

Dani, Marco

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Economic and social conflicts, integration and constitutionalism in contemporary Europe

Marco Dani



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Economic and social conflicts, integration and constitutionalism in contemporary Europe

Marco Dani*

* **London School of Economics**

Marie Curie Fellow, European Institute, Houghton St, London WC2A 2AE, UK

Email: m.dani@lse.ac.uk

Table of Contents

1. The Reconfiguration of Economic and Social Conflicts in Europe and its Constitutional Implications	1
2. Smend's Theory of Integration as Analytical Device	7
3. Integration as Europe's Constitutional Reason	16
3.1. Integration <i>within</i> the constitutional frameworks	16
3.2. Integration <i>between</i> constitutional frameworks	30
3.3. Integration <i>across</i> constitutional frameworks	41
4. Questioning Integration	46

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Economic and social conflicts, integration and constitutionalism in contemporary Europe

1. The Reconfiguration of Economic and Social Conflicts in Europe and its Constitutional Implications

Concern for economic and social conflicts remains one of the most defining features of contemporary political and constitutional systems. This is particularly evident in Western democracies where political alignments are traditionally conceived along the left-right divide, a conflict line whose current configuration is reminiscent of the ideological cleavages associated with the 19th and 20th Century class struggles. This type of conflict (hereafter, *first type conflicts*), alongside playing a crucial role in the shaping of national political identities, has prominently featured in constitutional history as one of the main variables contributing to the rise of constitutional democracy.

Nowadays, such legal and political reality is under challenge. Of course, first type conflicts are a constant source of debate about the role of public powers, the scope for individual freedoms and the endowment of social rights. Nevertheless, their influence in political and constitutional structuring is increasingly questioned as far as an alternative type of economic and social conflict, namely that associated with the transnational mobility of factors of production (hereafter, *second type conflicts*), is gaining momentum. The rise of second type conflicts brings about a number of consequences on the established political and constitutional reality: the left-right

Economic and social conflicts, integration and constitutionalism

divide appears on the wane, and even constitutional democracy struggles to maintain its hold on political and social organisation.¹

In Europe, the constitutional² implications of these processes are more dramatic than elsewhere. Basic considerations may explain such specificity. On the one hand, one must consider the weight of legal and political tradition: first type conflicts, ideological cleavages and constitutional democracy are elements that not only go into making up national communities, but are probably among the most telling aspects of Europeaness. On the other hand, the law of the European Union, a *unicum* in Western democracies, in carrying out the common market project amplifies the unsettling political and legal potential of second type conflicts.³ Indeed, in responding to the concerns emerging as to the mobility of factors of production, the law of the EU has progressively established a political and legal framework that in many aspects is alternative to that of states' constitutional democracy. What is more, due to the ramifications inherent in market regulation and the nature of Community law, such an alternative framework not only defies the canons of states' constitutionalism but, critically, it disputes their legal authority and ideological hegemony. As a consequence, the reconfiguration of economic and social conflicts as prompted by the common market project also brings about a conflict between legal orders and, notably, the clash between the constitutional narratives propounded by the EU and its member states (hereafter, *third type conflicts*).

Despite their uneasy coexistence, all the listed conflicts happen to share a common feature: their solutions are not rigidly defined or, more accurately, their legal discipline is framed in open-ended terms. In fact, as both first and second type conflicts normally may invite a range of equally legitimate outcomes, also the tensions between Europe's constitutional frameworks (i.e. the constitutional frameworks of the EU and those of its member states) may bring in a variety of

¹ M. Revelli, *Sinistra destra. L'identità smarrita* (Laterza, 2009).

² But, arguably, also the political implications, see S. Bartolini, *Restructuring Europe – Centre formation, system building, and political structuring between the nation state and the European Union* (OUP, 2007), 354.

³ See Case 265/95, *Commission v France* [1997] ECR I-6959 and, more recently, Case 438/05, *The International Transport Worker's Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

possible adjustments. Admittedly, out there one finds not only disordered legal materials but also very basic doctrines ruling specific conflicts between EU or states norms.⁴ But when it comes to collisions between constitutional systems and, notably, between their distinct ideological conceptions of conflict, the utility of those doctrines may be questioned, and more sophisticated answers are needed to make some sense of such a fragmented and potentially contradictory political and legal reality.

So far, the accounts put forward in relevant scholarly and doctrinal debates seem to follow three main conceptual frameworks. The first, the most positivist in nature, conceives of economic and social conflicts from the vantage point of the EU legal order.⁵ Accordingly, the conceptual framework associated with second type conflicts prevails over that of states' constitutional democracy and, therefore, solutions to third type conflicts are formulated with the language of EU principles of economic law.⁶ The opposite approach, one where the constitutional framework associated with first type conflicts replaces at a EU level that of second type conflicts, was particularly popular prior to the debacle of the Constitutional Treaty. Constitutional lawyers seized the opportunity of the EU's supposed constitutional momentum to overcome the latter original market texture, and to redefine it through the language of states' common constitutional traditions.⁷ Against such a normalised background,⁸ solutions to economic and social conflicts had still to be devised at a supranational level, although the methodology employed in framing and sorting them out had to reflect the EU's newly acquired republican ethos.⁹ Finally, insights into our problems may also be found in the rich and articulate intellectual vein of constitutional

⁴ An exhaustive account for the EC supremacy doctrine and its national constitutional reservations is offered in B. de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (OUP, 1999), 177.

⁵ For a valuable example, see G. Davies, *The process and side-effects of harmonisation of European welfare states*, Jean Monnet Working Paper No 2/06, <<http://www.jeanmonnetprogram.org/papers/06/060201.html>>.

⁶ See, as significant examples, Case 112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659 and Case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

⁷ A. Manzella, 'Dal mercato ai diritti', in A. Manzella, P. Melograni, E. Paciotti, S. Rodotà (eds), *Riscrivere i diritti in Europa* (Il Mulino, 2001), 29.

⁸ K. Lenaerts and D. Gerard, 'The structure of the Union according to the Constitution for Europe: the emperor is getting dressed' (2004) 29 *European Law Review*, 322, claiming that the EU differs from a state-like structure solely because of its coexistence with other sovereign entities.

⁹ M. Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called' (2006) 54 *American Journal of Comparative Law*, 517.

Economic and social conflicts, integration and constitutionalism

pluralism.¹⁰ Here, third type conflicts are addressed in mostly theoretical terms echoing longstanding debates on sovereignty.¹¹ Solutions are broadly devised without specific distinctions or qualifications as to the substantive contents of those conflicts.¹² Nonetheless, as far as a more horizontal configuration of the relationships between the legal orders is envisaged, constitutional pluralism may suggest that the issue at stake is not what conceptual framework must prevail, but how their competing substantive claims can be accommodated.¹³

Arguably, all the aforementioned approaches capture important aspects of the phenomena at hand; yet, in sticking exclusively to their conceptual standpoints, they also offer partial accounts. Positivists, for example, fail to explain on what normative grounds it is legitimate for EU economic law if not to rewrite, at least to question states' constitutionalism. Conventional constitutional narratives, instead, succeed in representing at a symbolic level the high stakes inherent in many of the conflicts at hand but, in most cases, they end up overlooking the persisting economic law structure beneath the declamation of EU values. A similar shortcoming permeates the approaches of constitutional pluralists. As noted, the latter are probably the most accurate in enhancing the multiplicity of vantage points and describing what is beyond raw legal materials. Yet, that also ends up being their most critical limit as not only do they fail to explain in substantive terms the constitutional implications of the process of reconfiguration of economic and social conflicts undergoing in Europe, but they all too often assume constitutional democracy to be the uncontested standard for assessing the legitimacy of European integration.¹⁴ As a result, how does one cope with the partiality of these approaches? How does one profit from their explanatory dividend? And is it possible to overcome their limits?

¹⁰ N. Walker, 'The Idea of Constitutional Pluralism', (2002) 65 *Modern Law Review*, 317.

¹¹ N. MacCormick, *Questioning Sovereignty – Law, State, and Practical Reason* (OUP, 1999).

¹² M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal*, 262.

¹³ M. Dani, 'Constitutionalism and Dissonances: Has Europe Paid Off its Debt to Functionalism?' (2009) *European Law Journal*, 324.

¹⁴ On such issue, see the critical remarks in G. Majone, 'Europe's 'Democratic Deficit': The Question of Standards' (1998) 4 *European Law Journal*, 5-6.

This article argues not only that a more comprehensive theoretical and analytical framework bringing together previous approaches may be possible but, critically, that in interpreting the challenge posed by the reconfiguration of economic and social conflicts in Europe, it might deliver more than the sum of its single components. Indeed, my primary purpose here is essentially explanatory: the crux of the article is to provide an accurate account of the constitutional status quo and, namely, of the identities and the patterns of interactions of Europe's constitutional frameworks as to economic and social conflicts.¹⁵ Prior to debating the constitutional solutions to third type conflicts, in fact, one ought first to break down the terms of the latter, describe the hallmarks of the constitutional responses to first and second type conflicts, and only at that point try to devise some kind of accommodation. But how can a similar exercise be structured? And what are the possible interpretive tools to penetrate and compare the reality of Europe's constitutional frameworks?

A valuable starting point for our analysis may be the rather elementary observation that both the EU and its member states are in the business of integration, a rather lax notion which is meant to respond to the conflicts between the subjects of a polity by establishing a variety of conditions which can range from peaceful coexistence to unity. The degree of integration as well as its specific definition and constitutional implications depend on the political and legal context in which it is pursued. In the EU, for example, integration is part and parcel of its constitutive mission and implies, broadly speaking, the cooperation of the member states in carrying out common policies as well as the establishment of civic bonds between the individuals and peoples of Europe. As to the member states, integration, though not being codified as their official philosophy, may still be regarded as an underlying ideal of their constitutional systems, for its call for cohesion and recognition among citizens easily matches their explicit democratic commitment.

¹⁵ As a consequence, to provide a comprehensive theory on the interactions between the EU and member states' legal systems is beyond the purposes of this article. It will be for further research to discuss to what extent the achievements of the analysis herein conducted may be extended to other substantive areas. Similarly, for the purposes of this article other international legal frameworks related to the EU policies such as those of the UN, the WTO or the ECHR are not considered.

Economic and social conflicts, integration and constitutionalism

But apart from their current concretisations and descriptive accounts, is there a single concept of integration we may employ in the effort to explain the constitutional challenges Europe is experiencing as to its three types of conflicts?¹⁶ A positive answer in this regard may be found in constitutional theory and, notably, in Rudolf Smend's *Integrationslehre*¹⁷ – a theory on integration and the role of the constitution conceived in the backdrop of the fierce struggles of the Republic of Weimar. Admittedly, Smend's reflections do not address the multiplicity of conflicts previously mentioned. Nonetheless, the conceptual framework emerging from that theory not only may shed some light on the general content of the notion of integration but, arguably, may bring in a number of questions and insights which appear of the utmost importance in accounting for the constitutional aspects of Europe's three types of conflict.

On such premises, the following section II introduces the main aspects of Smend's theoretical and constitutional thinking. His concept of integration is presented as the source of an analytical device that, if adequately refined, may help not only in structuring a comparative inquiry into the notions of integration developed in the EU and its member states, but also in qualifying the relationships between their constitutional frameworks at the intersection of economic and social law. Such comparative analysis is carried out in section III where the account of integration as Europe's constitutional reason unfolds in three conceptually distinct steps. Subsection 1 looks *within* the original constitutional frameworks of the member states and the European Economic Community to identify in turn their distinct responses to first and second order conflicts. The contrast between such diverse strategies of integration reveals all the potential for third type conflicts inbuilt in the process of European integration. But against such a dramatic background, subsection 2 tells a more relaxed story, one where Europe's constitutional frameworks, although not renouncing their original identities, evolve in a process whose prevalent traits are

¹⁶ For an attempt to build a concept of legal integration in Europe see G. Itzcovich, 'Integrazione giuridica. Un'analisi concettuale' (2005) *Diritto Pubblico*, 749.

