

The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe

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Abstract

The history of the “Integration through Law” (ITL) project, conducted by Mauro Cappelletti at the European University Institute in the late 1970s and 1980s, unfolded in this Article, provides clarity on the nature of the power-knowledge nexus in European law, as it pulls the curtain on the close collaboration between academia and the Community institutions in the ITL project. It demonstrates that the ITL was an academic expression of a constitutional vision, which had flourished in the Commission and the European Court of Justice (ECJ) for decades, but had never truly been adopted in the emerging academic discipline of European law. Alongside the studies of Eric Stein, the ITL project was the impetus behind the constitutional discourse in academia turning into a paradigm in the 1980s, but the ITL project had an unparalleled impact. Firstly, because of the scholarly environment at the European University Institute (EUI), and secondly, because of the notion of “Integration through Law,” which has proved to be an extremely powerful concept, providing a field of scholars, law professors, civil servants from the Community institutions, and ECJ judges with a flattering self-image and a *raison d'être* expressed in three little words.

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A. Introduction

Every scholar of the European Union (EU) knows the seven green voluminous books with the title *Integration through Law* (ITL) printed with white letters on the back. Based on a gigantic research project directed by the world-famous professor of comparative law Mauro Cappelletti, these books were the launching pad for the ITL theory arguing that law and the European Court of Justice (ECJ) constituted the key dynamics in the European integration process and that European law had a constitutional nature. The publication of the books from 1985 to 1988¹ coincided with the establishment of the Internal Market following the Single European Act, which made the ITL theory seem to perfectly match the new development of the Community. As a result, a topic as arcane and inaccessible as European law became popular in the booming field of EU studies, where an entire generation subscribed to the ITL theory as a guiding research hypothesis in the 1990s and 2000s. The ITL's key proponent, Joseph Weiler, became an academic superstar, and the Law Department of the European University Institute (EUI), where the ITL project had been conducted by Mauro Cappelletti, evolved into a think tank of the Community. No wonder that the 25th jubilee of ITL publications was celebrated with an anthology edited and written primarily by former EUI PhD students, who reproduced or relied on the ITL theory and concluded that the significance of the ITL project for European studies is enduring.²

While the mothership of ITL scholarship has received a historical celebration, a proper analysis of the ITL project's history is still missing. This is an important gap in the recent historical research tracing and exploring the development of European law,³ which offers

¹ See *Methods, Tools, and Institutions*, in 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 1–3 (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1985–88) (1986); Eckard Reh binder & Richard Stewart, *Environmental Protection Policy*, in 2 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1985–88) (1985); Thierry, Bourgoignie & David Trubek, *Consumer Law, Common Markets and Federalism in Europe and The United States* in 3 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1985–88) (1987); Richard M. Buxbaum & Klaus J. Hopt, *Legal Harmonisation and The Business Enterprise*, in 4 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1985–88) (1988), Terence Daintith & Stephen F. Williams, *The Legal Integration of Energy Markets*, in 5 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1985–88) (1987).

² See, e.g., Daniel Augenstein & Mark Dawson, *Introduction: What Law for What Polity? 'Integration through Law' in the European Union Revisited*, in 3 'INTEGRATION THROUGH LAW' REVISITED: THE MAKING OF THE EUROPEAN POLITY (Daniel Augenstein ed., 2012).

³ The historiography of European integration has ignored the role of law, but recently a network of historians has begun researching European law. In the auspices of the University of Copenhagen, the collective research towards a new public history of European law directed by Associate Professor Morten Rasmussen has provided new historical insights on the jurisprudence of the ECJ, the role of EC institutions, the reception of European law in the Member States, and European law academia. The present author is a part of this network of historians and has been a part of the collective research project, which was formally concluded in 2016.

potential for reassessing questions about the origins, evolution, and contemporary implications of the EU's legal structures.⁴ With these aims in mind, this Article provides the first historical analysis of the ITL project. Primarily based on the hitherto unexplored private archive of Cappelletti,⁵ it illuminates the origins of the ITL theory, the synergy between the development of the ITL project and the EUI Law Department, the collaboration between Cappelletti and key actors from the Community institutions, and it provides initial reflections on the impact of the project. The central question is whether the ITL project is an academic legitimization of controversial claims promoted in the 1950s-1970s by jurists from the Community institutions, such as Michel Gaudet, the director of the Legal Service of the Commission of the European Economic Community (EEC) from 1958 to 1969, Walter Hallstein, president of the Commission from 1958-1967, and Pierre Pescatore, ECJ judge from 1967-1985. These jurists dreamed of a European federation, but as the political impetus was missing, they promoted ideas on the constitutional nature of the European legal order and the integrating potential of law in order to build a "Community of law."⁶

Excellent researchers have already provided initial answers to the central question. Matej Avbelj pointed to the "double nature" of ITL and argued that there was a clear separation between a "policy conception of ITL" and the academic ITL project conceived and carried out at the EUI. He noticed the overlaps between proponents and claimed that the academic project was to some degree an activity of a critical self-examination revealing the main underlying assumption of the policy conception. The principal orientation of the academic ITL project was nevertheless scientific rather than concerned with promoting a particular vision of European integration by instrumental reliance on law, according to Avbelj.⁷

A recent strand of sociological and historical research on the constitutional paradigm constitutes an opposition to Avbelj's claim. The political scientist, Antoine Vauchez, and the historians, Morten Rasmussen, and, Anne Boerger, have pointed to the political and ideological motivations behind both the creation of the constitutional discourse by Community jurists as well as the academic constitutional reading of European law. In somewhat parallel analyses, they trace the origins of the constitutional discourse to Hallstein and Gaudet, but they emphasize different actors with regard to the academic breakthrough of the constitutional paradigm. Vauchez describes the Law Department of the EUI as the

⁴ See Bill Davies, *Why EU Legal History Matters-A Historian's Response*, 28 AM. U. INT'L L. REV. 1355 (2013).

⁵ The archive has recently been transferred to the Historical Archives of the European Union (HAEU), where files up until 1983 will be made accessible. I would like to thank Dieter Schlenker, director of the HAEU, for cooperation regarding the archive.

⁶ See, e.g., Walter Hallstein, *La Communauté européenne, nouvel ordre juridique*, in LES DOCUMENTS DE LA COMMUNAUTÉ EUROPÉENNE 27, 5 (1964).

⁷ See Matej Avbelj, *The Legal Viability of European Integration*, in 'INTEGRATION THROUGH LAW' REVISITED: THE MAKING OF THE EUROPEAN POLITY 29-33, 38 (Daniel Augenstein ed., 2012).

epicenter of the new paradigm of constitutionalism,⁸ whereas Rasmussen and Boerger underline the importance of Eric Stein in the academic breakthrough.⁹ According to Rasmussen and Boerger, Weiler built on Stein's work and transformed the discourse into the prevailing paradigm.¹⁰

Additionally, in an epilogue in the 25th ITL jubilee anthology, Weiler stated that the ITL project played "an appreciable role" in a qualitative transformation of the academic and intellectual milieu of European Law, not just as a published set of books, but also as an educational and scholarly milieu and an intellectual and academic happening. He also stated that the Achilles' heel of the academic ITL project was its normativity. Fundamental critique of the European project was therefore muted, elliptic, and concealed. Weiler attributed this to Cappelletti's personal idealism, which made him believe in the convergence of legal systems and the higher law of human rights, rather than the "messy and oft ugly vicissitudes of democratic politics."¹¹

Regarding the central question in this Article, the value of the existing literature is limited for different reasons. Avbelj's analysis is short and primarily based on academic ITL literature from 1999 and forth. Vauchez and Rasmussen/Boerger rely on an impressive amount of different empirical sources, but the ITL project is unexplored in both accounts. The estimation by Weiler is useful information from one of the central actors of the ITL project, but he does not define the normativity of the ITL; he simply states that integration was considered good. All in all, the existing literature falls short of delivering a thorough answer to the question of the relation between the community jurists' policy argument on the constitutional nature of European law and the primary role of law in the integration process and the ITL project. Understanding this relation is central to illuminating the nature of the power-knowledge nexus between academia, the Commission, and the ECJ in European law.

⁸ See ANTOINE VAUCHEZ, BROKERING EUROPE: EURO-LAWYERS AND THE MAKING OF A TRANSNATIONAL POLITY 201–04 (2015).

