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## Integration Through Law: Europe and the American Federal Experience. Vol. 1: Methods, Tools and Institutions (Cappelletti, Seccombe & Weiler Eds.)

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## BOOK REVIEW

INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE. VOL. 1: METHODS, TOOLS AND INSTITUTIONS. Edited by Mauro Cappelletti, Monica Seccombe, and Joseph Weiler. New York: Walter de Gruyter and Co., 1986. Volume 1: three books. Lib. Cong. No. KJE 5075.I58. Book One: US\$151.00; Book Two: US\$82.50; Book Three: US\$93.00.

*Reviewed by George A. Bermann\**

The richness and complexity of this three-book introductory volume to a still longer series of comparative studies on the European Communities and the United States (The Florence Integration Project Series) make the series one of the most ambitious works on the subject ever to appear. The books will pose a challenge to readers at all levels of familiarity with European Federalism due to the scope and structure of their inquiry, their interdisciplinary ambitions, and their commitment to the comparative method. The general editors of the European University Institute, under whose aegis the Florence Integration Project Series was undertaken, deliver to their readers the "large research adventure" (p. viii) promised early on.

Consider first the scope and structure of the enterprise. While the subject—"the dilemma of reaching an equilibrium between, on the one hand, a respect for the autonomy of the individual unit, freedom of choice, pluralism and diversity of action, and, on the other hand, the societal need for cooperation, integration, harmony and, at times, unity" (p. 4)—is conventional enough, the presentation is not. An intelligently articulated structure lends the collection of seventeen separate essays an overall logic and coherence, without the contrived interconnectedness one might expect in a "text" of this size on European federalism. *Integration Through Law* gains depth and texture by repeatedly approaching similar themes from different angles. In truth, the editors might have even better ex-

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exploited the natural interconnectedness of the essays, either by building more bridges between them or, what is more feasible, by having the authors themselves take more explicit note of what their co-contributors have written. The likely result would have been less bulk, less repetition, and, more important, a greater sense of real progression in the volume as a whole. In short, a trifle more discipline in covering the terrain would have heightened the book's utility without seriously jeopardizing its subtlety or sophistication.

Next to its scope and structure, the volume's most ambitious feature is the striking assemblage of distinct intellectual perspectives. Book One achieves this variety most obviously by collecting under one rubric a series of three "overview" essays on the political, legal, and economic dimensions of American and European federalism. But the interdisciplinary flavor continues throughout the volume, for example in the juxtaposition in Book Two of a lawyerlike treatment of choice of law and a rich political science account of American and European decisionmaking. An intelligent reading of the book as a whole makes it abundantly clear that European federalism cannot adequately be studied in economic or political or legal terms alone. The individual essays, however, do not show as clearly the value of combined economic, legal, and political analysis. The absence of that fusion within the contributions has the effect of shifting to the reader the challenge of synthesizing the volume's different perspectives. That is a worthy challenge that the reader may or may not be equipped to meet.

Finally, when Professor Cappelletti in the foreword describes *Integration Through Law* as "an inherently and proudly pluralistic product" (p. v.), he doubtless has in mind more than this interdisciplinary flavor, or the fact that the various contributors hold different conceptions of federalism. The volume also takes a rigorous and sustained comparative look at federalism. Europe and the United States are the pillars of the comparison, but Australian, Canadian, Swiss, and West German federations are viewed along the way. In addition, the editors have drawn their authors widely from both European and American academic circles. All of this makes *Integration Through Law* a still more cosmopolitan product. Of course, since each author understandably has his own comparative sense of the landscapes on which the European and American

federalisms are being built, the ultimate comparisons to be drawn are never simple or obvious. The generous helpings of introductions and conclusions notwithstanding, the relationships among the volume's many elements and themes are essentially left for the reader to determine.

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Book One serves as a rich and extended introduction to the entire volume. Its own four parts are: (a) a general introduction by the editors, bearing as its own title that of the entire project, namely *Integration Through Law: Europe and the American Federal Experience*; (b) a series of three separately authored "perspectives"—one political, one legal, and one economic—on American and European federalism; (c) a second series of three separately authored essays, taking up no particular "perspective" on federalism, but instead relating federal experiences in other polities, specifically Australia, Canada, West Germany, and Switzerland; and finally, (d) a brief set of comparative conclusions addressed chiefly to the single-nation reports that immediately precede it.

The initial essay, while designed essentially as an introduction to both the book and the volume, is also a valuable set of insights on comparative American and European federalism. In fact, effectively as it serves its purpose, the material would have performed even more effectively as a conclusion, by providing useful synthesis. Not only is the introduction quite long, but, very much to the editors' credit, it also closely builds on developments in the essays that follow. Precisely because it strives to remain faithful to the various contributions, but is not set forth as a conclusion, it comes across at times, despite the editors' strong sense of organization, as diffuse and understandably unsupported.

