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EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

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**Constitutionalism and Dissonances –
Has Europe Paid Off Its Debt to Functionalism?**

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European Legal Integration: The New Italian Scholarship (ELINIS)

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship*. Even the most cursory examination of the major scientific literature in the field of European Integration, whether in English, French, German and even Spanish points to a dearth of references to Italian scholarship. In part the barrier is linguistic. If Italian scholars do not publish in English or French or German, they simply will not be read. In part, it is because of a certain image of Italian scholarship which ascribes to it a rigidity in the articulation of research questions, methodology employed and the presentation of research, a perception of rigidity which acts as an additional barrier even to those for whom Italian as such is not an obstacle. The ELINIS project, like its predecessor – the New German Scholarship (JMWP 3/2003) – is not simply about recent Italian research, though it is that too. It is also new in the substantive sense and helps explode some of the old stereotypes and demonstrates the freshness, creativity and indispensability of Italian legal scholarship in the field of European integration, an indispensability already familiar to those working in, say, Public International law.

The ELINIS project challenged some of the traditional conventions of academic organization. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions to ELINIS were not limited to scholars in the field of “European Law.” Such a restriction would impose a debilitating limitation. In Italy as elsewhere, the expanding reach of European legal integration has forced scholars from other legal disciplines such as labor law, or administrative law etc. to meet the normative challenge and “reprocess” both precepts of their discipline as well as European law itself. Put differently, the field of “European Law” can no longer be limited to scholars whose primary interest is in the Institutions and legal order of the European Union.

ELINIS was the result of a particularly felicitous cooperation between the Faculty of Law at the University of Trento – already distinguished for its non-parochial approach to legal scholarship and education and the Jean Monnet Center at NYU. Many contributed to the successful completion of ELINIS. The geniality and patience of Professor Roberto Toniatti and Dr Marco Dani were, however, the leaven which made this intellectual dough rise.

The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

--J. H.H. Weiler

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Constitutionalism and Dissonances – Has Europe Paid Off Its Debt to Functionalism?

Marco Dani^{*}

Abstract

The negative outcomes of the French and Dutch referenda on the Constitutional Treaty have opened a period of profound constitutional disenchantment in relation to the EU. This impression seems confirmed by the recent Presidency Conclusions of the European Council which, although salvaging many important solutions contained in the Constitutional Treaty, explicitly sanction that “the constitutional concept ... is abandoned”. In the light of this context, what role could the constitutional scholarship play? How to make sense of a polity in which the claims of constitutionalism as form of power are politically unappealing though legally plausible? This article tries to respond to these questions by reaffirming functionalism as a valid analytical and normative perspective in facing the current constitutional reality of European integration. The analytical value associated with functionalism is evidenced by testing against the current context of the EU legal framework the accounts for EU constitutionalism which postulate functional equivalence between the EU and the member states. The normative potential of functionalism, then, is discussed by arguing that there may be a value worth preserving in a degree of functional discrepancy between the EU and state constitutionalism and, notably, that the transformative and civilizing dividend inherent in functionalism could still be exploited at least in certain policy-areas. Finally, the article suggests that the difficulties in accounting for EU constitutionalism in the light of state-centered constitutional theory could be regarded as symptoms of European integration marking a moment in the theoretical evolution of constitutionalism.

^{*} Faculty of Law, University of Trento, dani@jus.unitn.it. An early version of this paper was presented in December 2006 in Trento at the seminar *European Legal Integration – The New Italian Scholarship (ELINIS)* with the title *European Integration and Constitutional Perbenismo: Has Europe Paid Off its Debt to Functionalism?*. I am grateful to all the participants in the seminar for their helpful comments and sincere criticism. Particular thanks go to Professor Giandomenico Falcon whose discussion has contributed to a profound reconsideration of this work, and to Gareth Davies and Francesco Palermo for their useful comments. The usual disclaimers apply.

1. Constitutional Narratives: Time for Dismissal?

Viewed through constitutional lenses, the European Union appears at present to be experiencing a period of profound disenchantment. Expected to open up a new era in the process of European constitutionalization,¹ the Treaty establishing a Constitution for Europe seems more likely to be remembered as the trigger of a momentous constitutional debacle rather than the product of a constitutional moment. The negative outcomes of the French and Dutch referenda, indeed, not only have chilled the enthusiasm (to be sure, quite faint) grown after the Laeken declaration² but, critically, they have cast a dim shadow over the very possibility of the EU achieving full constitutional status by political means. The Presidency Conclusions of the European Council issued last June seems very much in line with this general mood:³ despite the attempt at salvaging many important innovations contained in the Constitutional Treaty, this document explicitly sanctions that “the constitutional concept ... is abandoned” and the amended treaties “will not have a constitutional character”.⁴

The implications of such constitutional surrender are in many ways problematic even when observed from the legal analysis standpoint. If the post-Laeken period appears retrospectively as a time of constitutional euphoria among academics, the disenchantment the EU is currently undergoing can be regarded as a time of constitutional disorientation where concerns for the EU constitutional *acquis* emerge⁵ and the very expediency of a constitutional approach to European integration might seriously be questioned. The ‘case against’ constitutional narratives could be advocated as follows: for decades constitutional devices and analogies have proven

¹ A. von Bogdandy, *The Prospect of a European Republic: What European Citizens Are Voting On*, in *Common Market Law Review*, 2005, 42, p. 913. The political significance of the Constitutional Treaty is underlined in K. Nicolaidis, *Paradise Lost? The new European Constitution in the Shadow of Federalism*, in D. Halberstam, M. Maduro (eds.), *The Constitutional Challenge in Europe and America: People, Power, and Politics*, Cambridge University Press, 2006 (forthcoming).

² Laeken declaration on the Future of the European Union, 15 December 2001, http://europa.eu.int/constitution/futurum/documents/offtext/doc151201_en.htm.

³ Presidency Conclusions of the Brussels European Council, 21-22 June 2007, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf.

⁴ Presidency Conclusions, Annex I, pp. 15-16.

⁵ New challenges to the EU constitutional *acquis* in the meantime have been brought by the Czech, Hungarian and Polish Constitutional Courts. See W. Sadurski, “*Solange, chapter 3*”: *Constitutional Courts in Central Europe – Democracy – European Union*, EUI Working Papers Law No. 2006/40.

quite successful in developing and accounting for the Community legal framework.⁶ Then, when a political attempt has been undertaken to use constitutional language as a catalyst for the reforms necessary to the EU, its dividend in terms of legitimacy and popular support has been modest, if not negative. Not only have reforms not been adopted, but also previous achievements of integration have become subjects of discussion.⁷ Although several reasons could explain this failure, the label “constitution” and the strategy underlying its use is one of the most important candidates. Constitutional language, indeed, has probably performed more in attracting criticism than mobilizing positive engagement by the EU citizens. As a consequence, if the EU legal framework is to be preserved and European integration further developed, what is the sense in insisting on the pursuit of constitutionalism as the EU form of power? Why not considering alternative narratives for European integration? If there is still an added value associated with constitutionalism that European integration can benefit of, the burden of proof rests on constitutional lawyers and aficionados.

Reasonable answers in this regard have been put forward in the aftermath of the referenda. The NO votes, it has been convincingly argued, far from rejecting the idea of European constitutionalism, express genuine dissatisfaction for the current state of European democracy.⁸ Similarly, those interested in furthering European integration have been invited to reflect seriously on the message that emerged from polls and to face squarely the challenges and profound democratic dilemmas inherent in that transnational project.⁹ But when confronted with a reality in which governments and political and social forces seem unable to (or not sufficiently interested in) aggregating the constitutional ambitions dispersed in European societies, such generous and well founded comments end up appearing as nothing more than wishful thinking.

⁶ M. Maduro, *The importance of being called a constitution: Constitutional authority and the authority of constitutionalism*, in *International Journal of Constitutional Law*, 2005, 3, 2-3, p. 336, identifies in the constitutional thesis “an epistemological shift in the understanding of EC law and the source of its normative authority”.

⁷ K. Nicolaidis, *The Struggle for EUrope*, in *Dissent*, Fall 2005, p. 13, observes that “most controversies during the [referenda] campaigns were not over constitutional articles ... but over provisions simply copied from existing treaties, especially the single market. By seeking the refoundation of the whole European project, the proposal for a constitution led everyone to confront the magnitude of popular unease with what the EU had become (or rather, perceptions of what it had become)”. A similar point can be made by considering that if the adoption of the Constitutional Treaty was expected to legitimate *ex post* the normative and political authority assumed by the EU (M. Maduro, *supra* note 6, p. 353), its rejection might be seen as questioning those very achievements.

⁸ D. Halberstam, *The Bride of Messina: Constitutionalism and Democracy in Europe*, in *European Law Review*, 2005, 30, 6, p. 788.

⁹ G. de Búrca, *After the Referenda*, in *European Law Journal*, 2006, 12, 1, p. 8.

In such a context and, even more, after the Presidency Conclusions of June 2007, support for EU constitutional narratives rests mostly on defensive arguments. Whereas it might be true that constitutional language is at present politically inconvenient, adequate consideration should also be given to the implications of quitting not just constitutional symbols but even constitutional discourses in scholarly debates. Not only dismissal would amount to a loss of valid tools for explaining important sectors of EU policy-making, but also it would be probably perceived in the public opinion as an implicit choice of polity whereby the exclusive locus for constitutionalism and majoritarian decision-making is the state.¹⁰ The risks inherent in a similar scenario are not difficult to envisage. Institutions which have more invested in a constitutional account for the EU (*in primis*, the Court of Justice) would be increasingly exposed to the discredit of European integration discontents. Quite predictably, then, the legitimacy of the doctrines characterizing the supranational legal framework would be subject to considerable stress. As a consequence, and despite the fact that the currency of constitutional narratives in the political arena may be at its lowest levels, their doctrinal dismissal is equally problematic and, probably, not even an available option. In the EU sphere decisions of constitutional relevance continue and, reasonably, will continue to be taken regardless of the failure of the Constitutional Treaty and abandonment of constitutional language. In the absence of credible alternatives, constitutionalism remains the most adequate legal and normative framework against which the solutions to the kind of economic, social, political conflicts the EU is constantly engaged with can be understood and criticized.¹¹

The post-constitutional debacle phase of European integration poses specific questions to the role of constitutional scholarship. How to make sense of a polity in which the claims of constitutionalism are politically rejected though legally plausible? A first point of this article is that there is a need to delineate a more realistic narrative of current EU constitutionalism and, most importantly, a sounder conceptual framework for its account in relation to the usual benchmark of state constitutionalism. Arguably, critical points of constitutional thinking on European integration put forward during the pre-referenda euphoria require profound discussion as, in the eagerness to include the EU within the boundary of its discipline, large part of constitutional scholarship has drawn from its traditional language and categories without

¹⁰ M. Maduro, *supra* at note 6, p. 333.

