



European Union Law (4th edn)
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p. 75 **4. Constitutionalism and the European Union**

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Abstract

This chapter addresses the question of whether the EU has a constitution. This question has plagued EU law ever since its birth. The chapter explores the formal constitutionalist credentials of the Union legal order and shows that the Union has claimed that the EU Treaties constitute the highest law in Europe. It then examines the constitutional nature of the Union from a 'democratic' perspective. Finally, it evaluates the Union legal order through the lens of liberal constitutionalism. This 'classic' constitutionalism assesses the legal nature of a document by insisting on a separation of powers and the existence of fundamental rights.

Keywords: EU constitution, legal order, treaties, democratic constitutionalism, liberal constitutionalism

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1 Introduction: constitutionalism(s)

Constitutionalism is the set of ideas that defines what a constitution is or ought to be. Various conceptions of constitutionalism have developed in legal history. According to a 'descriptive' constitutionalism, a constitution is the factual description of the institutions and powers of government.¹ By contrast, normative constitutionalism insists that constitutions do not merely *describe* the existing governmental structures, but *prescribe* their composition and powers.² Standing above all ordinary laws, constitutional laws are identified with those norms that represent the highest laws within a society. This *formal* definition has in the last 200 years competed with a *material* understanding of what a constitution ought to be. This material constitutionalism links the—legal—concept of constitution with a particular *political* philosophy. According to a 'democratic' constitutionalism, a genuine constitution only exists where it is based on the idea of a 'government of the people, by the people, for the people'.³ A 'liberal' constitutionalism, on the other hand, believes that a constitution is only a true constitution if it sets limits to the powers of government,⁴ and the two traditional constitutional limits here are the separation of powers and fundamental rights (see Fig 4.1).⁵

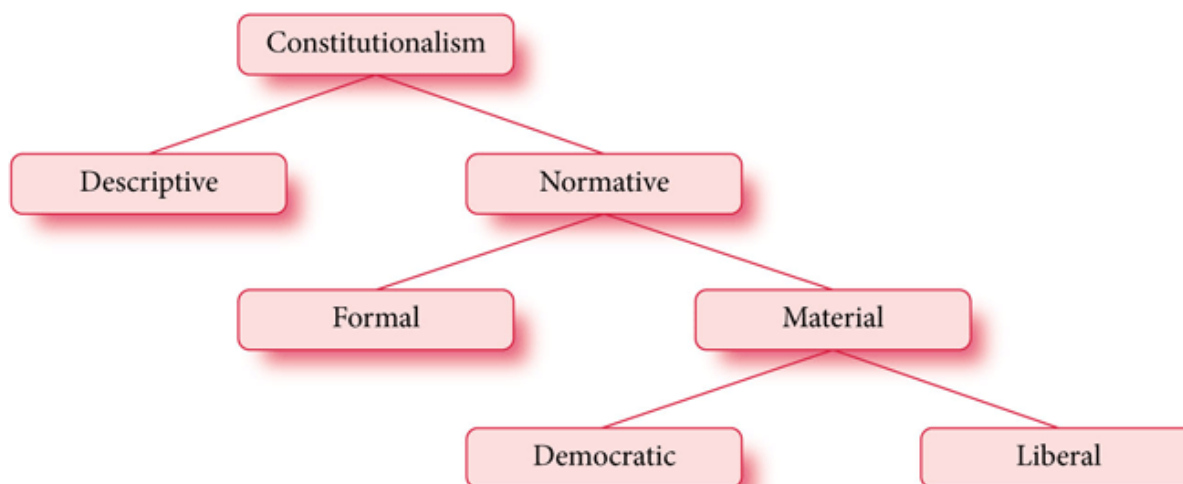


Fig 4.1 Concepts of constitutionalism

Is there an EU constitution? This question has plagued EU law ever since its birth.⁶ From a descriptive point of view, the EU undoubtedly has a constitution, since it has a set of institutions that engage in the business of government.⁷ However, could the same be said from the perspective of normative constitutionalism? Does the EU have a formal constitution; and if so: what is the political philosophy that underpins that formal constitution? Section 2 explores the formal constitutional credentials of the Union legal order. We shall see there that the Union has claimed that the EU Treaties constitute the highest law in Europe. Sections 3 and 4 subsequently explore the constitutional nature of the Union from a democratic perspective. Should the EU Treaties be denied their constitutional law status because they have not had a (nation-like) democratic foundation, or because they have not established a (nation-like) democratic system of representation?