⁹ See generally Morten Rasmussen & Anne Boerger, *Transforming European Law: The Establishment of the Constitutional Discourse*, 10 EUR. CONST. L. REV. (2014). Vauchez has furthermore emphasized Robert Lecourt, Hallstein, and Pescatore as the original promoters of the idea of the primary role of law in the integration process, an aspect which is missing in the account of Rasmussen and Boerger. See VAUCHEZ, *supra* note 8; Antoine Vauchez, 'Integration-Through-Law.' *Contribution to a Socio-History of EU Political Commonsense* (EUI Working Paper 2008/10, 2008).

¹⁰ See Rasmussen and Boerger, *supra* note 9, at 220.

¹¹ See Joseph Weiler, *Epilogue to ANTOINE VAUCHEZ, 'INTEGRATION THROUGH LAW' REVISITED: THE MAKING OF THE EUROPEAN POLITY* 29–33, 38, 123, 175–79 (Daniel Augenstein ed., 2012).

B. Mauro Cappelletti and his Quest for Justice

Cappelletti's story is a remarkable one. The scholarly quest for justice and effective rights, which, according to his associates, was at the core of his research,¹² had its roots in personal experiences of his early life. Born in 1927 in Trento, Cappelletti was still a boy at the outbreak of the Second World War, but nevertheless, he left home to join the partisans of "Justice and Liberty" and their fight against fascism, acting as a messenger. In the mountains around Trento, he met a leader of the resistance, the law professor, Piero Calamandrei, who would have an enormous influence on Cappelletti's life. Calamandrei was a scholar of civil procedure, who had a profound belief in courts and written constitutions as a bulwark against infringements of the rights of the people,¹³ and when Calamandrei was appointed rector of the University of Florence in 1943, Cappelletti followed him and began studying law and philosophy.¹⁴ In the academic life to follow, Cappelletti would remain devoted to the core learning of Calamandrei on the ability of constitutions and constitutional courts to protect rights, and he would share the passion for the common law tradition.¹⁵

After his graduation, Cappelletti practiced law, did his post-doctoral studies on judicial protection of civil rights in Freiburg,¹⁶ and held a professorship in civil procedure at the University of Macerata (1957-62). He came back in 1962 to assume a professorship at the University of Florence, where he founded the Institute of Comparative Law.¹⁷ Here in Italy, he led a group of reformist comparatists, who insisted that comparative law had a mission to improve society through policy-making and suggesting solutions to transform society, as opposed to comparative legal scholars pursuing "pure knowledge."¹⁸ It quickly became a

¹² See Joseph Weiler, *A Self-interview: Remembering Mauro Cappelletti – 10 Years to His Death*, EUROPEAN UNIVERSITY INSTITUTE, <http://www.eui.eu/Documents/DepartmentsCentres/Law/Conferences/HeritageCappelletti/WeilerASelfinterview.pdf>; Interview with Monica Seccombe (May 11, 2013).

¹³ See Guido Calabresi, *Introductory Remarks to Mauro Cappelletti, Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice,"* 35 CATH. U. L. REV. 1, 1–2 (1985); Elisabetta Grande, *Development of Comparative Law in Italy*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 112 (Reimann & Zimmermann eds., 2006).

¹⁴ See EUI Activities Report, Second Academic Year 1977–78, Historical Archives of the European Union, Mauro Cappelletti (HAEU, MC) 13.

¹⁵ See, e.g., Kim Economides, *Remembering Mauro Cappelletti*, EUROPEAN UNIVERSITY INSTITUTE, <http://www.eui.eu/Documents/DepartmentsCentres/Law/Conferences/HeritageCappelletti/Cappelletti-EUIRev-KE.pdf>; see Grande, *supra* note 13, at 112.

¹⁶ See Curriculum Vitae (including a list of principal publications; on file with the Historical Archives of the European Union, MC).

¹⁷ See EUI Activities Report, *supra* note 14, at 13.

¹⁸ See Grande, *supra* note 13, at 117.

magnet for young scholars of comparative law from all over the world. Drawn by the scholarly and personal reputation of Cappelletti, these scholars met and worked with Cappelletti's approach to law.¹⁹

Cappelletti shared his contempt for scholars pursuing pure knowledge with a close American associate of his. In 1962 in Florence, Cappelletti met John Merryman from the Stanford University, and Cappelletti described it as a "magic encounter,"²⁰ where they discovered a common eagerness to fight anti-realistic legal scholarship. Cappelletti's approach to legal studies was in this way given legitimacy by Merryman, who was "imbued with American realism"²¹ and represented the movement towards interdisciplinary, contextual studies, which developed in the U.S. in the 1960s.²² Through Merryman, Cappelletti developed a close tie to the American legal scholarly milieu, which culminated when Cappelletti took a professorship at Stanford in 1970, while keeping his chair in Florence.²³ In the U.S., Cappelletti's interest in the constitutional law of the U.S. — especially regarding human rights protection and the role of the Supreme Court—was deepened.²⁴ In terms of theory and method, Cappelletti was no doubt inspired by his American colleges at Stanford²⁵ when conducting interdisciplinary studies and insisting that rules, processes, and institutions should be seen in their societal and political context.²⁶ These preferences were clear in Cappelletti's first major international research projects, namely the Access To Justice project initiated in 1973. It was a world survey of requirements for access to justice and the institutions, standards, and techniques to meet these requirements. Lawyers, sociologists, anthropologists, economists, and policymakers from five continents collaborated with national reports, which Cappelletti synthesized. In Cappelletti's own words, it was an attempt to understand the social dimension of the current epoch, and it was an outspoken

¹⁹ See Nicolò Trocker, *Mauro Cappelletti*, in *IN HONOREM MAURO CAPPELLETTI (1927–2004): TRIBUTE TO AN INTERNATIONAL PROCEDURAL LAWYER* 14 (Marcel Storme ed., 2005).

²⁰ See Mauro Cappelletti, *In Honor of John Henry Merryman*, 39 *STAN. L. REV.* 1079 (1987).

²¹ See *id.* at 1080.

²² See generally Anthony Arnall, *The Americanization of EU Law Scholarship*, in *CONTINUITY AND CHANGE IN EU LAW: ESSAYS IN THE HONOUR OF SIR FRANCIS JACOBS* (Anthony Arnall et al. eds., 2008) (providing a description of the turn in American legal scholarship).

²³ See Curriculum Vitae, *supra* note 16.

²⁴ See Interview with Monica Seccombe, *supra* note 12.

²⁵ Cappelletti also had institutional affiliations with Harvard—visiting professorship in 1969—and Berkeley—visiting professorship in 1970.

²⁶ See Trocker, *supra* note 19.

aim to impact policy makers.²⁷ A few years later at the EUI, Cappelletti would initiate a new grand research project on access to justice within the transnational dimension—the ITL project.²⁸

C. EUI and New Perspectives for a Common Law for Europe

Max Kohnstamm, former Secretary-General in the European Coal and Steel Community and Vice-Chairman of the Monnet Committee, had just been appointed principal of the future EUI in Florence, when he received a letter from Cappelletti.²⁹ The two men were not acquainted, but Cappelletti wanted to inform Kohnstamm how pleased he was with the appointment, as Cappelletti admired Kohnstamm's enthusiasm and tenacity in his endeavors for a new United Europe. Moreover, Cappelletti had a firm belief in the EUI as a frontrunner in a badly needed "Europeanization" of the national universities. He quoted a lecture of Kohnstamm, where he had stated that the states were not forever "condemned to remain" as they were in the past; there was a possibility "of gradually changing men's minds and their behaviour." Cappelletti shared these sentiments.³⁰

²⁷ See ACCESS TO JUSTICE: THE NEWEST WAVE IN THE WORLDWIDE MOVEMENT TO MAKE RIGHTS EFFECTIVE (Mauro Cappelletti & Bryan Garth eds., 1978).

²⁸ Cappelletti's life's work can be summarized as a quest for justice and a mission to improve society in three dimensions: the constitutional dimension; the social dimension; and the transnational dimension. These dimensions corresponded to three enduring projects of Cappelletti's; Judicial Review in the Contemporary World, Access to Justice, and the ITL project. In Weiler's word, these projects were all about furthering the cause of justice in an unjust world, as law in some ways was a religion to Cappelletti since he believed in its redeeming power. See Weiler, *supra* note 12.