¹¹ N. Walker, *Postnational constitutionalism and the problem of translation*, in J. H. H. Weiler, M. Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge, 2003, p. 35.

assessing sufficiently whether and to what extent the conceptual premises of a similar operation were methodologically founded. Notably, narratives of constitutional conversion have been proffered in which the EU, on the assumption of a substantial equivalence of its legal framework and that of the member states, appeared as strategically committed towards fundamental rights protection and, more in general, democracy and constitutionalism.¹² But to what extent is it legally plausible to rely on a premise of equivalence between the objectives pursued respectively in the supranational and national spheres? And under what circumstances is it normatively desirable to endorse an intellectual (if not political) strategy whose inherent aim is to promote such equivalence?

Admittedly, even during the post-Laeken constitutional euphoria crucial pieces of work reflecting similar concerns have been produced.¹³ Of particular importance are those in which not only the original nature of the EU legal framework has been pointed out, but also the value of preserving some of its specific features has been maintained by refusing constitutional literal translation.¹⁴ This article, though sharing as a point of departure such conceptual premises, suggests that for both analytical and normative purposes functionalism could perform as a further and particularly promising perspective for facing the challenges posed by the current phase of European integration. The analytical value associated with functionalism will be evidenced in section 2, where a number of arguments constituting the conversion narratives will be tested against the context of European integration. Here, the critique will be framed in purely legal terms by addressing a *crescendo* of ambiguities which spring from the critical field of fundamental rights protection and flood the whole domain of EU constitutionalism. In this regard, the specificity of the latter will be reconstructed by pointing out a number of distinctive elements which resist the idea of functional assimilation purported by the conversion narratives and require open discussion and conceptualization.

¹² This is particularly evident in the Italian scholarship of constitutional law where the constitutional perception of the EU has been predominantly built on its fundamental rights doctrine. This is not to imply that the positions in this regard are unanimous, as important differences and debates have of course taken place even among Italian scholars. Nevertheless, what can be regarded as a hegemonic (if not unanimous) element shared by both the enthusiasts and the discontents of EU constitutionalism is their consideration of the EU and states politics as functionally equivalent.

¹³ See the collection of essays in J. H. H. Weiler, M. Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge, 2003; J. Shaw, *Postnational constitutionalism in the European Union*, in *Journal of European Public Policy*, 1999, 6, 4, p. 579; P. Eleftheriadis, *The Idea of a European Constitution*, in *Oxford Journal of Legal Studies*, 2007, 27, p. 1; M. Kumm, *Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called*, in *American Journal of Comparative Law*, 2006, 54, p. 505.

¹⁴ N. Walker, *supra* at note 11, pp. 27-31.

These latest considerations will introduce a different level of analysis. As authoritatively stated, what is really fundamental – and therefore presupposed – in the approaches, categories and narratives put forward by legal scholarship are often undisclosed normative ideas on the role of the law and the constitution.¹⁵ In this regard, conversion narratives make no exception, instrumental as they are to quite precise visions on the ‘be’ and ‘ought to be’ of European integration. Hence, in section 3 the discussion will be conducted from a normative standpoint. It will be advocated that EU constitutionalism requires the interpreters to identify the rationales and the possible potential of its distinctive elements. Only at that point it seems possible to devise interpretations and regulatory solutions at EU level which in turn could result in a relationship of assimilation, convergence and divergence with the canons of traditional state constitutionalism. Against this general background, the normative potential of functionalism will be underscored. It will be argued not only that there may be a value worth preserving in a degree of functional discrepancy between EU and state constitutionalism, but also that the transformative and civilizing dividend inherent in functionalism could be particularly beneficial for both revitalizing European integration and reinterpreting critical parts of national constitutional *acquis*.

Finally, in section 4, the focus will shift from the questions constitutionalism poses to the practice of European integration to the questions that European integration poses to the theory of constitutionalism. There are elements, indeed, which suggest that the relationship between constitutionalism and European integration is bilateral and that, arguably, European integration and its impact on states’ politics and constitutions might mark a moment in the theoretical evolution of constitutionalism.

2. Questioning the Conversion Narratives against the Context of European Integration

Conventional support for European constitutionalism points at the incorporation of the Charter of Fundamental Rights in EU primary law as one of the most advanced achievements of the Constitutional Treaty. To be sure, emphasis on fundamental rights dates back at least to the adoption of the Charter of Nice where an overt exercise of self-definition and positioning in the realm of constitutionalism was attempted by the EU. The motives underlying such an interest are

¹⁵ G. Zagrebelsky, *Il diritto mite*, Torino, Einaudi, 1992, p. 3.

easy to identify. Fundamental rights evoke a general idea of society, a constitutional order inspired by a composite set of values and objectives, a framework for deliberation based on political institutions, social participation and judicial guarantees. In other words, fundamental rights encapsulate the normative ambitions and functional concerns of contemporary constitutionalism. By increasing their visibility, therefore, the EU pursues a strategy directed at profiting from their supposed virtues in terms of both legitimacy and polity-building. At present, indeed, political, economic and social conflicts arising in EU policy-making are primarily addressed in an intergovernmental matrix where a sustainable balance between the interests of the Union and those of the member states is to be found. Were the EU to shift its predominant focus to the divides inbuilt in fundamental rights, its self-definition as a constitutional (as opposed to intergovernmental) political community would also acquire substance.¹⁶ As a consequence, in the debates on the EU, fundamental rights discourse appears to the eyes of both the enthusiasts and discontents of European integration as an icon fraught with far reaching political and institutional implications: constitutionalism as the framework for coming to terms with contemporary conflicts; constitutionalism as the form of power of the EU.

Nevertheless, the EU's is a controversial context for a discourse on fundamental rights. It must not be forgotten that at the outset of the process of European integration the idea of building a European Political Community around, *inter alia*, fundamental rights protection was rapidly abandoned¹⁷ and that only in a subsequent period the latter were considered as part and parcel of the broader process of constitutionalization of the Community legal framework. Nonetheless, contemporary discourse tends to downplay this contentious background and, in drawing inspiration from both the ECHR and national constitutional traditions, suggests the conversion of the EU to constitutionalism by means of fundamental rights protection.

In a nutshell, the narratives of conversion consist of a number of standard arguments which start from the path-breaking *Van Gend en Loos* judgment¹⁸ and its claim for a Community of individuals, develop by emphasizing the Court of Justice doctrine on fundamental rights protection and reach the heart of the Union by addressing fundamental rights as the core values of the integration process. At this point, conversion narratives unfold by advocating a substantial

¹⁶ The concepts of constitutional and intergovernmental political community are defined in M. Maduro, *supra* at note 6, p. 333.

¹⁷ P. Craig, G. de Búrca, *EU Law – text, cases, materials*, Oxford, Oxford University Press, 2003, p. 318.

¹⁸ Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I-1.

redefinition of the original economic profile of the Community to the extent that, at least from a teleological perspective, the type of constitutionalism developed in the EU context could substantially be equated to its national counterparts. Yet, to what extent have the original elements of the Community legal framework been normalized? Is this kind of conversion truly achieved? And, if not, what about the residual discrepancies with member states' constitutionalism? To respond to these questions conversion narratives must be unpacked and discussed in each of their component parts by highlighting their elements of ambiguity.

a) A Community of individuals?

The standing of individuals in the Community legal framework can be regarded as a useful initial point of discussion. One of the most celebrated recitals of the early period of the Court of Justice reads as follows:

The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.¹⁹

The emphasis usually placed on this passage is of course fully justified.²⁰ It is by this reasoning that the traditional indifference of classical public international law for the rights and duties of individuals is firstly challenged by the Court and it is in this very passage that the Court comes out with that sort of activism which will be decisive in the process of constitutionalization of the Community.²¹ In deciding that case, it was famously commented, the judges had “*une certaine idée de l'Europe*” of their own whereby the treaty had created a Community not only of states but also of peoples and persons.²² According to this interpretation, *Van Gend en Loos* and its progeny of pronouncements on direct effect and supremacy reflect a genuine democratic ideal

¹⁹ *Van Gend en Loos*, *supra* at note 18.

²⁰ B. de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in P. Craig, G. de Búrca (eds.), *The Evolution of EU Law*, Oxford, Oxford University Press, 1999, p. 177.

²¹ G. F. Mancini, *The Making of a Constitution for Europe*, in *Common Market Law Review*, 1989, 26, p. 595.

²² P. Pescatore, *The Doctrine of “Direct Effect”: An Infant Disease of Community Law*, in *European Law Review*, 1983, 8, p. 155, 157-158.

which has helped to put the individual person at the heart of European law²³ and inspired a more comprehensive “democratic recalibration” of the Community legal framework.²⁴

Admittedly, the subjectivation of the Treaties,²⁵ prompted by the activism of the Court of Justice and coupled with the engagement of national courts, constitutes an indispensable premise of the democratic potentialities in the current EU legal framework. Could we imagine European citizenship without acknowledging unmediated rights and duties to individuals? Could we imagine any type of EU democratic deliberation without recognizing autonomous status to the citizens? Nonetheless, the fact that the democratic elements actually inbuilt in the EU legal framework postulate those premises does not necessarily mean that the latter were originally conceived of for democratic purposes. Different accounts for direct effect and supremacy doctrines may be proffered and, on these bases, the claim that subjectivation of the treaties could have been brought about by “principled behavior democratically inspired” by the judges of the Court may also be questioned.²⁶

A first argument contrasting the democratic understanding of *Van Gend en Loos* arises out of its very reasoning in another oft-quoted passage:

*The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to the governments but to the peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.*²⁷

In this excerpt it seems evident that the trigger for subjectivation and constitutionalization is not democracy or dispassionate interest for individual rights. More crudely, it is the objective of the common market which, by reaching beyond the usual texture of international obligations, transcends the international law framework and requires the Court to empower individuals in their capacity as affected parties. Democratic arguments, by contrast, are advanced in the

²³ B. de Witte, *supra* at note 20, p. 205.

