan?),

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44 J. Pinder (Ed.), Altiero Spinelli and the British Federalists: Writings by Beveridge, Robbins and Spinelli, 1937-1943 (1998).

45 C. J. Friedrich, Europe as an Emergent Nation? (1969).

46 Spinelli, *supra* note 39.

47 The draft title was L'Utopia democratica, as we know from *id.*, at 411.

48 C. J. Friedrich, *Federal Constitutional Theory and Emergent Proposals*, *in* A. W. Mcmahon (Ed.), Federalism: Mature and Emergent 510 *et seq*. (1955); C. J. Friedrich, An Introduction to Political Theory: Twelve Lectures at Harvard (1967); C. J. Friedrich, Man and His Government: An Empirical Theory of Politics (1963).

49 C. J. Friedrich, Trends of Federalism in Theory and Practice 8 (1968).

50 A. La Pergola, *L'empirismo nello studio dei sistemi federali: a proposito di una teoria di Carl Friedrich*, *in* A. La Pergola (Ed.), Tecniche costituzionali e problemi delle autonomie garantite. Riflessioni comparatistiche sul federalismo e regionalismo 123, at 133 *et seq*. (1987).

51 *Id*., at 129.

because the European legal order is characterised by the interlacement of different levels (international, supranational and national). It is principally founded on this pact between the Emperor and the Leviathan, on this constitutional exchange between different levels. A clear difference to the traditional approaches to federalism exists here. Friedrich specified that such opposition was 'amplified' by scholars studying the theories of Hamilton, Madison and Jay:

> The American concept, at this point, may be called the discovery of the 'federal state', because that was the term which the Germans and others attached to it when they contrasted it to a confederation of states. Actually, no such dichotomy was ever faced by the master builders of the American system. They were, in fact, the first who realized, at least in part, that federalism is not a fixed and static pattern but a process.[52]

Despite Friedrich's softness and delicacy, an evident 'break' exists between him and the American Founding Fathers. The famous contrasts between Hamilton and Madison seem to confirm this intuition. The institutional dimension of federalism is not a detail in their reasoning (see, for example, the works on the 'insufficiency of the Confederation', nn. 15-20) and the idea of sovereignty is central.

This impression seems to be confirmed by Lucio Levi, who devoted a few pages to Friedrich's theory in *Il pensiero federalista*. In this work, Levi contests Friedrich's approach by arguing that the institutional point of view (which was neglected by Friedrich's federalizing process) is central.[53]

Such a premise is fundamental, because Friedrich's concept of federalism is a notion that all American scholars had considered. In his masterpiece, *Federalism and Supranational Organizations*, Peter Hay found many analogies between federalism and supranationalism. According to Hay, supranationalism is connected to the idea of federalism because both concepts are based on a transfer of power from the state to a higher entity. He started from a dynamic notion of federalism without regard for the institutional form and distinguished the "federal elements from the international elements":[54]

> 'Federal' is therefore used in an adjectival sense: it attaches to a particular function exercised by the organization and is used to denote, as to that function, a hierarchical relationship between the Communities and their members.[55]

Hay used the notion of 'functional federalism' in order to describe the jurisdiction/activity of the ECJ and the relationship between national and supranational law (despite the scant discourse devoted to national legal orders). Such a formula is clearly oxymoronic for European scholars, who are used to the distinction between federalism and functionalism, and apparently represents a form of heresy.

Nevertheless, Hay explained what he meant by this formula when he specified that his notion of federalism did not consider the institutional form of the organization.

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52 Friedrich, *supra* note 49, at 18.

53 L. Levi, Il pensiero federalista 110 (2002).

54 P. Hay, Federalism and Supranational Organizations. Patterns for New Legal Structures 90 (1966).

55 *Id*.