¹⁷ R. Smend, *Verfassung und Verfassungsrecht* (Duncker & Humblot, 1928). References below are made to the Italian translation: R. Smend, *Costituzione e diritto costituzionale* (Giuffrè, 1988, translation by F. Fiore and J. Luther).

adjustment and mutual accommodation. The disclosure of the potential for coherence inherent in the interactions *between* constitutional frameworks leads, in subsection 3, to the description of a more advanced stage of integration. Emphasis here is on the porousness and overlaps between the legal systems of the EU and those of its member states. Such features, it is argued, give rise to an unresolved disjunction between a one-dimensional social reality developing *across* the constitutional frameworks, and the still segmented conceptualisations of conflict and integration proffered by the latter.

As section III exhausts the explanatory part of the article, section IV points out a few critical remarks on the overall constitutional setting resulting from the interactions between and across Europe's constitutional frameworks. It is observed that for all the achievements in the field of legal integration (including also the possibility of devising virtuous solutions to third type conflicts), Europe's constitutional frameworks perform poorly in terms of the effective integration of the peoples who live in Europe. Empirical considerations will reveal that the current legal reality meets the demands of only a rather narrow social elite including essentially the actors more deeply engaged in the processes of transnational mobility. As long as large portions of the European population continue to remain underrepresented, it is argued that the current structuring of Europe's constitutional frameworks is destined to appear and be partial. This invites a more profound consideration of the remit and intensity of supranational integration, and suggests the need for more robust procedural entitlements to ensure the active participation in policy-making of a broader social constituency.

2. Smend's Theory of Integration as Analytical Device

As anticipated, Rudolf Smend's theory of integration was conceived in the turmoil of the Weimar Republic, probably the period of European history in which concerns for the disruptive potential of economic and social conflicts were more acutely manifested. Such concerns rarely surface in the text of *Verfassung und*

Economic and social conflicts, integration and constitutionalism

Verfassungsrecht. Nonetheless, the insistent quest for unity and reconciliation inspiring Smend's intellectual contribution echoes the more explicit efforts undertaken by the prolific German constitutional scholarship of the time¹⁸ to figure out adequate constitutional responses to the upcoming tide of social and political disintegration.¹⁹ Smend's theory, an alternative to Kelsen's *Reine Rechtslehre*,²⁰ may be ascribed to the category of the material conceptions of the constitution and constitutional law.²¹ But rather than envisioning, as in Carl Schmitt's decisionism, an escalation in the process of disintegration leading up to civil war and, ultimately, to the establishment of a constitutional order by hegemonic political forces, Smend cultivates the opposite idea of civilizing the conflict and promoting social reconciliation in the polity.²² On this basis, the general theory of integration lays the conceptual grounds for a theory on the role of the constitution, the legal device expected to regulate the process of integration.

For most of the 19th Century, European constitutional theories had apparently overlooked the organisation of society and, notably, economic and social conflicts. Constitutions were generally understood as ruling over the organisation of government and, at most, as affording a limited degree of protection to a limited catalogue of human rights.²³ The unity of the polity was not perceived as a contentious issue: at a symbolic level, constitutions claimed to be a product of mythical unitary entities such as the Nation or the State;²⁴ at a more operational level, gender- and census-based exclusionary rules contained in the electoral legislation ensured political homogeneity.²⁵ As a consequence, the unity of national

¹⁸ For a survey on Weimar constitutional debates see P. C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law – The Theory & Practice of Weimar Constitutionalism* (Duke University Press, 1997) and A. J. Jacobson and B. Schlink (eds), *Weimar. A Jurisprudence of Crisis* (University of California Press, 2000).

¹⁹ G. Zagrebelsky, *Introduzione* a R. Smend, *Costituzione e diritto costituzionale*, cit., 1.

²⁰ For the harsh critique of Kelsen's theoretical approach, see Smend, cit., 59-60 and 62-63. For the response see H. Kelsen, *Der Staat als Integration* (Springer Verlag KG, 1930). References below are made to the Italian translation: H. Kelsen, *Lo stato come integrazione* (Giuffrè, 2001, translated by M. A. Cabiddu).

²¹ Caldwell, cit., 121.

²² Zagrebelsky, *Introduzione*, 2-3.

²³ Notably, only the so-called first generation of fundamental rights was protected and no judicial protection was afforded to violations of fundamental rights perpetrated at a legislative level.

²⁴ M. Dogliani, *Introduzione al diritto costituzionale* (Il Mulino, 1994), 200-208.

²⁵ R. Bin, 'Che cos'è la Costituzione?' (2007) *Quaderni Costituzionali*, 16-19.

communities could be taken as given,²⁶ and only occasionally could social conflicts attain constitutional relevance as enabling governments to adopt measures of political emergency.²⁷

After World War I and, critically, the German and Bolshevik revolutions, concerns for previously neglected economic, social and political conflicts entered the constitutional scene.²⁸ At that juncture, not only did the unity of the state and society appear controversial, but also the very idea of invoking abstract *a priori* entities, such as the *Kaiserprinzip* or the *Grundnorm*, to prevent disintegration and maintain the coherence of the polity seemed to Smend fatally undermined.²⁹ Conflicts at that time began to be incorporated in a new generation of constitutions, and constitutional law had to renew its role and concepts accordingly.³⁰

Smend's theoretical contribution in this regard draws explicitly from Litt's general theory on the science of the spirit, a philosophical source which allows him to devise in turn a theory of the state, a theory of the constitution and, finally, interpretive considerations on the Weimar constitution.³¹ It is in fact with an explicit reference to Litt's dialectic approach that Smend opens *Verfassung und Verfassungsrecht* and develops his critique of contemporary material theories of the state. The failure of the latter, observes Smend, is largely a result of their unproductive focus on antinomies such as that between the individual and the community or the individual and the State. For Smend such an antinomic configuration is misleading: the individual-State relationship is not a question of values and, hence, of choice between individualism or collectivism, but a matter of structure.³² As such, an appropriate conceptualisation requires an enquiry into the phenomenological structure of the ego. Both the individual and the community, in fact, cannot be conceived of in isolation as rigidly defined, monolithic and opposing entities:

²⁶ G. Zagrebelsky, *Il diritto mite* (Einaudi, 1992), 36.

²⁷ Bin, *Che cos'è la Costituzione?*, 17.

²⁸ Bin, *Che cos'è la Costituzione?*, 20-22.

²⁹ Zagrebelsky, *Introduzione*, 9 and Dogliani, cit., 279.

³⁰ Zagrebelsky, *Il diritto mite*, 48.

³¹ Smend, cit., 53-54.

³² Smend, cit., 64

Economic and social conflicts, integration and constitutionalism

The ego is not conceivable first in itself and then as causal for spiritual life, but only to the extent that it spiritually exists, expresses itself, understands, takes part in the spiritual world; that is, the extent to which it is in some general sense a member of the community, intentionally connected to others. It can only fulfil and shape its essence through spiritual life, which is social in structure.

Even less is it the case that there is a collective ego based on itself. Collectivities are merely the unified structures of the experiences of meaning by individuals; not their product, however, but their necessary essence. Development of essence and creation of meaning are necessarily “socially linked”; they are essentially a meshing of individual and super-individual life.³³

According to this view, the individual and the community are no longer to be treated as separate entities; on the contrary, they are best to be regarded as moments of a process of unitary dialectic coordination.³⁴

A similar general conceptual framework informs Smend’s theory of the State. The unity of the State is identified in the structure of the individual-State interactions, a circular movement consisting of a continuous mutual identification of the State and the individuals. In this process one may not find any hierarchy or Archimedean point:³⁵ individuals’ participation in social life reflects a stimulus stemming from the community, an entity that for its part exists only as the essence of individuals’ experiences. Consequently, the state-individual coordination comes out as a restless and self-referential oscillation which neither transcends its constitutive moments nor achieves a more advanced state.³⁶

Smend names a similar reality as integration, a concept that leads him to revisit in radical terms the inherited notion of state as a physical entity.³⁷ In his words:

³³ Passage extracted from Jacobson and Schlink, cit., 216.

³⁴ Smend, cit., 65-66.

³⁵ Smend, cit., 69-72.

³⁶ Zagrebelsky, *Introduzione*, 13, correctly observing that this movement does not amount to a Hegelian dialectic process.

³⁷ Smend, cit., 75-76.

... the state [...] is not a static whole that issues individual manifestations of life, laws, judgements, diplomatic and administrative acts. Instead, it only exists at all in these various manifestations of life to the extent that they are activations of an overall spiritual context, and in the even more important renewals and formations that act upon this context itself. It exists and is present only in this process of constant renewal, continuously being-experienced-anew; it exists, to borrow [Ernest] Renan's famous characterization of the nation, because of a plebiscite repeated daily. It is this central process of state life, or if one prefers, its central substance, which I have elsewhere suggested be called integration.³⁸

Integration, therefore, is the reality and the central substance of the State. But what is integration actually about? What are the concrete processes Smend has in mind when referring to it? In *Verfassung und Verfassungsrecht* Smend sketches a taxonomy of the modes of integration. The concrete foundation of the reality of the state is the vector resulting from the combination of different forms of integration, and the main combinations produce the different forms of state.³⁹ Personal integration, for instance, is about embodying, representing, maintaining but also transforming the unity of the polity and its fundamental legal convictions – a consociational function that Smend identifies especially in the monarchy but also, although to a different extent, in the cabinet and the bureaucracy.⁴⁰ Functional integration,⁴¹ on the other hand, relates to all the procedures constituting forms of collective life. Examples in this regard abound spanning from military marches to elections, even though Smend's main focus is predictably on the formation of political will and, notably, on domination and processes based on the majority rule such as parliamentary decision-making. Finally, material integration⁴² points to the processes of identification and unification through substantive values, a composite category including elements such as flag, territory and human rights.

³⁸ Passage extracted from Jacobson and Schlink, cit., 217-218.

³⁹ Smend, cit., 111.

⁴⁰ Smend, cit., 82-88.

⁴¹ Smend, cit., 88-99.

⁴² Smend, cit., 100-110.

Economic and social conflicts, integration and constitutionalism

In all of these dimensions, the constitution is expected to favour the process of integration and contribute to the renewal and regeneration of the life of the State.

According to Smend

... the constitution is the legal order of the State, or more precisely, of the life through which the state has its reality – namely, of its process of integration. The meaning of this process is the constantly renewed production of the totality of the life of the state, and the constitution provides the legal norms for various aspects of this process.⁴³

But what is the relationship between the constitution and the process of integration? And how may constitutional norms contribute to the latter? This issue is not fully spelled out in Smend's theory of the constitution. Nonetheless, in many passages he seems to regard integration as an essentially endogenous and spontaneous process.⁴⁴ The constitution may only facilitate, stimulate or limit this process since the state and its life by no means can be externally guaranteed. But what if the impulse to integration is absent? Can integration be the object of a top-down or even imposed constitutional strategy?⁴⁵ Smend does not deal with this critical aspect of his theory. In concluding *Verfassung und Verfassungsrecht* he simply affirms that his investigation presupposes the concept of state, but leaves unanswered the question of its achievement.⁴⁶

To some commentators silence on this specific regard has appeared rather ambiguous,⁴⁷ a reaction which seems justified particularly if combined with the sympathetic language Smend dedicates to fascism and dictatorial regimes in a number of other passages of his work.⁴⁸ For our purposes, however, such ambiguity may turn out to be intellectually attractive since it unveils a more controversial side

⁴³ See Jacobson and Schlink (eds), cit., 240.

⁴⁴ See Smend, cit., 150, 152, 156-157.

⁴⁵ Zagrebelsky, *Introduzione*, 15.

⁴⁶ Smend, cit., 254.

⁴⁷ Zagrebelsky, *Introduzione*, 15.