²⁴ D. Halberstam, *supra* at note 8, p. 779.

²⁵ M. Poiares Maduro, *We, the court – The European Court of Justice and the European Economic Constitution*, Oxford, Hart Publishing, 1998, p. 9.

²⁶ D. Halberstam, *supra* at note 8, p. 782.

²⁷ *Van Gend en Loos*, *supra* at note 18, *Italic added*.

reasoning just to “confirm” and color a solution already achieved by other means and only retrospectively they may appear as heralding the more promising developments that occurred later. This is not of course to diminish the importance of that judgment. It is more simply to underscore that the original glance at individuals by the Community is largely filtered by market rather than democratic lenses and that, as a result, Community rights in that context are mostly shaped as corollaries of economic regulatory principles. From a substantive standpoint, therefore, the original Community approach to individuals is patently instrumental.

There is then another argument contrasting the democratic reading of direct effect doctrine which is worth remembering. As mentioned, the Court of Justice infers from the common market design the necessity of an unmediated engagement of individuals. As noted,²⁸ this turn to direct effect reflects mostly a general concern for the effectiveness of treaty obligations and secondary law. Indeed, the ambitions inherent in the contents of the common market program could hardly be pursued by relying exclusively on public means of enforcement such as the infringement procedure.²⁹ Consequently, individuals’ judicial involvement in national courts was pursued as a crucial element of a broader strategy of the Court of Justice to enforce the common market by foreclosing selective exit by the member states.³⁰ Also from a procedural perspective, therefore, Community’s approach to individuals reveals a degree of instrumentality.

But why bother with speculations on Community archeology now that individuals’ autonomous status is undisputed and citizenship of the Union “is destined to be the fundamental status of nationals of the member states”?³¹ To be sure, the current EU approach to individuals has undergone considerable evolution from the years of *Van Gend en Loos*. Citizenship of the Union has been introduced and, after a dormant period,³² performs at present as autonomous source of individuals rights.³³ Citizens are increasingly addressed regardless of their economic qualification and their rights and duties extend to areas which are far beyond the scope of

²⁸ S. Weatherill, *Law and Integration in the European Union*, Oxford, Clarendon Press, 1995, p. 116.

²⁹ P. Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, in *Oxford Journal of Legal Studies*, 1992, 12, 4, p. 453, 458-463.

³⁰ J. H. H. Weiler, *The Transformation of Europe*, in *The Constitution of Europe*, Cambridge, Cambridge University Press, 1999, pp. 18-29.

³¹ Case 184/99, *Rudy Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

³² Case 193/94, *Skanavi and Chyssanthakopoulos* [1996] ECR I-929.

³³ Case 85/96, *María Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691; Case 413/99, *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I-7091; Case 200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department* [2004] ECR I-9925.

common market provisions. Even within the domain of the common market, their protection seems to have lost the original economic characterization. Not only have citizenship provisions prompted considerable redefinition of previous regulatory strategies in the field of free movement of persons,³⁴ but cases have been decided in which market freedoms have been stretched to the extent of appearing as functions of fundamental rights protection rather than the opposite.³⁵

Nonetheless, at a closer look even these most recent achievements contain traces which go back to the original Community approach to individuals. Take, for instance, the directive establishing residence requirements³⁶ and the cases concerning persons who travel to other member states and cannot fulfill those (or other similar) requirements³⁷ and a clear discrepancy with the fundamental rights endowment of national citizenship will suddenly reappear. Indeed, not only differences persist in the quality of the bond implied by European and state citizenship, but also the degree of practical solidarity they respectively entail continue to diverge for reasons which are at least open to discussion.³⁸ As a result, the struggle between genuine interest in citizens' condition and the heritage of the *homo oeconomicus* brings about an ambiguity which does not allow a complete conflation between the EU and member states' approach to individuals. It is argued that this ambiguity extends to the whole field of fundamental rights protection and, arguably, permeates the whole EU constitutional approach.

b) A Community where fundamental rights protection is pursued?

By recognizing individuals as unmediated subjects of Community law, the Court of Justice establishes the logical premises for a doctrine of fundamental rights protection at

³⁴ Compare Case 316/85, *Centre public d'aide sociale de Courcelles v. Marie-Christine Lebon* [1987] ECR I-2811 with Case 138/02, *Brian Francis Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703 and Case 197/86, *Steven Malcolm Brown v. The Secretary of State of Scotland* [1988] ECR I-3205 with Case 209/03, *The Queen (on the application of Dany Bidar) v. London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119.

³⁵ Case 60/00, *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279.

³⁶ See article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77.

³⁷ Case C-456/02, *Michel Trojani v. Centre public d'aide sociale de Bruxelles* [2004] ECR I-7573.

³⁸ The link between the degree of integration and the gradations in the application of the principle of solidarity is highlighted by S. Giubboni, *Free movement of persons and European solidarity*, URGE Working Paper 9/2006, pp. 13-16. A similar discussion is conducted by P. Eleftheriadis, *supra* at note 13, pp. 18-20.

supranational level. Little could be added in this article to the abundant literature describing the Community coming out in this field and its subsequent developments.³⁹ For our purposes it seems more interesting to dwell upon its accounts because also in this regard progresses in the status of individuals have been advanced in a framework remarkably different from that of state constitutionalism.

It was previously observed that the process of constitutionalization may be regarded as reflecting a comprehensive strategy of the Court of Justice directed at ensuring the effectiveness of Community policies. The same objective pervades also the initial phases of the fundamental rights doctrine, its deliberate concern being the uniform and unconditioned application of the common market design at national level.⁴⁰ The substantive implications of such approach arise out clearly in another well known passage:

... respect for fundamental rights forms an integral part of the general principles of Community Law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member states, *must be ensured within the framework of the structure and objectives of the Community.*⁴¹

Also in this regard, a consequential role is played by the context where fundamental rights are developed and by the functional concerns of the legal order at issue.⁴² Firstly, their identification occurs essentially in the judiciary, an arena where the participation of private actors is often selective,⁴³ at least when specific policies directed at promoting access to justice are absent. Secondly, as witnessed by the above excerpt, their contents are devised in close relation to the regulatory strategies inbuilt in integration policies and, therefore, largely reflect a

³⁹ P. Alston, M. Bustelo, J. Heenan (eds.), *The EU and Human Rights*, Oxford, Oxford University Press, 1999.

⁴⁰ This emerges clearly in decisions such as *Internationale Handelsgesellschaft* (Case C-11/70, [1970] ECR I-1125, paragraphs 3 and 4), but also when the Court of Justice enforces ECHR fundamental rights against member states' measures to restrict the scope for derogation of the EC fundamental principles (See C-260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925).

⁴¹ *Internationale Handelsgesellschaft*, *supra* at note 40, paragraph 4 (Italics added).

⁴² As correctly pointed out "i diritti fondamentali comunitari esprimono in modo originale l'identità del sistema comunitario, perché sono definiti dal 'reagente' con cui essi vengono in contatto al momento della loro concretizzazione nel singolo caso. Benché mutuati da o ispirati a testi altrui, i diritti fondamentali sono trasfigurati dal contesto comunitario in cui vengono ad operare ...", R. Bifulco, M. Cartabia, A. Celotto (eds.), *L'Europa dei diritti*, Bologna, Il Mulino, 2001, p. 14.

⁴³ M. Maduro, *supra* at note 25, pp. 25-30.

market bias.⁴⁴ No surprise, thus, that fundamental rights protection at EU level has attracted criticism for being conceived of as ancillary to the implementation of economic freedoms.⁴⁵

Even procedural instrumentality extends into the field of fundamental rights protection. This becomes evident when fundamental rights doctrine is approached in the light of the relationships between Community and national legal orders. In this regard, the Court of Justice has employed fundamental rights discourse to facilitate the dialogue with national courts and, notably, to tone down their cyclical uneasiness with the impact of Community law on domestic legal systems.⁴⁶ The interest of the Court here is mostly for the language and symbolism attached to fundamental rights, supposedly helpful in easing the interactions between Community and member states legal orders and jurisdictions. In its initial stages, therefore, fundamental rights protection does not emerge as a fully-fledged objective of the Community. It helps in elevating the tenor of adjudication by stressing the subjective implications of integration policies. But its introduction does not amount to a change of focal point in the European integration process.⁴⁷

A comprehensive assessment of the role of fundamental rights, however, cannot be limited to the foundational period of the Community and to the earliest decisions of the Court of Justice. Latest versions of the treaties and more recent judicial pronouncements contain clear signs of convergence by the Community towards the constitutional fundamentals of state polities.⁴⁸ Analogies are particularly evident when fundamental rights are addressed and enforced by way of general principles⁴⁹ as substantive conditions of legality by the Court of Justice or the Court of First Instance. The importance of these judgments does not rest simply on their contribution in terms of remedies and individuals' protection vis-à-vis the EU and, more often, member states institutions. Inherent in judicial protection of fundamental rights is also a gradual process of redefinition of Community policy-making, adjudication and self-

⁴⁴ The market bias is not just the reflection of the substantive contents of treaty provisions but, critically, of the selective character of the judicial circuit.

⁴⁵ J. Coppel, A. O'Neill, *The European Court of Justice: Taking Rights Seriously*, in *Common Market Law Review*, 1992, 29, p. 669.

⁴⁶ The German and Italian Constitutional Courts are the usual examples in this regard. See, respectively, *Solange I* [1974] 2 CMLR, p. 540 and *Frontini*, [1974] 2 CMLR, p. 372.

⁴⁷ A clear manifestation of this emerges by confronting the Court of Justice judgment with the AG Conclusions in Case 168/91, *Christos Konstantinidis v. Stadt Altensteig – Standesamt and Landratsamt Calw – Ordnungsamt* [1993] ECR I-1191.

⁴⁸ A number of recent cases, such as Case 112/00, *Eugene Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* [2003] ECR I-5659 and Case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, witness this trend.

⁴⁹ Article 6(2) TEU.

understanding in the light of a broader (and not only market-centered) set of values which the Charter of Nice has eventually codified. But can we infer from these latest developments that the EU has achieved standards of fundamental rights protection comparable to those of the member states? At present, the official answers by the most prominent national courts to this question are largely affirmative. The Court of Justice is increasingly perceived by its interlocutors as having internalized not only the language but also the sensibility which fundamental rights protection deserves. Thus, when it comes to their judicial enforcement, EU and member states' approaches do not reveal significant elements of divergence and consolidate an idea of constitutional conversion.

