

European Constitutional
Law

Second Edition

ROBERT SCHÜTZE

Dipartimento di Scienze Politiche Biblioteca	
Inv.	DSP 8752
Coll.	ORGINT. 341.1.C. 16/6

Table of Contents

<i>Introduction: European Constitutional Law</i>	lxiii
<i>Part I: Constitutional Foundations</i>	
1 Constitutional History: From Paris to Lisbon	3
2 Constitutional Nature: A Federation of States	43
3 European Law I: Nature – Direct Effect	77
4 European Law II: Nature – Supremacy/Pre-emption	117
5 Governmental Structure: Union Institutions I	147
6 Governmental Structure: Union Institutions II	185
<i>Part II: Competences and Procedures</i>	
7 Legislative Powers: Competences and Procedures	223
8 External Powers: Competences and Procedures	263
9 Executive Powers: Competences and Procedures	302
10 Judicial Powers I: (Centralised) European Procedures	343
11 Judicial Powers II: (Decentralised) National Procedures	394
12 Judicial Powers III: EU Fundamental Rights	429
<i>Appendices</i>	471
1. How to Find the EU Treaties	473
2. How to Find (and Read) EU Secondary Law	476
3. How to Find (and Read) EU Court Judgments	479
4. How to Find EU Academic Resources	483

Detailed Contents

<i>List of Illustrations</i>	xviii
<i>List of Tables</i>	xx
<i>List of Cases</i>	xxi
<i>List of Secondary Law</i>	xlvii
<i>Table of Equivalents</i>	liii
<i>List of Abbreviations</i>	lix
<i>Acknowledgements</i>	lxi
Introduction: European Constitutional Law	lxiii
Part I Constitutional Foundations	1
1 Constitutional History: From Paris to Lisbon	3
<i>Introduction</i>	3
1. From Paris to Rome: The European Coal and Steel Community	7
<i>a. The (Supranational) Structure of the ECSC</i>	8
<i>b. The (Failed) European Defence Community</i>	10
2. From Rome to Maastricht: The European (Economic) Community	12
<i>a. Normative Supranationalism: The Nature of European Law</i>	13
<i>b. Decisional Supranationalism: The Governmental Structure</i>	14
<i>c. Intergovernmental Developments outside the EEC</i>	18
<i>d. Supranational and Intergovernmental Reforms through the Single European Act</i>	20
3. From Maastricht to Nice: The (Old) European Union	22
<i>a. The Temple Structure: The Three Pillars of the (Maastricht) Union</i>	23
<i>aa. The First Pillar: The European Communities</i>	24
<i>bb. The Second Pillar: Common Foreign and Security Policy</i>	26
<i>cc. The Third Pillar: Justice and Home Affairs</i>	27
<i>b. A Decade of ‘Constitutional Bricolage’: Amsterdam and Nice</i>	27
<i>aa. The Amsterdam Treaty: Dividing the Third Pillar</i>	28
<i>bb. The Nice Treaty: Limited Institutional Reform</i>	30
4. From Nice to Lisbon: The (New) European Union	32
<i>a. The (Failed) Constitutional Treaty: Formal ‘Total Revision’</i>	33
<i>b. The Lisbon Treaty: Substantive ‘Total Revision’</i>	36