²⁹ In 1948, the idea of a European University was put forth at the Congress of Europe in The Hague. For the next 22 years, a number of negotiations on establishing such a university took place, but questions on the seat, the opposition between a supranational Europe and "Europe des patries," and the accession of third countries, among other questions, blocked an agreement. In 1972, a convention for the establishment of a European University Institute in Florence was finally signed by Belgium, France, Italy, Luxembourg, the Netherlands, and Germany. In institutional terms, it was an intergovernmental cooperation outside but in orbit around the Communities, and it was far more modest than some of the visions for a European university imagined as a part of the Communities. The main object was to "contribute, by its activities in the fields of higher education and research, to the development of the cultural and scientific heritage of Europe . . . pursued through teaching and research at the highest university level." The organs to make this come true were the High Council with representatives from the Member States and the Academic Council consisting of professors and researcher representatives. See generally JEAN-MARIE PALAYRET, A UNIVERSITY FOR EUROPE: PREHISTORY OF THE EUROPEAN UNIVERSITY INSTITUTE OF FLORENCE (1948–76) (1996) (providing a detailed review of the long and winding prehistory of the European University Institute).

³⁰ See Letter from Mauro Cappelletti to Max Kohnstamm (Nov. 20, 1973) (on file with the Historical Archives of the European Union, MC).

When the EUI was inaugurated in the northern hills of Florence, Cappelletti³¹ was one of the professors to join the Law Department.³² At the time, the Access to Justice project was coming to an end, and Cappelletti gained an interest in European law, which was partly a natural progression based on his love of comparative law, and partly an attempt to explore the potential ability of the new phenomenon to make rights effective.³³ He began the exploration by organizing the colloquium, “New Perspectives for a Common Law for Europe” (16-10 May 1977)—in many ways a pilot of the ITL project.³⁴ It gathered a group primarily composed of comparativists from Europe and the U.S. to discuss the historical foundations, present components, and future developments of a common law of Europe in a broad sense.³⁵ Among these people were prominent European law scholars like Ole Lando, a Danish law professor of international private law and comparative law, Thijmen Koopmans, a Dutch professor of constitutional law and comparative law and future judge at the ECJ (1979-1990), and J.D.B. Mitchell, a British professor of constitutional law. Dimitrios J. Evrigenis, Greek judge at the European Court of Human Rights, contributed with a chapter, whereas the ECJ was represented by Pescatore. Pescatore expressed his keen interest in the project from the very outset and participated in the colloquium.³⁶ From the U.S., Merryman from Stanford and Guido Calabresi from Yale University participated.

The project rested on two main assumptions. Firstly, the assumption that a trend towards a *jus commune* of the peoples of Europe had recently been reborn. In Cappelletti’s historical perspective, the distinct legal systems of the western European nations “from Iceland to Cyprus” represented an irrational, suicidal division in a world demanding larger and larger open areas of personal, cultural, commercial, and labor exchanges. Harmonization, coordination, and interdependence were conceived as objective needs of the modern world. Secondly, the assumption that the legislators were overloaded and unable to satisfy the

³¹ Cappelletti kept his chairs at the University of Florence and Stanford University.

³² As of today, the EUI consisted of four departments: History and Civilization, Economics, Law, and Political and Social Sciences.

³³ See Interview with Monica Seccombe, *supra* note 12.

³⁴ The project turned into the first opening volume of the EUI Publications Series. In the foreword, Max Kohnstamm stated that a search for the common basis on which to find legal provisions applicable to the European nations was clearly a part of the tasks entrusted to the Institute. See Max Kohnstamm, *Foreword* to NEW PERSPECTIVES OF A COMMON LAW FOR EUROPE, at v (Mauro Cappelletti ed. 1978).

³⁵ To Cappelletti, Community law was only “the tip of the iceberg” of European common law. At this time, he granted the European Court of Human Rights a profound importance as the Council of Europe united all but one of the twenty-one Western European nations (the exception was Finland), and as the philosophy of human rights was the most valuable heritage of Europe’s political thoughts. See Mauro Cappelletti, *Introduction* to NEW PERSPECTIVES OF A COMMON LAW FOR EUROPE 2–3 (Mauro Cappelletti ed., 1978).

³⁶ See Letter from Pierre Pescatore to Mauro Cappelletti (Aug. 9, 1976) (on file with the Historical Archives of the European Union, MC).

demands for legislating, revising, and updating legislation of modern, democratic welfare-oriented states. Therefore, Cappelletti and the participants pointed to law and judicial activism as an instrument for change. This change was needed in all Western states in Europe, but the need was all the more accentuated at the Community level. The concrete answer to this need was the ECJ, which resembled the U.S. Supreme Court more than a supreme court of the Continental *ordre judiciaire*. Indeed, the *Costa v. ENEL* ruling of the ECJ might prove to be no less important than the *Marbury v. Madison* doctrine by the U.S. Supreme Court in 1803, according to Cappelletti. In the colloquium, the democratic dangers of judicial activism and courts rushing in where parliaments feared to tread were discussed, but as reported by Cappelletti, the general feeling was that activism was necessary. Koopmans for instance stated that courts rushing in was a better alternative than violence and widespread disobedience following dissatisfaction with political processes. This meant that courts could not stay aloof from political issues.³⁷

The "New Perspectives for a Common Law for Europe" project anticipated the ITL project in several ways, but particularly in placing emphasis on the role of law and courts as law-makers because of an overburdened or paralyzed legislative, especially at the Community level. This resonated with a narrative of European law, which was promoted by ECJ judges and jurists from the Commission at the time around the ECJ's *Van Gend en Loos*³⁸ and *Costa v. ENEL*³⁹ rulings. Actors such Gaudet, Hallstein, and Robert Lecourt—ECJ judge 1962–1967 and ECJ President 1967–76—promoted the idea that because the political impetus for European integration was missing at the time—the fall of the Fouchet Plan in 1961–1962, the French rejection of the British application for membership in 1963 and the Empty Chair Crises in 1965—the ECJ had to carry on the integration process through law.⁴⁰ In front of Association des juristes européens, the French academic association of European law, Lecourt for instance held a presentation entitled "The Role of Law in Unifying Europe," where he stated that:

The legal method to unify Europe lies in the fact that EC law has the effect of multiplying relations, associations, transactions beyond borders, as well as of triggering

³⁷ See Cappelletti, *supra* note 35, at 19–20; Thijmen Koopmans, *Legislature and Judiciary – Present Trends, in NEW PERSPECTIVES OF A COMMON LAW FOR EUROPE* 234–35 (Mauro Cappelletti ed., 1978). Koopmans and Cappelletti stayed in touch after the colloquium. Upon taking office in Luxembourg, Koopmans, for instance, wrote to Cappelletti that he was more and more convinced of the importance of comparative public law for the evolution of European law, and that he remained devoted to what he saw as Cappelletti's cause. See Letter from Thijmen Koopmans to Mauro Cappelletti (May 29, 1976) (on file with the Historical Archives of the European Union, MC).

³⁸ See Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

³⁹ See Case C-6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 585.

⁴⁰ See VAUCHEZ, *supra* note 8, at 129.

narrow interrelations of activities, interests, and human relationships. The resulting interpenetration of populations cements in concreto a lively Europe thereby irreversible. Thereby, this process will necessarily call for a political coronation required by the very needs of the population ruled by this unique body of law.⁴¹

In the words of Vauchez, this was “arguably the first systematic conceptualization of the Court’s contribution to the dynamics of what would today be referred to as ‘integration through-law.’”⁴² Similar conceptualizations by a range of ECJ judges and the Legal Service of the Commission were published in a number of legal journals and newspapers,⁴³ and Hallstein defined Europe as a “European Community of Law.”⁴⁴ In the 1960s and the 1970s, this narrative was continuously developed and promoted—for instance, in Pescatore’s book, *Le droit de l’intégration* from 1972 and in Lecourt’s book, *L’Europe des Juges* from 1976. This early ITL narrative was however not commonly accepted. In national legal fora, the jurisprudence by the ECJ was contested, which led some judges to publicly reject the notion of a “*gouvernement des juges*,”⁴⁵ and the scholarship on European law in the nascent discipline of European law was generally doctrinal and devoid of explicit discussions of the role of law and the ECJ in European integration. In such an academic milieu, Cappelletti’s colloquium bore the seeds of bold and eloquent scholarship comparing the legal systems across the Atlantic and emphasizing the role of the ECJ in the integration process, thus anticipating the ITL project.

D. The First Framing of the ITL Project

After the colloquium, Cappelletti wanted to frame a worthy successor to the Access to Justice project, so he wrote to Sanford Jaffe from the Ford Foundation, which had funded the Access to Justice project, with an idea for a project about the needs and trends of rapprochement among the legal systems in Europe. According to Cappelletti, this project should focus on instruments, institutions, and doctrines with American federalism as a model. Cappelletti had no doubt that Jaffe would be able to see the importance of “fresh, interdisciplinary, policy-oriented research” in the area, and he further wrote that “there is

⁴¹ See Robert Lecourt, ‘*Le rôle du droit dans l’unification européenne*’, *Bulletin de l’Association des juristes européens* (Vauchez trans., 1964); VAUCHEZ, *supra* note 8, at 142.