Despite this criticism, the introduction raises all of the important federalist ideas, while underscoring the special value of comparative and interdisciplinary inquiry in this field. If there is an overriding theme to the introduction, it is the flexibility of federalist structure. Cappelletti, Seccombe, and Weiler acknowledge at the very outset the critical difference between a community of states (constituting a union among peoples) and a federal state (composed of one people), but rather than de-

pict a set of sharp contrasts between the United States and Europe, they present the two as different accommodations of the apparent tensions between federalism and integration, each with its own distinctive genius. Thus, they actually support rather than merely restate the familiar thesis that federalism is best understood not as a simple contest between central and peripheral power, but as a functioning framework of interdependence. In this way, the introductory essay nicely sets the stage for a pluralistic inquiry into a pluralistically conceived subject.

The heart of Book One is the series of comparative political, legal, and economic overviews of American and European federalism. Predictably the most broadly-based and accessible is Elazar and Greilsammer's *Federal Democracy: The USA and Europe Compared—A Political Science Perspective*. As good comparativists, the authors acknowledge early on the critical differences in the contexts of American and European federalism—among them, the age of the federal experiment relative to that of the political entity in which it occurs, the scope of the federation's aims and activities, the degree of common geographical and political culture among the federating units, and the intended pace of integration. In doing so, they give refreshing emphasis to the fact that in the United States federalism sought above all to give structure to a democratic, popularly sovereign political enterprise, whereas the Community is chiefly the product of international cooperation among independent sovereign states in the interest of more or less well defined programmatic goals. Though that difference alone is rich in its implications, the authors decisively reject the view that the political contexts of European and American federalism are so dissimilar as to render comparison useless.

The comparison is in fact enlightening. On the one hand, Elazar and Greilsammer present a reasonably conventional view of American federalism: an essentially non-centralized federal system marked by a constitutional and practical sharing of powers between a strong national government and a series of strong state and local governments, in short, a federation. While the characterization is basically fair, the authors are not clear as to which among the many institutional features of the American system—the existence of a constitution as such, the international non-sovereignty of the American states, the pre-

cise division of competences, the institution of effective federal judicial review, and so on—are the ones that really count. Nevertheless, the clearly emerging motif is one of partnership, that is, a mode in which all participants (not just governmental units) enjoy freedom of action within a framework of acknowledged political ties.

Interestingly, Elazar and Greilsammer do not abandon the partnership imagery when they turn to Europe. But the European compact cedes political and judicial powers to the Community over a much narrower Treaty-delineated domain. The Member States have retained for themselves the larger, essentially non-economic issues that the authors characterize as matters of “regime, philosophy of the state, [and] political culture” (p. 108). The European partnership is a “restricted” one, largely predicated on a common economic liberalism. As a general comparative conclusion, this rings entirely true. Whether the authors succeed in actually tying to this comparison the four discrete respects in which they find that European and American processes and institutions differ—namely, the extent of territorially organized democracy, the political party structure, the prevalence of partnership between public and private actors, and the existence of a dual system of courts and judicial review—is another matter.

In their conclusion, Elazar and Greilsammer assimilate the Community to a confederation (though without, except by implication, identifying a confederation’s essential features) and discuss the prospects of the Community’s moving toward the federal end of the spectrum. The recently expressed preference of the Member States for the Single European Act over the politically more ambitious Draft Treaty of European Union (only the latter of the two actually coming under discussion as the authors were preparing their essay) is impressive confirmation of their belief that Western Europe is not yet ready for American-style federalism. Though the authors plausibly cite the Community’s so-called “democratic deficit” and its beleaguered budget as among the obstacles to European federalism, neither of these compares in explanatory force to the authors’ admittedly vague but powerful third factor, namely the lack of popular support for a united Europe or, in a word, “federalist feeling.”

The passage in Book One from “political” to “juridical”

perspective illustrates perfectly the difficulty of maintaining such a distinction. Jacobs and Karst's essay, *The "Federal" Legal Order: The U.S.A. and Europe Compared—A Juridical Perspective*, covers much the same ground, albeit with markedly different emphases, as Elazar and Greilsammer's, particularly in its background reflections on comparing Europe and America. But there are a number of new elements that nicely complement the earlier, more general essay. First, Jacobs and Karst briefly describe governmental institutions, and their interrelationship, in both polities. The information is presented here in unusually straightforward and readable terms, with the added virtue of emphasizing both the reality and theory of the institutional arrangements.

In terms of originality, the strongest part of the chapter is the discussion of "Institutional and Doctrinal Devices for Integrating the Central and State Legal Systems" (pp. 199-240), and particularly the institutional devices. Here, Jacobs and Karst ask how and to what extent central authority is recognized and given effect within the federation. The American institutional analysis deals with Congress's political wisdom in legislating so as to build on existing state law, even where Congress might constitutionally have displaced such law. The account is convincing, more so than the rather formalist European analysis that follows. The comparison of judicial systems as instruments of integration is attentive to both procedural and substantive aspects, and so comprehensive that it tends to preempt much of what awaits the reader in Book Two. The discussion of doctrinal devices is probably the less original of the two, but it does conveniently and lucidly, though again by way of anticipation, juxtapose the essential normative doctrines of the American constitutional system—supremacy, implied powers, preemption, and the like—with their European Community counterparts. Comparison, as such, is not undertaken.

