Contents

Prefa	ce		,
List o	of Con	tributors	xxix
Table	of Ca	ises	XXX
R A I. II	elatio rmin Th . Th	tutional Approach to EU Law—From Taming Intergovernmental nships to Framing Political Processes <i>von Bogdandy and Jürgen Bast</i> e Idea of the Volume e Structure of the Volume action to Critique	1 1 3 5
Part	I: De	fining the Field of European Constitutional Law	9
		ng Principles yon Bogdandy	11
I.	Ain	ns, Theses and Premises	11
II	. The	coretical Issues Regarding the Union's Founding Principles	13
	1.	Founding Principles and Constitutional Scholarship	13
	2.	Three Functions of a Legal Doctrine of Principles	14
		a) Doctrinal Constructivism	14
		b) The Role of Legal Doctrine for Legal Practice	17
		c) Maintenance and Development of a 'Legal Infrastructure'	17
	3.	Perspectives of Legal and Integration Policy	18
II	l. Gei	neral Issues of a European Doctrine of Principles	20
	1.	The Subject Matter	20
		a) Principles in European Law	20
		b) The Union's Founding Principles and Their Constitutional Character	21
		c) Principles of Public International Law	23
	2.	On the Role of Constitutional Principles of the Member States	24
		Uniform Founding Principles in View of Heterogeneous Primary Law	26
IV		the Relationship between the Union and its Member States	28
	1.	The Creation of Unity under the Rule of Law Principle	28
		a) Rule of Law and Supranational Law	28
		b) The Effectiveness Principle	29
		c) The Principle of Comprehensive Legal Protection	32
		Principles of the Political Process	33
		a) The Rule of Law and the Legality Principle	33
		b) Principles of the Order of Competences	35
		c) The Principle of the Free Pursuit of Interests	37
		Principles of the Composite (Verbund) of Union and Member States	38
		a) The Composite (Verbund) as a New Perspective	38
			-

		b) A Principle of Structural Compatibility or a Principle of Homogeneity?	40				
		c) The Principle of Loyalty and the Federal Balance	41				
	V.	On the Relationship between the Individual and the Union	42				
		1. The Principle of Equal Liberty	43				
		2. The Principle of Protection of Fundamental Rights	45				
		3. The Rule of Law Principle	47				
		4. The Principle of Democracy	47				
		a) Development and Basic Features	47				
		b) The Principle of Democracy and the Institutional Structure	50				
		c) Transparency, Participation, Deliberation and Flexibility	51				
		d) Supranational Democracy: An Evaluation	52				
		5. The Solidarity Principle	53				
	VI.	Concluding Remarks	54				
2	Fed	eralism and Democracy	55				
	Ste	fan Oeter					
	I.	Introduction: 'Understanding the European Union as a Federal Polity'	55				
	II.	The Different Federalism Discourses-An Outline	57 59				
	III. The European Union as a Mixed System of a Federative Character						
	IV.	The Benefit of Federal Analogies-Or the Central State as a 'Leitmotiv' of					
		Political Theory	62				
		1. The Question of Sovereignty	63				
		2. 'Divided Sovereignty' and the Principle of People's Sovereignty	64				
		3. People's Sovereignty and the 'Constitution' of the European Union	65				
	V.	The Role of the Principle of Democracy in a Federal Commonwealth	68				
	VI.	The Construction of Democratic Responsibility-Experiences of Federal Systems	72				
		Conclusions: The Federal 'Union' as a Promising Construction	78				
3		tional Constitutional Law Relating to the European Union	83				
	L.	<i>ristoph Grabenwarter</i> Introduction	83				
		The Relationship between Union Law and National Constitutional Law	84				
	11.	1. Full Primacy of Community Law	85				
		 Limited Primacy of Community Law over Constitutional Law 	85				
		3. Primacy of the Constitution	90				
		 The Situation in the Legal Systems of New Member States 	91				
		5. Similarities and Differences in Justifications	93				
		 The Legal Situation According to the Lisbon Treaty 	95				
	ш	. Contents of National Constitutional Law Relating to the					
		European Union	95				
		1. Sovereignty and Transfer of Sovereign Rights	95				
			100				
			102				
			108				
			116				

		a)	Expanding the Scope of National Guarantees of Fundamental Rights Demanded by Community Law: The Example of the Right to Vote in	
			Municipal Elections	116
		b)	Increasing the Protection of Fundamental Rights within the Scope of Community Law: The Example of Equal Treatment of Men and Women	118
		c)	Reinforcing and Changing the Effect of the European Convention on	
			Human Rights in the National Area	120
		d)	Community Law Indirectly Affecting the Scope of National	
			Guarantees of Fundamental Rights	120
		e)	Matching National Fundamental Rights with Increased Standards at	
			European Level	122
IV.	Сс	onclu	isions: The Relationship between National Constitutional Law and	
			Law	123
	1.	Bo	dies Acting under the Constitutional Order	123
	2.		erdependencies between the Constitutional Orders of Member States	125
	3.		pology According to Substantive Orientation: Adaptations that are	
			ceptive and Defensive towards Integration	126
	4.		velopment towards a Reciprocal Linking of Constitutions	127
Th	e Co	onsti	tutional Role of International Law	131
Rol	bert	Uer	bmann-Wittzack	
I.	A	Cons	stitutional Question: The Exposure of a Legal Order to International Law	131
II.			International Constitutional Law Direct Effect within EC Law	135
	1.		tomatic Implementation of International Custom	135
	2.		cession to International Supplementary Constitutions	137
		a)	WTO	137
		а)	aa) Article 300(7) EC as a Starting Point	138
			bb) The Theory of Direct Effect	139
			cc) Delimiting Different Jurisdictions	141
				141
				142
				144
			,	145
			56.	147
		b)		147
	2		gal Succession by Virtue of Functional Succession and Other Forms of	
	5.			149
			in our obligation	149
		•		150
		b)		150
				150
			bb) Direct Responsionally of De Line and	131
			cc) The Member States' Responsibility to Guarantee the Observance	152
ш	т.			152
111,			······································	155
	1.			
		a)	Legal Succession under Union Law	154