Nonetheless, pursuit of fundamental rights does not rest only on courts. Judicial protection, indeed, performs mostly a defensive function in relation to individuals' rights. But when it comes to social rights or, more generally, to rights whose pursuit requires positive intervention by public bodies the prevalent locus for fundamental rights protection shifts to legislation and administration.⁵⁰ As a consequence two dimensions of fundamental rights protection are to be distinguished. A first horizontal dimension is evident when fundamental rights serve as general principles to be respected in achieving other policy objectives. Here, their role is to defend certain values by channeling policy action according to the framework provided by the principle of proportionality. A second vertical dimension emerges instead when fundamental rights are considered as goals driving policy-making processes. In this regard they are conceived of as objectives to be promoted and, as a consequence, they entail positive efforts by the legislative and the executive. In state constitutional orders both of these dimensions are normally developed. As a rule, scrutiny on fundamental rights as general principles is carried out in national constitutional courts or their equivalents, while fundamental rights promotion may often be seen as underlying much of the states' initiatives and apparatus. But what about these two dimensions in the context of the EU? Can we maintain that also in respect to fundamental rights promotion the EU approach matches that of the states?

In answering to such questions, the thorny relationship between EU competences and fundamental rights must be considered. As previously mentioned, fundamental rights are respected by way of general principles within the policy areas covered by the treaties and,

⁵⁰ As emphatically observed "... il potere ha bisogno del *diritto* per legittimarsi, ma i *diritti* hanno bisogno del potere per affermarsi", see M. Luciani, *Costituzionalismo irenico e costituzionalismo polemico*, in *Giurisprudenza costituzionale*, 2006, 2, p. 1653 (Italics in the original).

therefore, in this domain they develop their horizontal dimension. In ensuring this kind of protection, the Court of Justice has often absorbed within the circuits of supranational integration issues which, according to the formal distribution of powers between the EU and the member states, would fall under national competences.⁵¹ Such tendency towards broadening the scope of EU fundamental rights protection can nourish the idea of a limitless Community jurisdiction. Take, for instance, cases such as *Bickel and Franz*,⁵² *Bidar*⁵³ or *Watts*⁵⁴ and the EU jurisdiction will reach respectively fields such as criminal procedure legislation, educational support and supply of health care services – all fields which are normally considered as domains of the states.

Nevertheless, the broad extension of EU jurisdiction due to policy absorption does not allow us to conclude that the EU enjoys a general power to pursue fundamental rights even in their vertical dimension. Admittedly, even when it comes to legislative and administrative competences the EU legal framework reveals an extensive propensity for which, lastly, the Laeken declaration has expressed significant concern. Yet, fundamental rights may be regarded as an exception in this respect. A major deviation from states' approach to fundamental rights protection can firstly be inferred from the well-known *Opinion 2/94*⁵⁵ on the accession of the Community to the ECHR by the Court of Justice. Here, the existence in the treaties of a general competence of the Community to enact legislation for an indiscriminate promotion of human rights was denied.⁵⁶ As a result, an important distinction was drawn between outcomes of policy absorption and possibility to pursue certain fundamental rights by way of positive interventions. In the light of *Opinion 2/94*, indeed, it may be perfectly plausible for the Court of Justice to interfere on national rules on criminal procedure, to extend educational loans provided by a member state to student nationals of other member states or to charge national administrations for health care services supplied by other member states to their citizens. But these cases of absorption do not automatically entail that the EU has autonomous competences to approximate national legislations on criminal procedure, educational support or national health care services.

⁵¹ The phenomenon of absorption is analyzed in J. H. H. Weiler, *supra* at note 30, p. 49.

⁵² Case 274/96, *Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7637.

⁵³ *Bidar*, *supra* at note 34.

⁵⁴ Case 372/04, *The Queen (on the application of Yvonne Watts) v. Bedford Primary Care Trust, Secretary of State for Health* [2006] ECR I-4325.

⁵⁵ *Accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94 [1996] ECR I-1759.

⁵⁶ As affirmed by the Court of Justice in paragraph 27 of the Opinion 2/94 “no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field”.

Such interpretation seems confirmed also by the Charter of Nice, where article 51(1) and (2)⁵⁷ stipulates clearly that fundamental rights included in that catalogue leave unaffected the framework of EU competences.⁵⁸ Finally, also in instituting an Agency for the protection of fundamental rights, a similar demarcation of the scope of EU fundamental rights protection has been carefully drawn.⁵⁹

As a result, in the context of the EU the only chances to promote fundamental rights in their vertical dimension are considerably restricted to the fields where the treaties provide for specific legal bases.⁶⁰ In all other circumstances, fundamental rights are applied by way of general principles and, therefore, promote a redefinition of the EU constitutional framework exclusively along the horizontal dimension. Consequently, even in respect to fundamental rights protection the Community process of constitutionalization is marked by an unresolved ambiguity. The results achieved by the Court of Justice in adjudication are not at present paralleled in the field of policy-making where EU institutions are constrained by a narrower approach to treaty competences. This persistent divergence with the attitude of state constitutional approach has far reaching ramifications and resonates in the further components of the conversion narratives which will be in turn analyzed.

c) Fundamental rights as the *raison d'être* of the EU?

In state constitutions the role of fundamental rights is not exclusively confined to the sole remedial dimension. Besides defending individuals' interests, fundamental rights perform an essential constitutive function. They aggregate national communities around a set of shared values and, by doing this, they express in legal terms the substantive contents of citizenship and

⁵⁷ In the Constitutional Treaty, article II-112.

⁵⁸ A different position is sustained by A. Barbera, *La Carta Europea dei diritti: una fonte di ri-cognizione?*, in *Il Diritto dell'UE*, 2-3/2001, p. 258, arguing "non è azzardato ... intravedere un processo costituente che alla fine potrebbe portare alla autolegittimazione della Carta stessa con effetti ... di tipo costituente anche allargando, nonostante il comma 2 dell'art. 51, le competenze comunitarie (e facendo regredire il già debole principio delle 'competenze enumerate') proprio al fine di tutelare i diritti enunciati". A position akin is endorsed also by A. Manzella, *Dal mercato ai diritti*, in A. Manzella, P. Melograni, E. Paciotti, S. Rodotà (eds.), *Riscrivere i diritti in Europa*, Bologna, Il Mulino, 2001, p. 53.

⁵⁹ Articles 2 and 3 Council Regulation 168/2007, 15 February 2007, establishing a European Union Agency for Fundamental Rights, OJ L53/1, 22.2.2007.

⁶⁰ Examples in this regard can be legal bases such as article 13 TEC, empowering EU institutions to take appropriate action to combat discriminations, or article 177, enabling specific measures in the field of development and cooperation contributing to the general objective of developing and consolidating democracy and the rule of law.

the objectives which ought to inspire democratic decision-making. Does the same apply also to the EU?

The conversion narratives respond positively.⁶¹ In the current EU legal framework, it is argued, fundamental rights are progressively coming closer to the heart of European integration.⁶² Accordingly, their role at present neither rests on the narrow function of imparting legitimacy to the implementation of EU policies nor on the protection of the individuals adversely affected by EU acts. Fundamental rights carry out a constitutive function which is openly recognized by the treaties. Article 6 TEU stipulates that the EU, as its member states, is founded on human rights protection and other republican values.⁶³ Article 49 TEU establishes that only the states respecting fundamental rights are entitled to apply for EU membership. Article 7 TEU, then, empowers EU institutions to monitor and sanction member states in case of gross violations of fundamental rights. Moreover, fundamental rights are considered a manifestation of the civic bounds linking European peoples and, hence, as expressions of European citizenship.⁶⁴ Finally, their codification in the Charter of Nice strengthens the constitutional commitment of the EU and conveys the ideological potential of contemporary constitutionalism to the process of completion of European integration.⁶⁵

Unequivocally, also in this respect conversion narratives capture important aspects of the EU evolutionary process, namely its ambition at achieving full political and constitutional status. Fundamental rights appear in this regard as the cheapest device for evoking a constitutional moment. But besides the notorious difficulties that such strategy is currently experiencing, in the EU context fundamental rights have however succeeded partially in accomplishing their constitutive promise. To be sure, when articles 6, 7 and 49 TEU stipulate that the EU as the states (members or candidates for membership) are founded on freedom, democracy and respect for human rights they certainly identify common axiological bases which might be profitably

⁶¹ This aspect is underlined in R. Toniatti, *Verso la definizione dei "valori superiori" dell'ordinamento comunitario: il contributo della Carta dei diritti fondamentali dell'Unione Europea*, in R. Toniatti (ed.), *Diritto, diritti, giurisdizione – La Carta dei diritti fondamentali dell'Unione Europea*, Padova, Cedam, 2002, p. 7; A. Manzella, *supra* at note 58, pp. 33-35.

⁶² A. Pizzorusso, *Il patrimonio costituzionale europeo*, Bologna, Il Mulino, 2002, p. 183; A. Barbera, *supra* at note 58, pp. 257-258; L. S. Rossi, *La Carta dei diritti come strumento di costituzionalizzazione dell'ordinamento dell'UE*, in *Quaderni Costituzionali*, 2002, 3, p. 574; F. Palermo, *La Carta tra diritto positivo e positività del diritto*, in R. Toniatti (ed.), *supra* at note 61, pp. 204-205.

⁶³ The republican character of the European constitution is underlined in M. Kumm, *supra* at note 13, p. 506.

⁶⁴ A. Manzella, *supra* at note 58, pp. 53-55.

⁶⁵ S. Rodotà, *La Carta come atto politico e documento giuridico*, in A. Manzella, P. Melograni, E. Paciotti, S. Rodotà (eds.), *supra* at note 58, p. 59.

enriched with further values enshrined in the Charter of Nice. In making visible foundational principles, therefore, fundamental rights perform a constitutive role and contribute to the self-definition and constitutional positioning of the EU.

