Introduction: The ECJ as a Federal Constitutional Court
Alicia Hinarejos

in Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars

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Item type: chapter

This chapter focuses on those aspects of the role of the European Court of Justice (ECJ) that liken it to the constitutional court of a federal legal system. It provides a broad-brush overview of the different models of constitutional review, before focusing on the ECJ itself, its creation, and its posterior evolution into a constitutional adjudicator of sorts. It then sheds light on the choice of two specific areas of the jurisdiction of the Court as the object of this study.

Conflict Abroad and at Home
A. W. BRAIN SIMPSON

in Human Rights and the End of Empire: Britain and the Genesis of the European Convention

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This chapter charts the conflicts which developed in the United Nations Human Rights Commission — both with the Soviet Union, and with the US, and those within the British governmental machine — over negotiations whose aim was to produce a draft international covenant on human rights, binding in international law. These negotiations ran parallel to those which produced the Universal Declaration. There was controversy over the specification of limitations to rights, over US pressure to include a federal applications clause, and UK pressure to include a colonial applications clause. The chapter describes the growing
pessimism over the possibility that United Nations negotiations would ever produce a useful human rights covenant.

Loyalty in Context
Marcus Klamert

in The Principle of Loyalty in EU Law

Chapter 2 discusses various concepts related to Union loyalty, such as constitutional and federal loyalty, federal fidelity (Bundestreue in German law), the Union law principle of solidarity, and the public international law principles of pacta sunt servanda and good faith. It explores whether Union loyalty is distinct from solidarity, to which it is often compared in the literature, and to what extent it shares features with the German and Austrian variants of federal fidelity, as well as with good faith in public international law in general and World Trade Organization law in particular. Case studies on national federal systems such as the US, Canada, and Australia examine the correlation between the absence of a clear division of competences in federal systems and the strength of the respective principles of fidelity.

Courts, Continuity, and Change
Paul Craig

in The Lisbon Treaty: Law, Politics, and Treaty Reform

This chapter analyzes the impact of the Lisbon Treaty on the EU judiciary. It begins by examining the Lisbon Treaty amendments that affect the nomenclature of the Union courts and the rules relating to judicial appointment. This is followed by analysis of the provisions concerning the courts' jurisdiction, and the extent to which these have been altered by the Lisbon Treaty. The focus then shifts to the overall judicial architecture of the EU courts. This was given scant attention in the deliberations that led to the Constitutional Treaty, which largely replicated the schema in the Nice Treaty, and the same remains true for the Lisbon Treaty. The reasons why this issue never made it onto the reform agenda are explained, and the possibilities for more coherent and rational division
of power between the European Court of Justice (ECJ) and the General Court is explored. The chapter then addresses the implications of the Lisbon Treaty for central components of judicial doctrine, direct effect, and supremacy. It concludes by considering what can be learned from national courts during the ratification process, with particular attention focused on the German Federal Constitutional Court.

Courts, Continuity, and Change
Paul Craig

in The Lisbon Treaty, Revised Edition: Law, Politics, and Treaty Reform

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The Idea of European Demoicracy *
Kalypso Nicolaidis

in Philosophical Foundations of European Union Law

This chapter analyzes the theory of “demoicracy” in the EU. It provides a historical account of federalism and “demoicracy.”. It shows that the
treaties seem to accept the fact that the European Union is based on the mutual recognition of identities and not their merger. Even though the balance between federal union and self-government need not always be stable, a Kantian view of the EU as a union of states is advocated. It is argued that there is nothing new or revolutionary in claiming that the EU represents a “federalism of free states” or a federal union rather than a federal state. This idea has been put forward by the second article of Kant's Perpetual Peace, which presupposes that a federal union of states is not a state. The federal union transcends the “sacrosanct distinction” between domestic public law and international law. A federal union is a voluntary legal union of states that is based on regular and organized deliberation and not on those states' subordination to a higher authority.