It seems evident that such a distinction is similar to Wheare's distinction between federal government and federal constitution. Here, Hay stressed the possible gap between the federal functions of an organization and its possible definition as a federation.[56]

Thanks to this distinction between a federation/federal state and federalism, Weiler's reasoning can be supported today:

> The Community is not destined to become another America or indeed a federal state. But I am convinced that the relevance of the federal experience to Europe (and the European experience to any novel thinking about federalism in the United States and other federations) will become increasingly recognized.[57]

Another element of distinction between the federalists and the American scholars lies in the terminology. Federalists use the term 'unification' rather than 'integration'.[58] This lapsus clearly reveals the aims of the movement. From a theoretical point of view, Albertini explained the relations between integration, construction and unification.[59] He defined integration, firstly, as a term related to the idea of a process and, secondly, as a concept insufficient for explaining the European route independently and unassisted by construction and unification. If Spinelli was a politician, a man of action, Albertini wanted to give a strong theoretical basis to the federalist movement by writing long essays about the notion of federalism. As he pointed out, one can give two possible interpretations to the notion of federalism: federalism as a theory of the federal state and federalism as a vision of the world strongly connected to the Kantian idea of peace.

He suggested that it was necessary to overcome the first (narrow) point of view without losing the peculiarity of federalism as an original thought, already emancipated from liberalism thanks to Altiero Spinelli.[60] The debate with the scholars of integral federalism and Elazar can be appreciated in this sense.[61]

Mario Albertini was a very important figure in the European Federalist Movement's history and was able to spread and clarify Spinelli's thought (although there were some polemics between them).[62] He was a Hamiltonian thinker, not allowing much room in his works for other American writers. Nevertheless, it is impossible to believe that Albertini did not know Friedrich or the other authors mentioned in this paper. Such a bibliographical absence can be explained by looking at Albertini's premises.

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56 K. Wheare, Federal Government 16-34 (1953).

57 Weiler, *supra* note 5, at 1161.

58 For example, F. Rossolillo, *Il ruolo dei federalisti* (2002), available at: http://www.euraction.org/rivfiles/i3_02.pdf.

59 Albertini, *supra* note 41, at 34-35.

60 As Lucio Levi has pointed out. *See* L. Levi, *Il federalismo dalla comunità al mondo* (2002), available at: http://www.euraction.org/rivfiles/i3_02.pdf.

61 *Id*.

62 J. Pinder, *Mario Albertini e la storia del pensiero federalistico* (2002), available at: http://www.euraction.org/rivfiles/i3_02.pdf.

From his point of view, federalism is a political project with three aspects: a structural element (the federal state), an axiological element (peace) and a socio-historical element (the overcoming of the division of society into classes and nations).[63]

According to Albertini, the model is clearly that designed by the American Constitution, and all that remains does not count. It is a different aim from that of American lawyers engaged in explaining the trends of such a process from a theoretical point of view.

Nevertheless, some common points do exist. The idea of federalism as a project (although conditioned by the absolute goal of the federal state) and the refusal of nationalism and the state-centred perspective.[64]

## D. The Scholars

In simple terms, it can be said that in Europe the premise of EU studies is the peculiarity of the European Union and the impossibility of categorising it by looking at other historical experiences. In the United States, in contrast, the premise of comparative lawyers is the comparability of US federal experience and the EU integration process.

Nevertheless, such a clear-cut dichotomy would obviously be a methodological mistake. For example, it may be recalled that Cappelletti and Dehousse, both European authors (although Cappelletti also taught at Stanford), do not share the first methodological approach.

Stein, Hay, Friedrich and Bowie operated a *de facto* process of scholarly 'exchange', studying Europe in light of the American experience because the latter was the most well-known experience for them (although many of them were Europeans who had been transplanted to the United States and became very important scholars there).

As Weiler points out:

> Eric Stein was able in the early years of the Community, along with colleagues of both sides of the Atlantic, to reject the temptation of synthesising Community legal developments into the mainstream of public international law. In so doing he contributed to the creation of an entirely new discipline.[65]

This kind of comparison would have also been pursued by the first pupils of such masters. The Italian Maurizio Cappelletti, Professor of Comparative law and Italian Civil Procedural Law, is one example.