<i>Conclusion</i>	39
<i>Further Reading</i>	41
2 Constitutional Nature: A Federation of States	43
<i>Introduction</i>	43
1. The American Tradition: Federalism as (Inter)national Law	45
a. <i>Madisonian Federalism: Three Dimensions</i>	45
b. <i>The 'Mixed Constitution' and the Sovereignty Question</i>	48
2. The European Tradition: International versus National Law	50
a. <i>Conceptual Polarisation: 'Confederation' versus 'Federation'</i>	50
b. <i>Early Criticism: The European Tradition and the (Missing) Federal Genus</i>	53
3. The European Union in Light of the American Tradition	56
a. <i>Foundational Dimension: Europe's 'Constitutional Treaties'</i>	56
b. <i>Institutional Dimension: A European Union of States and People(s)</i>	59
c. <i>Functional Dimension: The Division of Powers in Europe</i>	61
d. <i>Overall Classification: The European Union on Federal 'Middle Ground'</i>	62
4. The European Union in Light of the European Tradition	62
a. <i>The Sui Generis 'Theory': The 'Incomparable' European Union</i>	63
b. <i>The International Law Theory: The 'Maastricht Decision'</i>	65
c. <i>Europe's Statist Tradition Unearthed: Three Constitutional Denials</i>	67
d. <i>Excursus: Europe's 'Democratic Deficit' as a 'False Problem'?</i>	71
<i>Conclusion</i>	73
<i>Further Reading</i>	76
3 European Law I: Nature – Direct Effect	77
<i>Introduction</i>	77
1. Primary Union Law: The Effect of the Treaties	82
a. <i>Direct Effect: From Strict to Lenient Test</i>	84
b. <i>The Dimensions of Direct Effect: Vertical and Horizontal Direct Effect</i>	87
2. Direct Union Law: Regulations and Decisions	89
a. <i>Regulations: The 'Legislative' Instrument</i>	89
aa. <i>General Application in All Member States</i>	90
bb. <i>Direct Application and Direct Effect</i>	91
b. <i>Decisions: The Executive Instrument</i>	93
aa. <i>Specifically Addressed Decisions</i>	93
bb. <i>Non-addressed Decisions</i>	95

3. Indirect Union Law: Directives	95
a. <i>Direct Effect and Directives: Conditions and Limits</i>	96
aa. <i>The No-horizontal-direct-effect Rule</i>	98
bb. <i>The Limitation to the Rule: The Wide Definition of State (Actions)</i>	100
cc. <i>The Exception to the Rule: Incidental Horizontal Direct Effect</i>	101
b. <i>Indirect Effects through National and (Primary) European Law</i>	103
aa. <i>The Doctrine of Consistent Interpretation of National Law</i>	103
bb. <i>Indirect Effects through the Medium of European Law</i>	105
4. External Union Law: International Agreements	109
a. <i>The Conditions of Direct Effect</i>	110
b. <i>The Dimensions of Direct Effect</i>	112
Conclusion	114
Further Reading	115
4 European Law II: Nature – Supremacy/Pre-emption	117
Introduction	117
1. The European Perspective: Absolute Supremacy	118
a. <i>The Absolute Scope of the Supremacy Principle</i>	120
aa. <i>Supremacy over Internal Laws of the Member States</i>	120
bb. <i>Supremacy over International Treaties of the Member States</i>	122
b. <i>The ‘Executive’ Nature of Supremacy: Disapplication, Not Invalidation</i>	124
2. The National Perspective: Relative Supremacy	127
a. <i>Fundamental Rights Limits: The ‘So-long’ Jurisprudence</i>	129
b. <i>Competences Limits: From ‘Maastricht’ to ‘Mangold’</i>	131
3. Legislative Pre-emption: Nature and Effect	134
a. <i>Pre-emption Categories: The Relative Effects of Pre-emption</i>	134
aa. <i>Field Pre-emption</i>	135
bb. <i>Obstacle Pre-emption</i>	136
cc. <i>Rule Pre-emption</i>	136
b. <i>Modes of Pre-emption: Express and Implied Pre-emption</i>	137
4. Constitutional Limits to Legislative Pre-emption	139
a. <i>Union Instruments and their Pre-emptive Capacity</i>	139
aa. <i>The Pre-emptive Capacity of Regulations</i>	139
bb. <i>The Pre-emptive Capacity of Directives</i>	141
cc. <i>The Pre-emptive Capacity of International Agreements</i>	142
b. <i>Excursus: Competence Limits to Pre-emption</i>	144
Conclusion	144
Further Reading	146