⁴⁸ See, for instance, Smend, cit., 80 and 173-174. The fact that organicist elements loom in Smend's theory is evidenced also by Kelsen, cit., 49 and 123.

of the concept of integration. In Smend's theoretical framework, indeed, integration occurs in a social and political context which has already consolidated sufficient conditions of stability and reciprocal recognition between individuals and political groups. In such a scenario, the polity is assumed as a given and integration is essentially about its renewal and regeneration. Conversely, it may be inferred that if those social and political preconditions are not entirely achieved, integration may hardly be regarded as the project of political and social forces in disagreement but, most probably, it may be the objective of external actors or internal social and political elites. As such, integration acquires a more authoritarian flavour since it implies an element of imposition, even if aimed at the civilisation of existing conflicts, the reconciliation of social and political forces, the building of a polity. Admittedly, the above are abstract and extreme options which only after several approximations could fit actual constitutional systems. On a close analysis, real constitutional settings reveal more of a mixed nature, since the boundary between spontaneity and imposition is often blurred. However, characterisation is not meant to draw borderlines, but rather to focus a discussion on integration that in this as in other aspects may greatly benefit from Smend's intellectual contribution and its theoretical implications.

To be sure, Smend's constitutional approach cannot be plainly applied to the context of European integration. A number of its elements and underlying assumptions hardly fit with the reality of the latter. Just to list the most evident amongst them, it can be remembered that Smend explicitly resists the idea of conceiving of the constitution as the higher law,⁴⁹ that the process of integration is assumed as taking place within a single and unified legal order,⁵⁰ and that its purpose is defined as essentially self-referential, i.e. it is not meant to achieve objectives other than integration itself.⁵¹ However, if such aspects may justify a word of caution prior to embracing Smend's theoretical framework, they do not seem to rule out the possibility of its critical adoption. His theory of integration, with appropriate

⁴⁹ Smend, cit., 152.

⁵⁰ Smend, cit., 110-111.

⁵¹ Smend, cit., 76, 99 and 158.

Economic and social conflicts, integration and constitutionalism

specifications and refinements, may reveal a fertile ground of investigation to account for a variety of aspects associated with the reality of economic and social conflicts in contemporary Europe.

Modes of integration are certainly a first and rather evident terrain to test the explanatory dividend of Smend's approach. Personal, functional and material integration, in fact, appear as useful indicators for unravelling and comparing the type of integration pursued by the EU and its member states as responses to first and second type conflicts.⁵² Of course, all of them require some specification and adjustment in light of the characteristics of contemporary constitutional reality.

Personal integration, for instance, is probably the field where Smend's theory needs the most incisive overhaul and update. It was previously observed that personal integration refers to the representation of the unity of the polity and the maintenance of its fundamental legal convictions. In this regard, one must concede that nowadays in most of the constitutional systems the unity of the polity is no longer or only putatively embodied by the monarchy or the bureaucracy. Indeed, the rise of constitutional democracies overshadowed the unifying role of the latter, and shifted the task of representing and codifying the unity of the polity to the authors of the constitution (*pouvoir constituant*). Moreover, the context of European integration invites a more articulate account of personal integration as to the nature and composition of the polity. Smend's theory assumes a polity conceived of in only nation-like terms. By contrast, European integration unfolds in a multidimensional context which calls for a more articulate frame of analysis. Investigation on personal integration, in fact, requires further specification as to the nature of the subjects involved in the processes of integration at national and supranational level, and the qualification of their relationships with the respective constitutions as texts and living documents. In fact, modifications in the nature of the polity may also bring about the redefinition of the fundamental legal convictions of the constitutional frameworks at issue, a field determined by a broader set of elements such as the type

⁵² This resonates Smend's idea of connecting types of integration and theory of forms of state, see Smend, cit., 99 and 182.

of conflict, the constitutional objectives and, eventually, the attitudes towards the existing distributions of economic resources.

The adoption of Smend's theory is more straightforward in relation to material integration. Here, almost no specification is needed since Smend's account is already aware of the integrative potential inherent in substantive principles and constitutional adjudication.⁵³ The difference may be only one of degree since in current legal systems constitutional populism and identification of the polity with unitary symbols once associated with institutions such as the *Reichpräsident* have increasingly migrated to constitutional rules and constitutional courts⁵⁴ – a process that to some extent Smend himself notes in his description of the declining role of the monarchy on behalf of values and fundamental rights.⁵⁵

Finally, the extent to which Smend's notion of functional integration must be refined is also minimal. Here, formation of political will may still be regarded as the main form of collective life. Yet, parliamentary democracy being only one of the possible patterns of decision-making, investigation must include a more sophisticated account of the institutions and procedures currently involved in policy-making. Moreover, the fact that in most constitutional frameworks substantive principles have been entrenched justifies an enquiry into the scope for political decision-making.

Apart from the modes of integration, insight into Smend's theoretical thought may be productive in further and less obvious dimensions. Firstly, his concept of integration and its inherent circularity alert us to be wary of static representations of legal systems, mechanical explanations of their relationships and the search of Archimedean points. Indeed, if integration is really about constant renewal, regeneration and mutual identification, the accounts of constitutional systems and their interactions should give a sense of their stratified nature and reciprocal

⁵³ Smend, cit., 218.

⁵⁴ C. Möllers, 'We are (afraid of) the people': Constituent Power in German Constitutionalism', in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism – Constituent Power and Constitutional Form* (OUP, 2007), 96.

⁵⁵ Smend, cit., 113, 183 and 241-248.

Economic and social conflicts, integration and constitutionalism

hybridisation.⁵⁶ Smend's general notion of integration, then, may provoke questions on the effective dynamic of the interactions between the constitutional frameworks at issue. It may be asked, indeed, whether third type conflicts generate processes of oscillation and mutual identification between entities which remain distinct or, on the contrary, if they are best conceptualised as moments of a unitary process of dialectic coordination. Finally, Smend's call to focus constitutional theory on structures rather than on conflicts of values suggests that the reconstruction of Europe's current constitutional reason should not immediately be interpreted as an exercise of morality and, namely, that in analytical terms the choice between statist or supranational constitutional ideology and epistemology may be misleading. This, of course, does not rule out the value of normative considerations which may be used at a later stage for a critique of the undergoing processes.

3. Integration as Europe's Constitutional Reason

3.1. Integration *within* the constitutional frameworks

Frequently, in accounting for phenomena of stratification (or, similarly, of identity formation), analysis of the oldest geological sections may prove illuminating.⁵⁷ Arguably, also investigation on the distinctive features of Europe's constitutional frameworks may greatly benefit from considerations on their genetic moments as it is often at that evolutionary stage that the main identity traits are shaped. In this view, the first step of this comparative survey describes how the member states and EEC legal systems have initially responded to first and second type conflicts. The focus, therefore, is on the original traits of states' common constitutional traditions⁵⁸

⁵⁶ On stratification and its explanatory potential see J. H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Heidelberg Journal of International Law*, 10.

⁵⁷ P. W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press, 2000), 42-43.

⁵⁸ Construction of common constitutional tradition will not reflect the methodology usually employed by the Court of Justice in interpreting articles 6 EU or 288 EC. For the aim here is analytical and not operational, national law is not regarded as offering solutions meeting EU's functional concerns (see, for instance, Opinion AG Maduro in Joined Cases 120/06 P and 121/06

and the pre-SEA Community legal framework. At this stage analysis approaches legal systems as in mutual isolation and highlights both their inherent values and biases. By doing so, the defining features of the competing cognitive models of conflict and integration currently confronting in Europe are spelled out.

Personal integration

Previous analysis has already pointed out first type conflicts (i.e. conflicts associated with class struggles) as the main factor of potential disintegration and, therefore, the central concern of states' constitutionalism. Admittedly, national constitutions revolve around a broader set of contentious issues: gender, local self-government, religion, languages are only a few of the possible sources of conflict included in the projects of integration of states' polities. Still, in establishing new constitutional regimes in the aftermath of World War II the economic and social divide proved to be a major catalyst. Not only were the political identities of the authors of the new constitutions largely defined along those lines, but also much of the legal tradition associated with constitutional democracy owed a great debt to intellectual contributions conceived of in the backdrop of first type conflicts. The prominence of the latter was such that political divisions and constitutional responses to other and more remote sources of disintegration often ended up reflecting categories and approaches originally devised in respect to economic and social cleavages.

Economic and social cohesion may be regarded as the objective inspiring the general strategy of integration pursued within the member states. Its contents and constitutional implications are largely an application of the canons of republican constitutional democracy to the field of first type conflicts. In this view, the recognition of the nature of the polity emerges as a first crucial element. Promotion of economic and social cohesion, indeed, presupposes the definition of the subjects of

P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v Council and Commission and Giorgio Fedon & Figli SpA and Others v Council and Commission*, not yet reported). On the contrary, the attempt is identifying, with the inevitable degree of approximation, those traits in which the majority of national constitutional systems converge and which, as such, may be considered as symptomatic of states' constitutional nature.

Economic and social conflicts, integration and constitutionalism

integration, which national constitutions identify primarily in the citizens. In the light of the newly acquired republican ethos, citizenship is broadly defined in both scope and entitlements. As to the former, previous gender, social and race discriminations are expressly ruled out. As to the latter, political rights are acknowledged as both individual and collective entitlements – a feature that makes citizens fully-fledged actors of socialisation.⁵⁹

In this regard, the most dramatic manifestation of citizenship is probably the exercise of constituent power. Newly enacted constitutions are commonly legitimised by the rhetoric – and, in many cases, also by the practice – of the sovereignty of the people expressed either directly through referendum⁶⁰ or as the political compromise between the main political forces.⁶¹ The symbolic meaning of such dignified discourse could hardly be overstated since the emerging emphatic republican conception of constituent power⁶² marks the shift between two radically opposing forms of personal integration. While in the authoritarian regimes prior to World War II personal integration occurred mainly in populist plebiscites, in the newly established constitutional democracies the unification of the polity is the object of a circuit of consensus politics associated with the making of entrenched constitutions.⁶³ In this view, previous political clashes for the establishment of general political decisions as the contents of constitutional rules are transformed into more civilised conflicts within the constitution for the interpretation of its shared norms.⁶⁴

The treatment of first type conflicts results in a clear concretisation of such a general approach. National constitutional traditions converge on certain fundamental legal convictions concerning the promotion of robust civic bonds amongst their citizens which inspire systems of solidarity whose main components are progressive

⁵⁹ On the characteristics of modern citizenship, see R. Bellamy, 'Introduction – The Making of Modern Citizenship' in R. Bellamy, D. Castiglione, E. Santoro (eds), *Lineages of European Citizenship: Rights, Belonging and Participation in Eleven Nation States* (Palgrave Macmillan, 2004), 1.

⁶⁰ See, for an example, the approval of the French Constitution in 1958.

⁶¹ The Italian and Spanish cases may be examples in this regard. For a classification of the process of constitution-making, see M. Rosenfeld, *The problem of "identity" in Constitution-making and constitutional reform*, Cardozo Legal Studies Research Paper, 143/2005.

⁶² Kumm, *Beyond Golf Clubs*, 509.

⁶³ G. Zagrebelsky, 'La Corte in-politica' (2005) *Quaderni Costituzionali*, 273.

⁶⁴ See below in this subsection on material integration.

taxation, proactive industrial policy and universal entitlement to social rights or services. Yet the attitude of the constitutions towards the existing distributions of resources is framed only in open-ended terms. Indeed, the degree of status quo conservation or redistribution is not decided by constitutional norms, but it is conceived of as a vector resulting from electoral majoritarian politics and constitutional interpretation by principled institutions.

Second type conflicts, on the other hand, constitute the baseline of the EEC strategy of integration. In this view, the main factors of concern are associated with the mobility of factors of production and regulatory competition between member states. Disintegration, therefore, can result from member states' protectionism, another of the sources of uneasiness and tension that had notoriously featured in Europe's history prior to World War II. Even second type conflicts turn out to be a catalyst for integration within the Community. Their centrality, nevertheless, is far less obvious a matter than that of first type conflicts in national constitutionalism. The pivotal role of economic integration, in fact, is equally the result of a successful regulatory strategy pursued in crucial substantive areas, and of the failure of other efforts of international cooperation at the European level attempted in similarly decisive sectors such as defence or foreign policy.