4

			b) Explicit Incorporation in Primary Law—Particularly Article 6(2) EU	155
			c) General Principles of Law	156
		2.	Incorporation by Secondary Law—The Implementation of UN Sanctions	157
	IV.	Ass	essment and Perspectives	159
		1.	Reasons for Different Ways of Implementation	159
			a) Ensuring Sovereignty	159
			b) European Integration through Human Rights	161
			aa) Increasing Reference to the ECHR and the Strasbourg Court	161
			bb) Intensified Review of the Member States' Action	162
			cc) Attempting an Explanation	163
			c) A Special Problem: UN Sanctions	163
		2.	The Lisbon Treaty	165
5			r Constituant—Constitution—Constitutionalisation ph Möllers	169
			-	169
	I.		nstitutional Rhetoric: Levels of Meaning	170
	II.		eoretical Prerequisites: Two Types of Constitutions	170
		1.	Founding of a New Order: Constitution as Politicisation of Law	171
			a) Foundation of a New Political Order	172
			b) Normativity, Supremacy and Written Form of the Constitution	172
		n	c) Result	173
		2.	Shaping of the Powers: Constitution as Juridification of Politicsa) Limiting Powers by Legalisation of Government	174
			• • •	175
			b) Restricted Normativity of the Constitutionc) In Particular: Constitutional Treaties	176
			c) In Particular: Constitutional Treatiesd) Result	176
		3.	The Traditions Correlated: Constitution as Coupling of Politics and Law	177
	ш		sic Positions in the Constitutional Discussion—A Critical Inventory	178
	111.	. Da 1.	Assignment of the Constitution to the Nation-State	178
		2.	Constitutional Elements—Constitutional Functions	180
		3.	Heteronomy, Autonomy or Fragmentation of EU Law	182
		4.	Limited Relevance of the Discussion Fronts	184
	IV.		aree Concepts of the Constitution in Europe	184
		1.		185
		2.	Constitution: The European Treaties as a Formal Constitution for the Union	189
			a) The Treaties in Written Form	190
			b) Supremacy of the Treaties	192
			aa) Constitution as a Legal Argument-the ECJ and Hierarchies within	
			the Treaties	192
			bb) Supremacy of Treaty Law	193
			c) The Treaties as a Formal Constitution: Supranational Over-juridification	
			and Intergovernmental Politicisation	194
		3.	Constitutionalisation	195
			a) Common European Constitutional Law—Establishing Principles	196
			b) Charter of Fundamental Rights	197
			c) Administrative Constitutionalisation and Governance	197

		d) The Legitimacy of Evolutionary Constitutionalisation	198
	V.	European Constitutional Law-A Legal Field and its Academia	199
	VI.	Epilogue: From Constitution to Reform	201
		1. Constitutional Deliberation: Convention and Intergovernmentalism	201
		2. Constitutional Moments: The Political Remaining Outside	202
		3. Constitutional Honesty: The Limits of Constitutional Nominalism	203
		·	
6		n Finality rich Haltern	205
	I.	Entangled Discourses on Finality	205
	II.	Post-politics and Law: The State of the Union	210
		1. A Cultural Study of Law	210
		2. The Union's Birth from Reason	211
		3. Europe as Style, Expertise and Project	212
		4. Europe as Imagined Community	213
		5. Europe's Iconography	214
		6. A Cultural-legal Study of the Union's Problem	216
	III.	The Middle Ground: Politics Gone Awry	217
		1. Europe and Consumer Aesthetics	217
		2. The EU Charter of Fundamental Rights as Consumer Aesthetics	218
		3. The Problem with Consumer Aesthetics	221
	IV.	Post Post-politics: The Court Steps In	222
		1. Cautious Beginnings: Konstantinidis	222
		a) Advocate General Jacobs	223
		b) The Court	225
		c) Conclusion and Critique	227
		2. The Way Forward?-Evolving Union Citizenship	227
	V.	Politics and Post-politics	231
		1. The Murmuring Nation	231
		2. Europe's Legal Imagination of the Political	232
		3. Finality: Eros? Civilisation?	233
Pa	rt II	: Institutional Issues	235
			225
7		e Political Institutions lipp Dann	237
	I.	Introduction and Purpose	237
	II.	Past Research and Recurrent Questions	238
		1. Addressing Council and Commission through Principles and Procedures	239
		2. European Parliament: The Pet Object	241
		3. Changing Tides: Research on Institutions since the 1990s	242
	III.	Conceptual Framework: The Structure of Executive Federalism	243
		The Institutional Framework	245
		1. Council	245
		a) Form Follows Function: Members, Organisation and Competences	245
		b) Mode of Decision-taking: Majority-voting and the Resilience of Consensus	247