As individual essays, those comprising the third introductory perspective—the economic one—have the greatest thematic strength. This impression may be due in part to the fact that the contributions here are not co-authored, but written as quite separate pieces, by Thomas Heller and Jacques Pelkmans; it may also simply betray the reviewer's lesser familiarity with economic, as opposed to either political or legal

analysis. In a long and at times somewhat dense presentation, Heller essentially calls into question the time-honored belief that the dismantling of economic and trade frontiers will inexorably lead both to the superior use of resources and to a unified or at least harmonious regulatory regime. At some point, Heller argues, a choice may have to be made between the dogma of open borders and the reality of decentralized regulatory policy. Though Heller refrains from predicting the ultimate resolution, he seems clearly enough inclined to the view that, at least in the European Community, the commitment to Member-State interdependence necessary to centralized regulation does not yet exist. The simplicity of the contrast with the United States makes it no less valid: here the positive administrative state emerged well after a firm institutionalization of market interdependence and open borders had already occurred. This is a learned essay, one rich in sources and allusions. Ideally, its content could have been translated into more economical and penetrable prose, and less burdensome notes.

The link between Heller and Pelkmans is their shared awareness of the tension between transnational economic integration and the twentieth-century positive state, as well as their sober projections for further economic integration, especially in Europe. Pelkmans's essay first offers a highly analytic eight-stage sequence of increasing market integration, from pure tariff union to pure common market. It then considers the present and prospective "economic constitution" of the European Community against this set of benchmarks, concluding in the author's own words "that economic integration in the EC has been caught in a capsule of fairly precisely defined ambitions beyond which the EC cannot proceed unless extreme assumptions of union (or integrationist) loyalty are made" (p. 318). For each of the more advanced stages, Pelkmans demonstrates quite precisely how and why the Community has failed to attain the corresponding ideal. His assessments tend to be harsh, the emphasis falling on lapses rather than achievements. But the account is strikingly comprehensive and doubtless will generate debate. This is a sophisticated and lively, if somewhat technical, article that skillfully weaves general economic integration theory with a great many specifics about Community law and politics. A concluding postscript by Heller makes



explicit some of the comparisons that were subjacent in the two essays, particularly Heller's own. The dominant conclusion will occasion no surprise: conditions do not favor resolving the fundamental Community tension through traditional American-style regulatory centralism, but disintegration through center-periphery conflicts is not a likely outcome either.

The next part of Book One features accounts of federalism in Australia, Canada, West Germany, and Switzerland. Each chapter is independently conceived, aiming chiefly to describe the federalism that prevails in the particular country in question. The contributions are all lucid and informative, providing the descriptive data on the basis of which the reader might draw his or her own comparisons with European and/or American federalism or with the other national experiences reported. The essays do not, generally speaking, undertake that comparison themselves, and when they do, it is with a preference for comparison with Europe.

As described by Gerard Rowe, Australian federalism comes across as heavily influenced by British political and legal traditions, and marked by a strong federal presence on the executive and administrative level, compared notably to the European Economic Community. The federal government's plenary foreign affairs competence, its powers to tax and spend, and its broad legislative authority, emerge as major factors pointing in the same direction. Curiously, while the Australian High Court as an institution probably has greater potential than the European Court of Justice for promoting legal integration, its conservative bent disinclines it to do so. Nevertheless, the Australian court's contribution to promoting free interstate trade and protecting civil and human rights illustrates the peculiar capacity of common-law methodology to promote certain federal values. An extended case study on aboriginal land rights issues before the High Court serves to illustrate the salient themes.

In light of the "economic perspective" essays that immediately precede the Australian account, the reader may regret the brevity with which the author takes up the question of permissible state regulation of interstate trade in the interest of public health and welfare. Other interesting comparisons, particularly with Europe, do emerge. For example, in policing dis-

crimination, the Australian court concerns itself primarily with discrimination against private individuals, while the Community court not surprisingly tends to address acts of discrimination by and against constituent states as such. In a more speculative vein, the author questions why the central government of a true federation like Australia has done so little by way of directives to the states, compared with what the "merely inter-governmental" organs of the Community have done in a similar context. The author's tentative answers are only a beginning.