In 1985, he was the editor of one of the most important editorial projects in EU studies. In the volumes of *Integration Through Law*, Cappelletti – thanks to

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63 *See* M. Albertini, Lo stato nazionale (1960); L. Levi, Il federalismo. Antologia e definizione (1979); M. Albertini, Nazionalismo e federalismo (1999); L. Levi, *Federalismo*, *in* N. Bobbio, N. Matteucci & G. Pasquino (Eds.), Dizionario di politica 403-414 (1983).

64 Albertini (1999), *supra* note 63.

65 Weiler, *supra* note 5, at 1161.

his bi-systemic teaching experience – grouped many American and European authors in order to compare US/European federalisms and the EC integration process.

In the editors' words, this work is

> characterised as a highly pluralistic research endeavour … the product of the efforts of close to forty contributors from many countries in three continents, with almost every contribution being, in its turn, the joint product of a team.[66]

Adopting Friedrich's notion of federalism as a federalizing process, the authors began to study the strong connection between the notions of federalism and integration as 'twin concepts'.[67]

In his work, Elazar recognized the importance of such a dynamic approach to the federal issue when he identified several types of federalism, going beyond the static contraposition between federation and confederation.[68]

While Smend[69] had already emphasized the strong relationship between the state and the constitution ("the integration belongs to the content of the constitution") with regard to the national context, Cappelletti, Weiler and Seccombe studied the supranational dimension of integration (conceived as process of integration and as the outcome of such a process).

Their philosophy was based on trust in the comparative approach conceived as a third way that differed from legal positivism and the natural law approach.

According to the authors of *Integration Through Law*, comparison serves as a laboratory that permits scholars to test and verify the theoretical constructions.

In 1994, Renaud Dehousse[70] wrote about the lack of a comparative approach in European studies, stressing the benefits and difficulties (the problem of the level of analysis) of comparison in this field. The refusal to compare implies the 'absolutization' of the EU level and the consecutive denial of EU complexity:

> In many respects, the situation of Community lawyers is similar to that of a scholar who would have confined himself to the study of his domestic legal system … In other words, one could argue that comparative research is indispensable if Community law is to move to a more advanced level of scholarship.[71]

In contrast, starting from the necessity to build a normative jurisprudence in the European Union, Ian Ward stressed the fact that the European peculiarity requires a *sui generis* approach. According to him, comparativism denotes the failure of every attempt to build a EU jurisprudence.

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[66] M. Cappelletti, M. Seccombe & J. H. Weiler, *A General Introduction*, *in* M. Cappelletti, M. Seccombe & J. H. Weiler (Eds.), Integration Through Law, Vol. 1, 3, at 5 *et seq*. (1985).

[67] *Id*., at 15.

[68] Among the many: D. Elazar, *Extending the Covenant: Federalism and Constitutionalism in a Global Era* (1998), available at: http://www.jcpa.org/dje/articles/fed-const-global.htm.

[69] R. Smend, Costituzione e diritto costituzionale 286 (1990).

[70] R. Dehousse, *Comparing National and EC Law: The Problem of Level of Analysis*, 43 American Journal of Comparative law 761 (1994).

[71] *Id*., at 764.

Ward recalls that "comparativism in law is invariably used as an alternative to jurisprudence,"[72] and it represents the weak answer to the inadequacy of the tools "inherited from our forefathers."[73]

In contrast, it may be recalled that comparison is not a static process.[74] Although a huge difference exists between the federal state and the European Union, a comparison between the two is possible. It is on this premise that we base our support for the comparative approach in EU studies.

Many scholars stress the comparability between the ECJ and US Supreme Court, following Hay's intuitions.

The latest example in this sense is provided by the studies of Rosenfeld, in which he remarks on the nature of these two courts as constitutional adjudicators despite the formal absence of such a status in terms of fundamental norms.[75]

The integration techniques used by the ECJ have been described by Hay and Rotunda in three works: in a book, *The United States Federal System*,[76] and in two essays contained in *Integration Through Law* (*Instruments for Legal Integration in the European Community: A Review*[77] and *Conflict of Laws as a Technique for Legal Integration*[78]).