Yet, this reflexive exercise exhausts the constitutive potential of fundamental rights. At this juncture, a first implication of the competences issue becomes evident. As previously mentioned, in the EU fundamental rights are not indiscriminately conceived of as objectives driving the policy-making. The order of EU competences and the focal point of integration, indeed, neither are shaped nor have been subverted by the fundamental rights doctrine. The core of the EU is still codified in functional terms and its *raison d'être* can be more appropriately found in the policy objectives laid down by the treaties.⁶⁶ In such a context, therefore, the EU takes only partial advantage of the constitutive dividend of fundamental rights. They surely succeed in defining what the EU and member states share and this function is particularly useful as it defines the substantive requirements of compatibility between them. But when it comes to defining what the EU is about, they largely fail in capturing its *raison d'être*, which continues to lay elsewhere.

d) Fundamental rights protection balancing market integration?

A further qualifying characteristic of contemporary constitutionalism is the rejection of absolute hierarchies of values.⁶⁷ This feature is directly connected with one of the most important claims of constitutionalism, namely its capacity of establishing an inclusive framework for dealing with political, social and economic conflicts.⁶⁸ The recognition of equal dignity, protection and access to the legitimate values and actors constituting a polity may be regarded as a precondition in this regard. On these premises, indeed, democratic procedures and institutions can perform their function of furthering political, economic and social cohesion, arguably the *raison d'être* of state constitutionalism.⁶⁹

⁶⁶ Articles 2 and 3 TEC. See also A. von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, in *Common Market Law Review*, 2000, 37, p. 1335.

⁶⁷ G. Zagrebelsky, *supra* at note 15, p. 11.

⁶⁸ R. Bin, *Che cos'è la Costituzione*, in *Quaderni Costituzionali*, forthcoming.

⁶⁹ N. Walker, *supra* at note 11, pp. 45-46.

Indivisibility is a name for this concept in conventional constitutional parlance.⁷⁰ Democratic constitutional settings include a composite set of values which can be made explicit through catalogues of fundamental rights formulated in the form of principles. These latter perform simultaneously as sources of inspiration and limits for the decision-making processes taking place mostly in representative democracy sites and as a yardstick for adjudication in those legal orders where judicial review of legislation exists.

In the EU sphere, indivisibility comes to the scene with the Charter of Nice and constitutes one of its most prominent features.⁷¹ The reasons underlying the interest in indivisibility are easy to identify. The approval of the Charter follows a turbulent period of political discussion dating back at least to the Treaty of Maastricht. In this debate, ‘Europe of Maastricht’ is famously targeted for being the product of conservative and technocratic elites interested only in an economic and monetary integration of Europe.⁷² Despite the gradual introduction of social policies and objectives in the treaty, the EU is felt to be tilted on the economic side and to promote a hierarchy of constitutional values which clashes with national constitutional pluralism. Such constitutional asymmetry⁷³ has been correctly addressed as a potential hurdle in the relationship between the supranational and national legal orders. Not only integration policies are perceived at the roots of the domestic losses of social protection, but also the EU appears unable to adequately compensate them at a supranational level.⁷⁴

Against this background, the adoption of the Charter of Nice may be interpreted as a clear attempt at re-establishing constitutional symmetry within the EU⁷⁵ and, consequently, as a sign

⁷⁰ S. Rodotà, *supra* at note 65, p. 73; A. Pizzorusso, *supra* at note 62, p. 121.

⁷¹ The principle of indivisibility is expressed in the Preamble of the Charter: “... the Union is founded on the *indivisible, universal values* of human dignity, freedom, equality and solidarity ...” (italics added).

⁷² This kind of criticism is evident among the left-wing discontents of the Constitutional Treaty. In the Italian debate, see G. Ferrara, *La costituzione europea: un’ambizione frustrata*, in *Costituzionalismo.it*, fascicolo 2/2004 and F. Bilancia, *Referendum, populismo e moneta unica. A proposito della costituzione europea*, in *Costituzionalismo.it*, fascicolo 3/2005.

⁷³ See F. W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, in *Journal of Common Market Studies*, 2002, 40, 4, p. 646, underlining “the political decoupling of economic integration and social-protection issues which has characterized the real process of European integration from Rome to Maastricht”.

⁷⁴ As a result, as pointed out in M. Poiaras Maduro, *Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU*, in P. Alston, M. Bustelo, J. Heenan (eds.), *supra* at note 39, p. 451, “the balance between economic freedom and social rights in European economic constitution has largely been defined by the balance between market integration and national social rights”.

⁷⁵ This aspect is particularly stressed in S. Rodotà, *supra* at note 65, p. 79; R. Toniatti, *supra* at note 61, p. 24, U. de Siervo, *L’ambigua redazione della Carta dei diritti fondamentali nel processo di costituzionalizzazione dell’Unione Europea*, in *Diritto Pubblico*, 2001, 1, p. 39.

of reconciliation in the relationship with the member states.⁷⁶ It is in this context that the newly introduced principle of indivisibility contributes to the constitutional redefinition of the EU. The inclusion in the Charter of a broader set of constitutional values on an equal standing signifies for the EU the acceptance of the same axiological bases which characterize contemporary constitutionalism and democracies. In the light of these values, it is argued, the Court of Justice is now enabled to balance the original economic regulatory principles with social rights which, in the new framework defined by the Charter, are no more relegated in an ancillary position.⁷⁷ With constitutional symmetry reaffirmed within the EU, then, the Charter contributes to the effort of assuaging the tensions between the supranational and national systems of fundamental rights protection. According to its provisions, not only indivisibility may improve EU social standards and, therefore, narrow the degree of divergence with state legal orders, but even in cases in which the standards of protection delivered at a national level result higher, a safeguard clause allows their recognition and preserves them from the detrimental impact of supranational harmonization.⁷⁸

A contextual analysis of the Charter weakens the claims associated with indivisibility and, notably, the expectations to re-establish constitutional symmetry in the EU architecture and downplay the discrepancies with states' legal orders. Quite predictably, ramifications of the competences issue are decisive even in this regard. The uneven possibility of developing fundamental rights in their vertical dimension, indeed, is the clearest sign of a context which can hardly be accommodated with a credible commitment to indivisibility. As seen, indivisibility implies absence of hierarchical relationships among several values. Conversely, circumstances such as the fitful availability of legal bases and, within the available legal bases, the diverse efficacy of the modes of governance fuel a sense of prioritization in EU goals and values. In such framework, therefore, criticism of the supposed virtues of the Charter to contrast EU social asymmetries appears well founded.⁷⁹

⁷⁶ A. Barbera, *supra* at note 58, p. 254; R. Toniatti, *supra* at note 61, p. 17.

⁷⁷ D. Grimm, *Il significato della stesura di un catalogo europeo dei diritti fondamentali nell'ottica della critica dell'ipotesi di una Costituzione europea*, in G. Zagrebelsky (ed.), *Diritti e Costituzione nell'Unione Europea*, Roma-Bari, Laterza, 2003, p. 9.

⁷⁸ See article 53 of the Charter (Article II-113 of the Constitutional Treaty). The importance of the safeguard clause is stressed by G. Silvestri, *Verso uno ius commune europeo dei diritti fondamentali*, in *Quaderni Costituzionali*, 2006, XXVI, 1, p. 16. See also A. Manzella, *supra* at note 58, pp. 44-45 and S. Rodotà, *supra* at note 65, p. 82.

⁷⁹ More persuasive seem the regulatory strategies outlined by F. W. Scharpf, *supra* at note 73, pp. 661-665.

The maintenance of these distinctive elements inevitably leads to a more disenchanted consideration of the relationships between the EU and states' legal orders. In this regard, the very issue of indivisibility may symbolize the persisting margin of divergence among them. Nor it seems that other provisions of the Charter can help in this regard. Particularly misplaced appear the expectations for the virtues of the safeguard clause of the Charter. It is not for this article to repeat persuasive arguments put forward against the rhetoric of the highest level of protection.⁸⁰ Here, it seems sufficient to refer to them and to note that, if systematically applied, the principle enshrined in article 53 of the Charter is likely to bring about intolerable fragmentations in EU policy-making and to undermine any credible design of integration. As a consequence, even arguments based on indivisibility appear as failing the proof of the European integration context. By contrast, the idea that constitutional conversion is far from having been reached is enriched by further elements.

e) EU constitutionalism evolving towards functional assimilation?

In accounting for the whole process of European integration, conversion narratives largely reiterate their approach to fundamental rights. A metaphor of functional evolution is often employed in this regard.⁸¹ Accordingly, European integration starts under functionalist guises and unfolds through a series of genetic modifications affecting vital parts of its legal framework such as the objectives, institutions and values.⁸² Such an evolutionary process is oriented towards a final destination, identified univocally in the total assimilation by the EU of the requirements mandated by traditional state constitutionalism. To be sure, in analyzing the EU framework conversion narratives points out the elements which depart from the state benchmark. But in

⁸⁰ As observed by M. Cartabia, *Principi inviolabili e integrazione europea*, Milano, Giuffrè, 1995, p. 31, “vi è innanzitutto una impossibilità strutturale di assestare i diritti fondamentali a valutazioni quantitative [...]. L'esatta portata di un diritto fondamentale emerge nella trama di relazioni tra i diversi valori che si instaura in un ordinamento: il singolo diritto non si trova mai isolato, o in posizione assoluta, ma sempre in rapporto con altri diritti di contenuto configgente, o con il medesimo diritto riconosciuto ad altri soggetti dell'ordinamento o ancora con interessi collettivi e generali che operano come limite al diritto preso in considerazione”. A similar approach emerges also in J. H. H. Weiler, *The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes*, Jean Monnet Working-Paper No. 2/96, <http://www.jeanmonnetprogram.org/papers/96/9602.html> and M. Luciani, *supra* at note 50, p. 1661.

⁸¹ The evolutionary metaphor – formulated in terms such as “from market to fundamental rights” or “from market to values” – is employed, for instance, in A. Manzella, *supra* at note 58, p. 37.

⁸² S. Dellavalle, *Necessità, pensabilità e realtà della Costituzione europea*, in G. Zagrebelsky (ed.) *supra* at note 77, p. 121.

such a mindset these elements are eloquently treated as contingent deviations, essentially justified by the necessary gradualism of the process of constitutionalization and as destined to be normalized in the next evolutionary phases. Conversion narratives, therefore, purport a comprehensive redesign of the EU whereby its completion consists in the conformation of the supranational sphere with the basics of traditional state federalism. Thus, the EU is rightly addressed as a source of constitutionalism without state,⁸³ even though it should be added that this kind of constitutionalism is conceived of as if the EU were a state.