⁴² See VAUCHEZ, *supra* note 8, at 142.

⁴³ See Antoine Vauchez, ‘*Integration-Through-Law.*’ *Contribution to a Socio-History of EU Political Commonsense* (EUI Working Paper No. 2008/10, 2008).

⁴⁴ See VAUCHEZ, *supra* note 8, at 138.

⁴⁵ See, e.g., Andreas Donner, *The Constitutional Powers of the Court of Justice of the European Communities*, 11 COMMON MKT. L. REV. 127, 139 (1974).

no need for articulating the interest of the U.S. generally, and of cultural and political policy-making leaders such as the Ford Foundation, in particular, in this type of project."⁴⁶ At the same time, Ole Lando wrote to Cappelletti with a concrete proposal. At the colloquium, Lando had argued in favor of the development of a European Uniform Commercial Code, an idea originally proposed to him in 1974 by Winfried Hauschild, the head of division in the Directorate General for the Internal Market and industrial affairs of the Commission.⁴⁷ Lando wanted Cappelletti to be a part of the project,⁴⁸ and a meeting between Hauschild, Lando, and Cappelletti was arranged in Florence in the fall of 1977, when Lando was at the EUI as a visiting professor. There, Cappelletti and Lando decided to merge their research aims, and the collected project was discussed with Hauschild.⁴⁹

In a draft from December 1977, the framing of this project was called "The Emergence of a New Common Law of Europe: Some Basic Developments and Instruments for Integration, Considered in the Light of the US Federal Experience." The introduction stated that there was tremendous skepticism about the social and political potential of the European Communities, as the political institutions—the Commission and the European Parliament—had been unable or unwilling to push ahead towards unity. But the courts and the political effects of rapid increase in European trade showed another picture. Consequently, a study of the role of the courts and the increasing economic demands for a uniform commercial code would reveal a long-term trend towards integration—especially when placed in the light of the American Federal experience. The study would therefore examine basic developments, tools, and potential for European integration.⁵⁰ Cappelletti would direct the project from the EUI, while Lando would coordinate the uniform commercial code part. The plan was a three-year research project with an international board of advisors, a range of different contributors, and involvement of community agencies, as the project had direct

⁴⁶ Letter from Mauro Cappelletti to Sanford Jaffe, Ford Foundation (Sept. 8, 1977) (on file with Eric Stein Papers, Bentley Historical Library, Ann Arbor, Michigan, Box 30). The Ford Foundation funded numerous academic projects on the EC, and there were many ties between prominent officials, the EC institutions, and the foundation. An empirical study of the role of the Ford Foundation in European integration is, however, still missing.

⁴⁷ See Ole Lando, *Eight Principles of European Contract Law*, in *MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE* 103–04 (R. Cranston ed., 1997).

⁴⁸ See Letter from Ole Lando to Mauro Cappelletti (Aug. 10, 1977) (on file with the Historical Archives of the European Union, MC).

⁴⁹ In February 1978, Cappelletti described to Fernand Braun from the Commission how Hauschild had been "most instrumental in the preparation stages of the project." See Letter from Cappelletti to Braun (Feb. 22, 1978) (HAEU, MC).

⁵⁰ See Cappelletti, *The Emergence of a New Common Law of Europe: Some Basic Developments and Instruments for Integration, Considered in the Light of the US Federal Experience* (Dec. 1, 1977) (HAEU, MC).

and practical community interest. It was also mentioned that the Commission had already shown considerable interest in the project.⁵¹

In 1978, Cappelletti and Lando split up their research aims, as Lando's effort to develop a European Uniform Commercial Code was turned into a research project in its own right. This was a matter of finances, among other things. At that point, the Ford Foundation had declared that they would fund parts of the project, but not a European commercial code.⁵² The early collaboration with Lando was of great importance to the development of the ITL project, because it got prominent officials from the Commission, with whom Cappelletti had only had superficial contact, involved in the ITL project.⁵³

E. Weiler

Another vital event was the hiring of Weiler. Weiler was an Israeli born in South Africa, who had studied in Sussex and Cambridge, where he developed a research interest in the legal aspects of the EEC. In 1978, the 27-year-old Weiler wrote to Cappelletti and asked if there was a possibility that his work might be integrated into Cappelletti's project.⁵⁴ On the basis of the high quality of an article that Weiler had written with the help of another student, on European Competition law published in the *European Law Review*,⁵⁵ Cappelletti employed Weiler, in October 1978, as an assistant of the ITL project, which he would work on while writing his doctoral dissertation on European Integration from both a legal and political point of view.⁵⁶ It was clear to Cappelletti and his colleagues from the outset that Weiler was an extraordinarily talented young scholar, and this evaluation was shared by some of Cappelletti's main collaborators in the ITL project. The director of the Legal Service of the Commission, Claus-Dieter Ehlermann, found Weiler's essay, titled "The Community System:

⁵¹ See *id.*

⁵² See Letter from Mauro Cappelletti to Ole Lando (Feb. 24, 1978) (on file with the Historical Archives of the European Union, MC). Eventually, Lando's project would evolve into The European Principles of Contract Law, known as the Lando Principles. See THE PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando, Ugh Beale, & Comm'n. of Eur. Contract Law eds., 1995).

⁵³ Furthermore, Lando ended up co-authoring a chapter, *Conflict of Laws as a Technique for Legal Integration*, in the ITL publication series with Peter Hay and Ronald Rotunda in Volume 1, Book 2.

⁵⁴ See Letter from Joseph Weiler to Mauro Cappelletti (Mar. 5, 1978) (on file with the Historical Archives of the European Union, MC).

⁵⁵ See Note from Geoffrey Hand to René David, Hans Daalder & Mauro Cappelletti (undated) (on file with the Historical Archives of the European Union, MC).

⁵⁶ See JOSEPH WEILER, SUPRANATIONAL LAW AND THE SUPRANATIONAL SYSTEM: LEGAL STRUCTURE AND POLITICAL PROCESS IN THE EUROPEAN COMMUNITY (1982).

The Dual Character of Supranationalism,"⁵⁷ remarkable.⁵⁸ Pescatore wrote that it was "the best written ever on this problem. A remarkable balance in analysis of legal and political factors in their interaction. A new, profound and highly realistic explanation of the community structure transcending both former scientific discussion and current political phraseology."⁵⁹ In Weiler's words, Cappelletti and he developed a "Rabbi-Pupil" relationship,⁶⁰ and Weiler was given substantial tasks in the ITL project. In fact, Weiler became the actual leader of the project once the project's conceptual frame had been developed and the topics and authors had been found. Furthermore, it was sometimes the Pupil who taught the Rabbi, as Weiler gained a much more profound knowledge of European law than Cappelletti had. When Cappelletti had to teach a course on European law at Stanford in 1982, it was Weiler who prepped Cappelletti on the peculiarities of European law.⁶¹ The ITL originated in Cappelletti's mastery of comparative law and his normative approach to Europe, but to a large extent, it was the product of the understanding of the European legal order that Weiler developed during the completion of the project.

F. US Collaborators and Bellagio

To use the American legal system to illuminate or develop the European system was not new. In fact, Hallstein championed a European constitutional rule of law inspired by American Federalism in the Treaty of Paris negotiations in 1950,⁶² and the Legal Service of the High Authority promoted a similar interpretation already from the mid 1950s and forward. In the beginning of the 1960s, the Legal Service of the Commission and its director, Gaudet, in addition tried to establish an independent academic discipline of European law in order to support this new interpretation. Most European scholars, though, regarded the European Coal and Steel Community and the European Economic Community as international organizations ruled by principles of public international law.⁶³ When the ECJ followed the lead of the Legal Service in the *Van Gend en Loos* and *Costa v. ENEL* rulings, it

⁵⁷ See Joseph Weiler, *The Community System: The Dual Character of Supranationalism*, in 1 YEARBOOK OF EUROPEAN LAW 267 (1981).

⁵⁸ See Letter from Claus-Dieter Ehlermann to Mauro Cappelletti (July 13, 1981) (on file with the Historical Archives of European Union, MC).

⁵⁹ See Telex from Pierre Pescatore to Terence Daintith (May 26, 1982) (on file at the Historical Archives of the European Union, MC).

⁶⁰ See Weiler, *supra* note, at 12.

⁶¹ Common Market I-VII (Fall 1982) (HAEU, MC).