	2.	Eur	opean Parliament	250
		a)	Co-Elector: Appointment Power and Negative Competence	251
		b)	Oversight Function: Control via Organisation	254
		c)	Co-Legislator: Law-making by Co-operation and Consensus-building	255
	3.	Eu	opean Commission	257
			The Problem of Leadership	257
		b)	Organisational Structure: The Outlook of a Consensual Government	258
		c)	Functions: Agenda-setter, Mediator and Guardian	259
		,	aa) Agenda Setting	259
			bb) Mediating Interests	259
			cc) Federal Guardian	260
		d)	Conclusion and an Unresolved Problem of Leadership	260
	4.	Eu	ropean Council	261
		a)	Composition and Form: The Ideal of the 'Fireside Chat'	261
		b)	Functions	263
		,	aa) Steering Committee	263
			bb) Final Arbiter and Co-ordinator	263
			cc) Treaty Negotiator and Constitutional Motor	264
		c)	Conclusions	265
			aa) An Institution from the Playbook of Executive Federalism	265
			bb) European Council and European Commission as Twofold	
			Government	266
		d)	A Threefold Government? The Lisbon Treaty and the New High	
			Representative for Foreign Affairs and Security Policy	266
V.	Le	gitin	nacy of the Institutional System	267
	1.		e Dilemma of the National Parliaments	267
	2.	Th	e EP and its Representational Limits	269
	3.	Co	ncluding Proposal: A Semi-parliamentary Democracy	271
VI.	Su	mm	ary and Prospects	272
				275
			al Order of Competences	275
Arr	nin	von	Bogdandy and Jürgen Bast	
I.	In	trod	uction	275
II.	Tl	he C	urrent Order of Competences	278
	1.	Te	rminological and Theoretical Foundations	278
		a)	The Competence Requirement as an Evolutionary Achievement	278
		b)		280
		c)		283
		d)		284
		e)		285
		f)	Rules Regarding the Exercise of Powers	287
	2.	. T	pes of Federal Competences	287
		a)		289
		b	Concurrent Powers	290
		c)	Parallel Powers	294
		ď	Non-regulatory Powers	295

8

III	. Tł	e Lisbon Treaty's Constitutional Order of Competences	297
	1.	The Protection of Member States' Sovereignty	297
		a) The Basis for Competence	298
		b) A Critically Narrow Concept of Competence?	299
		c) Preservation and Enlargement of Article 308 EC as 'Flexibility Clause'	300
		d) Reinforced Protection of Essential State Functions and Fundamental	
		Structures	300
		e) The ECJ as Guardian of the Order of Competences	301
	2.	Protection of Member States' Scope of Action against Irregular Exercise of	
		Union Competences	302
		a) A Revised Principle of Subsidiarity and a Reconstructed Protocol	302
		b) Involvement of National Parliaments	303
		c) Revocability of Union Legal Acts	304
	3.	Transparency of the Order of Competences	305
		a) The New Presentation of the Order of Competences	305
		b) The Persistent Entanglement of Union and Member States	307
For	reigr	Affairs	309
Da	niel	Thym	
I.	Int	oduction	309
II.	Со	nstitutional Foundations	310
	1.	Particularity of Foreign Affairs	311
	2.	Transformation of the International Context	314
III.	Suj	oranational External Relations	316
	1.	Reach of Community Competences	317
		a) Expansive Phase	317
		b) Constitutional Consolidation	319
	2.	The Court of Justice and International Law	320
	3.	Supranational Decision-Making: Parliamentary Deficit?	323
	4.	Substantive Constraints of Foreign Affairs	326
		a) Judicial Control	326
		b) Political Questions?	328
		c) Substantive Orientation	329
IV.	Inte	rgovernmental Foreign Policy	330
	1.	Intergovernmental Decision-Making	331
	2.	Executive Authority in Military Matters	334
	3.	Characteristics of Intergovernmental Union Law	336
V.	Col	herence and Complementarity	338
	1.		338
	2.	riorizontal do operation zaropran e	339
	3.		341
VI.	Co	clusion	343

9

10	-	al In gen E	nstruments and Judicial Protection Bast	345		
	 I. Exercise of Public Authority and its Judicial Control as Complementary Constitutional Issues II. Sketching the Discipline's Development: Interplaying Discourses on Legal 					
	II.	Inst	tching the Discipline's Development: Interplaying Discourses on Legal cruments and Judicial Protection	348		
		1.	The ECSC as an Administrative Union: Supranational Decisions and Direct Actions of the Enterprises Concerned	348		
		2.	The EEC as a Legislative Union: Regulations and Indirect Judicial Protection	350		
		4.	a) The Regulation as the Standard Legal Instrument	350		
			b) Preliminary References as a Means of Legal Protection	352		
		3.	Legislation and Administration in a Composite Polity: Directives and			
			Protection of Rights Derived from Community Law	355		
			a) Discovery of the Directive as an Instrument of Legislation	355		
			b) The Protection Mandate of National Courts	358		
		4.	The EU of the Reform Decade: Proliferation of Instruments and Discovery			
			of Old and New Deficits in Protection	359		
			a) Framework Decisions and the Deficits in Legal Protection Connected to			
			the Pillar Structure	359		
			b) Simplification or Systematisation? Options for Reform of the Legal	2 (2		
			Instruments	362		
			aa) The Calls for Hierarchy and Simplification	362		
			bb) The Contribution of Legal Scholarship to the Reform of Legal Instruments	364		
			c) System Change or Fine-tuning the System? Options for the Reform of	301		
			Judicial Protection	366		
	III.	Do	ctrinal Analysis I: The Long Road to Formal Neutrality of Legal Protection	368		
		1.	The Concept of Reviewable Acts According to Article 230(1) EC: The General			
			Clause of Judicial Control	368		
		2.	The Concept of Contestable Decisions According to Article 230(4) EC: The			
			General Clause of Direct Legal Protection	370		
			a) Challenging Decisions Addressed to Individuals	370		
		_	b) Challenging Decisions Taken 'In the Form of a Regulation'	371		
	IV.	Do	octrinal Analysis II: Structural Choices Regarding the Order of Legal Instruments	373		
		1.	Structural Choice in Favour of an Open System of Legal Instruments	374		
			a) The Structure of Article 249 EC	374		
			 b) No Exhaustive Enumeration of Legal Instruments c) Limits of the System's Elevibility 	374		
		2.	, the officer striction y	376		
		۷.	The Structural Choice in Favour of a Non-hierarchical Unity of Secondary Law a) Equality of Law-making Institutions	377		
			a) Equality of Law-making Institutionsb) Equality of Law-making Procedures	377		
			c) Equality of Edw-making Procedures c) Equality of Binding Instruments	378 379		
			d) Equality of Treaty-based and Delegated Acts	375 380		
			e) Is the Lack of Hierarchy an Anomaly of the System?	381		
		3.	Structural Choice for a Differentiation of Legal Instruments According to	501		
			Legal Effects	382		