Solidarity in the European Union *

Andrea Sangiovanni

in Philosophical Foundations of European Union Law

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This chapter reconstructs and criticizes three different arguments regarding how and whether solidarity, as a value, applies to the EU, and what implications each one has for our understanding of distributive justice beyond the state. The three arguments, in brief, are that: because the EU is a voluntary association, Member States should be held liable for the consequences of joining, and hence distributive justice concerns are irrelevant to its evaluation; the EU should be transformed into a federal welfare state in order to discharge obligations of “postnational” solidarity to the worst off individuals in the EU; and there are no obligations of solidarity across EU borders because the EU lacks an encompassing societal culture necessary for such obligations to apply. Although these three are the most promising arguments currently available for thinking about solidarity at the EU level, all of them are believed to fail. The chapter aims to demonstrate the need for more careful, philosophical reflection on one the most important of the fundamental values animating the European project.
This chapter examines the various legal and political means of federal law enforcement by Germany’s Federal Government and by the Federal Constitutional Court. This is understood as a form of resolution of vertical power conflicts within federations. While by its nature the main focus of this chapter lies on the legal means of federal law enforcement within the context of the notion of executive federalism, it also devotes some attention to the political dimension. Since German federalism is strongly based on consensus and cooperation, this dimension is very important in practice. Where antagonism between the Federation and the Länder occurs (whether expressed in political or legal terms), it is frequently either motivated by party politics or triggered by matters where specific subnational interests are at stake. Apart from negotiation, adjudication by the Constitutional Court is one of the key instruments to deal with that.

This chapter looks at enforcement in the Belgian federal system. It first introduces the dynamics of Belgian federalism, how it channels processes of defiance to some extent through a dismantling of the federal state, and how it avoids the issue of enforcement of federal law by federate entities by reference to the exclusivity and equality principles. The chapter then analyses the exceptional situations where the enforcement of federal law is clearly provided for—concurrently through framework competences and parallel competences. It likewise analyses expressions of defiance in the framework of cooperative Belgian federalism, before turning to the power of the Constitutional Court to
sanction violations of the enforcement of federal law. Finally, the chapter examines the scenario where defiance is brought to a higher level, with the flagrant and explicit disrespect by the federate entities of the Federal Constitution and of the judgments of the Constitutional Courts.

Member State Federalism and Primary EU Law
ELKE CLOOTS

in National Identity in EU Law
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The present chapter demonstrates that a rule-like style of adjudication, in particular a categorical one, offers the best prospect for the European Court of Justice to arrive at a proper trade-off between, on the one hand, respect for key principles of European integration and, on the other hand, respect for a Member State’s national identity as reflected in its (quasi-)federal structure. The reasons for constraining the European Court of Justice’s discretion turn out to be particularly strong in this type of case, given that the Court is likely to undervalue a Member State’s federal arrangements when free to balance them against core Treaty provisions such as the fundamental freedoms or the prohibition of State aid. By constraining the European Court of Justice’s discretion, bright-line rules reduce the risk of such judicial mistakes. It is shown that the Court’s body of jurisprudence is, to a significant extent, in harmony with the recommendations made in this chapter.

Limits to the Union’s ‘Internal Market’ Competence(s)
Robert Schütze

in The Question of Competence in the European Union
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DOI: 10.1093/acprof:oso/9780198705222.003.0011

This chapter examines the internal market competence of the United States and the EU. It first considers the American internal market competence — the ‘Commerce Clause’ which allows Congress to regulate Commerce in several states and has been the chief competence to deregulate and re-regulate the American federal market. It then analyses the EU’s internal market competence, showing that Article 114 TFEU has — like the US ‘Commerce Clause’ — been given an (almost) unlimited
scope. Both the American and the European internal market powers have encountered some political and legal limits, and the chapter compares these constitutional limitations.

Theoretical Deflation
Guillaume Tusseau

in The Question of Competence in the European Union

This chapter analyses the question of whether the EU can be described as a federal order of competences. It identifies the meaning(s) that can be ascribed to this expression if one focuses on the EU as a legal order and elucidates what can be, from the viewpoint of concrete legal study of the basic elements of the EU legal order. It discusses the debate about power-conferring norms in legal theory; the proposed concept of power-conferring norm; the types of power-conferring norms in the EU legal order; and types of relationships between power-conferring norms in the EU legal order.