The former is an American book written from a European perspective for an Italian publisher (Giuffrè) and is contained in a collection (Studies in Comparative Law) edited by Cappelletti himself. Authors like Weiler[79] and others[80] use this conceptual and terminological apparatus in their analysis without subscribing to the view that the EU is a federation.

Rather, the idea of constitutional tolerance in Weiler's thought permits a distinction of Europe from other similar experiences.

The concept of 'pre-emption' describes the removal of a government's power to regulate a specific subject matter. When an act of Congress removes a local or state government's power to regulate a specific issue, the process is called 'federal pre-emption'. This technique is based on the supremacy clause of the American Constitution.

When looking at the debate caused by the proclamation of the Charter of Fundamental Rights of the European Union, it becomes clear that one of the most important potential effects of such a document is the centralization of powers and

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72 I. Ward, A Critical Introduction to European Law 181 (1996).

73 *Id*.

74 P. Glenn, Legal Traditions of the World. Sustainable Diversity in Law (2005); *see also* P. Glenn, *Doin' the Transsystemic: Legal Systems and Legal Traditions*, 50 McGill Law Journal 863 (2005).

75 M. Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, Cardozo Legal Studies Research Paper No. 157 (2006), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917890.

76 P. Hay & R. Rotunda, The United States Federal System. Legal Integration in the American Experience 198 (1982).

77 G. Gaj, P. Hay & R. Rotunda, *Instruments for Legal Integration in the European Community, in* M. Cappelletti, M. Seccombe & J. Weiler (Eds.) Integration Through Law, Vol. 1, 113 (1985).

78 P. Hay, O. Lando & R. Rotunda, *Conflict of Laws as a Technique for Legal Integration, in* M. Cappelletti, M. Seccombe & J. Weiler (Eds.), Integration Through Law, Vol. 1, 161 (1985).

79 *See* Weiler, *supra* note 23.

80 Star-Deelen & Deelen, *supra* note 24; Bermann, *supra* note 26.

competences in the field of fundamental rights. Such an effect is connected to the American experience of incorporation by the federation. 'Incorporation' is a doctrine whereby portions of the US Bill of Rights are applied to the states through the Due Process Clause of the Fourteenth Amendment. Most of these portions of the Bill of Rights were incorporated by a series of US Supreme Court decisions in the 1940s, 1950s and 1960s, especially in the case of *Gideon v. Wainwright*.[81]

Another instance of terminological and conceptual borrowing concerns the 'implied powers' doctrine by which American scholars mean the expansion of federal power and the progressive centralization of federal powers.[82] This concept is used to describe the ECJ's activity despite the differences that exist in the European and American contexts regarding the role of vertical subsidiarity.

## E. Conclusion

In conclusion, it can be said without any doubt that the intuitions of American scholars have had a very important impact on the legal reasoning of the European Court of Justice and the academic debate in subsequent years. However, the impact on the language and activity of the European Federalist Movement is less evident.

As regards the influence on the legal reasoning of the ECJ, one could say that the features of the initial case law, which was more oriented towards the French style (short judgments), do not offer an 'explicit' confirmation of such influence. Nevertheless, as Weiler and Cappelletti later proved, the technique of integration used by the Court and the 'premises' of cases like *Van Gend en Loos* and *Costa/ ENEL* clearly bring to mind the instruments of American federalist integration: the doctrine of implied powers, supremacy, incorporation and expansion of federal jurisdiction.

The influence on the language of the European Federalist Movement was not fundamental. In fact, in their writings, Albertini and Levi adopted a notion of federalism and a language that is quite different from that of the American comparative lawyers.

In contrast, later scholars (from both Europe and the United States) undoubtedly 'applied' these lessons by translating the categories and techniques of federalism in contexts not centred on the national state (international and supranational organizations).[83]

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81 *Gideon v. Wainwright*, 372 U.S. 335 (1963).
82 *See* Sec. 8, Art. I of the US Constitution.
83 *See, for example*, R. Dehousse, Fédéralisme et relations internationales (1991).