Dan Soberman's essay, *The Canadian Federal Experience—Selected Issues*, is similarly valuable both as an account of the structures and processes of a particular federal state (including its distinctive centripetal and centrifugal forces) and as another example against which to examine European and American federalism. The Canadian experience illustrates the importance of studying practice as well as theory, for the federal government has made little use of certain of its undisputed powers vis-à-vis the provinces (particularly its powers of reservation and disallowance), but considerable use of other less well-founded ones (such as the award of conditional grants). Canada also illustrates the dynamism and flux that seem to inhere in virtually all federal systems and possibly in federalism itself. If crucial decisions in Canada still rest with the federal parliament, the provinces have taken determined enough initiatives to generate a discernible momentum in their favor. Conversely, if the Member States of the European Community still hold the essential reins of power, development of consensus-building techniques in Brussels have produced an opposite momentum. But perhaps the chief value of including an essay on Canada (and other third countries) in a volume devoted to American-European comparisons is that it tends to soften contrasts that might otherwise emerge overdrawn. Thus, Canada exhibits certain impediments to the free movement of goods and other factors of production, a structurally fragmented economy, and an attenuated federal jurisprudence on human rights (subject to developments under the new Canadian Charter of Rights and Freedoms)—features that make the European Community appear less simply confederal than it might from an untempered comparison with the United States.

Germany and Switzerland, taken up in a single essay, pres-

ent somewhat different examples, chiefly because the federal character of each is inextricably bound up with a unique set of historical circumstances and is correspondingly less "planned." On one level, Germany demonstrates the merely relative legal and political centralization of the United States, a point that likewise can easily be obscured by conventional comparisons between the United States and the European Community. A critical factor in German federalism is the breadth of federal jurisdiction, both in theory and practice. Yet, the *Länder* have a major role and stake in the exercise of federal power, participating through the *Bundesrat* in the federal legislative process, enjoying broad legislative delegations, and wielding important executive powers. Against the background of Germany's long federal tradition and genuinely integrated economy, these factors conduce to a highly flexible, cooperative federalism—one that puts the European Community's rather more rigid federalism into even sharper relief than comparison with the United States alone tends to suggest. Significantly, both Germany and the United States, federations to which the term cooperative has been ascribed, possess both a forceful Supreme Court committed to the flexible maintenance of a federal balance, and at the same time populations that, while attached to their local traditions, feel strong impulses toward national unity. Switzerland probably offers an even more striking example of cooperative federalism, since there the same basic integrationist forces—an ancient federal tradition, a well-developed exercise of federal legislative power in the economic domain, a conspicuous reliance on the states to implement federal law, and a Supreme Federal Tribunal exerting integrationist influence not only on federalism issues but also on federalized issues of human rights—have overcome some obvious cultural, linguistic, and territorial barriers.

Though, like the authors of the single-nation studies themselves, I have suggested some broad comparisons among the various federal entities, the studies above all illustrate the broad range of structure and process that can be accommodated under the rubric of federalism. In his concluding remarks to Book One, Professor Donald Kommers makes the point quite explicit, as he warns against seeking to distill from the richness of federal experience any firm conclusions about the optimal mode or level of integration in a federal system.

Kommers identifies certain features that recur in the American, Australian, Canadian, German, and Swiss federations—express divisions of power, a bicameralism in which one house is identified with the constituent states, a rigid constitution, the presence of judicial review, the free movement of goods, persons and services, and the recognition of human rights as a privileged matter of federal law—but I suspect that some of these may be less than universal among federations and may reveal as much about the democratic constitutionalism (or what Kommers calls the supportive political culture) of the countries selected as about anything else. As he acknowledges, even in these few countries, the relationship among federalism, democracy, and economic integration is “a bit murky” (p. 610). More important, as Kommers also acknowledges, no structure or process will make federalism work in the absence of that all-important but elusive “will” to make it work. Of course, that observation in itself raises more questions than it answers; it certainly leaves the future evolution of the European Community very much an open matter.

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Book Two, whose title within the *Integration Through Law* project is *Political Organs, Integration Techniques and Judicial Process*, constitutes in a sense the heart of the enterprise. Against the background of Book One's introductory and comparative material, it squarely takes up political and legal aspects of federalism in the United States and the Community. This is the kind of material with which legal scholars tend to be most familiar and with which those who are not will nonetheless feel most comfortable. The three parts of Book Two address in turn: (a) the institutional framework and decision-making processes of the United States and the European Community (in a comparative essay authored by Samuel Krislov, Claus-Dieter Ehlermann, and Joseph Weiler); (b) characteristically legal techniques for achieving integration (in a pair of articles, the first of which surveys the range of available instruments of legal integration, and the second of which focuses specifically on harmonization in choice of law as one such instrument); and (c) the specific contribution of a federal or transnational judiciary to legal integration.

The essay on decision-making has its logical roots in the perspective material contained in Book One. This causes repetition of material discussed earlier—for example, the political institutions and some of the contextual differences between Europe and the United States—but there is an obvious progression. Rather than concern itself chiefly with institution or process as such (though it does revisit those issues), the Krislov/Ehlermann/Weiler piece essentially takes up two sets of problems: executive-legislative relations in the two systems (including an examination of the alleged *lourdeur* in Community policymaking) and the incidence of state noncompliance with federal norms. On the first, the authors discern a parallel accretion in power by the American executive and the Community's Council of Ministers. They trace this growth in power, rightly I believe, to the inherent advantages flowing to the political branch that has the greatest capacity to act decisively and that enjoys the support of a large technical bureaucracy. This latter point is fortified by the authors' empirical finding that, thanks in part to the support the Council derives from the Committee of Permanent Representatives (COREPER), *lourdeur* is not quite as great a problem in the Community as had been expected.