In most of the cases, a similar approach to European integration stems from a conditioned reflex which, again, is associated with the competences issue. At present the reach of EU policies extends to almost all the areas traditionally governed by states.⁸⁴ The resulting overlap of jurisdictions nourishes often the idea that since the EU and the member states intervene in the same domains they perform also equivalent functions,⁸⁵ face equal concerns and purport analogous normative aspirations.⁸⁶ In the absence of a more viable framework, therefore, it seems natural to transpose the type of constitutional discourse developed so far within the states to a supposedly equivalent polity. But in suggesting a similar conceptualization, conversion narratives appear to materialize the most elementary hypothesis of comparative malpractice.⁸⁷

At a closer analysis, Community departures from the state benchmark do not always reveal a contingent character. A short overview on the field of industrial policy, for instance, may be useful to explain this point.⁸⁸ Member states' traditional approach to industrial policy consists, *inter alia*, in the supply of financial incentives to strategic economic sectors and firms or, according to a less idealized image, to the economic actors which have succeeded in capturing the regulator. The Community complements this kind of interventions through state-

⁸³ S. Rodotà, *supra* at note 65, p. 69, and, in more normative perspective, A. Pizzorusso, *supra* at note 62, p. 157.

⁸⁴ M. Maduro, *supra* at note 6, p. 334, describes the emergence of "a community of open and indeterminate political goals".

⁸⁵ A. Pizzorusso, *supra* at note 62, p. 158.

⁸⁶ G. F. Mancini, *Europe: the Case for Statehood*, in *European Law Journal*, 1998, 4, 1, pp. 30-31; A. Pizzorusso, *supra* at note 62, p. 158.

⁸⁷ As observed by R. Dehousse, *Comparing National and EC Law: the Problem of the Level of Analysis*, in *American Journal of Comparative Law*, 1994, 42, 4, p. 767, "propositions worked out at different levels are not readily interchangeable. Being the product of different frame of analysis, they tend to reflect the bias of the level at which research has been conducted. Great caution should therefore be exerted before transferring analytical propositions from one level to another".

⁸⁸ A deeper analysis can be found in M. Dani, *Lo sviluppo dell'imprenditorialità nello spazio costituzionale europeo: le politiche pubbliche tra sostegno ed emancipazione*, in *Diritto pubblico comparato ed europeo*, 2005, 1, pp. 396-420.

aids provisions.⁸⁹ The treaty establishes a general prohibition on state-aids affecting intra-community trade and carves out for the Commission the role to monitor the respect of this obligation and to authorize a number of derogations.⁹⁰ Both the Community and the member states, therefore, impinge in the industrial policy domain but, in doing so, they pursue divergent objectives and regulatory strategies. The focus of member states' approach is on market failures. In industrial policy and, more broadly, in economic regulation state intervention is devised to cure market defects and to foster the growth of national economy. The Community, instead, is inspired by different concerns. Its objective is market integration and, accordingly, its main focal point are government failures. Enforcement of treaty provisions, indeed, serves the objective to prevent market distortions by states' governments and to leave unaffected the competitive positions of European firms. Divergence, therefore, is structural rather than contingent as it reflects diverse and, arguably, alternative normative assumptions and functional concerns.⁹¹

Many of the distinctive elements and unfamiliar circumstances⁹² of the Community legal framework depend upon functional divergences of this nature. Conversion narratives downplay and even neglect these aspects as they struggle with the overarching ambition of functional assimilation. The resulting accounts for the EU constitutional identity, nevertheless, appear partial if not misleading and suggest the definition of alternative frameworks and narratives where also distinctive elements are adequately treated.

In contrast to the evolutionary metaphor, it may be argued that EU constitutionalization resembles a process of gradual stratification.⁹³ In this perspective, the current EU legal framework may be compared to the accretion of different layers corresponding to different geological eras. The critical difference between the evolutionary and geological metaphor consists in their respective focal points. While evolution stresses the modifications brought about by each new phase and, thus, emphasizes change, stratification contends that each new layer leans on the previous ones and, as a result, addresses continuity. According to stratification, the

⁸⁹ An overview on EU industrial policy is provided by V. Angiolini, A. Mangia, *Politica industriale*, in M. P. Chiti, G. Greco (eds.), *Trattato di diritto amministrativo europeo*, II, Milano, Giuffrè, 1997, p. 935.

⁹⁰ Articles 87 and 88 TEC.

⁹¹ The shift of political (but, arguably, also constitutional) focus from market to regulatory failures has been underlined by N. Reich, *The Regulatory Crisis: American Approaches in the Light of European Experiences*, in *American Bar Foundation Research Journal*, 1983, 3, p. 693 and A. La Spina, G. Majone, *Lo Stato regolatore*, Bologna, Il Mulino, 2000, pp. 15-23.

⁹² J. Shaw, *supra* at note 13, p. 581.

⁹³ The metaphor of stratification is borrowed from J. H. H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*.

EU legal framework could be regarded as consisting in a first and more dated layer where divergences with the functional concerns of state polities are predominant and strategic. Then, a more recent layer reveals a more complex functional identity as, depending on the policy area, the relationships between EU and state constitutionalism may result in assimilation, convergence or divergence. Arguably, the treaty of Maastricht might be considered the watershed between these different eras.⁹⁴

As seen in the field of industrial policy, elements constitutive of the divergent layer cannot be reduced to the exclusive logic of gradually bypassing the initial disagreement of member states on the grand goal of European political union.⁹⁵ Functionalism, indeed, is more than a short cut to European federalism. Inbuilt in the regulatory design of common market and, more generally, integration policies are equally legitimate objectives conceived of in the light of a fruitful relationship with member states polities. As authoritatively pointed out, in this layer the Community seems animated by transformative and civilizing purposes as far as it struggles against longstanding European (states) vices such as nationalism⁹⁶ and protectionism.⁹⁷

Whereas in the divergent layer the EU privileges its capacity to induce social change through political and legal means,⁹⁸ in its most recent layer its functional profile appears more blurred and controversial. Difficulties are essentially determined by the fragmentations in EU governance initiated in Maastricht and maintained in the subsequent treaty amendments. In this regard there have been warnings of how a monolithic account of the EU is likely to make no justice of the different modes of governance and patterns of democracy actually coexisting at supranational level.⁹⁹ Analogous considerations could be developed in respect to the objectives and the functional concerns which at present animate the EU. There are policy fields, indeed, where the functional profile of the EU continues to diverge in respect to member states'

⁹⁴ As observed in J. H. H. Weiler, *supra* at note 30, pp. 89-90, the public debate on Maastricht breaks the perception of ideological neutrality which hitherto was associated to the European integration design.

⁹⁵ This, however, seems the argument defended by G. Amato, *Il Trattato che istituisce la Costituzione Europea*, in *Costituzionalismo.it*, fascicolo 3/2004, pp. 2-3.

⁹⁶ J. H. H. Weiler, U. Haltern, F. Mayer, *European Democracy and its Critics – Five Uneasy Pieces*, Jean Monnet Working Paper 1/95, <http://www.jeanmonnetprogram.org/papers/95/9501ind.html>, p. 15.

⁹⁷ J. H. H. Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of Free Movement of Goods*, in P. Craig, G. de Burca (eds.), *The Evolution of the EU*, Oxford, Oxford University Press, 1999, p. 349.

⁹⁸ A. von Bogdandy, *supra* at note 66, p. 1336.

⁹⁹ J. H. H. Weiler, U. Haltern, F. Mayer, *supra* at note 96, pp. 20-27, identify coexisting international, supranational and infranational approaches to European integration which correspond respectively to consociational, pluralist and neo-corporatist models of democracy. The difficulty of monolithic accounts for the EU is expressed also by P. Eleftheriadis, *supra* at note 13, pp. 5-10.

approach. Industrial policy and state-aids, despite some adjustments,¹⁰⁰ are still good examples in this respect. In other areas, instead, the EU merely replicates the objectives or at least the ambitions of the states. Cooperation in criminal affairs or immigration seem the probable candidate areas for functional assimilation.¹⁰¹ In other substantive domains, then, EU policy-making develops along patterns of convergence. As seen on fundamental rights protection, the EU overtly embraces the language and categories of constitutionalism though preserving elements of functional divergence. Such ambiguity underlies a subtle rationale. Recourse to symbols, of course, reinforces the legitimacy of EU policy-making and facilitates the relationships with the member states. But in the convergent move there is also a strategic redefinition of the original transformative objectives. The commitment to efficiency and access to market, for instance, ceases to be interpreted as the mechanical promotion of pre-defined and somewhat artificial goals as it is increasingly refined in a process of political construction of the contents of efficiency and market regulation.¹⁰²

The comprehensive picture, where old and more recent layers combine, delivers a more articulated and problematic image of the EU than that emerging from conversion narratives. The simultaneous existence of elements which respond to different normative aspirations makes it difficult to single out a unique and straightforward account for the EU. The relationship between the EU and member states' functional profiles changes significantly depending on the policy area at hand. Functional fragmentation, therefore, comes out as one of the most prominent features of the current EU framework and the extent of this phenomenon impairs the very possibility of an all-encompassing discourse on European constitutionalism. In such a framework supposed advancements and weaknesses are to be carefully assessed. What are often perceived as underdeveloped parts of the EU architecture, in a more accurate analysis might be parts of a mature design responding to concerns and schemes alternative (and, arguably, equally legitimate) to those cultivated in national constitutions. Yet, the consideration of these

¹⁰⁰ A more relaxed approach on state-aids has been started by Council Regulation (EC) 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, OJ L 142, 14.5.1998, pp. 1–4, which exempts certain categories of aids from the duty of notification to the Commission (article 1).

¹⁰¹ Of course, at present there are several elements which differentiate the EU and member states' constitutional approach to criminal matters and immigration. Nevertheless, it seems that the objectives pursued at both levels in this field conflate and that possible deviations have a largely contingent character.

¹⁰² On the transformation of efficiency within EU political administration see R. Dehousse, *Misfits: EU Law and the Transformation of European Governance*, in C. Joerges, R. Dehousse (eds.), *Good Governance in Europe's Integrated Market*, Oxford, Oxford University Press, 2002, p. 207.

dissonances implies assessments and conceptualizations which largely draw on normative choices requiring further discussion.