5	Governmental Structure: Union Institutions I	147
	<i>Introduction</i>	147
1.	The 'Separation-of-Powers' Principle and the European Union	150
2.	The European Parliament	154
	<i>a. Formation: Electing Parliament</i>	155
	<i>aa. Parliament's Size and Composition</i>	156
	<i>bb. Members of the European Parliament and Political Parties</i>	158
	<i>b. Internal Structure: Parliamentary Organs</i>	160
	<i>c. The Plenary: Decision-making and Voting</i>	162
	<i>d. Parliamentary Powers</i>	164
	<i>aa. Legislative Powers</i>	164
	<i>bb. Budgetary Powers</i>	165
	<i>cc. Supervisory Powers</i>	166
	<i>dd. Elective Powers</i>	167
3.	The European Council	169
	<i>a. The President of the European Council</i>	170
	<i>b. The European Council: Functions and Powers</i>	172
4.	The Council of Ministers	173
	<i>a. The Council: Composition and Configuration</i>	173
	<i>b. Internal Structure and Organs</i>	175
	<i>aa. The Presidency of the Council</i>	175
	<i>bb. 'Coreper' and Specialised Committees</i>	176
	<i>cc. Excursus: The High Representative of Foreign Affairs and Security Policy</i>	178
	<i>c. Decision-making and Voting</i>	179
	<i>d. Functions and Powers</i>	183
6	Governmental Structure: Union Institutions II	185
1.	The Commission	185
	<i>a. Composition and Structure</i>	186
	<i>aa. The President and 'his' College</i>	187
	<i>bb. The Commission's Administrative Organs</i>	190
	<i>b. Decision-making within the Commission</i>	190
	<i>c. Functions and Powers of the Commission</i>	192
	<i>d. Excursus: European Agencies and the Commission</i>	195
	<i>aa. European Agencies: Functions</i>	196
	<i>bb. European Agencies: Structure</i>	197
2.	The Court of Justice of the European Union	198
	<i>a. Judicial Architecture: The European Court System</i>	198
	<i>aa. The Court of Justice: Composition and Structure</i>	199
	<i>bb. The General Court: Composition and Structure</i>	201
	<i>cc. Excursus: The Advocates General</i>	202
	<i>dd. The 'Specialised Court(s)': The Civil Service Tribunal</i>	203
	<i>b. Judicial Procedure(s)</i>	204

c. <i>Judicial Reasoning: Methods of Interpretation</i>	206
d. <i>Jurisdiction and Judicial Powers</i>	207
3. <i>The European Central Bank</i>	209
a. <i>The Special Status of the ECB</i>	209
b. <i>Organs and Administrative Structure</i>	211
c. <i>Internal Divisions and Decision-making</i>	213
d. <i>Functions and Powers</i>	214
4. <i>The Court of Auditors</i>	216
<i>Conclusion</i>	218
<i>Further Reading</i>	219
7 Legislative Powers: Competences and Procedures	223
<i>Introduction</i>	223
1. <i>The Scope of Union Competences</i>	224
a. <i>Teleological Interpretation</i>	225
b. <i>The General Competences of the Union</i>	229
aa. <i>The Harmonisation Competence: Article 114</i>	229
bb. <i>The Residual Competence: Article 352</i>	231
2. <i>The Categories of Union Competences</i>	235
a. <i>Exclusive Competences: Article 3</i>	237
b. <i>Shared Competences: Article 4</i>	238
aa. <i>General Considerations</i>	238
bb. <i>Minimum Standard Competences</i>	240
c. <i>Coordinating Competences: Article 5</i>	241
d. <i>Complementary Competences: Article 6</i>	242
3. <i>Legislative Procedures: Ordinary and Special</i>	243
a. <i>The 'Ordinary' Legislative Procedure</i>	245
aa. <i>Constitutional Text: Formal Procedure</i>	245
bb. <i>Constitutional Practice: Informal Trilogues</i>	249
b. <i>The 'Special' Legislative Procedures</i>	251
4. <i>The Principle of Subsidiarity</i>	252
a. <i>Procedural Standard: Subsidiarity as a Political Safeguard of Federalism</i>	253
b. <i>Substantive Standard: Subsidiarity as a Judicial Safeguard of Federalism</i>	256
<i>Conclusion</i>	259
<i>Further Reading</i>	261
8 External Powers: Competences and Procedures	263
<i>Introduction</i>	263
1. <i>The External Competences of the Union</i>	265
a. <i>The Common Foreign and Security Policy</i>	267
b. <i>The Union's Special External Powers</i>	268