The authors similarly rely on empirical data on the issue of noncompliance. It is questionable, however, whether the rising number of infringement actions may be taken as evidence of a growing compliance problem, especially in the absence of firm data on the Commission's prosecution policies over time or on levels of actual Member-State opposition to Community policy. Moreover, if the increase in enforcement actions actually has been accompanied by a real explosion in the issuance of Community directives, the problem of noncompliance may not have proportionally worsened. Nevertheless, the data shed interesting light on the breakdown of cases that the Commission does choose to pursue and on the stages through which these cases pass. In any event, the essay stakes out original ground in addressing the noncompliance issue, and in addressing it empirically. The authors also speculate on the so-called "noncompliance paradox," according to which the incidence of Member-State noncompliance appears to be growing despite evidence of increased Member-State influence in Community decision-making. The discussion raises inter-

esting issues, including the possible relationship between a state's legislative preparedness and involvement, on the one hand, and its faithfulness at the implementation stage, on the other. However, the paradox yields readily to reason, as the authors supply a number of adequate answers to the apparent contradiction, and might have supplied still others. The truth is that a Member State may, for any number of reasons, either refuse or fail to implement policies to which it gave its abstract assent at an earlier stage and under different political circumstances.

Apart from the wisdom it brings to the *lourdeur* and non-compliance issues, the essay has a recurring comparative theme, expressed at one point as follows: "The latitude and ambiguity reflected in the American system gives it resilience and pliability. This was a luxury the subscribing nations were not willing to afford the EEC, and of which the grand designers of the Treaty were suspicious" (p. 20). The idea is that, compared to the United States, the Community has both strictly defined competences and strictly confined resources. That these circumstances should produce a more rigid federalism may itself seem a paradox; but the Community's predisposition toward uniformity and harmonization, rather than flexibility, within its limited domain is in a way natural. The contrast between a defined European and a less well defined American federalism doubtless has other interesting implications as well, but should not be overdrawn, since both "constitutions" have at times allowed federal expansionism and retreat. The real difference lies, first, in the will and capacity of the political branches to assert themselves and, second, in the capacity of the constituent states to make their separate and potentially divisive influences felt at the policymaking and implementation stages. The chapter thus rightly identifies politics as "the heart of the matter" (p. 92) and closes with apt and interesting accounts both of how Member States arrive at their positions in Community decision-making and of the impact of basically relegating to them the implementation of Community law. Its provocative but basically sound conclusion is that the Community should emulate the flexibility and tolerance of local diversity that marks American federalism, even if, or perhaps precisely because, that would lessen the heavy normative and dogmatic stakes associated with European integration.

If the decisionmaking essay seems like a broad and speculative extension of the overview essays in Book One, its three companion pieces in Book Two have a narrower, more "legal" focus. I refer to Gaja, Hay, and Rotunda's *Instruments for Legal Integration in the European Community—A Review*, Hay, Lando, and Rotunda's *Conflict of Laws as a Technique for Legal Integration*, and Cappelletti and Golays *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*. Though I have some doubt whether choice of law deserves separate treatment in a volume that so clearly and for the most part successfully seeks a balance between political and legal considerations, there is no denying the outstanding quality of all the essays in Book Two. Since many of the ideas that they contain are otherwise available to the interested reader in published writings of the same authors,<sup>1</sup> the remaining essays will only briefly be described here.

As its title suggests, *Instruments for Legal Integration in the*

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1. Important sources for the first essay in Book Two, Krislov, Ehlermann & Weiler, *The Political Organs and the Decision-Making Process in the United States and the European Community*, are as follows: Weiler, *Community, Member States and European Intergration: Is the Law Relevant?*, 21 J. COMM. MKT. STUD. 39 (1982); Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267 (1981).

For the second essay, Gaja, Hay & Rotunda, *Instruments for Legal Integration in the European Community—A Review*: P. HAY & R. ROTUNDA, *THE UNITED STATES FEDERAL SYSTEM: LEGAL INTEGRATION IN THE AMERICAN EXPERIENCE* (1982); E. SCOLES & P. HAY, *CONFLICT OF LAWS* (1984); Hay, *Federal Jurisdiction of the Common Market Court*, 12 AM. J. COMP. L. 21 (1963); Hay, *International Versus Interstate Conflicts Law in the United States*, 35 RABELSZ 429 (1971); Hay, *Reflections on Conflict of Laws Methodology*, 32 HASTINGS L.J. 1644 (1981).

For the third essay, Hay, Lando & Rotunda, *Conflict of Laws as a Technique for Legal Integration*: Lando, *Contracts*, in 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 24 (1972); Lando, *European Contract Law*, 31 AM. J. COMP. L. 653 (1983); Lando, *New American Choice-of-Law Principles and the European Conflict of Laws of Contracts*, 30 AM. J. COMP. L. 19 (1982); Lando, *The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations*, 38 RABELSZ 6 (1974).