On the Status of the EU’s Democratic Legitimacy after Lisbon
Dieter Grimm

in The Constitution of European Democracy

This chapter examines the status of the EU’s democratic legitimacy after Lisbon: the treaty, which forms the legal foundation of the EU, and the 2009 judgment of the German Federal Constitutional Court, which declared that the German law ratifying the treaty was compatible with the Basic Law, Germany’s constitution. One of the Lisbon Treaty’s declared goals is to strengthen European democracy. This chapter first considers the levels of creating and organizing European public authority and the exercise of European public authority before discussing the European Parliament’s limited role in terms of approving decisions. It then asks whether the notion that EU is democratically deficient is accurate, suggesting that the necessary degree of democratization in the EU depends on the scope of its powers and on the extent of its
autonomy from the Member States. Finally, it explores the question of de-legitimation through Europe’s democratic deficit.

The Basic Law as a Barrier against a Transformation of the EU into a State
Dieter Grimm

in The Constitution of European Democracy
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This chapter examines how Germany’s Basic Law can prevent the transformation of the European Union into a state. It begins with a discussion of the German Federal Constitutional Court’s (Bundesverfassungsgericht) 2009 decision on the compatibility of the Lisbon Treaty with the Basic Law. In particular, it highlights the message of the Bundesverfassungsgericht’s judgment: that European integration will not be hindered by Germany but finds it limits in the Basic Law. It then explains why, on the side of the EU, the German Court puts so much weight on the treaty character of the EU’s legal basis and why, on the side of the Member States, much emphasis is placed on sovereignty. It also considers the question of whether Germany would be allowed to join a federal European state if its democratic legitimacy were at the level required by Article 79(3) Basic Law.

Europe Needs Principles, Not Pragmatism
Dieter Grimm

in The Constitution of European Democracy
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Item type: chapter

This chapter examines the question of European statehood, arguing that what is needed is not pragmatism but greater orientation to principles and more explanations of consequences. It first considers the EU’s ultimate goal: whether it should become the United States of Europe or whether it should remain a community of Member States who unite for specific purposes in areas that they can better address unitedly than separately. It then explains how the transformation of European institutions in accordance with a nation-state model would lead towards a European state, suggesting that one cannot transform the
EU’s institutional structure on the nation-state model and at the same time defer to a later date the question of European statehood. It also considers the German Federal Constitutional Court’s role in bridging the scope of EU powers and the autonomy of European decision-making on the one hand, and European democracy on the other.

Financial Crisis, National Parliaments, and the Reform of the Economic and Monetary Union

Ingolf Pernice

in National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?

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This chapter first discusses some essential propositions developed by the German Federal Constitutional Court (GFCC) regarding the protection of the German Parliament (Bundestag) and the principle of democracy in general against challenges from developments in the Economic and Monetary Union (EMU). The analysis then depicts some of the most important implications of EMU reform for the autonomy of national parliaments (NPs). With a view to remedy the existing or possible shortcomings in terms of transparency and democratic legitimacy, the chapter develops some reform ideas to be implemented within the framework of the Treaties of Maastricht and Lisbon, or requiring a revision of the Treaties.

The Role of the Court of Justice in European Contract Law

Kathleen Gutman

in The Constitutional Foundations of European Contract Law: A Comparative Analysis

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Chapter 2 explores the three distinct roles played by the Court of Justice in European contract law. First, there is the Court’s interpretative role by virtue of its interpretation of various measures falling within the EU contract law acquis. Secondly, while not as widely recognized, there is the Court’s lawmaking role by virtue of its formulation of Union judge-made rules of law falling within the rubric of what is called European
‘federal common law’. Thirdly, there is the recourse made to European comparative contract law materials in the Opinions of the Advocates General, which although not yet undertaken by the Court still has potential implications for its role in European contract law.

The American Contract Law Framework

Kathleen Gutman

in The Constitutional Foundations of European Contract Law: A Comparative Analysis

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Chapter 3 examines four main strands of the American contract law framework: American ‘federal common law’, uniform and model laws promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), Restatements published by the American Law Institute (ALI), and the Uniform Commercial Code (UCC), which is a joint product of these two organizations. This is done with a view to elucidating their meanings, the problems associated with their usage, and the extent to which they are related to the prospect of federalization of contract law in the US. For each strand, a general overview, its origins, and certain underlying tensions are presented.