⁶² See Rasmussen & Boerger, *supra* note 9, at 203.

⁶³ See *id.* at 206.

conceptualized European law as a “new legal order” in order to avoid political controversy, and this vague notion was adopted by the nascent academic field of European law.⁶⁴

The American scholars interested in European law did not shy away from comparisons and the term “constitutional.” The pioneers were the comparative law professor from the University of Michigan, Eric Stein, and his apprentice, Peter Hay, who had hinted at comparability between the Communities and the U.S., already in the beginning of the 1960s.⁶⁵ Both were expats who had gained a new homeland in the U.S., one with which they were very impressed. According to Hay, they therefore developed an unconscious motivation to make Europe like the U.S., which influenced their writings on the nascent European legal system.⁶⁶ Additionally, Stein had a number of collaborators and friends in the European institutions with an influence on his writings, such as Gaudet.⁶⁷ In the following years, the American interest in European law grew. As enterprises increasingly needed lawyers with skills in European law, it became fashionable for students and scholars to engage in European law, as it made them more marketable.⁶⁸ To these Americans, the logic of the *Van Gend en Loos* and *Costa vs. ENEL* rulings seemed natural in the light of American legal history.⁶⁹

As a comparativist with an outspoken belief in a converging world and in rights upheld by strong legal orders, Cappelletti took the obvious step of conducting a survey comparing the European and the American legal system.⁷⁰ Seemingly by coincidence, Cappelletti developed the ITL project simultaneously with Stein working on his grand European-American study on the role of the judiciary in economic integration, which resulted in the Bellagio conference

⁶⁴ See *id.* at 223.

⁶⁵ See, e.g., Eric Stein & Peter Hay, *New Legal Remedies of Enterprises in the European Economic Community*, 9 AM. J. COMP. L. (1960).

⁶⁶ See Interview with Peter Hay (Mar. 17, 2014).

⁶⁷ See Rasmussen & Boerger, *supra* note 9, at 216–17.

⁶⁸ See Interview with Peter Hay, *supra* note 66.

⁶⁹ See *id.*

⁷⁰ While the comparison was generally well conceived among those who Cappelletti sought advice from, a few scholars found this path to be a mistake. Henry Schermers noted that the American experience would be of little use to the emergence of a European higher law, because the European supreme courts considered themselves sovereign, as could be seen in the *Cohn Bendit* case. Although other supreme courts accepted the principle of EC law supremacy, Schermers was not at all sure that these courts would grant priority to community law in case of real conflict. See Letter from Henry Schermers to Mauro Cappelletti (May 7, 1979) (on file with the Historical Archives of the European Union, MC). Ivo Samkalden also warned Cappelletti that the title might indicate that Europe was aiming towards a federation, and this would be a dangerous and unrealistic impression for political reasons. See Summary of Main Points, Planning Meeting (Oct. 19, 1979) (on file with the Historical Archives of the European Union, MC).

in 1979 and the book, *Courts and Free Markets: Perspectives from the United States and Europe*, published in 1982.⁷¹ Cappelletti knew Stein, but a description of Stein's project had been sent to other contacts at the EUI in 1976 at a time when Cappelletti was at Stanford, and Cappelletti therefore did not hear about the project until the fall of 1977.⁷² But he participated in the Bellagio conference along with the political scientist Martin Shapiro from the University of California, Berkeley, who had now been included in the ITL project as the principle contact in the U.S.⁷³ Cappelletti had initially pondered some kind of coordination between Stein and himself on their projects given the similarity in content and focus,⁷⁴ but apart from Stein contributing to ITL with a chapter on European foreign policy, coordination did not take place.

G. Collaboration with Community Institutions

From the very beginning, jurists from the Commission had a key role to play in the ITL project. Hauschild was, as previously mentioned, the first to be involved, and soon after, Cappelletti, Lando, and Hauschild had a meeting with Ehlermann, the newly appointed director of the Legal Service.⁷⁵ Ehlermann had an academic background as a PhD graduate and assistant at the University of Heidelberg (1954-59), which had given him a sensitivity for questions of constitutional law, but he had entered the Legal Service of the Commission already in 1961 and had thus spent most of his carrier in the Community.⁷⁶ Nevertheless, he did not shy away from academic writing, where he had championed a constitutional interpretation of the treaties⁷⁷ and promoted the ECJ as a prime factor of integration.⁷⁸ Lando knew him already, but it was a new acquaintance for Cappelletti—one that would develop into a close professional relation.

⁷¹ See generally COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE (Terence Sandalow & Eric Stein eds., 1982).

⁷² See Letter from Mauro Cappelletti to Eric Stein (Sept. 19, 1977) (on file with the Historical Archives of the European Union, MC).

⁷³ See Letter from Cappelletti to Martin Shapiro (Apr. 11, 1979) (on file with the Historical Archives of the European Union, MC).

⁷⁴ See Memorandum from Mauro Cappelletti to Max Kohnstamm (Jul. 16, 1979) (on file with the Historical Archives of the European Union, MC).

⁷⁵ See Letter from Ole Lando to Claus-Dieter Ehlermann (Nov. 22, 1977) (on file with the Historical Archives of the European Union, MC).

⁷⁶ See Interview with Claus-Dieter Ehlermann (June 29, 2016).

⁷⁷ See VAUCHEZ, *supra* note 8, at 218.

⁷⁸ See, e.g., Claus-Dieter Ehlermann, *Legal Status, Functioning and Probable Evolution of the Institutions of the European Communities*, 10 COMMON MKT. L. REV. 198 (1973).

Ehlermann immediately took an interest and promoted the project in the Commission. Michel Carpentier, the director-general of the Environment and Consumer Protection Service at the Commission, especially found the project exciting.⁷⁹ Ehlermann and Carpentier thus engaged a number of jurists in the Commission to participate in the ITL project, and on Ehlermann's initiative, a meeting gathering potential contributors and partners to discuss the project took place at the EUI in June 1978 with the presence of Cappelletti, Lando, Hauschild, Ehlermann, Carpentier, Scheuer, and Krämer from the Carpentier's service, Mr. Loerke, chief advisor to the Secretariat-General of the Commission, Klaus Hopt from the University of Tübingen, Yves Mèny from the University of Rennes, and representatives from the EUI including Professor Geoffrey Hand from the Law Department.⁸⁰ The heavy representation by the Commission became a continuous feature of the ITL project meetings, and at these meetings Ehlermann and Carpentier would specify their interests. Ehlermann was, for instance, particularly concerned with the inclusion of the early American experience of transforming a confederation into a federation and the subsequent rise of federal power, as well as with studies of other federal experiences.⁸¹ Carpentier emphasized that the parts dealing with parallel legislation and access to justice at the supranational level had his main interest, as they were of paramount importance the evolution of environment and consumer protection policies.⁸²

Ehlermann and Carpentier assigned a number of their civil servants to participate in the project as informants, and some of them became very involved in the project, acting as co-authors.⁸³ The co-writers could, however, not figure as authors. As Carpentier stated in a letter to Cappelletti, it was difficult for them to be mentioned, as they were officials of the Community.⁸⁴

⁷⁹ See Notes from Telephone Conversation with Michael Carpentier (Feb. 7, 1978) (on file with the Historical Archives of the European Union, MC).

⁸⁰ See Letter from Mauro Cappelletti to Max Kohnstamm (May 19, 1978) (on file with the Historical Archives of the European Union, MC).

⁸¹ See Letter from Claus-Dieter Ehlermann to Mauro Cappelletti (July 12, 1979) (on file with the Historical Archives of the European Union, MC).

⁸² See Letter from Michael Carpentier to Mauro Cappelletti (June 26, 1979) (on file with the Historical Archives of the European Union, MC).

⁸³ Jean Amphoux from the Legal Service worked with Bryan Garth on writing a chapter about migrant workers. See Cappelletti to Amphoux (Mar. 12, 1981) (HAEU, MC). David Lawrence from Carpentier's service collaborated with Eckard Reh binder and Richard Stewart from Berkeley University on volume two on environmental protection policy. Ludwig Krämer from the same service collaborated with David Trubek and Thierry Bourgoignie on producing volume three on Consumer Law, Common Markets. See Letter from Carpentier to Mauro Cappelletti (July 22, 1980) (on file with the Historical Archives of the European Union, MC). In fact, Krämer had been the one to suggest Thierry Bourgoignie. See Telephone Conversation with Krämer (Nov. 12, 1979) (on file with the Historical Archives of the European Union, MC).