For the fourth essay, Cappelletti & Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*: M. CAPPELLETTI & W. COHEN, *COMPARATIVE CONSTITUTIONAL LAW* (1979); M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971); Cappelletti & Garth, *Finding an Appropriate Compromise: A Comparative Study of Individualistic Models and Group Rights in Civil Procedure*, 2 CIV. J.Q. 111 (1983); Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207 (1966); Cappelletti, *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis*, 8 MONASH U.L. REV. 15 (1981); Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409 (1980); Cappelletti, *The Significance of Judicial Review in the Contemporary World*, in IUS PRIVATUM GENITUM, FESTSCHRIFT FÜR MAX RHEINSTEIN 147 (E. von Caemmerer, S. Mentschikoff & K. Zweigert eds. 1969).

*European Community* presents a traditional survey of legal integration techniques in the Community. Essentially a description of the sources and forms of European Community Law, the essay is most suited both in approach and content to readers not already acquainted with the Community legal system. For instance, it methodically covers the definition of Community powers, preemption, forms of legislation (regulations, directives, financial incentives), international agreements, general principles of law, and "federal common law," as well as the possibility of model laws and restatements (a prospect obviously prompted by American experiences). What justifies inclusion in the volume of a basic presentation of Community law are the references throughout to the integrating effect that the various sources and forms of law under discussion might be expected to have.

With its largely overlapping authorship, the essay *Conflict of Laws as a Technique for Legal Integration* adopts basically the same approach, though with less exposition and considerably more analysis. Hay, Lando, and Rotunda provide, in effect, a general comparative introduction to choice of law, explicating the difference between particularist and universalist approaches and, more important, the respective strengths and weaknesses of uniform choice of law rules, on the one hand, and uniform rules of substantive law, on the other. There follows a sound, systematic, but essentially standard comparison of American and European practices on pleading and proof of foreign law, judicial jurisdiction, and choice of law. All of this leads back to the conclusion that the United States tends toward particularist state rules with federal constitutional limits alone providing the integrationist element, whereas Europe squarely favors universalist solutions, a preference exemplified most recently by the 1980 Rome Convention on the law applicable to contractual obligations, of which the authors give an extensive summary. Although they do not trace the reasons for the divergence of approach on this issue, or its consequences, the authors finally reveal their preference for universalist solutions and, among them, for uniform substantive law as compared to uniform choice of law rules. Even so, the latter preference is a guarded one, not only because of the authors' appreciation of the political and technical obstacles to harmonization of substantive law, but also because of their evident



regard for the Rome Convention as a specific solution. This guardedness, coupled with the balance and fairness of the overall presentation, leaves readers free to draw their own conclusions.

Cappelletti and Golay's chapter, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, differs from the two preceding law-related essays in its breadth of inquiry and its willingness to enter into areas of substantive law alongside institutional and procedural ones. Thus, the authors examine comparatively the contributions of the European Court of Justice and the United States Supreme Court to three distinct sets of issues: constitutional relations between the center and the states, development of common judicial procedures, and the elaboration of fundamental individual rights. The first and third of these issues are obvious candidates for inclusion in a study of high court contributions to integration in federalist systems, and they are in fact repeatedly anticipated and rehearsed in other essays within the volume. But judicial procedure is a less compelling case, notwithstanding the authors' enthusiasm for the subject. To the extent that they address under this rubric the need for uniform interpretation of federal law in a federal state, the point is uncontroversial. But the broader need for a common judicial procedure and tradition in a federal state is not so obvious. At the same time, the authors do not take up separation of powers as a crucial arena of judicial activity. While the function of policing the horizontal allocation of authority is scarcely unique to a federal state, the fact remains that in most federal states one central organ or another best represents the interests of the constituent states, and to this extent separation of powers has special significance for divided power systems.

Before comparing judicial contributions under the three rubrics of constitutional adjudication, judicial procedure, and human rights, the authors briefly compare American and European attitudes toward the legitimacy of judicial review. These few pages—essentially a concise summary of views that Cappelletti and co-authors have elsewhere expressed at greater length<sup>2</sup>—contain an important new element, namely the observation that European courts, though generally less comfortable

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2. See *supra* note 1.

with judicial review of legislation, have brought to that review more radical and non-interpretive methods of constitutional adjudication than American courts customarily apply. This point surely opens up further avenues of thought for comparative law scholars.

The specific issues that the authors entertain are too numerous and far-ranging to review here. There are few surprises either in the topics (many of which will have been covered in some manner elsewhere in the volume) or in their treatment. The originality of the essay lies mostly in the way the authors skillfully organize under their three rubrics commentaries on such disparate topics as pre-emption (yet again), incorporation of the bill of rights, the abstention doctrine and the fashioning of judicial remedies (for the United States), and implied powers, preliminary rulings, the principle of proportionality, and the conflict between Community action and Member State constitutions (for the Community).