The Community response to second type conflicts is the common market project. Initially presented as a limited regulatory programme, the common market has embodied for a long time a far more ambitious strategy aiming at the transformation of states' political communities and, ultimately, at the integration of the peoples of Europe.⁶⁵ It is not for this article to rehearse the evolutionary trajectories and the consolidation of that process.⁶⁶ Suffice for our purposes to note that the common market project has ushered in an epistemological redefinition of the original

⁶⁵ This emerges especially from the Schumann declaration and the preamble to the EEC treaty. For an account of integration as originally a function of the common market project, see D. Chalmers, 'The Single Market: From Prima Donna to Journeyman', in J. Shaw and G. More (eds), *New Legal Dynamics of European Union* (Clarendon Press, 1995), 55.

⁶⁶ The classic in this regard is J. H. H. Weiler, *The Constitution of Europe* (CUP, 1999).

Economic and social conflicts, integration and constitutionalism

international law framework of the common market project⁶⁷ and, critically, the building of a polity composed of member states and individuals.⁶⁸ Yet the degree of participation in policy-making by the subjects of integration varies in scope and entitlements. Originally, only member states enjoyed full standing in deciding the contents of Community policies, while the status of individuals was limited both in scope and entitlements. For the purposes of economic integration, in fact, only market actors, although broadly defined, could vaunt some legal status in the emerging Community. Moreover, the entitlements of individuals originally consisted of participatory rights in the Community administration and judiciary. In the absence of political rights, acknowledged only in subsequent phases, individuals could appear essentially as beneficiaries of an already defined programme of economic integration. Indeed, neither the regulatory patterns nor the formation of the common market project met the republican credentials of state constitutionalism. Incorporated in international treaties, the constitutional provisions establishing the principles of economic integration were still a reflection of consensus politics but, critically, of an intergovernmental type.⁶⁹ Conceived of in this way, personal integration could hardly satisfy the urge for individuals' involvement and participation underpinning the republican conception of the constituent power.⁷⁰

The composition of the polity and the *octroyée* constitutional nature of the common market design⁷¹ are not the only aspects contrasting with the state constitutional template. True, as in national constitutional settings and first type conflicts, also the common market project provides norms that may civilise second type conflicts. Yet

⁶⁷ M. Maduro, 'The importance of being called a constitution: Constitutional authority and the authority of constitutionalism', (2005) 3 *International Journal of Constitutional Law*, 336. The link between the common market project and the normative and constitutional qualities of EC law is underlined in Chalmers, *From Prima Donna to Journeyman*, p. 60.

⁶⁸ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I-1.

⁶⁹ In this, it may be argued that treaty-making in the Community conforms with the standards of constitution-making in federal legal orders, see J. Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement', (2008) 14 *European Law Journal*, 409.

⁷⁰ Kumm, *Beyond golf clubs*, 510.

⁷¹ Of course, this excludes indirect democratic participation associated with treaty-making power.

such principles, devised under the influence of economic ordoliberal thought,⁷² delineate a thick regulatory programme amounting to a general political decision whose implementation and interpretation invites a range of political options narrower than those admitted under national constitutional principles.

Finally, the attitude of the common market project towards existing distributions also challenges national constitutional coordinates. Under the law of free movement, the Community is expected to tackle states' regulatory failures on the basis of an allocative rather than distributive strategy.⁷³ Against this background, the original version of the common market project avoids the establishment of demanding transnational civic bonds. In place of solidarity, therefore, one at most finds forms of assistance⁷⁴ between national communities consisting in the social opportunities of free movement, and the compensatory side payments supplied under the EEC cohesion policies.

Material integration

A hallmark of state constitutionalism is the entrenchment of a composite set of principles, economic freedoms and social rights featuring among them. Entrenchment fulfils both a positive and negative function towards political decision-making: on the one hand constitutional principles may inspire and direct legislation, on the other they limit the contents of the latter and orient its interpretation. But if the idea of limiting political power is all-pervasive in European common constitutional traditions, the same cannot be said for the mechanism of enforcement assisting constitutional principles. Most constitutional systems couple the entrenchment of constitutional principles with judicial remedies.⁷⁵ In this

⁷² Chalmers, *From Prima Donna to Journeyman*, 57. On ordoliberalism, see D. J. Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus* (Clarendon Press, 1998), 232-265.

⁷³ Chalmers, *From Prima Donna to Journeyman*, 66.

⁷⁴ P. Eleftheriadis, 'The Idea of a European Constitution', (2007) 27 *Oxford Journal of Legal Studies*, 18-20.

⁷⁵ Arguably, also the United Kingdom, despite its flexible constitution: see Human Rights Act (1998), articles 4 and 10.

Economic and social conflicts, integration and constitutionalism

perspective, the constraining power of higher norms is associated with judicial review of legislation, a function that member states arrange in a variety of ways ranging from scrutiny by constitutional or ordinary courts within their domestic legal orders to, arguably, external review entrusted to international courts.⁷⁶ Through constitutional justice, material integration starts from where constitution-making and personal integration ended. Interpretation of constitutional norms, indeed, activates processes of constant renewal and regeneration of meaning, a function that not only enhances the integrative potential of substantive principles, but also bridges personal and functional integration.

The latter role emerges clearly if the relationships between legislation and constitutional principles are analysed. As mentioned, substantive principles in national constitutions are often structured as constitutive principles, i.e. their prescriptive content is defined only in broad terms.⁷⁷ The constitutional significance of this feature has been already underlined in dealing with personal integration. At this stage, an important annotation from Smend may perhaps be added. In describing material integration and the integrative potential of symbols, Smend observes that such textual paucity – a legacy from archaic societies and their broad homogeneity of values – maintains in contemporary pluralist societies a powerful role insofar as it simultaneously expresses a shared value while allowing for its different interpretations.⁷⁸

The open-ended texture of constitutive principles brings about two important implications as to their relationship with legislation. Firstly, whereas constitutional principles are meant to direct legislative interpretation, also the opposite often occurs. Notably, in filling the contents of constitutional principles, it is common for judges or constitutional courts to specify them in the light of the more precise

⁷⁶ Economic freedom may find protection at the European Court of Human Rights (article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms). Respect of social rights enshrined in the European Social Charter is monitored by a Committee of Independent Experts (article 24(2) European Social Charter).

⁷⁷ On the distinction between constitutive and regulatory principles see Gerber, cit., 248-249.

⁷⁸ Smend, cit., 103.

indications contained in legislative norms.⁷⁹ Secondly, due to their structure, constitutive principles are handled in constitutional justice within the framework of the principle of proportionality.⁸⁰ In adjudicating on legislation on economic issues, national constitutional traditions converge on the application of ‘rationality test’,⁸¹ the most deferential of the standards of judicial review. In this test, courts avoid scrutiny on the public objectives pursued in legislation, and require only a minimal degree of coherence between those ends and legislative provisions.⁸² Consequently, within member states existing distributions are not entitled to any special protection towards majoritarian decision-making. In this field, indeed, constitutional courts play essentially the marginal and defensive role⁸³ of safeguarding the minimum contents of both economic freedoms and social rights.⁸⁴

In the Community legal framework, material integration of member states and market actors takes place in the interpretation of a more articulate set of principles. To be sure, also the common market project includes constitutive principles.⁸⁵ Yet material integration occurs mostly in respect of more specific regulatory principles, conceived of as default provisions whose application can always be ruled out or narrowed down by Community measures of respectively total or partial harmonisation.⁸⁶ Entrenched in the founding treaties, both categories of principles are operated through a system of enforcement including a prosecutorial infringement procedure assigned to the Commission and a judiciary organised around the Court of Justice and national courts.

Whereas constitutive principles perform an essentially symbolic function,⁸⁷ regulatory principles may be regarded as the backbone of the common market

⁷⁹ R. Bin, *Diritti e argomenti* (Giuffrè, 1992), 18-30.

⁸⁰ On the structure of the principle of proportionality, see R. Alexy, *A Theory of Constitutional Rights* (OUP, 2002), 394-414.

⁸¹ T. Koopmans, *Courts and Political Institutions* (CUP, 2003), 249-250.

⁸² C. R. Sunstein, *The Partial Constitution* (Harvard University Press, 1993), 29.

⁸³ Bin, *Diritti e argomenti*, 157-159.

⁸⁴ Möllers, cit., 104.

⁸⁵ See, for example, articles 2 and 14 EC.

⁸⁶ See, for example, articles 28 and 43 EC.

⁸⁷ On the lack of independent regulatory effects of articles 2 and 14, see, respectively, Case 126/86, *Fernando Roberto Gimenez Zaera v Instituto Nacional de la Seguridad Social e Tesorería General de la Seguridad Social* [1987] ECR I-3697 and Case 378/97, *Wijzenbeek* [1999] ECR I-6207.

Economic and social conflicts, integration and constitutionalism

project. They apply mostly to member states' measures with cross-border effects,⁸⁸ and their contents challenge the canonical distinction between rules and principles.⁸⁹ Indeed, their structure, repeated with specific adjustments in all substantive areas included in the common market project, consists at first of a *prima facie* prohibition, shaped either in relative or absolute terms⁹⁰ depending, respectively, on the existence or not of an equal treatment requirement.⁹¹ In this respect, the content of regulatory principles is clearly defined and it is structurally similar to that of rules. Yet the deregulatory impact of *prima facie* prohibitions, apart from being ruled out by harmonisation, is normally⁹² mitigated by specific derogations foreseen in the treaty.⁹³ Such grounds for justification bring in proportionality review of states' measures. In this respect, the scrutiny of the Court of Justice follows stricter standards than the rationality test employed by national courts. Notably, in adjudicating on states' measures, the Court assesses their congruity⁹⁴ as to their alleged objectives as well as the absence of any disguised protectionist intent.⁹⁵ At that point, it may go on and adopt an 'equivalence balance test' in order to ascertain whether the level of protection of non-market values established by domestic legislation can be achieved through a lesser burdensome measure.⁹⁶ In certain cases⁹⁷ it may even opt for a 'pure balance test', one where a less burdensome measure may

⁸⁸ See Case 180/83, *Hans Moser v Land Baden-Württemberg* [1984] ECR 2539 and Case 64/96, *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-3171. The need of a cross-border element was questioned in Joined Cases 321-324/94, *Jacques Pistre* [1997] ECR I-2343.

⁸⁹ On which see Alexy, cit., 47-48.

⁹⁰ Examples of absolute prohibition may be Case 76/90, *Säger v Denemeyer* [1991] ECR I-4221 and Case 55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165. Examples of relative prohibition may be Case 170/78, *Commission v United Kingdom* [1980] ECR 417 and Case 274/96, *Bickel and Franz* [1998] ECR I-7637.

⁹¹ On the blurred boundaries between absolute and relative prohibitions see G. de Búrca, 'Unpacking the Concept of Discrimination in EC and International Trade law', in C. Barnard and J. Scott (eds), *The Law of the Single European Market – Unpacking the Premises* (Hart Publishing, 2002), 181.

⁹² In certain cases derogations are not explicitly foreseen: see articles 25 and 90 EC.

⁹³ For a strict construction of derogations to free movement of services, see Case 17/92, *FDC* [1993] ECR I-2239.

⁹⁴ Case 217/99, *Commission v Belgium* [2000] ECR I-10251.

⁹⁵ Case 121/85, *Conegate Ltd v Commissioners of Customs and Excise* [1986] ECR 1007.

⁹⁶ For applications of the equivalence balance test, see Case 188/84, *Commission v. France* [1986] ECR I-419 and Case 340/89, *Vlassopoulou v Ministerium für Justiz Bundes-und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357.

⁹⁷ The best known application of pure balance is Case 120/78, *Rewe Zentral AG v. Bundesmonopolverwaltung Fuer Branntwein* [1979] ECR I-649.

be preferred even though it affects the level of risk decided in the measure under review.⁹⁸ Such types of more aggressive judicial review reflect the concern for states' regulatory failures inspiring the common market project. In this view, measures amounting to discriminations or obstacles to trade are perceived as symptoms of prevarication against outsiders by majoritarian groups within national jurisdictions.⁹⁹ As such, it takes for the member states to comply with demanding proportionality requirements to maintain such regulatory instruments. This explains why the scope of application of regulatory principles may be contentious:¹⁰⁰ their remit defines not only the areas of competition between national (lenient) review and (aggressive) supranational scrutiny on national measures but, critically, the extent to which the republican strategy of integration has to surrender to its common market counterpart.