			a)	The Regime of Validity: Form-specific Requirements Concerning	
				Legality and Effectuality	383
				aa) Requirements for Taking Effect in Law	383
				bb) Legality Requirements	384
			b)	Operating Mode as the Key to the System of Instruments	386
	V.	Le		struments and Judicial Protection after the Lisbon Treaty	388
		1.		ructuring the Legal Instruments: Inventing the European 'Domain of Laws'	388
				Simplification	388
			b)	Hierarchisation	389
				aa) A Comparative Approach to the European Concept of Legislation	390
				bb) Reinforcing Public Scrutiny as the Defining Feature of the Concept of 'Legislation'	392
		2.	Inno	ovations for the Legal Protection of Individuals	394
			a)	Extending the Constitutional Standard Case: The Dismantling of the Third Pillar	<i>39</i> 4
				Modifying the Constitutional Standard Case: The Modest Reform of the	577
				Action for Annulment	395
					575
11	Mı	ultile	vel C	onstitutional Jurisdiction	39 9
			C May		
	I.	Tak	cing S	tock: The ECJ and the Highest National Courts—	
			-	or Co-operation?	400
		1.		pting a Procedural Perspective: The Duty to Make Preliminary	
				rences under Article 234(3) EC (Article 267(3) TFEU)	401
				Supreme National Courts and the Duty to Make References from the	
				Perspective of European Law	402
				The Preliminary Reference Practice of Supreme National Courts	403
				The National Supreme Courts' Reference Practices-A Mixed Bag?	406
		2.	The	Courts' Relationship from the Perspective of Substantive Law	407
			a) '	The Perspective of the ECJ	407
			b) '	The Perspective of the Highest National Courts	410
			á	a) The German BVerfG	410
				(1) Fundamental Rights: The Solange I and Solange II	
					411
				(2) Powers and Competences: The German <i>Maastricht</i> Decision	412
					415
			ł	(b) Other High Courts of the EU 15	415
				cc) The Highest Courts of the Youngest Members of the EU 27 and	
					418
		3.	Inter	-	420
	II.				421
		1.		· · · · · ·	421
		2.			425
			-		425
				0 11	426
				-	xvii

Contents

			a	a) Clarification: What Constitution? Constitutions, Verfassungsverbund	
				and Multilevel Constitutionalism	427
				(1) Constitutions and the Concept of Verfassungsverbund	427
				(2) Multilevel Systems	429
				b) The Role of Courts in a Multilevel System	430
				Objections to Composite and Multilevel European Constitutional	
				Adjudication	431
				aa) Asymmetry	431
			ł	bb) The Evaporation of Responsibilities—Who is to Define the	
				Common Good?	434
			(cc) Is There any Added Value in Theories of Composite Structures of	
			-	Adjudication?	434
				rim Summary	434
	111.			Developments in the Relationship between European and National Courts	435
				Courts and the Core Topics of the Constitutional Reform Process	435
			_	n Questions	436
	1 V.	Sun	nmar	y and Conclusion	438
Pa	rt I	[]:]	[he]	Legal Position of the Individual	441
12	Un	ion (Citize	nship	443
	Ste	fan F	Kadel	bach	
	I.	Intr	oduc	tion	443
	II.	The	e Not	ion of Union Citizenship	445
			Hist		445
		2.	The	Legal Concept of European Citizenship	449
				Nationality	449
			b)	Citizenship	449
				Union Citizenship	450
				aa) Nationality as a Condition for Union Citizenship	450
				bb) Union Citizenship as a Complement to State Citizenship	451
	III.	Ele	ment	s of Union Citizenship in Positive Law	452
		1.		vidual Rights Based on EC Law	452
				Fundamental Freedoms	452
			b)	Secondary Law: Union Citizens as Taxpayers, Welfare Recipients and	
		2		Consumers	453
		2.		nts of Union Citizens	454
				Freedom of Movement	454
			b)	Political Rights	455
				aa) The Right to Vote and to be Elected at the Local Level	455
				bb) Rights to Vote and to Stand for Elections to the European Parliament	456
			c) d)	Petition, Information, Access to Documents	457
		3.	Ria	Protection by Diplomatic and Consular Authorities	459
		5.	a)	hts of Union Citizens and Prohibition of Discrimination	461
			~)	The Link between Union Citizenship and the General Prohibition of Discrimination	
				Derivative Social Rights	461 462
				- Contai Iugilly	46Z