3. Dealing with Dissonances: Towards a Convergence Narrative?

In the previous section a number of arguments have been presented which justify skepticism towards the idea of accounting for the EU in the light of the sole framework provided by state constitutionalism. A convincing critique of the conversion narratives, however, cannot only rest on analytical propositions but must face also their inherent normative concerns. State constitutionalism, indeed, evokes a set of ideals and institutional solutions which Europeans care a great deal about. Specific discussion, therefore, is needed on both the normative premises of the conversion narratives and the desirability of conversion.

The choice for state constitutionalism as the EU form of power relies on a strong normative assumption: it is believed that the combination of fundamental rights protection, broad legislative powers and representative democracy devices provides the most effective and, probably, the only framework for ensuring the republican ideals of political inclusion, economic prosperity and social cohesion. In this respect, conversion narratives may be regarded not only as proofs of faith on the virtues of constitutionalism and state constitutions,¹⁰³ but also as defenses of a clear political strategy intended to preserve the European *modus vivendi*.¹⁰⁴ Thus, it is argued that the most serious concerns for contemporary Europe are no more internal, as the original objectives of internal peace and single market have been substantially fulfilled.¹⁰⁵ Conversely, the new frontiers of EU action should be the defense of its social model against the disintegrating effects of global economic integration and the definition of strategies for facing the menace of global terrorism, possibly in alternative to the US war on terror. To face these challenges, it is claimed that European integration should be completed and acquire full political nature¹⁰⁶ by paying off once and for all the debt to functionalism inherent in its legal

¹⁰³ As acutely pointed out, in many aspects also state constitutional settings may be seen as falling short with their promise of participation and social protection: M. Maduro, *Europe and the constitution: what if this is as good as it gets?*, in J. H. H. Weiler, M. Wind (eds.), *supra* at note 13, p. 83.

¹⁰⁴ J. Habermas, *Perchè l'Europa ha bisogno di una Costituzione?*, in G. Zagrebelsky (ed.), *supra* at note 82, p. 98.

¹⁰⁵ J. Habermas, *supra* at note 104, pp. 96-97.

¹⁰⁶ J. Habermas, *supra* at note 104, p. 113.

framework.¹⁰⁷ As a result, the institutional architecture established for the pursuit of internal integration should be redefined and a traditional federal system should be considered as the best of the available institutional options for pursuing such a new EU agenda.¹⁰⁸ At this point, fundamental rights as well as the institutions and procedures normally associated to their pursuit are stressed by conversion narratives for evoking this new political and constitutional scenario for Europe.¹⁰⁹

But is the protection of the European *modus vivendi* a sustainable objective or is it part of the economic problems Europe is currently experiencing? Is the global promotion of fundamental rights really a viable political strategy or is it an objective conceived of in the absence of more marketable ideals or ideologies? Admittedly, the answers to these questions depend on one's own political preferences. Yet, some considerations can be put forward at least to nourish the debate on premises which too often constitutional analyses postulate passively.

The existence of a sufficiently shared European *modus vivendi*, for instance, is far from being demonstrated. Let alone generic assertion or stereotypes, which could apply also to some non European country, Europe hosts a broad variety of social models,¹¹⁰ but only part of them suffers global economic integration. Other European social models, instead, rather than being disintegrated, appear as taking advantage from these phenomena. Hence, to defend European *modus vivendi* is only apparently a politically neutral slogan as it could be read as a surreptitious attempt at arbitrarily imposing a unique social model which would be likely to imitate one – and not necessarily the most efficient – of the available national models. Such an option, apart from appearing scarcely persuasive in theory,¹¹¹ would be likely to encounter in practice insuperable political obstacles due to its difficult economic and social sustainability and, eventually, to result itself a factor of disintegration.¹¹²

¹⁰⁷ J. Habermas, *supra* at note 104, pp. 103-105.

¹⁰⁸ J. Habermas, *supra* at note 104, p. 95 argues that “... la sfida non consiste tanto nell’invenzione di qualcosa di nuovo, ma piuttosto nella conservazione delle grandi conquiste dello Stato nazionale europeo anche oltre le frontiere della nazione e in un altro formato”. An analogous position was supported by G. F. Mancini, *supra* at note 86, pp. 41-42.

¹⁰⁹ J. Habermas, *supra* at note 104, p. 101.

¹¹⁰ As remembered in F. W. Scharpf, *supra* at note 73, p. 650, Europe includes “three worlds of welfare capitalism”, namely the Scandinavian, the Anglo-Saxon and the Continental models.

¹¹¹ G. Davies, *The Process and Side-Effects of Harmonisation of European Welfare States*, Jean Monnet Working Paper 2/06, pp. 39-42.

¹¹² F. Scharpf, *supra* at note 73, p. 651.

Also the idea that the EU would have substantially accomplished its original objectives is questionable. To be sure, progresses in economic integration have been remarkable and, more importantly, peace between European states and peoples is a terrific achievement in a continent which has been at the epicenter of the two world wars. But could we conclude from these results that the original commitment to taming states' excesses such as protectionism and nationalism could be abandoned?¹¹³ An assessment of the current European reality induces more cautious considerations. Nationalism and its siblings such as racism, intolerance and the like continue to find their political way within the more or less protected European national democracies. Moreover, the desirable geographic completion of Europe with the Balkan countries is likely to require further efforts and resources in this respect. Analogous arguments can be suggested also in regard to market integration and protectionism. Recent cases of 'economic patriotism' but also episodes such as the watering-down of the services directive¹¹⁴ demonstrate that even in this field old state temptations persist and more desert is to be walked through before the functional redemption of the EU.¹¹⁵

Such considerations, coupled with the current political difficulties in achieving full conversion by the EU, suggest it might be more promising to invest in different normative bases for the EU. Notably, a more viable option could be a narrative of convergence for the EU in which the transformative potential of functionalism is maintained and developed at supranational level to tame states' excesses and cope with their failures. Admittedly, functionalism is not perceived at present as a particularly appealing and mobilizing political ideal. Its claims for market efficiency are increasingly feared as detrimental for political inclusion and social cohesion. Functionalism, then, sounds like technocracy, arguably one of the main targets of EU discontents. Yet, it is argued that a rediscovery of functionalism¹¹⁶ at fifty years from the approval of the Treaty of Rome could provide a new opportunity to overcome the deadlocks determined by the failure of European political integration.

Firstly, the idea that regulatory strategies normally associated with functionalism such as those embodied by free movement provisions are detrimental to social protection and citizens'

¹¹³ G. Davies, *Subsidiarity: the wrong idea, in the wrong place, at the wrong time*, in *Common Market Law Review*, 2006, 43, pp. 83-84.

¹¹⁴ See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36, in particular chapter IV on derogations.

¹¹⁵ J. H. H. Weiler, *supra* at note 97, pp. 362-363.

¹¹⁶ R. Dehousse, *Rediscovering Functionalism*, Jean Monnet Working Paper 7/00, <http://www.jeanmonnetprogram.org/papers/00/00f1101.html>.

rights can be contested. Take health care, arguably the cream of European *modus vivendi*. Member states' traditional approach to health care protection consists of establishing systems providing services to the individuals who reside within their territory. Most of the national systems are then conceived of on universal bases in order to protect social rights regardless of individuals' economic background. The function of such a system is not perceived only in the medical relationship between public bodies and individual citizens. As acutely noted, in many member states the existence of a system of protection reflects a more profound ideal of social inclusion which has historically fulfilled an additional function of community and polity building.¹¹⁷ The same pattern does not apply to the EU where health care is approached from a rather different perspective. Here, the relevant coordinates are those of economic law and market regulation. In positive harmonization, for instance, health care considerations have become an essential element in regulating access to market.¹¹⁸ More critically, health care provision is regarded as a service and, therefore, subject to free movement rules. As a consequence, the relationship between EU and member state constitutional principles in this field could be classified as one of divergence. Member states, as previously observed, focus on the potential of exclusion of market mechanisms and intervene to compensate them with their policies and institutions. The EU, by contrast, develops a system which addresses mostly governmental failures on health care provision. In recent judgments,¹¹⁹ indeed, the qualification of health care as a service has permitted the Court of Justice to improve individuals' protection by supporting their migration in cases of malfunctions of their home national systems. As a result, the functional approach by the EU reveals an unexpected beneficial impact on the standards of protection of individuals' social rights, even though a detrimental impact can also be identified if the community-building function of welfare state is considered.¹²⁰

Secondly, free movement strategies have still an underexploited potential. The original promise of free movement is to facilitate the optimal allocation of resources in the common market by removing the obstacles to the circulation of the factors of production.¹²¹ This objective responds first of all to economic concerns such as overcoming skill shortages or labor force

¹¹⁷ G. Davies, *supra* at note 111, p. 48.

¹¹⁸ Articles 95(3) and 152(1).

¹¹⁹ Case 385/99, *Müller-Fauré and van Riet* [2003] ECR I-4509; *Watts*, *supra* at note 54.

¹²⁰ C. Newdick, *Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity*, in *Common Market Law Review*, 2006, 43, 6, p. 1645.

¹²¹ P. Craig, *The Evolution of the Single Market*, in C. Barnard, J. Scott (eds.), *The Law of the Single European Market – Unpacking the Premises*, Oxford, Hart Publishing, 2002, p. 2.

excesses and, more generally, mitigating problems of race to the bottom by broadening the ambits of regulatory competition.¹²² Moreover, free movement provisions are expected to perform also a social function, notably to increase job opportunities in terms of career and income prospects. Finally, they serve also a profound cosmopolitan commitment. Free movement provisions, indeed, are expected to deliver in the cultural dimension by qualifying the contents of European citizenship. It has been claimed in this regard that

Europeans are part of a “community of others” who feel at home abroad anywhere in Europe.¹²³

Can we consider this original objective to have been sufficiently achieved? A look at recent figures reveals that similar statements may reflect a hope but hardly a reality in the current European context. Data on EU geographical mobility¹²⁴ show that while 18% of EU citizens have moved at least once in their career to another region, only 4% of them have moved at least once to another member state.¹²⁵ Such low results suggest not only that a ‘culture of mobility’ – i.e. its consideration as natural element in one’s career – is far from being internalized by European citizens, but also that at the moment Europe is not profiting from the supposed economic, social and cultural dividends associated to free movement of persons.