⁸⁴ See Letter from Michael Carpentier to Mauro Cappelletti, *supra* note 83.

In addition, Ehlermann suggested potential authors whom Cappelletti considered,⁸⁵ and Cappelletti often discussed his choice of academics with Ehlermann.⁸⁶ Finally, Ehlermann served as an author of the chapter "Political Organs and the Decision-Making Process in the United States and the European Community" with Weiler and Samuel Krislov, professor of political science from Brandeis University in Massachusetts. Yet Ehlermann did not do any of the writing. Shapiro described the arrangement regarding the chapter in the following way to Krislov:

The head of the Commission's legal staff is Claus-Dieter Ehlermann, a German in his 40's who I just can't say enough about. He is an extremely open, articulate political administrator, fully at home in the academic and bureaucratic worlds and oriented completely to real policy and political questions rather than the European style of abstract legal analysis. He and his people are too busy to actually write papers for this volume. But he has agreed to an arrangement under which he would serve an informant, editor, and reviser of a paper and most importantly as a contact man through whom interviews with the major people at both the Commission and the Council could be arranged.⁸⁷

This letter beautifully sums up Ehlermann's tasks in the project and the admiration the other contributors had for him, not least Cappelletti, who regarded Ehlermann as a "truly marvellous" colleague⁸⁸ and highly valued his visits to the EU.⁸⁹

⁸⁵ He considered, for instance, Jochen Frowein, the German member of the European Commission of Human Rights, for a chapter on human rights. See Pro Memoria Telephone Conversation Between Mauro Cappelletti and Claus-Dieter Ehlermann (Nov. 12, 1979) (on file with the Historical Archives of the European Union, MC). Frowein ended up writing the chapter on human rights with Stephen Schulhofer and Shapiro, as well as a chapter on the federal experience in Germany and Switzerland.

⁸⁶ See Pro Memoria Telephone Conversation Between Mauro Cappelletti and Claus-Dieter Ehlermann, *supra* note 85.

⁸⁷ See Letter from Martin Shapiro to Samuel Krislov (Aug. 22, 1979) (on file with the Historical Archives of the European Union, MC).

⁸⁸ See Letter from Mauro Cappelletti to Claus-Dieter Ehlermann (undated) (on file with the Historical Archives of the European Union, MC).

⁸⁹ Ehlermann visited in relation to meetings about the project, but he was also officially a visiting professor at the EU in February of 1982, giving a seminar on the tension between the Commission and other community organs. See *id.*

Judges from the ECJ had a role to play in the project as well. This is especially true of Pierre Pescatore, who was a primary source of inspiration to Cappelletti. In April 1979, Cappelletti wrote the following to Pescatore: "Part I of the project is, I believe, very much inspired by the activities and role of the European Court of Justice, and most particularly by the philosophy of integration of which you have been the leading advocate and representative."⁹⁰ Pescatore participated in project meetings and came to the EUI as a visiting professor. Mertens De Wilmars, the president of the ECJ (1980-84), was also very sympathetic to the aim of the project and visited the EUI a number of times. He confided to Cappelletti that he had always thought that Europeans could profit from the American experience.⁹¹ Andreas Donner, who had recently stepped down as an ECJ Judge, though, confessed that, in his opinion, the American experience offered as many lessons to avoid as to imitate.⁹²

Finally, Hans Glaesner from the Legal Service of the Council and Roland Bieber, a legal adviser working in the Parliament, both acted as consultants in the project and provided Cappelletti with Council and Parliament perspectives.⁹³

The EC institutions were thus heavily represented and took part in all aspects of the process developing and writing the ITL project. Why did Cappelletti want this degree of involvement by the institutions in an academic project? In a letter to de Wilmars, Cappelletti stated that he had been at pains to ensure a degree of involvement of "practitioners" in preparing the studies, because they were the best to appreciate existing problem areas in practice, and because the project should hopefully be of use to the practitioners. For instance, it was Cappelletti's opinion that the consumer and environment service had already learned a

⁹⁰ See Letter from Mauro Cappelletti to Pierre Pescatore (Apr. 11, 1979) (on file with the Historical Archive of the European Union, MC).

⁹¹ See Letter from Mertens de Wilmars to Mauro Cappelletti (Aug. 11, 1981) (on file with the Historical Archives of the European Union, MC). Mertens de Wilmars visited the EUI in February of 1982 and gave lectures on the jurisprudence of the ECJ and the relationship between community law and national law. See Letter from Mauro Cappelletti to Mertens de Wilmars (Feb. 11, 1982) (on file with the Historical Archives of the European Union, MC).

⁹² See Letter from Andreas Donner to Mauro Cappelletti (Feb. 6, 1980) (on file with the Historical Archives of the European Union, MC). In the correspondence between Cappelletti and Donner, an enlightening exchange of views on the role of the judge took place. Cappelletti had sent Donner a draft of his article "Interpreter or Law-Maker." Donner did not think that the law-profession as a whole had an interest in stressing the law-making consequences of their activities. The result of political interference was a decided lowering of the quality of the people nominated as judges. This was a tendency, which Donner for instance saw in the German Constitutional Court. See Letter from André Donner to Mauro Cappelletti (Mar. 4, 1980) (on file with the Historical Archives of the European Union, MC).

⁹³ See, e.g., Letter from Hans Glaesner to Geoffrey Hand (June 26, 1979) (on file with the Historical Archives of the European Union, MC); see Letter from Bieber to Cappelletti (Dec. 12, 1981). Bieber was at the EUI as a visiting professor in 1982.

great deal from the Americans involved.⁹⁴ This points to Cappelletti's policy-orientation. The project should be of real use to actual practitioners, which Ehlermann and Carpentier could ensure. Ehlermann, on his side, had a mutual interest in the interaction. In fact, pursuing synchronization between academia and practice was one of his guiding principles as director of the Legal Service.⁹⁵ Ehlermann and Pescatore were pioneers promoting a constitutional nature of European law and law's primary role in the integration process, and these ideas coincided with Cappelletti's views on the role of law in modern society. In the ITL project, this shared normative vision found an academic expression in the comparison between the European and American legal systems, which even the president of the ECJ supported.

H. The Three Levels of the Project

Around 1980, the project was in its final form, and most of the topics and authors were in place. The project was divided in two parts. Part one was a study of access to justice problems in a transnational dimension under the headline "Methods, Tools, and Institutions for Legal Integration" dealing with principles, institutions, processes, and techniques. Part two consisted of studies of substantive topics and areas in which integrational developments were crucial or especially needed.⁹⁶ The chapters were primarily to be authored by teams of 2-3 people consisting of both Europeans and Americans, in a mix of legal scholars, political scientists, and economists.⁹⁷

Beyond this research to be published in a publication series—the first level—the project had two other levels. The second level was a superstructure for seminars and research student activities,⁹⁸ encompassing practically the entire Law Department of the EUI. Most of the professors were engaged in the project,⁹⁹ and many of the involved external researchers came to the EUI as visiting professors and gave seminars on European law. Additionally, the students from the Law Department researched topics connected to the project.

⁹⁴ See Letter from Mauro Cappelletti to Mertens de Wilmars (July 2, 1981) (on file with the Historical Archives of the European Union, MC).

⁹⁵ See Interview with Claus-Dieter Ehlermann, *supra* note 76.

⁹⁶ See Letter from Mauro Cappelletti to Terence Daintith (Aug. 6, 1980) (on file with the Historical Archives of the European Union, MC).

⁹⁷ See Memorandum from Mauro Cappelletti to Max Kohnstamm and Marcello Buzzonetti (June 2, 1980) (on file with the Historical Archives of the European Union, MC).

⁹⁸ See Seventh Report of Activities (1982–83) (on file with the Historical Archives of the European Union, MC).

⁹⁹ Professor Terence Daintith, Professor Klaus Hopt, Professor Yves Mény, and Professor Jacques Pelkmans were all involved in the project. See Memorandum from Mauro Cappelletti to Max Kohnstamm and Buzzonetti, *supra* note 97.

The third level was related activities in the field of integration, such as setting up conferences and initiating meetings on European law. In 1982, Cappelletti and Weiler for instance became directly involved with the treaty revision project of the Institutional Committee of the European Parliament, which aimed at establishing a European Union. The resolution motions of the committee were sent in confidentiality to Cappelletti and Weiler, before the resolutions were to be discussed in plenary, in order to receive academic backing for the entire initiative within the framework of the ITL project.¹⁰⁰ This led to brainstorming sessions at the Institute in 1982 on the problems and possible solutions in establishing a union attended by a range of professors, politicians, and civil servants, such as Ehlermann, who was listed under “Academic Team.”¹⁰¹ Concretely, this connection resulted in Weiler’s, along with Roland Bieber and Jean-Paul Jacqu , drafting of the declaration of rights, which became a part of the Spinelli Draft Treaty adopted by the European Parliament in February 1984.¹⁰²

Overall, the ITL project ended up being much more than a number of publications. It created a scholarly environment of law professors, students, jurists from the EC institutions, and ECJ judges. The project enabled collaboration with politicians and jurists from the Community on reform proposals for Europe under its auspices.