このできたいで、このことで、こので、こので、こので、こので、

			c) Der	ivative Cultural Rights	463
		4.	The Rel	ationship between Union Citizenship and Fundamental Rights	464
		5.	Duties o	of Union Citizens?	466
		6.	Interim	Evaluation	467
	IV.	Un	ion Citize	enship in the Lisbon Treaty	468
	V.	Th	e Future o	of Union Citizenship	469
		1.		Citizens in the European Multi-level System	469
			a) Citi	zen Status and Identity	469
			aa)	The Multinational Tradition	470
			bb)	Universalist Visions	472
			b) Ider	ntities of Citizenship in Multi-level Systems	473
			c) The	Complementary Relationship between Citizen Status and Political	
			Part	icipation	475
		2.	Union C	Citizenship and Democracy in Europe	475
		3.	Union C	Citizenship and European Constitution-making	477
	VI.	Co	ncluding	Remarks	477
13			nental Rig	ghts	479
	Jürş	gen .	Kühling		
	I.	Int	roduction	1	479
	II.	Ph	ases of De	evelopment of Fundamental Rights Protection	482
		1.		elopment of Fundamental Rights Protection by the ECJ	483
		2.		damental Rights Debate in the Era of the Charter of Fundamental	
			-	f the European Union	484
				e for a Radical Re-orientation of the Development of Fundamental	
			Rigl		484
				alyst Effect, but not Legally Binding	486
				rter of Fundamental Rights and 'Exit Protocol'—Cracks in the	100
		~		nmunity of Values?	488
	111.			nts of a Legal Doctrine of Fundamental Rights	489
		1.		ns and Necessary Development of the Legal Doctrine of	400
				ental Rights	489
			•	ctions of the Legal Doctrine of Fundamental Rights against the	489
				sground of Diverging Fundamental Rights Cultures	489
				Necessity of Further Development of the Present Legal Doctrine of damental Rights of the ECJ	491
		r		as and Classification of Fundamental Rights	492
		2.		ible Classifications	492
				ective (Negative) Rights and Positive Obligations	492
			b) Subj aa)	The Difference between Subjective (Negative) Rights and Positive	492
			dd)	Obligations	492
			bb)	Duty to Protect as Central Positive Obligation	493
			cc)	Derived Participatory Rights Corresponding with the Positive	175
				Obligation to Give Access to Collective Benefits	494
			dd)	Original Rights to Performance Corresponding with Positive	
			uu)	Obligations to Provide Benefits	495
					xix

	:	3.	Who is Bound by Fundamental Rights? The Reach of Fundamental Rights 4	196
			a) The Binding Effect on the Institutions of the EC and the EU 4	196
			b) The Binding Effect on the Member States as a Determinant of the	
			Vertical Scope of the Fundamental Rights of the Union 4	196
			aa) The Position of the ECJ-Fundamental Rights within the Scope of	
			Application of Community law 4	196
			bb) The ruture consonation of the 200 of the set	198
			ter merease of the Gase Gategories (structure)	199
		4.	who way assert i undamental regite.	501
			The Structure of Examination of Fundamental Rights 5	501
			a) Overview of the System of Examination 5	501
			b) The file file file of the and the file of the file	502
			c) Justification of an interference with runnamental regime	503
			aay interference wust be i bunded on a bega busis	503
			bb) Legitimate Objective	504
			(c) The trinciple of Hopothonanty	505
			(1) Suitability	506
			(2) recessity	506 506
			(b) Hoportionanty in the Wallow Source	507
			(i) begree of control and margin of ripprediation	510
			d) Particularities of the Examination of the Equality Principle and Positive	
			Obligations	511
	IV.	Ou		512
14	Fun	dan	nental Freedoms	515
	The	orste	n Kingreen	
	I.	Th	e Fundamental Freedoms in the Jurisprudential Discourse	515
	II.		e Fundamental Freedoms in the Processes of Europeanisation and	
		Co	nstitutionalisation	519
		1.	The Political Institutional Context I: The Horizontal Relationship between	
			the ECJ and the European Legislator	519
			-,	519
			b) The Fundamental Freedoms after the Single European Act	522
			c) The Fundamental Freedoms in the Era of Constitutionalisation	523
		2.	The Political Institutional Context II: The Vertical Relation between the ECJ	
			6 State Province of States	525
				525
			b) The Fundamental Freedoms in the Constitutional Federation of the	
			1	527
		3.	0 pranacional Elegininacion.	530
	III.			532
		1.	and the stope of the full and the fire of the	532
				532
			aa) Review of an Understanding of the Fundamental Freedoms as	
			Rights of Freedom	532