There may be of course several explanations for these data. At a very simple level, it could be argued that notwithstanding the removal of obstacles to circulation, when European citizens consider the trade-offs implied by intra-Community mobility the threats tend to prevail over the opportunities.¹²⁶ An apologetic account of this reality could lead to conclude that citizens are substantially satisfied with their home situations and that their scarce mobility is just the result of conscious market choices. An alternative explanation could instead point out that the Community policies have so far postulated a capacity of mobility of persons which the above data manifestly deny. Community law has indeed targeted mostly *de jure* obstacles to free movement of persons ending up in promoting an elitist and exclusive cosmopolitanism. But what

¹²² M. Kumm, *Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, in *European Law Journal*, 2006, 12, 4, p. 503, 511-512.

¹²³ K. Nicolaidis, *supra* at note 1.

¹²⁴ European Foundation for the Improvement of Living and Working Conditions, *Mobility in Europe - Analysis of the 2005 Eurobarometer survey on geographical and labour market mobility*, <http://www.eurofound.eu.int/pubdocs/2006/59/en/1/ef0659en.pdf>, p. 14.

¹²⁵ Consider that 3% of EU citizens have moved at least once in a country outside the EU.

¹²⁶ H. Krieger, E. Fernandez, *Too much or too little long-distance mobility in Europe? EU policies to promote and restrict mobility*, European Foundation for the Improvement of Living and Working Conditions, p. 3.

about the *de facto* obstacles which impede or deter the circulation of non-privileged citizens? Is there something the EU could do in this regard?

Here, two different approaches to mobility appear and may be compared. According to the first – arguably the approach so far pursued by the Community – mobility is the result of natural competition between national labor markets and the role of supranational institutions is simply to remove legal obstacles to circulation. Conversely, it could be observed that capacity of mobility is a precondition of migration and regulatory competition which requires the adoption of positive measures to encourage mobility even by Community institutions. Positive interventions to face *de facto* obstacles could be envisaged such as language and educational training, support to the integration in the new social environments, aid to face the economic and social expenses in starting up a mobility project.

The advantages associated with this idea of completing the internal market by promoting forms of inclusive cosmopolitanism could be felt not only by their direct beneficiaries. The spill-over effects of this policy would obviously come out in both the economic and cultural spheres, but also the broader constitutional discourse could benefit from this revised commitment to free movement and functionalism. By making mobility a more tangible opportunity for EU citizens, it might be that market integration could end up being feared and addressed as a factor of exclusion and social disintegration, and start to qualify as an additional source for social and democratic revitalization. Furthermore, only by making cosmopolitanism inclusive, would European citizenship acquire substance and credibility as, at present, its rather elitist profile contrasts with the objective of establishing solid civic bounds among European peoples.

The latest arguments reveal how a convergence narrative for the EU could be framed. Its ingredients could be identified negatively in the refusal of the assimilation of state constitutionalism categories. On the positive side, convergence could result in the maintenance of the original functional transformative profile, though refined in the light of the requirements of political and social inclusion which guarantee an acceptable degree of compatibility with states' legal orders. The latter, it should be noted, because of their interactions with the EU, would similarly undergo processes of redefinition of their constitutional identities. Even in their regard assimilation – this time of the EU original functional profile – should be rejected and convergence preferred. As a result, the original state objectives of political and social cohesion

and the relative concerns for market failures would be reconsidered in the light of the integration policies devised in the supranational sphere.¹²⁷

Although convergence comes out as the most enriching pattern of interaction between the EU and member states' constitutional orders, a certain caution should be maintained even in respect to its generalization to other EU policy-areas. This is not to deny that other substantive domains could benefit from a similar approach. But there are fields of EU policy-making in which dissonances appear too strident and claims for assimilation do seem appropriate. Take criminal justice, for instance. Here, by no means divergence with the guarantees existing at national level appears justified. By contrast, recent legal and constitutional practice shows that in both the remedial and political dimensions serious constitutional deficiencies persist.¹²⁸

In conclusion, rather than suggesting convergence narrative as the only way forward for the EU, a more modest methodological statement seems appropriate. A functionalist analytical approach may be helpful in detecting dissonances between the EU and states' constitutional orders. Once those are identified, it is important to account for them. Even in this regard a functional assessment can be useful to interpret dissonances and single out their rationales, notably their contingent or structural nature. Particularly in this last case, careful consideration should be given to the fact that there could be a value worth preserving in a degree of functional divergence between legal orders. However, many could be the possibilities open to the choices of value of the interpreters at this juncture as dissonances can in turn be justified, denounced or, according to the most sophisticated counterpunctual techniques,¹²⁹ employed to promote harmonic interactions between constitutional orders.

4. A Moment in the Evolution of Constitutionalism?

Hitherto discussion has focused on the relationship between European integration and state constitutionalism. In the approach of the conversion narratives this relationship is framed

¹²⁷ More considerations in this regard are developed in M. Dani, *Economic Constitutionalism(s) in a Time of Uneasiness - Comparative Study on the Economic Constitutional Identities of Italy, the WTO and the EU*, Jean Monnet Working Paper 8/05, <http://www.jeanmonnetprogram.org/papers/05/050801.html> .

¹²⁸ EU Network of Independent Experts in Fundamental Rights (CFR-CDF), *The Balance Between Freedom and Security*, March 2003, www.europa.eu.int/comm/justice_home/cfr_cdf/doc/obs_thematique_en.pdf .

¹²⁹ M. Maduro, *supra* at note 103, p. 98.

unilaterally. Evolutionary accounts for European integration highlight the influence of constitutionalism on the EU legal framework and purport functional assimilation of the latter.

The analysis of previous sections suggests the relationship between constitutionalism and European integration may have a more complex nature. Whereas elements of convergence towards state constitutionalism have clearly been introduced, the EU legal framework resists total assimilation and maintains a significant margin of divergence. Critically, divergence may have a structural basis as it often reflects functional concerns which deliberately conflict with the identity of states' constitutions. In particular, different approaches to the idea of integration may be pointed out. In contemporary national constitutions, integration is conceived of as the search for political, economic and social cohesion among citizens through democratic means. In the original Community context, by contrast, integration may be seen as an effort to engage member states and their peoples in a positively and more defined program of transformation and civilization. Not surprisingly, the contents of this program may be in contrast with their national parallels. Dissonances, far from being absorbed, continue to resonate for those who listen carefully, even when the most recent evolutionary stages are considered.

Against this background, the relationship between European integration and constitutionalism may reveal a second dimension. The EU legal framework, in the process of internalizing many instances of state constitutionalism, has engendered a process of redefinition of constitutionalism by challenging its functional concerns and normative assumptions.

In observing the evolution of federal systems, it has been correctly pointed out that federalism can hardly be defined and conceptualized univocally.¹³⁰ The institutional solutions adopted in the name of federalism vary considerably and, arguably, their characteristics crucially depend on the functions which state legal orders have historically assumed.¹³¹ A rather general federal ideal has inspired concrete manifestations which include, *inter alia*, dual federalism in the times of *laissez-faire*, cooperative federalism in the times of welfare state and, arguably, asymmetrical federalism in our times of enhanced diversities.¹³² It is argued that analogous

¹³⁰ The difficulties of a global theory of federalism are discussed in A. Gamper, *A Global Theory of Federalism: The Nature and Challenges of a Federal State*, in *German Law Journal*, 2005, 6, 10, <http://www.germanlawjournal.com/article.php?id=635>.

¹³¹ G. Bognetti, *Federalismo*, UTET Libreria, Torino, 2001, p. 8.

¹³² F. Palermo, "Divided we stand". *L'asimmetria negli ordinamenti composti*, in A. Torre (ed.), *Processi di devolution e transizioni costituzionali negli Stati unitari (dal Regno Unito all'Europa)*, Giappichelli, Torino, 2007, where it is argued in the current phase of development of federalism a rediscovery of the elements of asymmetry would be underway.

considerations could apply to constitutionalism. Constitutional experiences can be identified where the predominant objectives are, for instance, *laissez-faire* or welfare state. At present, Europe witnesses a profound transition of constitutionalism determined by its process of integration. Transition may be appreciated both in a national and supranational perspective. At national level, as noted, states' constitutions undergo a mostly silent redefinition in the light of the concerns inherent in the Community concept of integration. Such transition may be seen as constituting a new phase of state constitutionalism which could be defined as 'constitutionalism of EU membership'. At supranational level, the ideals of constitutionalism are also at the source of a process of redefinition whose extent varies according to the policy areas. The resulting product of this process by no means reveals a precise identity and can hardly be summed up in a unique and coherent constitutional model. On the basis of the distinctive elements of its legal framework, therefore, the EU might be regarded as autonomously developing a sort of vulgarization of constitutionalism.¹³³

The comprehensive scenario emerging from European constitutional space is more articulated than the suggestions envisaged by conversion narratives. The metaphor of a counter-punctual constitutionalism appears more appropriate to describe the current situation:¹³⁴ different instruments (legal orders) play the same melody (constitutionalism) for the delight or the displeasure of the audience (European peoples). Following this image, it could be argued that not only are there different instruments playing, but also that the melodies (different types of constitutionalism) they are playing diverge. In studying harmony we learn that dissonances are the physiological result of this kind of interactions and that, if properly treated and brought to coherent solutions, they can improve the overall quality of music. Common experience suggests also that dissonances are to be kept within acceptable margins because if instruments play on different tonalities, the audience is likely to show disappointment.

The defeat of the Constitutional Treaty and the abandonment of the constitutional concept in the treaties leave unaffected this reality and could even be regarded favorably insofar as they halt conversion strategies. In the resulting context the nature of the undergoing transition

¹³³ The concept of "vulgarization" is often used to define the forms of law developed in alternative and sometimes in substitution of official Roman law in the transition from Roman to medieval law. As in "vulgar law" traditional legal categories and norms were often modified in the light of practical needs, it may be argued that supranational constitutionalism is employing and transforming traditional concepts of state constitutional law to face the functional concerns inspiring the EU legal framework. On "vulgar law" see P. Grossi, *L'ordine giuridico medievale*, Edizioni Laterza, Bari-Roma, 2006, pp. 52-53.

¹³⁴ M. Maduro, *supra* at note 103, p. 98.

transpires more clearly and elements heralding a new phase of constitutionalism are already evident in European integration practice. In this situation a subtle irony is also present: while the EU was expecting a constitutional moment, the very failure of its achievement shows more clearly the extent to which European integration could constitute a moment in the evolution of constitutionalism.

What is developing is certainly constitutionalism for good ears. It is easy to predict that constitutional scholarship will be increasingly requested to make sense of this reality and to define a balanced framework where solutions for the problems of contemporary societies could be worked out.