In part because it draws on so many sources, the essay does not generate sharp comparative conclusions. In general effect it reinforces the image of the Community as a programmatic and correspondingly more rigid federalism that, under the influence of the Court of Justice, has been acquiring more of the flexibility, mutual accommodation, and general "ebb and flow" associated with America's more mature federalism. As often occurs in comparative law scholarship, the leitmotif seems to be moderate convergence. The principal unanswered question is the legitimacy of deriving the momentum needed for the Community's continuing integration from the judicial rather than the political departments of government.

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Book Three (*Forces and Potential for a European Identity*), building on the foundation laid by the previous books, demonstrates the use of law in promoting certain substantive integration goals. The editors settled upon five social and economic goals that in their view constitute the "core" of an eventual European identity. These are foreign policy, the free movement of workers, the free movement of goods, protection of human rights, and legal education. Despite the editors' effort to explain how these particular areas rather than others were

chosen for inclusion in Volume One—and despite the deliberate attachment of each to an “international,” “social and economic,” or “moral and cultural” dimension—the choice of these five as uniquely critical to European integration is not entirely convincing. This is especially the case since the next segment of the Florence Integration Project consists precisely of separate comparative monographs on other selected substantive law topics likewise of considerable importance to European integration: environmental protection,<sup>3</sup> consumer law,<sup>4</sup> corporate and securities law,<sup>5</sup> energy regulation,<sup>6</sup> and regionalism.<sup>7</sup>

Still, the editors present us in the five essays that constitute Book Three with some highly valuable and in some cases brilliant presentations. All represent indisputably important arenas of social and economic integration, and none is any the less valuable for the fact that it can and in the end does stand essentially on its own footing. Though the essays vary considerably both in approach and in the cogency of their analyses, each will handsomely repay the student or scholar of the particular fields in which the authors represented here are writing.

My favorite among them, Eric Stein and Louis Henkin's<sup>8</sup> treatment of European political cooperation, under the title *Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution*, is a brilliant rendition of what that title promises to deliver. It is difficult to imagine how the essentials of American foreign policymaking, the critically different circumstances under which the Member States of the Community have undertaken their distinctive foreign policy coordination, the realistic prospects for greater European integration in that domain, and the pos-

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3. E. REHBINDER & R. STEWART, ENVIRONMENTAL PROTECTION POLICY (1985).

4. T. BOURGOIGNIE & D. TRUBEK, CONSUMER LAW, COMMON MARKETS AND FEDERALISM IN EUROPE AND THE UNITED STATES (1987).

5. R. BUXBAUM & K. HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE: CORPORATE LAW AND CAPITAL MARKET HARMONIZATION POLICY IN EUROPE AND THE U.S.A. (forthcoming).

6. T. DAINTITH & S. WILLIAMS, THE LEGAL INTEGRATION OF ENERGY MARKETS (forthcoming).

7. Y. MENY, B. DE WITTE & J. WEBMAN, REGIONALISM AND FEDERALISM: THE CHALLENGE OF REGIONS IN NATIONAL AND TRANSNATIONAL POLITICS (forthcoming).

8. Professor Henkin is identified as collaborating author.

sible lessons to be drawn from American experiences, could be communicated more elegantly and convincingly.

Also deserving of special mention is Kommers and Waelbroeck's comparative treatment of the free movement of goods in the American and European experience, *Legal Integration and the Free Movement of Goods: The American and European Experience*. More historical and doctrinal than Stein and Henkin's account of foreign policy formulation—but understandably so given the nature of their topic—the account essentially represents an exposition and synthesis of the case law, and it serves that limited purpose exceptionally well, both in explicating the extent of federal power over interstate trade and the extent of state autonomy in regulating that trade in the interest of local welfare. If the essay is not, for the free movement of goods, the definitive comparative work that Stein and Henkin's offers every hope of being in the field of foreign policy, I still regard it as a logical starting point for further comparative American and European studies of the federal regulation of interstate commerce.<sup>9</sup> In the end the contrasts are not dramatic. The authors find balancing of local and national interests by both high courts (albeit with somewhat differently weighted scales); they find a common intolerance of discrimination whenever it can be discerned; and they find a reluctance on both sides to interfere with strongly held local views on public morality. Still, the Court of Justice looks if anything more actively and decidedly centralist than the Supreme Court—a further reflection perhaps of the European court's tendency to promote the Community's limited objectives in a more complete and at times dogmatic fashion than we associate with the Supreme Court's less constant interstate-commerce jurisprudence.