いいですうとうためしまでいるないない

	bb) A New Attack on the Keck Formula: The Opinion of AG Maduro in Alfa Vita Vassilopoulos	534
	b) Consequences on the Test of the Justification of the Interference	538
	2. The Reservation of Statutory Powers	542
	3. The Union as Addressee of the Fundamental Freedoms?	543
	 The onion as ruditisee of the Fundamental freedoms. The Fundamental Rights as Part of the Test of Proportionality of Means and 	545
	Ends	543
	IV. The Horizontal Effect of the Fundamental Freedoms	545
	1. Direct Horizontal Effect?	545
	2. The Alternative: The Right to Protection	547
	V. Conclusion	549
15	The Area of Freedom, Security and Justice	551
	Jörg Monar	
	I. Introduction	552
	1. Relevance of the Subject	552
	2. Scope of the Subject	553
	3. Methodology	554
	II. The Fundamental Treaty Objective and its Conceptual Dimension	554
	1. The AFSJ as a Fundamental Treaty Objective	554
	2. The Concept of Area	556
	3. The Concept of Freedom	558
	4. The Concept of Security	559
	5. The Concept of Justice	560
	III. The AFSJ in the Treaty Architecture	562
	1. The Pillar Divide	562
	2. Implications of the Pillar Divide	564
	3. A Contested Divide	565
	4. The Abolition of the Pillar Structure by the Treaty of Lisbon	567
	IV. Differentiated Participation as a Constitutional Component of the AFSJ	569
	1. Differentiation as a Constitutional Issue	569
	2. The Opt-outs	569
	3. The Opt-in Possibilities	570
	4. The 'Enhanced Cooperation' Possibilities	571
	5. The position of the Schengen 'Associates'	572
	V. An Area of Cooperation rather than Integration	573
	1. The Cooperative Orientation of the Current Treaty Framework	573
	2. The Commission and the Court as (Limited) Factors of Integration	575
	3. The Reaffirmation of the Cooperation Rationale by the Treaty of Lisbon	578
	VI. The Place of the Individual in an Area of Cooperating Member States	578
	1. The Individual as a Passive Beneficiary of the AFSJ	578
	2. Two Missed Opportunities: The Charter of Fundamental Rights and	
	Union Citizenship	579
	3. The Protection of the Rights of the Individual	580
	VII. Conclusions	584

Par	rt IV	V: T	The Constitution of the Social Order 5	87
				589
			Hatje	589
	I.		nomic Constitution and European integration	589
		1.	Terminology and Functions of the Economic Constitution	590
		2.		590
			a) Approach b) Definitions	591
			c) Delimitations	592
		3.	The European Economic Constitution	592
		J.	a) Expansion of the Debate to a Superior Reference System	592
			b) The Composite Character of the European Economic Constitution	593
			c) Functional Characteristics of the European Economic Constitution	593
		4.	Scope for Economic Policy Formation	594
	II.	AS	Systemic Choice and its Legal Guarantees	594
		1.	The Choice in Favour of an Open Market Economy and Free Competition	594
			a) Legal Quality	595
			D) Contents	595
		2.	Guarances of a Market Economy	596
			a) Private Autonomy as Fundamental Requirement for a Market Economic	5 0 (
			System	596
			aa) The Economic Farticipant as Legal Terson	596 597
			bb) metvidual and Entrepreneurial recedin of Action	597
			cc) Equal Rights for Market Participants	597 597
			b) Co-ordination through Trade on the Open Markets	598
			 aa) Assured Availability of Products and Services (1) Private Programmer 	598
			(1) Private Property(2) Stable Currency	598
			bb) Reduction of Market Barriers through Fundamental Freedoms	599
			cc) Freedom of Communication	600
			dd) Limited External Access	600
			c) Competition as an Instrument of Co-ordination	601
			aa) Legal Framework	601
			bb) Areas Excluded from Competition	602
			cc) Competition and Market Malfunction	603
		3.	Guarantees of the Market and Economic Policies	603
			a) Goals of Community Activities	603
			b) Instruments	603
			c) Consequences for a Theory of a European Economic Constitution	604
	II	I. Fe	ormative Scope of the Community in Economic Policy	604
		1.		604
		2	Areas of Community Economic Policies	605
			a) Regulatory Policy (Ordnungspolitik)	605
			aa) Opening the Market by Approximation	605
			bb) Liberalising Regulated Markets	606
			b) Procedural Policy	606

			aa)	Financial Policy	606
			bb)	Structural Assistance Measures	607
			cc)	Employment Policy	607
			dd)	Environmental Policy	608
		c)	Dist	ribution and Social Policies	609
			aa)	Distribution Policy Goals of the Community	609
			bb)	Supplementary Social Policy	610
				(1) Co-ordination of the Systems Providing Social Services	610
				(2) Supplementation of National Activities	610
			cc)	Starting Points for European Employment and Social Order	610
		d)		dom of Choice in the Framework of Comprehensive Clauses	611
	3.	Fo		ve Boundaries	611
		a)	Incre	eased Effectiveness of Market Integrative Instruments	611
			aa)	Levels of Autonomy	611
			bb)	Procedural Safeguards	612
		b)	Subs	tantive Safeguards	612
			aa)	Principle of Subsidiarity	612
			bb)	Reservation Clauses	612
				(1) Provisions Supporting the Establishment and Functioning of	
				the Internal Market	612
				(2) Provisions Ensuring Undistorted Competition	613
				Effectiveness	613
		c)		len of Justification	614
			aa)	Subjective Rights and the Necessity of Justification	614
				Proportionality or a Minimum of Intervention Rule	614
	4.			netary Union in the Economic Constitution	615
IV.				onary Power of the Member States in the Field of Economic Policy	615
	1.			Constitutional Law	615
		a)	•	emic Choices	615
		b)		rantees of a Market Economy	616
	•	c)		ventionist Tendencies	616
	2.			Relevant Discretionary Powers	616
		a)	Ų	latory Policy Regulations	617
				National Systems of Property Ownership	617
				Guarantees in Favour of Services of General Economic Interest	617
		b)	-	e for Procedural Policy Formulation	618
		c)	-	e for Distribution Policy	618
		d)		Problem of System Competition	619
	3.			Discretionary Powers	619
		a)		ket Economic Orientation	619
		b)	-	ntitative Limitation of Financial Intervention Potential	620
		c)	-	ortionality as a Limit to Intervention	620
				Legitimisation Based upon European Standards	620
	-			Aptitude and Necessity as Precept of Minimum Intervention	620
V.	Per	spec	tives		622