I. The Academic Output

The ITL publication series was impressive when De Gruyter published it in 1985 and onward. Part One was a volume of three books still entitled “Methods, Tools, and Institutions for Legal Integration.” Part Two was five further volumes dealing with the substantive topics of environmental protection policy, consumer protection policy, energy policy, corporate law and capital market harmonization, and regional policy.¹⁰³

The direct line to Cappelletti’s previous projects is easily recognized. In the Foreword, Cappelletti described how the era was one of tremendously accelerated movement and change where convergence was indispensable for productive and peaceful coexistence.

¹⁰⁰ See Note from Cappelletti and Weiler to Maihofer (June 21, 1982) (on file with the Historical Archives of the European Union, MC).

¹⁰¹ See Brainstorming Exercise, Meeting 21–22 (Oct. 1982) (on file with the Historical Archives of the European Union, MC).

¹⁰² The Draft Treaty was described as representing “a structural innovation” in the final pages of Cappelletti, Seccombe and Weiler’s general introduction in the ITL publication series, however without mentioning of the involvement of Weiler. See Mauro Cappelletti, Monica Seccombe, & Joseph Weiler, *General Introduction to INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, 1 METHODS, TOOLS AND INSTITUTIONS*, bk. 1, at 67 (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1986).

¹⁰³ In this Section, I analyze the main objectives and assumptions of the project, especially regarding the way the nature of European law and the role of law in the integration process were conceived. A detailed analysis of the different parts lies outside the scope of this Article.

Divergence in basic human approaches would make societies unmanageable and coexistence impossible; it would result in chaos. Thus, Cappelletti saw a problem for which European integration could be the solution.¹⁰⁴ In the general introduction, written by Cappelletti, Weiler, and Monica Seccombe,¹⁰⁵ the Community was described as in a state of crisis due to a potentially inefficient decision-making process in an enlarged community, the Common Agricultural Policy, the budgetary crises, the lack of a transport policy, unemployment, inflation, a deep seated industrial malaise, and the questionable day-to-day implementation of Community law.¹⁰⁶ Therefore, the editors pointed to the potential of law. Thus, law was not seen only as the object of integration, but also as the instrument of integration¹⁰⁷—a conceptualization which was based on an assumed interdependence between the legal and politico-economic systems.¹⁰⁸ The entire publication series was infused with this understanding: For instance, the chapter "Instruments for legal integration in the European Community – Review" by Peter Hay, a law professor at the University of Illinois, Ronald Rotunda, also a law professor at the University of Illinois, and Lando. It was a traditional review of the sources of Community law—regulations, directives, international agreements, and general principles of law—as well as an analysis of the expected effect of the different sources of law.¹⁰⁹ Another example is the chapter titled "The protection of Fundamental Human Rights as a Vehicle of Integration," by Jochen Frowein, Stephen Schulhofer, and Martin Shapiro, where the authors advance the thesis that protecting human rights can have an integrating effect.¹¹⁰ The studies in the substantive volumes worked in the same way. In Volume Two, the authors Eckard Reh binder and Richard Stewart, for instance, reviewed the legal means to achieve full integration in the area of environmental policy.¹¹¹

The essentialist basis for seeing law as a strong instrument of integration was the assumption that the nature of European law was constitutional. This assumption rested on

¹⁰⁴ See Mauro Cappelletti, *Foreword* to INTEGRATION THROUGH LAW. EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, 1 METHODS, TOOLS AND INSTITUTIONS, bk. 1, at 67 (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1986).

¹⁰⁵ Monica Seccombe was Cappelletti's research assistant and an editor of the ITL publication series.

¹⁰⁶ See Cappelletti, Seccombe, & Weiler, *supra* note 102, at 10–11.

¹⁰⁷ See *id.* at 15.

¹⁰⁸ See *id.* at 4.

¹⁰⁹ See Peter Hay, Ronald Rotunda & Ole Lando, *The Protection of Fundamental Human Rights as a Vehicle of Integration*, in INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, 1 METHODS, TOOLS AND INSTITUTIONS, bk. 2 (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1986).

¹¹⁰ See Jochen Frowein, Stephen Schulhofer & Martin Shapiro, *The Protection of Fundamental Human Rights as a Vehicle of Integration*, in INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, 1 METHODS, TOOLS AND INSTITUTIONS, bk. 3 (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1986).

¹¹¹ See Reh binder & Stewart, *supra* note 1.

the comparison with the American legal system. Although the editors underlined the differences between the EC and the US in the general introduction, they argued that the EC resembled a federal state on the legal level because of the legal doctrines of direct effect, supremacy, and pre-emption. These doctrines had, in the words of the editors, come so close to emulating full-fledged federal systems that it was common to refer to the Community legal order as being “quasi-federal.”¹¹² The ECJ has been fashioning no less than a “federal” constitution of the EC, and the constitutional jurisprudence seemed to chart a strong converging trend with the American federal experience and indeed with the experience of other federal states, while in the decision-making process, the EC was closer to the United Nations than the United States.¹¹³ Other authors in the project shared this understanding, although they were often cautious in their choice of words. In the chapter titled “Federalism and European Integration: A Commentary,” by Donald Kommers, a law professor from the University of Notre Dame in Indiana, Kommers stated that the EC contained the seeds of both aggregation and disaggregation, but that Europe had begun to create the adequate institutional structures and relationships on which the success of a federal experiment depended, such as a federal “constitution” or treaty, direct applicability, and supremacy.¹¹⁴ While Kommers considered the EC to be a confederation, he believed that it could be a federation “tomorrow.”¹¹⁵ In Ehlermann, Weiler, and Krislov’s chapter on political organs and decision making, they stated that legal developments in the EC had exhibited trends following those that had evolved in more sophisticated federal systems.¹¹⁶ Giorgio Gaja, Hay, and Rotunda made the same point when they wrote that the ECJ had exercised extensive federal jurisdiction.¹¹⁷

All in all, the contributions in the ITL publication series all underlined the centrality of law in the integration process and the constitutional nature of European law. This was conceptualized in the new and forceful notion of “integration through law,” treated explicitly

¹¹² See Cappelletti, Seccombe, & Weiler, *supra* note 102, at 12, 30.

¹¹³ See *id.* at 29.

¹¹⁴ See Donald Kommers, *Federalism and European Integration: A Conclusion*, in *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, 1 METHODS, TOOLS AND INSTITUTIONS*, bk. 1, at 67 (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1986).

¹¹⁵ See *id.* at 616.

¹¹⁶ See Claus-Dieter Ehlermann, Joseph Weiler & Samuel Krislov, *The Political Organs and the Decision Making Process in the United States and The European Community*, in *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, 1 METHODS, TOOLS AND INSTITUTIONS*, bk. 2, at 3 (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1986).

¹¹⁷ See Giorgio Gaja, Peter Hay & Ronald Rotunda, *Instruments for Legal Integration in the European Communities*, in *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, 1 METHODS, TOOLS AND INSTITUTIONS*, bk. 2, at 113 (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1986).

in the general introduction by Cappelletti, Weiler, and Seccombe, and highlighted in the main title.¹¹⁸

J. Impact¹¹⁹

In 1981, Shapiro famously summed up the European scholarly production in a review of an article by Ami Barav:

It represents a stage of constitutional scholarship out of which American constitutional law must have passed about seventy years ago. . . . It is constitutional law without politics. Professor Barav presents the Community as a juristic idea; the written constitution (the treaty) as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court (the ECJ) as the disembodied voice of right reason and constitutional teleology.¹²⁰

Shapiro had a point. At the time, European law scholarship was characterized by formalism and a lack of theoretical aspirations. But this milieu was transformed in the 1980s, and the ITL project was a huge factor in this transformation, as it affected the milieu through impact channels related to the three-level superstructure of the project.