Functional integration

Institutions and procedures involved in political will formation are the last field where the distinctive elements of Europe's constitutional frameworks may be compared. How is political decision-making organised at a national and supranational level? How do the subjects of integration voice their political opinions and interests?

The official answer to these questions in member states' constitutional democracies is parliamentary democracy. According to a strong common constitutional tradition, parliaments are regarded as the main repository of democratic legitimacy and, as such, the most appropriate venue to integrate society in the institutional system.¹⁰¹ This makes parliaments also privileged institutions for debating, mediating and deciding first type conflicts. In principle, therefore, functional integration in states'

⁹⁸ On the 'equivalence' and 'pure' balance tests see M. Poiares Maduro, *We, the court – The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998), 56-57.

⁹⁹ Maduro, *We, the court*, cit., 70 and Sunstein, cit., 32.

¹⁰⁰ Concerns on the reach of article 28, for instance, have notoriously emerged in the Sunday trading saga (see Case 145/88, *Torfaen Borough Council v B&Q plc* [1989] ECR I-3851 and Case 169/91, *Council of the City of Stoke-on-Trent e Norwich City Council v B&Q plc* [1992] ECR I-6635).

¹⁰¹ V. Onida, *La Costituzione* (Il Mulino, 2004), 33.

Economic and social conflicts, integration and constitutionalism

constitutional frameworks unfolds in the circuit associated with electoral politics, political party representation, parliamentary deliberation and legislation. Two corollaries follow from the dogma of the centrality of parliaments. Firstly, executives are expected simply to implement the policies devised in legislation, subject to parliamentary control in the form of appointment, scrutiny and censure.¹⁰² Secondly, political decision-making enjoys a broad scope for manoeuvre as it encounters only the limits established by constitutional constitutive principles.

Beside regulatory principles, not only is political harmonisation a constitutive element of the common market project but, arguably, it is also its most distinctive feature.¹⁰³ Yet the patterns for functional integration in the Community and in the member states remain remarkably different. In the Community legal framework, political decision-making is essentially a technocratic and intergovernmental matter. Legislative initiatives, broadly envisaged in the meetings of the European Council, are formulated in more detailed terms by the Commission, an executive body entrusted with the task of ensuring the proper functioning and development of the common market.¹⁰⁴ Deliberation, instead, is assigned to the Council, an intergovernmental body where, at least under the rule of the Compromise of Luxembourg, responses to second type conflicts are primarily addressed along the centre-periphery divide. In this framework, individuals, social and political groups participate only indirectly in Community decision-making. Their voice, constrained at a domestic level when political measures impact with EEC regulatory principles, does not find comparable venues for expression at a supranational level. Originally, the Community political scene, apart from the decorative role reserved to the Parliamentary Assembly, is strongly occupied by the executives – institutions that, at least according to the republican standards for self-government, are unfit to represent adequately the concerns of conflicting segments of society.

¹⁰² A stylised representation of the parliamentary model may be found in R. Dehousse, 'European Institutional Architecture After Amsterdam: Parliamentary System or Regulatory Structure?', (1998) 35 *Common Market Law Review*, 598-599.

¹⁰³ J. H. H. Weiler, 'Epilogue: Towards a Common Law of International Trade', in J. H. H. Weiler (ed.), *The EU, The WTO and the NAFTA – Towards a Common Law of International Trade* (OUP, 2000), 214-215.

¹⁰⁴ Article 211 EC.

Finally, functional integration in the Community also differs as to the scope for political decision-making. In this regard, a more sceptical attitude towards the products of democratic deliberation and political discretion may be noted. This emerges not only in the inroads made by Community regulatory principles on states' political discretion, but also in respect to the policy initiatives undertaken by Community institutions. Such an attitude is best captured by a rather emblematic example. In opening its White Paper on the Completion of the Internal Market, the Commission defines its legislative proposals as the "essential and logical consequence" of the common market commitment.¹⁰⁵ In this view, supranational decision-making does not seem to be about contestation and competition between alternative political strategies but, on the contrary, it appears essentially to be about implementing an already defined programme – a feature that far from evoking republican ideals, recalls the idea of the total constitution.¹⁰⁶

The potential for conflict between constitutional frameworks

Investigation into the original features of Europe's constitutional frameworks reveals that their distinctive elements are the product of both the promises and biases inherent in their strategies of integration.¹⁰⁷

In the republican model inspiring member states' common constitutional traditions, integration is first of all about maintaining and renovating spontaneous conditions of democratic interplay. In this regard, the constitution is not expected to translate in legal terms a specific political programme – an element that would probably be divisive and end up undermining political freedom and pacific coexistence between citizens and political groups. Quite the opposite, the constitution is conceived of as a compromise product of consensus politics between the main political forces whose

¹⁰⁵ *Completing the Internal Market: White Paper from the Commission to the European Council* (Milan, 28-29 June 1985) COM(85) 310, June 1985.

¹⁰⁶ M. Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', (2006) 7 *German Law Journal*, 344.

¹⁰⁷ The conceptualisation of the following strategies of integration builds upon Zagrebelsky's distinction between liberty- and justice-oriented conceptions of human rights. See Zagrebelsky, *Diritto mite*, 99-114.

Economic and social conflicts, integration and constitutionalism

objectives are the recognition of first type conflicts and the entrenchment of an open legal framework for political participation and competition.¹⁰⁸ As a consequence, the constitution provides rules and institutions – especially those of parliamentary democracy – to discipline and facilitate political inclusion and deliberation. Political will formation is re-enforced by constitutional substantive principles on economic and social rights regarded as preconditions for effective political association and as ultimate constraints against the most egregious deviations of parliamentary decision-making.

As previously observed, in this strategy of integration policy-making may easily be diverted towards the interests of majoritarian political groups or influential economic and social players. Such naked preferences,¹⁰⁹ apart from their domestic negative effects, may be detrimental to the outsiders of the polity and, as such, constitute an evident threat to the idea of building a supranational polity. It is not surprising, therefore, that the objective of taming the potential for abuse inherent in states' constitutional frameworks is at the centre of the Community strategy of integration.¹¹⁰ In this view, the common market project, far from establishing an open constitutional framework for democratic deliberation, detaches regulatory policy not only from the member states but, critically, from the statist constitutional framework.¹¹¹ Integration in that context is conceived of as a programme of transformation of given conditions spelled out in constitutional regulatory principles, and entrusted to mostly intergovernmental institutions and procedures.

Nevertheless, in both of its constitutive elements the common market project reveals its own constitutional bias. In decision-making, only member states have clout in the definition of political objectives whereas the voice of other political and social players is relegated to interstitial spaces for political deliberation. Moreover,

¹⁰⁸ V. Onida, 'Le Costituzioni. I principi fondamentali della costituzione italiana', in G. Amato, A. Barbera (eds), *Manuale di diritto pubblico* (Il Mulino, 1997), 107.

¹⁰⁹ In the words of Sunstein, cit., 25, a naked preferences is "the distribution of resources and opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want".

¹¹⁰ An analogous constitutional profile is described by Majone, cit., 18.

¹¹¹ D. Chalmers, 'Political Rights and Political Reason in European Union Law in Times of Stress', in W. Sadurski (ed), *Political Rights under Stress in 21st Century Europe* (OUP, 2006), 57-58.

consensus policy-making is subject to the veto power of states' governments – an element at the origin of a prolonged political stagnation¹¹² supplemented only by the activism of the judiciary.¹¹³ But even in this regard biases may easily be identified. Admittedly, the circuit of material integration associated with treaty interpretation and judicial enforcement has given rise to a community of political and social players involved in the European judicial process.¹¹⁴ Yet courts are far from being neutral venues and, as noted, enforcement of regulatory principles has been dominated by repeat players and special interests.¹¹⁵ In such overall scenario, the common market appears as a particularly critical project for individuals: engaged indirectly and unevenly in the political and judicial implementation of a pre-defined project, they turn out to be treated more as objects than subjects of socialisation.

In its original version, therefore, the Community may well appear as an “enlightened form of benevolent authoritarianism”.¹¹⁶ Yet the identification of biases in the supranational strategy of integration should not automatically lead one to set republican constitutional democracy as the desirable constitutional standard for the Community constitutional framework. Republican constitutional democracy defines an ideological and epistemological status quo whose neutrality may also be questioned. The fact that it is not neutral provides no argument against it, but it simply suggests that it is open to critical discussion.¹¹⁷ The common market project may be regarded as performing precisely this role, particularly when it seems to profane many of the defining aspects of the statist common constitutional traditions.

It is against such a background that the collisions emerging in the original constitutional narratives of the Community and its member states must be conceptualised. Their uneasy interactions only superficially are a matter of ultimate

¹¹² But also of the expansion of Community competences, see Weiler, *Constitution of Europe*, 39-63.

¹¹³ See Case 2/74, *Reyners v Belgian State* [1974] ECR 631. On the effective capacity of courts to bring about social reform, see the sceptical observations in Sunstein, cit., 146-147.

¹¹⁴ M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003), 511-512.

¹¹⁵ Maduro, *Contrapunctual Law*, 518.

¹¹⁶ A. Follesdal and S. Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies*, 534.

¹¹⁷ The argument on status quo neutrality is borrowed from Sunstein, cit., particularly at 59.

Economic and social conflicts, integration and constitutionalism

authority, but they relate to more profound identity traits associated with their distinctive constitutive functions. In Sunstein's language, it might be argued that contemporary Europe witnesses the interaction between "partial constitution(s)". At the horizon there is not a unitary, hegemonic and neutral cognitive model for constitutional organisation which may absorb or resolve the ensuing tensions. Consequently, it is not surprising that such a high potential for conflict is feared as a source of possible disintegration.

3.2. Integration *between* constitutional frameworks

In arguing his claim for Europe's Christian self-understanding, Joseph Weiler has observed that the historical prevalence of Christian influence in Europe produced what he calls a "sophisticated dialectic effect":¹¹⁸ conceived of in opposition to Christian art, even profane art is indissolubly bound to that dominant paradigm and, as such, it is incomprehensible outside that context. To a certain extent, a similar pattern of identity formation echoes the underlying structure of supranationalism¹¹⁹ and, as such, it may explain the relationship between the Community constitutional framework and national common constitutional traditions. In many relevant aspects the common market project opposes the conventional paradigm of republican constitutionalism. Yet it is in respect to the latter standard that the strategy of integration of the former finds its most persuasive justification. Indeed, many of the arguments put forward in subsection 1 point to the profane nature of the Community legal framework, a thesis that far from remaining confined to the genetic moments of identity formation might also teach us something as to the possible patterns of interaction between the EU and its member states. In this view, opposition does not seem ineluctably destined to disintegration. Quite on the contrary, the tension between our partial constitutions may be the source of a more

¹¹⁸ J. H. H. Weiler, *Un'Europa Cristiana – Un saggio esplorativo* (BUR, 2003), 51.

¹¹⁹ Weiler, *Constitution of Europe*, 251.

sophisticated dialectic effect possibly leading to mutual identification and, arguably, to a coherent settlement of Europe's constitutional orders.¹²⁰

With this in mind, this subsection reassesses the indicators previously considered in order to account for the mutual identification and accommodation of the national and supranational constitutional frameworks. At this stage analysis digs into more recent strata of their evolutionary process, a material that provides more realistic images of the legal orders at issue and may contribute to a more relaxed interpretation of their interaction.

Personal integration

The period following the adoption of the Single European Act and, most importantly, the Treaty of Maastricht is one of remarkable constitutional activism in Europe. In the EU not only have the original treaties been repeatedly subject to extensive amendment¹²¹ but outspoken constitutional discourses echoing the tones of republican constitutionalism have also recently entered (and, perhaps, already abandoned) the scene. Quite similarly, national constitutions have undergone amendments as to EU membership and participation. But have these changes deflected EU and national constitutionalism from their constitutive objectives and fundamental legal convictions? Can we still claim that first and second type conflicts remain the central concerns of their strategies of personal integration? In other words, are more recent constitutional discourses only decorative or do they entail a degree or even a complete reconfiguration of the original constitutional identities?

Apart from their inherent symbolic message, innovations associated to amendments of national constitutions may be appreciated in at least three concrete dimensions.