17		e Labour Constitution rian Rödl	623
	I.	Introduction	623
		1. European Constitution and Social Order	623
		2. The Concept of a Labour Constitution	625
	II.	The EEC Labour Constitution and the Social Compromise for Integration	627
		1. The base rooms of the EEO Eabour Constitution	628
		2. The Foundation and Function of the EEC Labour Constitution	629
		a) The Promise of Neoclassical Economics	629
		b) The Social Compromise for Integration	630
		3. The Form of the European Labour Constitution and Social Change	632
	III.	The Guilent state of the Eo Euson Sonstation	633
			633
			633
		b) Guiung Hornis	635
		of competences	636
			637
	IV.		639
		1. An Integrated European Labour Constitution 'in the Making'?	639
		a) Milestones in the Development of the EU Labour Constitution	639
		aa) The Introduction of Autonomous Labour-constitutional	
		Competences: The Single European Act (1987) and the Social	
		restront of Mastricht (1995)	639
		bb) The Constitutionalisation of Rights: The Community Charter of the	
		Fundamental Social Rights of Workers (1989) and the EU Charter	
			641
		cc) The Proliferation of Guiding Norms: The Social Agreement of	(12)
		(1)))	642
		, intervention in the nearly of Lisbon	643
		, and foncied decisionnearly francineur risymmetry	643
		b , and a constitution for the EG.	645
		and the Labour Constitution in an Association of Labour Constitutions	647
		s state state subour constitution futorionly	647
		 aa) Horizontal Protection: Conflict of Labour Laws and Fundamental Freedoms 	647
			647
		bb) Vertical Protection: European Competition Law and Internal Market Law	650
			651
		, presente for a market functional Substantive Labour Law	652
			052
		bb) The Harmonisation of Markets for Machinery, Production Material and Facility Sites	652
		cc) The Harmonisation of Other Technical and Social Occupational	200
		Health and Safety Provisions	653
			654
		c) Transnationalisation of Labour-constitutional Rights	654
		aa) Transnational Freedom of Exercise of Profession	655
		The second rectain of Exercise of Profession	000

あんない かまやなになる しょういいしい

		bb) Transnational Participation Rights	655
		cc) Transnational Collective Bargaining Rights	656
	V.	Conclusion	658
18		mpetition Law as Part of the European Constitution	659
	Jose	ef Drexl	
	I.	Introduction: Between the Lisbon Treaty and the	
		Economic Approach	659
	II.	The Effects of the Lisbon Treaty on Competition Law	661
		1. Protecting Undistorted Competition in the Internal Market-Still an	
		Objective of Union Law?	662
		a) Analysis of the Lisbon Treaty's New Provisions	662
		b) The Guarantee of Undistorted Competition as a Limitation to the	
		Possibility to Outbalance the Competition Goal by Reference to	
		Conflicting Goals	664
		c) Harming the 'Structure of Competition' as an Abuse of Market Dominance	665
		2. Repositioning the Guarantee of the 'Open Market Economy with Free	
	111	Competition' in the Lisbon Treaty	667
	ш.	The Economic Approach to Competition Law as a Response to an Application	(())
		Problem 1. Historic Development and Characterisation of the Mars Foonemic American	669 669
		 Historic Development and Characterisation of the More Economic Approach The Block Exemption Regulation on Vertical Agreements of 1999: The 	007
		New 'Effects-Based' Approach	669
		b) Direct Application of Article 81(3) EC	671
		c) Reform of Merger Control Law	672
		d) Reform of the Application of Article 82 EC	673
		e) Reforming Competition Law Enforcement and Strengthening Private	
		Enforcement	676
		f) Conclusion	679
		2. Lack of Legal Certainty	679
		3. Making Predictions on Future Effects	681
		4. The Excessive Claim of Knowledge	682
		5. The Disregard of the Institutional Dimension	684
	Π7	6. Plea for an 'Even More Economic Approach'	684
	IV.	The Objectives of Competition Law from an Economic Perspective	685
		 Consumer Welfare as an Objective of European competition law a) The Recognition of Consumer Welfare as an Objective by Community 	685
		a) The Recognition of Consumer Welfare as an Objective by Community Institutions	685
		b) The Objective of Consumer Welfare in European Competition Policy	685
		c) Consumer Welfare as an Objective from the Perspective of the European	005
		Constitutional Order	686
		2. The Consumer Surplus Standard in European Competition Law	687
		a) The Economic View	687
		b) The Legal Situation under European competition law	688
		c) The Consumer Surplus Approach and the Efficiency Defence from the	
		Perspective of the European Constitutional Order	689