The first channel was the publication series, and it was already clear in the reviews that the series had the potential to become a classic because of its new conceptions and approaches. George A. Bermann, a professor of law from Columbia University, for instance, wrote the following in *Fordham International Law Review* in 1987:

Clearly, Volume One of Integration Through Law is a monumental work in terms of its conception, its approaches, and its achievements. The proof will be that no serious scholarship in general aspects of European or comparative legal integration can safely be undertaken

¹¹⁸ It is unclear in the archive of Cappelletti exactly when the notion of "integration through law" was created and who created it, but most likely, it was not coined until the general introduction by Cappelletti, Weiler, and Seccombe was written. Thus, it was late in the project process.

¹¹⁹ This Section is a first attempt at writing an impact history of the ITL project. Thus, it provides initial reflections.

¹²⁰ See Martin Shapiro, *Comparative Law and Comparative Politics*, 53 S. CAL. L. 537, 538 (1980).

without prior recourse to the insights given expression in these three books.¹²¹

In a review in *Common Market Law Review*, Koen Lenaerts, professor of European law at the University of Leuven,¹²² in the same vein, stated that, “The original and essentially empirical content of most contributions, relying on the wealth of an interdisciplinary reflection (law, political and economic science), has resulted in the creation of a gold mine of ideas, perspectives and data.”¹²³

The second impact channel was the Law Department of the EUI, where researchers linked to the project were shaped by the ITL theory and Cappelletti’s contextual, comparative approach. It was inevitable that these researchers would carry the ITL theory and the EUI approach with them to positions in the national settings and the Community institutions, and spread the theory and approach of the ITL project. The main figure to proceed along the path laid forth by the ITL project was Weiler himself; it was not just Cappelletti’s personality, but also Weiler’s academic and personal skills that contributed immensely to the popularization of the ITL theory. In 1985, when the project had ended, Weiler went to Michigan to become a colleague of Stein, where he stayed until he joined the faculty at Harvard Law School in 1992. In the U.S., Weiler further developed the ITL theory, culminating in the famous article, “The Transformation of Europe” in *Yale Law Journal* in 1991. The time was marked by the optimism following the Single European Act, which made American political scientists, such as Anne-Marie Slaughter, Walter Mattli, Alex Sweet-Stone, and Karen Alter keen on studying Europe. They read the work of Weiler, became fascinated with the role of the ECJ, and adopted the ITL theory. Eventually, the assumptions of the constitutional nature of European law and law’s centrality in the integration process would become the standard interpretations not only in European law scholarship,¹²⁴ but also in European studies in general, where ITL became a guiding research hypothesis and a self-explicating super-theory.¹²⁵ On this basis, Weiler became the superstar of European law.

¹²¹ See George A. Bermann, *Book Review of Volume I of ITL*, 11 *FORDHAM INT’L L. J.* 232, 253 (1987).

¹²² Koen has also been the President of the ECJ since October of 2015.

¹²³ See Koen Lenaerts, *Book Review of Volumes 1-2 of ITL*, 24 *COMMON MKT. L. REV.* 310 (1987). Lenaerts did also find a general lack of coherence in the ITL publication series—a critique which was also brought forth in a review by Edward McWhinney, Professor of international law at the Simon Fraser University, Vancouver. See Edward McWhinney, *Book Review of Volumes 1-2 of ITL*, 81 *AM. J. INT’L L.* (1987).

¹²⁴ There are countless examples, but see, for instance, these illuminating sentences by the Dutch legal scholar and former jurist at the ECJ Kamiel Mortelmans: “The European community is for a large part the creation of law. It was with good cause that a large international research project on European integration was given the title *Integration Through Law*.” See Kamiel Mortelmans, *Community Law: More Than a Functional Area of Law, Less Than a Legal System*, 23 *LEGAL ISSUES. EUR. INTEGRATION* 23, 26 (1996).

¹²⁵ The notion “Integration through law” is seldom defined by the authors, who subscribe to the theory and use the notion in their work. See, e.g., Karen Alter, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN*

Finally, the third impact channel included activities in the field of integration related to the ITL project, as the collaboration Cappelletti initiated between the EUI and the Community subsequently branched out and established the EUI as an EU think tank. In 1984, the European Policy Unit—the forerunner of the Robert Schuman Centre founded in 1994—was created, where activities similar to Weiler's drafting of the declaration of rights for the Spinelli Draft Treaty would take place. According to Vauchez, EUI professors were since engaged in different reform initiatives such as the Herman Constitution (1994), the Convention on the Future of Europe (2002–2003) and the draft Lisbon Treaty, which all aimed at reinforcing the constitutional character of the treaties with a range of solutions from the simple constitutional codification of the existing treaty articles to a constitutional treaty.¹²⁶ Ehlermann was one of the EUI professors involved in the reform proposals, after joining the EUI as a professor of EC law in 1995 and thus made the tight bond and shared understanding of European law in the EUI and the Commission official.

When estimating the collected impact the ITL project had through the three impact channels, Weiler's view that the ITL played "an appreciable role" in a qualitative transformation of the academic and intellectual milieu of European Law not just as a published set of books, but also as an educational and scholarly milieu, and an intellectual and academic happening¹²⁷ is certainly justified. The ITL project provided the European law academia with a theory that gathered the discipline, EU studies with a court-centered grand interpretation, and a common understanding in the collaboration between the EUI and Community institutions. The EUI remained the locus of the ITL theory, not just because of the impact the ITL project had on the research environment of the EUI, but also because Weiler never really left the EUI. In 1990, he established the Academy of European Law at the EUI, which provided summer courses on European law and human rights law, and in 1995, he was one of the founding editors of the *European Law Journal* with the subtitle 'Review of European law in context,' which was based at the EUI. In 2013, he became the president of the EUI.¹²⁸

INTERNATIONAL RULE OF LAW IN EUROPE (2001).

¹²⁶ See VAUCHEZ, *supra* note 8, at 204–06.

¹²⁷ See Weiler, *supra* note 11, at 175.

¹²⁸ After the millenium, Weiler's interpretation the European legal order changed significantly with the promotion of his theory of "constitutional tolerance," where he contrasted European constitutionalism with American or other federal forms of constitutionalism. See, e.g., Joseph Weiler, *Federalism without Constitutionalism: Europe's Sonderweg*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (Kalypso Nicolaidis & Robert Howse eds., 2001).

K. Conclusion

The history of the ITL project unfolded in this Article provides clarity on the nature of the power-knowledge nexus in European law, as it pulls the curtain on the close collaboration between academia and the Community institutions in the ITL project. Jurists from the Commission, the ECJ, the Council, and the Parliament were thus massively present in the project as informants, consultants, authors, and visiting professors at the EUI. The cooperation between Cappelletti and the ubiquitous Ehlermann, who functioned as a main collaborator of Cappelletti's, as well as the relation to Pescatore, whose philosophy of integration was a main source of inspiration, is especially noteworthy. It demonstrates that the ITL was an academic expression of a constitutional vision, which had flourished in the Commission and the ECJ for decades, but had never been truly adopted in the emerging academic discipline of European law, where the scholars subscribed to the careful characterization of the ECJ in the *Van Gend en Loos* and *Costa v. ENEL* rulings declaring a "new legal order." As a comparativist, Cappelletti was an outsider in this field, but his comparative approach to European law and his strong belief in courts and constitutions would transform the discipline of European law. His normative interpretation of European law was present already in the New Perspectives for a Common Law for Europe project, but it was the ITL project, which had the impact. The high standard, daring theoretical conceptualizations, and original approach in the publication series, the scholarly milieu of students and researchers engaged in the ITL project at the EUI, the rise of Weiler, and the continued collaboration between the EUI and the Community institutions made the ITL theory a leading narrative in the entire field of European law.

On the basis of this history, Avelj's thesis on a difference between a policy conception of ITL and an academic project of ITL should be re-evaluated; it presents a picture of a separation between academia, Community institutions, and the conceptualizations of European law, which they produce, that is not representative. The findings in this Article instead support the claims of Vauchez and Rasmussen/Boerger, who have traced the roots of the constitutional paradigm in the practice and writings of Hallstein and Gaudet, and linked it to Stein/the EUI. But it also adds nuance to their histories of the constitutional paradigm by providing a very important piece in the puzzle, which has so far been neglected. This Article shows Stein and Cappelletti's efforts as parallel, as Stein and Cappelletti initiated their large comparative, transatlantic studies of the Community and the American Federation infused with a constitutional understanding of European law and notions of its centrality around the same time. Yet it argues that the ITL project had an unparalleled impact because of the very concrete legacy of the ITL project, namely the notion "Integration through Law," which has proved to be an extremely powerful concept providing a field of scholars, law professors, civil servants from the Community institutions, and ECJ judges with a flattering self-image and a *raison d'être* expressed in three little words.