¹²⁰ It could be argued that the interaction between Europe's constitutional frameworks is even more sophisticated than in Weiler's excerpt: it will be shown not only how the profane entity (the EU) opposes states' more orthodox constitutional paradigm, but also how orthodoxy (national constitutional traditions) may evolve in the light of the claims of the profane entity.

¹²¹ B. de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process', in P. Beaumont, C. Lyons and N. Walker (eds), *Convergence and Divergence in European Public Law* (Hart Publishing, 2002), 39.

Economic and social conflicts, integration and constitutionalism

Firstly, by entrenching European integration clauses in their constitutions, national main political forces seem to rule out EU membership from the domain of issues open to ordinary political competition. Disputes and contestation may arise as to the implementation of EU policies or even later treaty amendments. But at least from a formal standpoint, the participation in the processes of European integration and, crucially, the interaction with an alternative strategy of integration become by and large a states' common constitutional tradition.¹²² Secondly, the codification of specific integration clauses implies recognition of the distinctiveness of the EU project from other forms of international cooperation and introduces specific rules of engagement in its regard. Finally, European integration clauses invite discussion as to the strength of the ideology and epistemology embedded in national constitutional frameworks and, notably, as to the relationships between their strategy of integration and that of the EU. Debates on the contents of the 'economic constitution' find their way into many political and intellectual environments. In arguing for a sort of bottom-up incorporation of the common market ethos, their proponents suggest that national constitutional frameworks should be re-oriented towards standards of economic efficiency, a move implying if not a repudiation at least an implicit reconsideration of states' original constitutional attitude towards first type conflicts.¹²³

On this point, treaty amendments reshape in more articulated terms the original Community legal framework. Particularly after Maastricht, fragmentation appears as the main structural feature of the renewed EU legal order.¹²⁴ Integration no longer may be equated to the common market project since in the new context the latter is regarded as just the first among equals in a whole series of other objectives.¹²⁵ Paradoxically, newly inserted flanking policies and non-economic principles prompt

¹²² A comparative analysis of European integration clauses is offered in F. Palermo, *La forma di stato dell'Unione Europea – Per una teoria costituzionale dell'integrazione sovranazionale* (Cedam, 2006), 157-194.

¹²³ G. Bognetti, *La costituzione economica italiana* (Giuffrè, 1995).

¹²⁴ D. Curtin, 'The Constitutional Structure of the Union: a Europe of Bits and Pieces' (1993) 30 *Common Market Law Review*, 17.

¹²⁵ Chalmers, *From Prima Donna to Journeyman*, 68.

a process of redefinition of the contents of the common market project, a trend that distances it from neoliberal models and enhances its social connotation.¹²⁶

Recalibration of the EU constitutional framework involves a broader range of strategies aiming at incorporating in the supranational sphere elements of states' republican constitutionalism. Fundamental rights are a first clear sign of this trend. The judicial development and, then, the codification of a catalogue of rights do not simply reflect the idea of grounding EU policy-making on more visible substantive bases.¹²⁷ In particular the Charter of Nice conveys the idea of a rather definite integrative vocation associated with fundamental rights,¹²⁸ a constitutive ambition that at least in symbolic terms contests second type conflicts and market integration as the main concerns of the EU, and envisages first type conflicts and republican constitutionalism as the new EU frontier.¹²⁹

In a way, incorporation of fundamental rights discourse is paralleled by a more inclusive definition of the EU polity. The introduction of EU citizenship means the enfranchisement in the law of free movement of a broader set of individuals than market actors.¹³⁰ Citizens gain EU status regardless of their economic qualifications and their rights and duties extend to areas which are far beyond the scope of common market provisions. Even within the domain of the common market, their protection seems to have lost the original economic character. Not only do citizenship provisions induce considerable redefinition of previous regulatory strategies in the field of free movement of persons,¹³¹ but in a number of cases market

¹²⁶ Chalmers, *From Prima Donna to Journeyman*, 63-65.

¹²⁷ *Compliance with the Charter of Fundamental Rights in Commission legislative proposals – Methodology for systematic and rigorous monitoring*, COM(2005) 172 final.

¹²⁸ 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 e giurisdizione – La Carta dei diritti fondamentali dell'Unione Europea* (Cedam, 2002), 12.

¹²⁹ J. Habermas, 'Why Europe Needs a Constitution' (2001) *New Left Review*, 17.

¹³⁰ See Case 85/96, *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691 and article 24(1) of Directive 2004/38/EC 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 77.

¹³¹ 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.

Economic and social conflicts, integration and constitutionalism

freedoms are stretched to the extent of appearing themselves as functions of fundamental rights protection rather than the opposite.¹³²

In such an overall effort to recalibrate the EU strategy of personal integration towards more conventional constitutional coordinates the missing element is constituent power. In this respect events associated with the Constitutional Treaty and the French and Dutch referenda sound like an extremely telling lesson as to that ambition and its effective deliverance when transplanted in the EU. Indeed, the idea of imparting bottom-up constitutional legitimacy to the EU constitutional framework¹³³ has inspired a process which has only aped emphatic republican constituent power – an attempt that has notoriously been debunked by more genuine manifestations of national popular will.

This teaches us that processes of mutual identification and accommodation between Europe's constitutional orders, though certainly significant, are not limitless and uncontroversial. Other elements in the strategies of redefinition of the patterns of personal integration described above confirm such a more sophisticated trend. Constitutional amendments, for instance, can hardly be regarded as innovations in the strategies of integration of Europe's constitutional frameworks. In member states, the discourse on the economic constitution, however relevant for the interpretation of economic freedoms and social rights, by no means has removed national constitutionalism from its commitment towards economic and social cohesion. Similar arguments may be proffered as to the evolution of the EU forms of personal integration. The democratic aura surrounding the Charter of Nice and the Constitutional Treaty suddenly dissolves when contrasted with the intergovernmental logic underpinning respectively their non binding nature and ratification procedure.¹³⁴ Despite all the rhetorical efforts, the EU remains a highly divided polity where not only do the preconditions for an emphatic republican

¹³² Case 60/00, *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

¹³³ Lenaerts and Gerard, cit., 322.

¹³⁴ It could be argued that the procedure of adoption and the legal nature of both the Charter of Nice and the Constitutional Treaty confirm the theory whereby "the harder the law the harder the law making" (Weiler, *Constitution of Europe*, 34): whereas the lack of voice of member states' governments in the adoption of the Charter is reflected in its non binding nature, the (desired) bindingness of the Constitutional Treaty required the ratification by each member state.

exercise of constituent power seem absent but where also a serious commitment to solidarity appears misplaced.

Both the substantive and procedural attempts to revise in republican terms the EU constitutional framework leave largely unaffected this reality and the original strategy of integration associated with it.¹³⁵ The common market project, although profoundly revised in its contents by treaty amendments and flanking policies, maintains its constitutional role as evidenced not only in the persisting absence of an EU general taxing and spending power,¹³⁶ but also in many of the EU non-economic policies whose very concern seems the protection of the market society.¹³⁷ Even progress made on citizenship at a closer look reveals traces which go back to the original instrumental approach to individuals by the Community.¹³⁸ Take, for instance, the residence requirements established in the directive on the free movement of citizens¹³⁹ and the cases concerning persons who cannot fulfil them and a clear discrepancy with the civic bonds inbuilt in national citizenship will suddenly reappear.¹⁴⁰

This should not lead to the conclusion that discourses perform only a bad faith placatory function towards the discontents of each constitutional framework. A number of elements show that mutual identification and accommodation at the level of personal integration between states' and EU constitutional frameworks are processes underway which have prompted more profound elements of convergence in their respective fundamental legal convictions. Without doubt, analysis reveals also that distinctive elements persist with all their potential for conflict. Yet interactions seem to evolve in a climate of substantial awareness of the functional and substantive claims endorsed in each constitutional framework, a crucial precondition that discourses have certainly helped to thrive.

¹³⁵ This is confirmed by the text of both the Constitutional Treaty and, critically, the Charter of Nice (see especially article 52(2)).

¹³⁶ Majone, cit., 10.

¹³⁷ Chalmers, *Political rights and political reason*, 66.

¹³⁸ M. Everson, 'The legacy of the market citizen', in Shaw and More, cit., 86.

¹³⁹ Article 7 of Directive 2004/38/EC.

¹⁴⁰ Case 456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles* [2004] ECR I-7573.

Material integration

The previous account for the evolution of personal integration has already shown how discourses on fundamental rights and market principles have been used in Europe's constitutional frameworks to re-orient original identities. Analysis has also revealed that despite these attempts, the original commitments to economic and social cohesion and market integration have not been deflected but only revised. This sets the context also for the evolution of material integration: market regulatory principles and economic and social rights, far from superseding each other, maintain their grip on their respective constitutional frameworks and continue to perform their function of material integration. Nonetheless, even in this regard mutual identification and accommodation have brought about a degree of reconsideration of the original identity traits – a phenomenon that is in line with the convergent trends of personal integration.

In national constitutional adjudication economic and social rights, regardless of the claims of the proponents of the economic constitution, continue to play their original defensive role vis-à-vis legislation. Constitutional courts maintain a deferent stance and if market considerations surface in their judgements, most of the time this occurs because the relevant legislation has incorporated them. Similarly, deregulatory outcomes in constitutional adjudication are far from being the result of stricter standards of judicial review. In many of these cases, in fact, constitutional courts attain these solutions at the end of litigation on the side-effects of supranational adjudication. Cases on reverse discriminations are emblematic in this regard. Finally, also more cautious approaches to the protection of social rights hardly qualify as products of pro-market judicial activism. Reconsideration of the standards of social protection, indeed, are often just an indirect reflection of the EU constraints on national budgets conveyed by national legislation, or of a more disciplined interpretation of constitutional norms.

The increasing relaxation and, to some extent, the marginalisation of market regulatory principles are the main convergent traits of the EU strategy of material integration. Many factors contribute to this phenomenon. The first and, probably,

most important element is the shift to qualified majority voting introduced by the SEA. This institutional reform, in promoting an exponential increase in the adoption of measures of positive harmonisation, implies as a consequence a substantial reduction of the field of application of free movement treaty rules. A more cautious approach, then, is endorsed also in the judiciary where the Court of Justice has revised its standards of review on national regulatory measures. *Keck*¹⁴¹ and its progeny reflect not only the rejection of the idea of using market principles as economic due process clauses¹⁴² but also a strategic shift from a strategy of market building to one of market maintenance.¹⁴³ Moreover, the expansion of mandatory requirements well beyond the originally permitted ends broadens the grounds for justification of *prima facie* violations of the treaty.¹⁴⁴ Yet the combination of these factors does not amount to a complete overturn of the original features of Community constitutional adjudication: not only in their redefined domain do market principles continue to inspire stringent scrutiny on national measures,¹⁴⁵ but also positive harmonisation and national legislation find in their regulatory strategies a crucial blueprint.¹⁴⁶

¹⁴¹ Joined Cases 267/91 and 268/91, *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

¹⁴² See, for instance, Case 70/95, *Sodemare v Regione Lombardia* [1997] ECR I-3395, Case 190/98, *Graf v Filzmozer Maschinenbau GmbH* [2000] ECR I-493 and Case 134/03, *Viacom* [2005] ECR I-1167. The field, in fact, is still a turbulent one as recently emerged in the opinions of the Advocates General in Case 159/04, *Alfa Vita Vassilopoulos and Carrefour* [2006] ECR I-8135, Case 110/05, *Commission v Italy*, not yet reported, Case 142/05, *Åklagaren v Percy Mickelsson and Joakim Roos*, not yet reported.

¹⁴³ Maduro, *We, the court*, 88.

¹⁴⁴ Such expansion is particularly visible in areas where none or only limited derogations are enshrined in the treaty: see Case 213/96, *Outokumpu Oy* [1998] ECR I-1777 (taxation of goods), Case 384/93, *Alpine Investments v Minister van Financiën* [1995] ECR I-1141 (services) and Case 368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 (goods).

¹⁴⁵ An aggressive interpretation of article 43 is followed in Case 442/02, *Caixa Bank France v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-8961.