			XXV

	3. Consumer Harm as a Requirement for a Restraint of Competition	690
	a) The Economic View	690
	b) Practice of European Competition Policy	691
	c) The Consumer Harm Requirement from the Perspective of the	
	European Constitutional Order	692
	4. Conclusion	693
V.	The Economic Approach in the Light of Constitutional Objectives	694
	1. The Freedom Paradigm	694
	a) The Economic Freedom of Action of Individual Market Participants	694
	b) Protecting the Freedom of Competition	695
	2. Economic Integration	696
VI	. Conclusion	697
Part V	V: Contending Visions of European Integration	699
19 Th	ne European Union as a Federal Association of States and Citizens	701
Ul	rich Everling	
I.	Introduction	701
II.	Foundations of the European Union	703
	1. Goals of the Union	703
	a) Establishment of the Union	703
	b) Development of the Original Goals	704
	2. The European Union as a Political Union	705
	a) The Political Core of the Economic Integration	705
	b) Connection to the Politics of the Member States	706
	3. The European Union as an Economic Union	708
	a) Opening of the National Markets	708
	b) Competition Policy and Other Economic Policies	710
II	I. The Institutions in the System of the European Union	711
	1. Peculiarities of the Institutional System	711
	a) Pluralism of the Political Parties	711
	b) Participation of the Administrations in the Decision-making Process	712
	2. The Union's Decision-making Process	713
	a) Majority Decisions	713
	b) Delegation of Implementing Measures	715
	3. Competences and Legitimation of Law-making in the Union	716
	a) Distribution of Competences	716
	b) Legitimacy of Law-making	718
Г	V. The Constitutional and Legal Order of the European Union	720
	1. The Constitutional Structure of the Union	720
	a) Discussion on the Constitution of the Union	720
	b) Organisational Structure of the Union	721
	2. The Union as a Community of Law	722
	a) Principles of the Rule of Law	722
	b) General Principles of Law	724
	3. System of Judicial Protection	725
	a) The European Judiciary	725

AND THE FULL OF CALLS OF

		b) Judicial Protection and Procedural Rules	727
	V.	The Legal Nature and Future of the European Union	729
		1. The Position of the Member States in the Union	729
		a) The Identity of the Member States	729
		b) Restrictions Imposed on the Member States	730
		2. Grouping the Views on the Union's Legal Nature	731
		a) An Attempt at Interpretation	731
		b) Summing up the Different Views in the Federal Principle	733
		3. Conclusions and Outlook	734
20	Th	e European Union of States	735
	Pai	ıl Kirchhof	
	I.	The Rejection of the Treaty Establishing a Constitution for Europe	735
		1. The European Community of Law as a Community of Measurement	735
		a) The Demand for More Democracy	736
		b) No Constitution-Making	737
		2. The Integration's Reality and Aspiration	738
		3. Constitution—a Uniform Text or the Basic Structure of a State?	739
		4. A Perpetualising Constitution and the Dynamic Order of Development	740
	II.	The Relationship between Constitutional Law and European Law	741
		1. The Constitutional Requirements for the Application of European Law	741
		2. The European Union as a Union of States	743
		3. The Europeanisation of Constitutional Law	745
		4. A Multi-level Model?	745
	III.	The State	746
		1. Statehood and Openness to Europe	746
		2. The People Encountered in Liberty	747
		3. Sovereignty	748
		4. New Challenges for the State	750
	IV.	The State in a Union	751
		1. Development of a Common Constitutional Law in the Aftermath of the	
		Maastricht Treaty	751
		2. Supranationality	754
		3. The Vitality of the State Declared Dead	755
		4. The Mandate of Co-operation	756
		5. Modern Forms of Balance of Powers	757
		a) The Legal Sources	758
		b) The Liberty-ensuring Balance of Powers	758
		c) Correctness of and Responsibility for Decisions	759
		d) Organisations for the Future and the Present	760
		aa) The Future-oriented European Power	760
		bb) The Present-oriented Power of the Member States	760
		e) Co-operation between Powers	761
		6. A Europe of States as an Opportunity for Peace and Freedom	761

Ι	і. Т II. Т	red Zuleeg he European Constitution—A Fact he Advantages in Detail . The Advantages of the European Institutions a) The European Community as a Community Based on the Rule of Law	763 765 765 765
	II. T	he Advantages in DetailThe Advantages of the European Institutionsa) The European Community as a Community Based on the Rule of Law	765
		The Advantages of the European Institutionsa) The European Community as a Community Based on the Rule of Law	
	1	a) The European Community as a Community Based on the Rule of Law	765
			,
		b) The Treaties as the Foundation of the European Constitution	766
		c) The Organisational Structure	766
		d) The Legislative Process of the European Union	768
		e) Legal Acts	769
	2		770
	3		770
	4	Constitutional Principles	772
		a) Democracy	772
		b) The Rule of Law	773
		c) Federative Principles	774
		d) Protection of Fundamental Rights	777
	4	. The European Legal Order's Structural Characteristics	777
	(5. The Constitution's Scope	779
	III. I	Recent Developments	780
		1. The Need for a Constitution	780
		2. The Manageability of the European Constitution	781
		3. The Lisbon Treaty and the Further Constitutionalisation of the Union	781
		a) Adjustment to Future Challenges	781
		b) Form and Content of the Treaties after Lisbon	782
		c) The Institutional Structure of the Union post-Lisbon	782
		d) The Strengthening of Democracy and the Rule of Law in the EU	783
		e) Fundamental Rights	783
		f) The Distribution of Competences between Member States and Union	783
		4. Differentiated Co-operation Instead of Renunciating Integration	784
	IV.	Forecast	785

Index

787

のなどの