In examining human rights protection in the United States and in Europe, Frowein, Schulhofer, and Shapiro give careful consideration to an idea that several of the volume's other contributors simply assumed, namely that judicial protection of fundamental rights constitutes an important integration technique. Their overall assessment is nuanced: yes, human rights

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9. A landmark study of comparative American and European legal and economic integration, frequently relied upon in this essay and others in the volume, is of course *COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE* (T. Sandalow & E. Stein eds. 1982).

protection can have an integrating effect, but that effect is neither automatic, nor smooth, nor without risk. In support of these contentions, the authors demonstrate that both in the United States and Europe, federal constitutional vindication of human rights as against the states has developed slowly and cautiously. In other words, if judicial attention to human rights tends to advance integration, to a certain extent it also seems to depend upon it. As a matter of fact, the very explanations offered as to why European human rights institutions have contributed only marginally to European integration—for example, the absence of a Community criminal law system, of lower Community courts, and of a Community-wide constitutional law bar—are all ways (though hardly the only ones) of saying that Europe is a legally and politically less integrated entity than the United States. Furthermore, as a comparison of freedom-of-expression and criminal-justice case law shows, the effectiveness of federal human rights protection has varied even in the United States from subject to subject, albeit usually in explicable ways. Finally, there is a well-known risk to integration when the most advanced human rights protection takes place at the state rather than the federal constitutional level. A related risk, also adverted to in the essay, is that interstate or international human rights protection, though set as a common minimum, may over time become the actual state or national norm.

One difficulty with comparing United States and Community federalism along the human rights dimension is that, as the authors would readily concede, the Community does not represent the only or even the most important arena of human rights activity within Europe. The Member State constitutions, on the one hand, and the European Human Rights Convention system, on the other, remain the central sources of human rights protection in Europe. It is even plausible, to put the matter boldly, that human rights protection in Europe would be nearly as developed as it is today without the good offices of the European Court of Justice. Human rights protection has tended to promote European integration, but the European Community quite simply can neither be credited nor charged with responsibility in this area in the same pervasive way it can in an area like the free movement of goods.

Despite their individual merits, the remaining essays of

Book Three serve the purposes of the volume less well, each for a different reason. Bryant Garth's treatment of migrant workers in the Community and in the United States, *Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law, Community, and Citizenship in the Welfare State*, is an attack on prevailing migrant worker policy, particularly in the Community, as essentially anti-communitarian. As such, it is informed and richly documented, though convoluted and at times pretentious in style, particularly in comparison with the sober and straightforward contributions that precede and follow it. By some distance it is also the most passionate, if not polemical, of all the essays in this collection, and for that reason too stands somewhat apart. But the fit seems awkward above all because the failures of policy the essay points out are at bottom just that: failures of policy. Without greater linkage to issues of federalist structure and process, the essay, however vibrant and informed, has difficulty advancing the themes that the Books One and Two initiated. In the end Garth's is chiefly a critique of migrant worker policy and only indirectly a study of the processes of integration through law.

The remaining essay, *Legal Education and Legal Integration: European Hopes and American Experience*, by Lawrence Friedman and Gunther Teubner, makes a case for reorienting the study of law in Europe away from doctrine and toward methodology, away from legal rules and toward policy and problem-solving, in the hope of developing a more common legal culture. The suggestion encounters several difficulties, not the least the very assumption that legal education in Europe ought to be shaped by integrationist goals as such. That premise, I think, is far less obvious than similar assumptions about the free movement of goods or even foreign policy or human rights. Legal education is basically instrumental in character, and not all the purposes it has to meet would necessarily be well served by systematically subordinating rule to method, or local law to federal law.

More promising and more realistic than a fundamental restructuring of legal education in an effort to mask real national differences in the law would be a concerted effort to introduce Community law as such into national curricula wherever it has in fact made a contribution. As this very volume and the

volumes of *Integration Through Law* to follow<sup>10</sup> illustrate, those places are many. They also will grow in number and importance as the Community's legal contribution to European law itself grows. In the authors' view, of course, this is precisely the wrong approach, since legal unity should not be made to depend on a necessarily uncertain political unity. But the authors do not demonstrate either that legal unity (in the broad cultural sense in which they understand that term) will in turn produce political unity or that it has real and substantial value even if it does not. Neither do they demonstrate the necessity that legal unity be achieved through legal education. The irony, in this writer's view, is that there are plenty of good reasons for redirecting legal education, in Europe and elsewhere, along the avenues that Friedman and Teubner suggest, but the argument that political or legal integration depends upon it is not among the most compelling. Unfortunately, this volume of *Integration Through Law* does not end on its most powerful note.

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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 without prior recourse to the insights given expression in these three books. I regret only that the magnitude of the enterprise shows up so forcefully in the volume's style and format. While the quantity of introductions and conclusions, the frequency and length of explanations for the choice of themes and sequences, the sheer length and density of much of the prose, and the elements of repetition all help demonstrate their seriousness of purpose, the editors could have done with less in these respects. But then, again, the editors never promised a sleek or elegant inquiry. They promised a study that would be detailed and comprehensive, comparative and pluralistic, and above all stimulating, and they delivered that. The ambition that fueled *Integration Through Law: Methods, Tools and Institutions* has translated into a major resource that a whole interdisciplinary generation of scholars

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10. See *supra* notes 3-7.

will have repeated occasion to mine and from which it will derive immense benefit.