¹⁴⁶ On the need to insert mutual recognition clauses in EC and domestic legislation see, respectively, Case 376/98, *Germany v Parliament and Council* [2000] ECR I-8419 and Case 184/96, *Commission v France* [1998] ECR I-6197.

Economic and social conflicts, integration and constitutionalism

Functional integration

Even analysis on functional integration indicates that hybridisation in the form of convergence permeates the most recent strata of Europe's constitutional frameworks.

The rise of governments and the marginalisation of parliaments are elements that reveal how member states are shifting from parliamentary to executive-based modes of functional integration. Admittedly such trend, to some extent a product of the centralisation associated with the original Community executive-based policy-making, takes place in contexts that are still profoundly informed by the rhetoric and structures of the constitutional democracy. Nonetheless, behind this democratic surface, the increased role of executives is a widespread reality that comes out in both electoral politics and policy-making. Originally conceived as the starting point for a process of functional integration hinging upon parliaments, electoral politics in member states is progressively more of a competition for government leadership than for democratic representation. Likewise, national policy-making, once dominated by the legislative paradigm, is extensively channelled into executive rule making either in the form of secondary regulation or delegated legislation.¹⁴⁷ Overall, such phenomena signal the emergence alongside the more dignified circuit of parliamentary democracy of unmediated forms of democratic legitimisation of the executives – a trend that may find in the Weimar constitution and its double source of parliamentary and quasi-populist legitimacy a rather bleak historical antecedent.¹⁴⁸

The emancipation of policy-making from the original technocratic and intergovernmental paradigm is undoubtedly a major element of convergence of the EU constitutional framework towards the original statist template of constitutional democracy. In many ways the turning point of this process is the already mentioned shift to qualified majority voting introduced by the SEA. Not only has that made positive harmonisation the privileged instrument for dealing with second type conflicts, but many elements of the democratic repositioning of the EU may be traced

¹⁴⁷ See the reports on national case-studies in P. Craig and A. Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (OUP, 2005).

¹⁴⁸ Möllers, cit., 91.

back to it. Firstly, qualified majority voting, combined with the introduction of new legal bases and the doctrinal legal framework created in the pre-SEA phase, expands the scope for EU policy-making. In this renewed context, legislative initiatives may by no means be considered the essential and logical consequences of any constitutional programme since virtually all policy objectives may be pursued at a supranational level. Moreover, qualified majority voting means a remarkable redefinition of the constitutional role of the Commission. Removal of veto powers allows it to interpret more convincingly its role of policy entrepreneur, a function that prompts the politicisation of its composition and, at a more general level, a comprehensive redefinition of the EU form of government. The rise of the European Parliament and parliamentary democracy is probably the most eloquent manifestation of this trend. Downgraded in national constitutional systems, parliamentary democracy appears to resurrect in the EU constitutional framework. Here, the usual story goes that the European Parliament has irresistibly evolved from its original consultative role to that of a fully-fledged legislative body with a remarkable role in policy-making and in the formation of the Commission.¹⁴⁹

But, again, important as they may be, the evolutionary trends should not be regarded as toppling the original structures of Europe's constitutional frameworks. In other words, even in functional integration the evolutionary paradigm is convergence rather than assimilation. In states' constitutionalism, for instance, the rise of the executives remains entrenched in systems in which parliamentary democracy is still regarded as the main source of legitimacy for political decision-making. In fact, not only are governments expected to obtain at least the implicit confidence of parliaments, but also executive rule making finds in legislation its main policy guidelines or, at least, legal grounding.

Similarly, emancipation from a prevalent intergovernmental paradigm and the move towards democracy in the EU are processes that meet clear lines of resistance in the former constitutional structure of the Community legal order. At the formal level, convergence and resistance find a clear concretisation in the patchwork nature of the

¹⁴⁹ Dehousse, *European institutional architecture*, 605-606.

Economic and social conflicts, integration and constitutionalism

EU system of governance.¹⁵⁰ Politicisation associated with parliamentary government pervades only segments of an EU policy-making that, on the whole, is still largely marked by intergovernmental and technocratic elements. The sharp slowdown in legislation and increase in secondary executive law making are a clear sign in this regard.¹⁵¹ Finally, the low intensity of EU constitutionalism is confirmed in its persisting deficit of republican life: the fragility of electoral politics and political rights¹⁵² and the prevalent national dimension of civil society participation and mobilisation¹⁵³ are eloquent factors that inhibit a claim by the EU to constitutional authority in a strong normative sense.

Convergence as antidote to disintegration

In a nutshell, it might be argued that interactions between Europe's constitutional orders have caused a transformation of national constitutional traditions proportional to the democratisation of the supranational constitutional framework. It was far from obvious that third type conflicts could trigger a similar sophisticated dialectic effect. Yet competition between constitutional models could have hardly ended up with the prevalence of one strategy of integration and the assimilation of the other. Either extensive market deregulation under the cover of placatory constitutional discourses or a European-wide constitutional democracy seem unlikely solutions with a high potential for disintegration. Conversely, the absence of a hegemonic constitutional model turns out to be the ideal structural condition for the development of a pattern of interaction alternative to both conflict and assimilation. In previous analysis this pattern has been named convergence, a process that may take place within each constitutional framework and that, in this

¹⁵⁰ Dehousse, *European institutional architecture*, 593.

¹⁵¹ R. Dehousse, 'Beyond representative democracy: constitutionalism in a polycentric polity', in J. H. H. Weiler, M. Wind (eds), *European Constitutionalism Beyond the State* (CUP, 2003), 140.

¹⁵² Chalmers, *Political rights and political reason*, 56.

¹⁵³ N. Fligstein, *Euroclash – The EU, European Identity, and the Future of Europe* (OUP, 2008), 234-235.

decentralised perspective, stands for pursuing substantive awareness¹⁵⁴ while preserving functional distinctiveness.

The persistence of an element of tension in convergent interactions is far from indicating that that process is unstable or that it has not yet achieved a consolidated state. To the contrary, tension may be regarded as its essential characteristic¹⁵⁵ and, arguably, its very engine. The distinctive natures of Europe's constitutional frameworks nourish a sense of reciprocal demystification, one where the emphasis of one's added value aims essentially at coming to terms with the other's bias. In this view, the common market project provides the standard to highlight and counteract the naked preferences for insiders and the potential of abuse in national constitutional democracies. Likewise, republican constitutional democracy not only challenges the aura of political neutrality surrounding EU policy-making, but it also unmasks the overrepresentation of business and economic elites behind it. Starting from similar premises, the response to third type conflicts suggested by the pattern of convergence consists in a dialectic process of identity regeneration. In such process, each of Europe's constitutional frameworks is expected to re-interpret its partial strategy of integration in the light of the counterparts' substantive claims¹⁵⁶ – a circular and continuous movement that Smend's phenomenology of integration could possibly help to conceptualise.

3.3. Integration *across* constitutional frameworks

In recalling Smend's critique to his contemporary constitutional scholarship, it has been noted how he rejected the idea of establishing any value-based hierarchies between state and individuals. Hierarchies, it was observed, are products of self-referential, rigidly defined and monolithic notions of those entities. Smend claims that similar conceptions are highly misleading for they do no justice to the very

¹⁵⁴ On mutual deference between Europe's constitutional frameworks see M. Poirares Maduro, *Contrapunctual law*, 530.

¹⁵⁵ D. Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, Public Law and Legal Theory Working Paper Series, No. 111/2008, 3.

¹⁵⁶ On reciprocal orientation as a pattern of interaction, see N. Walker, cit., 355-356.

Economic and social conflicts, integration and constitutionalism

nature of the state and individuals and to the structure of their interactions. Indeed, both of them evolve in a process of integration consisting in their continuous mutual identification. In such a process there is no point of rest and, as a result, any attempt to establish normative priorities between them is illusory.

In a number of ways, the structure of the interactions between Europe's constitutional frameworks happens to reflect Smend's notion of integration. As documented, no persuasive structural hierarchy can be established between the strategies of integration pursued by the EU and its member states'. Moreover, interactions between them not only may result in a constant process of mutual identification and accommodation, but they also trace a circular and oscillating movement where, critically, no Archimedean point can be identified.

Yet other aspects in Smend's theory may be more problematic. In his notion, for instance, integration is about the creation of a unified and coherent body.¹⁵⁷ Indeed, in developing his theory Smend has in mind the scenario of the federal state, an entity that in his conception encompasses the central state and the member states regarded as moments of a unitary process of dialectic coordination.¹⁵⁸ Does a similar formula describe the interactions between Europe's constitutional frameworks? Is it accurate to claim that what we have currently in Europe is a process of integration where the EU and the member states are moments of a unitary process of dialectic coordination?

To elaborate answers to these questions, our account of integration in Europe must first be brought to a further and more advanced state. In fact, if in subsection 1 the identification of the distinctive elements of Europe's constitutional frameworks justified the latter to be analysed in isolation, in subsection 2 their relational dimension has been addressed essentially for the purpose of highlighting the effects of their interactions on their identities. Nevertheless, even in this latter scenario the constitutional frameworks appeared in a state of artificial isolation. Despite the emphasis on interaction, accounts for convergence fail to convey the reality of the

¹⁵⁷ Smend, cit., 110-111.

¹⁵⁸ Smend, cit., 186-189.

social and legal practice in Europe. In those analyses Europe's constitutional frameworks come out as compartmentalised bodies applying to distinct and definite substantive domains – a condition that hardly fits current European legal reality. To a remarkable extent, in fact, European social and legal practices cut across Europe's constitutional frameworks. This is made possible by the extensive overlap between the substantive domains of the EU and member states' legal orders, and by the porousness of their boundaries, increasingly trespassed by the interconnections between the national and supranational circuits of personal, material and functional integration. In contemporary Europe, indeed, legislation, administration, adjudication and, arguably, even constitution-amending may already be regarded as chains including supranational and national rings. But does this mean that contemporary Europe has its own European legal order? Or, at least, that integration across Europe's constitutional frameworks is evolving in that direction, one that ultimately could reflect Smend's unitary process?

Much of current European constitutional scholarship would probably answer in affirmative terms. Mainstream discussion on Europe's constitutional setting, even if phrased in the language of constitutional pluralism, sometimes seems to assume the existence of a single and unified European legal order,¹⁵⁹ where Europe's constitutional frameworks could arguably be regarded as moments of a unitary process of dialectic coordination. In such a context, constitutional republican democracy, as embedded in the dignified part of the EU constitutional framework, would offer the main strategy of integration, while states' constitutional frameworks would end up being subsumed in such broader and encompassing federal system.

Nevertheless, alternative views can be proffered to contest a similar constitutional outcome for European integration. In analytical terms, it can be noted that if it might be accepted that social practices develop in a one-dimensional European space, that does not equally apply to their legal regime. Integration across Europe's constitutional frameworks has not yet achieved a state where a single constitutional vocabulary may equally be used for the different segments of policy-making or

¹⁵⁹ Maduro, *Contrapunctual law*, 521-522.

Economic and social conflicts, integration and constitutionalism

adjudication in which that is articulated. Indeed, EU and states' institutions remain firmly rooted in their respective legal orders and, as such, they are expected to refer to their native constitutional ideologies, cognitive models and institutional devices.¹⁶⁰ The disjunction between unified social practice and segmented constitutional frameworks is so ingrained in the European context that policy-making and adjudication reflect it to a remarkable extent. As noted,¹⁶¹ in many political and legal disputes arguments taken from the EU or states' common constitutional traditions are strategically employed to shift the relevant epistemological framework and define the set of participating actors. 'Integration across', therefore, does not necessarily entail a reconciled European legal order. On the contrary, that disjunction signals that processes of personal, material and functional integration across Europe's constitutional frameworks take place in an uneasy terrain. Let us briefly summarise their current configuration as resulting from the combination of the legal orders of the EU and its member states.

Contemporary Europe is probably not the setting for grand exercises of constituent power.¹⁶² In fact, personal integration is the level where segmentation between Europe's constitutional frameworks is more visible and spectacular. As underlined in previous subsection, it is not just a question of the different natures of the supranational and national polities, not least of the discrepancy between their respective procedures of engagement in constitutional politics. Segmentation reflects essentially the inconsistency between their strategies of integration and relevant conflicts. Therefore, if personal integration is really about embodying, representing and maintaining the unity of the polity and its fundamental legal convictions, Europe as a whole does not seem at the moment to have either a catalyst subject or a strategy of integration to perform a similar function. Conversely, the problematic coexistence of polities and strategies differently structured is the qualifying element of the European constitutional space.