c.	<i>The 'Residual' Treaty Power: From ERTA to Article 216</i>	270
aa.	<i>ERTA and the Doctrine of Implied Powers</i>	270
bb.	<i>Article 216: Codifying ERTA?</i>	272
d.	<i>The Relationship between the CFSP and the Special Competences</i>	273
2.	<i>The Nature of External Competences</i>	276
a.	<i>The Sui Generis Nature of the CFSP Competence</i>	276
b.	<i>Article 3(2): Subsequently Exclusive Treaty Powers</i>	278
aa.	<i>Three Lines of Exclusivity: Codifying Constitutional Practice?</i>	278
bb.	<i>Subsequent Exclusivity: A Critical Analysis</i>	279
3.	<i>External Decision-making Procedures</i>	280
a.	<i>The 'Specificity' of CFSP Decision-making Procedures</i>	281
aa.	<i>Institutional Actors and Institutional Balance</i>	281
bb.	<i>Voting Arrangements in the Council</i>	282
b.	<i>The Union's (Ordinary) Treaty-making Procedure</i>	283
aa.	<i>Initiation and Negotiation</i>	284
bb.	<i>Signing and Conclusion</i>	286
cc.	<i>Modification, Suspension (and Termination)</i>	288
dd.	<i>Union Succession to Member State Agreements</i>	289
4.	<i>Sharing External Power: Constitutional Safeguards of Federalism</i>	290
a.	<i>Mixed Agreements: An International and Political Safeguard</i>	291
b.	<i>The Duty of Cooperation: An Internal and Judicial Safeguard</i>	293
aa.	<i>Member States as 'Trustees of the Union'</i>	295
bb.	<i>'Reversed' Subsidiarity: Restrictions on the Exercise of Shared State Power</i>	296
	<i>Conclusion</i>	298
	<i>Further Reading</i>	300
9	<i>Executive Powers: Competences and Procedures</i>	302
	<i>Introduction</i>	302
1.	<i>Governmental Powers: The Union's Dual Executive</i>	304
a.	<i>The Legal Instruments of Political Leadership</i>	305
b.	<i>The Informal Procedure(s) of Government</i>	307
2.	<i>Law-making Powers: Delegated and Implementing Acts</i>	309
a.	<i>The Delegation of 'Legislative' Power: Article 290</i>	311
aa.	<i>Judicial Safeguards: Constitutional Limits to Delegated Acts</i>	313
bb.	<i>Political Safeguards: Control Rights of the Union Legislator</i>	315
b.	<i>The 'Conferral' of Executive Power: Article 291</i>	318
aa.	<i>The Scope of Article 291</i>	318
bb.	<i>Constitutional Safeguards for Implementing Legislation</i>	321
c.	<i>Excursus: Delegating 'Implementing' Power to Agencies</i>	324
3.	<i>Administrative Powers I: Centralised Enforcement</i>	327
a.	<i>The Scope of the Union's Administrative Powers</i>	328
b.	<i>Administrative Powers and the Subsidiarity Principle</i>	331

4. Administrative Powers II: Decentralised Enforcement	334
a. <i>The Effects of National Administrative Acts</i>	335
b. <i>National Administrative Autonomy (and its Limits)</i>	336
<i>Conclusion</i>	340
<i>Further Reading</i>	341
10 Judicial Powers I: (Centralised) European Procedures	343
<i>Introduction</i>	343
1. Annulment Powers: Judicial Review	347
a. <i>The Existence of a ‘Reviewable’ Act</i>	349
b. <i>Legitimate Grounds for Review</i>	350
aa. <i>‘Formal’ and ‘Substantive’ Grounds</i>	351
bb. <i>In Particular: The Proportionality Principle</i>	352
c. <i>Legal Standing before the European Court</i>	354
aa. <i>The Rome Formulation and its Judicial Interpretation</i>	355
bb. <i>The Lisbon Formulation and its Interpretative Problems</i>	359
d. <i>The Indirect Review of European Law</i>	363
aa. <i>Collateral Review: The Plea of Illegality</i>	363
bb. <i>Indirect Review through Preliminary Rulings</i>	364
2. Remedial Powers: Liability Actions	365
a. <i>Procedural Conditions: From Dependent to Independent Action</i>	366
b. <i>Substantive Conditions: From Schöppenstedt to Bergaderm</i>	368
3. Adjudicatory Powers I: Enforcement Actions	370
a. <i>Enforcement Actions against Member States</i>	371
aa. <i>The Procedural Conditions under Article 258</i>	371
bb. <i>Judicial Enforcement through Financial Sanctions</i>	373
b. <i>Enforcement Actions against the Union: Failure to Act</i>	375
4. Adjudicatory Powers II: Preliminary Rulings	377
a. <i>Paragraph 1: The Jurisdiction of the European Court</i>	378
b. <i>Paragraph 2: The Conditions for a Preliminary Ruling</i>	380
aa. <i>‘Who’: National Courts and Tribunals</i>	380
bb. <i>‘What’: Necessary Questions</i>	382
c. <i>Paragraph 3: The Obligation to Refer and ‘Acte Clair’</i>	385
d. <i>The Legal Nature of Preliminary Rulings</i>	388
<i>Conclusion</i>	391
<i>Further Reading</i>	392
11 Judicial Powers II: (Decentralised) National Procedures	394
<i>Introduction</i>	394
1. The (Consistent) Interpretation Principle	399
2. The Equivalence Principle	401
a. <i>Non-discrimination: Extending National Remedies to European Actions</i>	401
b. <i>‘Similar’ Actions: The Equivalence Test</i>	402