¹⁶⁰ Halberstam, cit., 2, noting the existence of competing claims of constitutional authority within a single system of governance.

¹⁶¹ Maduro, *Contrapunctual law*, 519-520.

¹⁶² It may be observed that, after the 1990s wave of new constitutions in Central-Eastern Europe, national constitutions have been merely amended.

To a large extent this uneasy situation reverberates through the circuits of material integration. Admittedly, in the economic and social area the EU and national judiciaries are formidably interfaced with the preliminary ruling procedure. Hence, segmentation at procedural level is most of the time the product of a poor respect of those terms of engagement or of principled (and sometimes interested) conflicts of authority between the Court of Justice and national supreme or constitutional courts. Yet it does not take only a sound procedure to avoid segmentation. Cases such as *Grogan*¹⁶³ or, more recently, *Laval*¹⁶⁴ demonstrate how litigation across Europe's constitutional frameworks is amenable to competing substantive principles and, critically, alternative constitutional qualifications. In such circumstances, it is often for ordinary courts to identify the relevant constitutional background, and, if required, to channel the case accordingly towards the appropriate supreme adjudicative body.

Although crucial in conveying the tensions associated with integration across Europe's constitutional frameworks, material integration is an increasingly peripheral process. As evidenced in subsection 2, the construction of substantive constitutional principles in the member states continues to be mostly a function of the contents of economic legislation. And also market regulatory principles, in a context of expanding positive harmonisation, are remarkably narrowed down. This leaves broad room for functional integration, a circuit that on its part is marked by the rise of the governments and executive rule making.¹⁶⁵ Perhaps contrary to Smend's sensibilities – he denied that the technical nature of administrative law permitted functional integration¹⁶⁶ – delegated legislation and, more generally, political administration associated to comitology and standardisation¹⁶⁷ are the core of that process.

¹⁶³ Case 159/90, *The Society for the Protection of the Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-4685.

¹⁶⁴ Case 341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767.

¹⁶⁵ Dehousse, *European Institutional Architecture*, 626.

¹⁶⁶ Smend, cit., 214-216.

¹⁶⁷ R. Dehousse, 'Misfits: EU Law and the Transformation of European Governance', in C. Joerges, R. Dehousse (eds.), *Good Governance in Europe's Integrated Market* (OUP, 2002), 207.

Economic and social conflicts, integration and constitutionalism

It has been previously documented how the statist tradition of political rights is on the decline in both the EU and national constitutional frameworks.¹⁶⁸ At this stage it can be added that functional integration across Europe's constitutional frameworks takes place increasingly in administrative networks disembedded from their national political contexts and requiring the definition of new vectors of accountability.¹⁶⁹ Indeed, executive rule making has inherited the aura of neutrality originally associated with both the national administration and the common market project. Yet the exposure to the normative claims typical of the tradition of state constitutionalism has made it a target of constitutional criticism whose ultimate goals are the improvement of the standards of transparency and accountability¹⁷⁰ and the direct participation of affected parties.¹⁷¹

4. Questioning Integration

The normative tenor of the latest consideration sets the tone for a few concluding remarks. If there is a merit in the above analysis, that is to demonstrate how integration, particularly if defined according to Smend's notion, may provide an adequate constitutional frame for treating Europe's three types of conflict. Integration, indeed, comes out not only as the "central substance" of Europe's constitutional frameworks, but also as the "fundamental process" that could guide their interactions.

The power of this conceptual device is not confined to an explanatory dimension. Integration may also deliver in normative terms as far as it permits to pursue coherent constitutional solutions in the absence of an ultimate uncontested authority. In this regard, the notion of convergence seems particularly promising for its claims for substantive awareness and respect for the distinctiveness of Europe's constitutional identities suggest a form of revised teleology as the blueprint for

¹⁶⁸ Chalmers, *Political rights and Political Reason*, 67.

¹⁶⁹ Chalmers, *Political rights and Political Reason*, 68.

¹⁷⁰ Majone, cit., 15.

¹⁷¹ Dehousse, *Beyond representative democracy*, 150-156.

sound institutional practices.¹⁷² Convergence, in fact, may be a source of inspiration not only for a theory of constitutional adjudication but, more generally, for a *modus operandi* with which all principled institutions¹⁷³ in Europe's constitutional frameworks could be expected to comply in order to ensure overall constitutional coherence.

Yet the fact that coherence through convergence may be a valid option in managing Europe's legal conundrums does not say much about its dividend in terms of social integration and, notably, about the capacity of the current constitutional setting to cope effectively with Europe's economic and social conflicts.¹⁷⁴ Legal integration through Europe's constitutional frameworks, indeed, may perhaps be attractive for the European elites and the constitutional clergy. But what about the citizens that ideally should give substance to that process and, in the meanwhile, draw inspiration from it? Are they better off with this emerging system of transnational constitutional integration? And what does that deliver for them?

An important though too often neglected answer to those questions could be that this very process of integration has transformed Europe from a set of societies whose economies had thrived on war and colonies to a set of societies that tried to implement systems of social justice and peaceful trade.¹⁷⁵ Although even such statement is not completely uncontroversial,¹⁷⁶ that is probably the main argument in defending the legitimacy of European integration. Yet that is too partial and, ultimately, fragile a justification. Legitimacy cannot only reside on outputs, be they the opportunities associated with the common market or the promise of an area of freedom, security and justice. A serious commitment to integration requires also social and political engagement – goals that hitherto seem to have been somewhat achieved only within national constitutions.

¹⁷² For a quite similar defence of teleological interpretation see Maduro, *Interpreting European Law*, 5.

¹⁷³ Sunstein, cit., 146.

¹⁷⁴ On the distinction between legal and social integration see D. Grimm, 'Integration by constitution' (2005) 3 *International Journal of Constitutional Law*, 195.

¹⁷⁵ Fligstein, cit., VI.

¹⁷⁶ On the 'imperialism of decolonization' and its constitutional consequences, see J. Tully, 'The Imperialism of Modern Constitutional Democracy', in Loughlin and Walker (eds), cit., 315.

Economic and social conflicts, integration and constitutionalism

In this regard, Fligstein's recent account of EU conflicts offers a provocative empirical insight. European integration, he observes, has generated three social constituencies.¹⁷⁷ The first includes the subjects who are inclined to see the EU as a social and political opportunity. Predictably, they are the insiders of European integration, a minority that has organised its economic and social life largely in a transnational dimension and, by doing so, has ended up shaping the common market project according to its social and political preferences. At the other extreme one finds the social constituency of the outsiders of European integration. They are European in a thinner sense as their social lives take place mostly, if not exclusively, within their home states' borders. As a consequence, their participation in that transnational process is more marginal, consisting essentially in the passive role of consumers of a broader range of products and services and, for those who can, in the use of the Euro currency. Outsiders' attitudes towards European integration, therefore, are the most problematic. To their eyes, Europe tends to be a constant source of threats since it may foster the deployment of firms, immigration, competition by cheaper products, constraints on states' budget, welfare and industrial policy. There is finally a more ambiguous "swing constituency". It is probably the most populated and it includes the so-called "situational Europeans", i.e. those who occasionally profit from free movement but, at the same time, are concerned by the possible negative impact of the common market on national welfares. In many ways this is also a crucial constituency for its political attitude towards the EU has often proved to be decisive for the destiny of the latter.

In fact, many of the recent political conflicts involving the EU, most notably the failure of the Constitutional Treaty, may be traced back to such EU clash.¹⁷⁸ EU clash – probably, the best approximation of Europe's reconfigured economic and social conflicts – combines elements of both first and second type conflicts. On the one hand, one may note elements echoing old class struggles: the uneven participation¹⁷⁹ in the European transnational society depends largely on the individuals' and social

¹⁷⁷ Fligstein, cit., 18 and 22, 211-212.

¹⁷⁸ Fligstein, cit., 216-217.

¹⁷⁹ Fligstein, cit., 4.

groups' capacity of access and mobility – variables that evoke too well known factors of social discrimination. Yet depicting the EU clash as a mere replication on a European scale of first type conflicts would be tantamount to offering its caricature. European integration is a more diagonal project, one that winners and losers of first type conflicts can experience in turn as a threat or an opportunity. The cases of incumbent monopolistic economic actors and intra-Community migrants are only the most evident amongst a variety of possible examples which may falsify that simplistic image.

With this in mind, the EU clash can be looked at as a privileged standpoint for a critique of Europe's current constitutional structure. Fligstein's social insight could help to dramatise the story so far told. It might be argued that at their inception national constitutions were adopted on the assumption that the lives of Europeans would have taken place in a mostly domestic dimension. In this view, first type conflicts were a kind of purely internal situation and domestic constitutional democracy their appropriate deliberative framework. Meanwhile, European elites pushed forward via their member states the common market, a project that they seized by nourishing the circuits of transnational litigation and orienting positive harmonisation. Yet the outputs of that process are not directed only at the members of this EU elitist society. Due to the overlaps and porousness of Europe's constitutional frameworks, EU regulatory strategies spill over all the peoples who live in Europe, a fact that can still be appreciated when national political communities are enlisted in implementing EU objectives.¹⁸⁰ True, democratic reforms have remarkably revised the contents and the institutional architecture of the common market project, and also the membership of the EU transnational society is increasingly broadening. Nonetheless, Fligstein's account of the EU clash warns of the persisting social and, arguably, constitutional bias of European integration.

This does not mean to say that the EU strategy of integration should be changed or replaced. A large part of this article has been devoted to arguing precisely the

¹⁸⁰ G. Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43 *Common Market Law Review*, 66-67.

Economic and social conflicts, integration and constitutionalism

opposite thesis, namely how the dialectic interactions between Europe's constitutional frameworks can deliver. The insights on the EU clash, then, may be best regarded as inviting discussion on the partiality of Europe's circuits of personal, material and functional integration. It has already been noted how in contemporary Europe's constitutional frameworks personal integration is a highly segmented circuit where the civilising potential of supranational integration¹⁸¹ clashes with the right to self-government of national political communities. Lacking a comprehensive constitutional framework, their reconciliation and balance are objectives to be pursued only on a case-by-case basis by trying to accommodate those competing normative claims and epistemologies. On their parts, material and functional integration face the most serious challenges. First of all, there are questions as to the remit and intensity of Community regulatory principles and policy-making: to what extent is it legitimate for supranational forms of integration to pre-empt national ones? Or, in other words, to what extent is it acceptable that the members of the EU society rule over the peoples who live in Europe? Of course, such questions involve ever-greens such as the division of competences, subsidiarity, and the intensity of EU policy-making. Yet, it may be argued that the challenge here is more demanding than drawing artificial borders between legal orders and making the scope for supranational integration somehow proportional to its degree of inclusiveness. Concern for social integration, in fact, raises questions as to the current structure of the circuits of material and functional integration. Here, the issue is not only about improving the standards of accountability and, notably, the transparency and openness of administrative and judicial decision-making. Critically, the participation of a broader social constituency in EU policy-making invites a more radical discussion on due process, including the adoption of more robust procedural entitlements aiming at effective access to justice and administrative procedures.

In concluding *Verfassung und Verfassungsrecht* Smend observes that the main problem for a constitution is its integrative capacity.¹⁸² At the moment Europe's constitutional

¹⁸¹ 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* (OUP, 1999), 362-363.

¹⁸² Smend, cit., 182-183.

organisation allows for the silent prevarication of an active EU society over the more indifferent peoples living in Europe. Alienation of the latter is often confused with loyalty to the European integration project, a misunderstanding that punctually surfaces when the indifference of public opinion to the EU policies turns to opposition to the EU system.¹⁸³ That might be quite a concern for the strength of Europe's constitutional frameworks.

¹⁸³ Follesdal and Hix, cit., 549.

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European Institute
London School of Economics
Houghton Street
WC2A 2AE London
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