3.	The Effectiveness Principle	404
a.	<i>The Historical Evolution of the Effectiveness Standard</i>	404
aa.	<i>First Period: Judicial Restraint</i>	405
bb.	<i>Second Period: Judicial Intervention</i>	406
cc.	<i>Third Period: Judicial Balance</i>	408
b.	<i>Procedural Limits to the Invocability of European Law</i>	410
4.	The Liability Principle	413
a.	<i>State Liability: The Francovich Doctrine</i>	414
aa.	<i>The Three Conditions for State Liability</i>	417
bb.	<i>State Liability for Judicial Breaches of European Law</i>	420
b.	<i>Private Liability: The Courage Doctrine</i>	422
	<i>Conclusion</i>	425
	<i>Further Reading</i>	426
12	Judicial Powers III: EU Fundamental Rights	429
	<i>Introduction</i>	430
1.	The 'Unwritten' Bill of Rights: Human Rights as 'General Principles'	431
a.	<i>The Birth of EU Fundamental Rights</i>	432
aa.	<i>The European Standard – An 'Autonomous' Standard</i>	434
bb.	<i>Limitations, and 'Limitations on Limitations'</i>	437
b.	<i>United Nations Law: External Limits to European Human Rights?</i>	439
2.	The 'Written' Bill of Rights: The Charter of Fundamental Rights	442
a.	<i>The Charter: Structure and Content</i>	443
aa.	<i>(Hard) Rights and (Soft) Principles</i>	444
bb.	<i>Limitations, and 'Limitations on Limitations'</i>	446
b.	<i>Relations with the European Treaties (and the European Convention)</i>	448
3.	The 'External' Bill of Rights: The European Convention on Human Rights	450
a.	<i>The Convention Standard for Union Acts</i>	452
aa.	<i>Before Accession: (Limited) Indirect Review of Union Acts</i>	452
bb.	<i>After Accession: (Full) Direct Review of Union Acts</i>	454
b.	<i>Union Accession to the European Convention: Constitutional Preconditions</i>	455
4.	The 'Incorporation Doctrine': EU Fundamental Rights and National Law	457
a.	<i>Incorporation and General Principles: Implementation and Derogation</i>	457
b.	<i>Incorporation and the Charter of Fundamental Rights</i>	460
aa.	<i>General Rules for All Member States</i>	460
bb.	<i>Special Rules for Poland and the United Kingdom</i>	464

<i>c. Incorporation and the European Convention on Human Rights?</i>	466
<i>d. Excursus: Incorporation and Individuals – Human Rights and Private Actions</i>	467
<i>Conclusion</i>	468
<i>Further Reading</i>	469
 <i>Appendices</i>	 471
1. How to Find the EU Treaties	473
2. How to Find (and Read) EU Secondary Law	476
3. How to Find (and Read) EU Court Judgments	479
4. How to Find EU Academic Resources	483
 <i>Index</i>	 485