Sections 5 and 6 finally evaluate the Union legal order through the lens of liberal constitutionalism. This classic school of constitutionalism assesses the constitutional character of the EU Treaties through the separation of powers and the existence of fundamental rights.

2 Formal constitutionalism: contested primacy

p. 77 Formal constitutionalism defines a constitution as the set of those norms that stand at the apex of a legal hierarchy. Constitutional norms are the highest norms within a legal order and as such enjoy absolute—legal—‘primacy’ over all other norms. Standing on top, their validity cannot be legally derived from other norms but is *socially* postulated.⁸ Norms that are socially ‘given’ such a constitutional status can, however, be produced in a variety of ways: they may be granted by a monarch,⁹ they may be adopted by a parliament,¹⁰ or they may result from a treaty between States.¹¹ From a formal constitutionalist perspective, the material origin or content of a norm that is ‘given’ constitutional status is secondary. All that counts for a constitution is that it enjoys the *status* as the highest law of the land; and this legal status is not granted by another legal norm but is postulated by a social convention.

What are the highest norms in the EU legal order? It is generally accepted that the EU Treaties stand above Union legislation and all other forms of EU law.¹² However, what about the relationship between EU and national law? This question became relevant once the Union legal order insisted—and the Member States accepted—that EU law was directly applicable in the national legal orders.¹³ For by integrating the EU legal order into the national legal orders, the question arose as to which legal norms would be ‘supreme’ in the case of a conflict. Modern federal states typically resolve conflicts between federal and state law in favour of the former: federal law reigns supreme over state law.¹⁴

However, when the Union was born, the EU Treaties, did not expressly state the primacy of EU law.¹⁵ Did this mean that primacy was a matter to be determined by the national legal orders (decentralized solution); or was there a Union doctrine of primacy (centralized solution)? The difficulty has never been definitively resolved. Two competing perspectives thus coexist within the EU: one national, one European. What does this mean for the constitutional credentials of the EU Treaties? Let us look at both questions in turn.

2.1 Legal primacy: two perspectives

p. 78 Early on, the European Court of Justice tried to centralize the question of primacy by turning it into a principle of EU law. In *Costa v ENEL*,¹⁶ the EU judiciary had been asked whether national legislation adopted after 1958 could prevail over the EU Treaties. Italy had claimed that the EU Treaties—like ordinary international law—had been transposed into the Italian legal order by national legislation, which could therefore be derogated by subsequent national legislation. The Court rejected this presumption of the primacy of national law by insisting on the primacy of EU law:

By contrast with ordinary international treaties, the E[U] Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply ... [T]he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as [European] law and without the legal basis of the [Union] itself being called into question.¹⁷

But how supreme was EU law? The fact that the EU Treaties prevailed over national legislation did not automatically imply that all EU law would prevail over all national law. Would the Court accept a relative solution for a State's own highest (constitutional) norms? This issue was clarified in *Internationale Handelsgesellschaft*.¹⁸ A German court had doubted that EU legislation could violate national fundamental rights granted by the German Constitution and raised this very question with the European Court of Justice. Were the fundamental principles of national constitutions, including human rights, beyond the scope of EU primacy? The Court disagreed. The validity of EU law could never be affected by national law—even by the most fundamental norms within the Member States. The Court's vision of the primacy of EU law over national law was thus an absolute one: 'The whole of [EU] law prevails over the whole of national law.'¹⁹ The European Treaties were thus constitutional treaties.²⁰

This EU perspective is—unsurprisingly—not shared by the Member States. Thus, a competing national view coexists with an EU view. And this national perspective only accepts the relative primacy of EU law over some national law; and this bounded primacy is seen as granted and limited by national constitutional law (see further chapter 6). While accepting that the EU constitutes a 'new legal order' distinct from classic international law, many Member States still insist that its validity ultimately derives from the national decision to accede to the EU (see further chapter 7). This national perspective has traditionally been expressed in two contexts. First, some Member States—in particular their supreme courts²¹—have fought a battle over fundamental rights within the Union legal order. It was claimed that EU law could not violate national fundamental rights. A similar ↵ constitutional contest arose in a second context: ultra vires control. This constitutional battleground became prominent in light of the expansive exercise of legislative and judicial competences by the Union. And again, while the Member States here generally accept the primacy of EU law within its sphere, they contest that the EU can exclusively delimit this sphere. In denying the Union a competence to create or exclusively interpret its own competences, some Member States insist on the last word with regard to the competences of the Union.²²

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Case study 4.1: Constitutional conflicts and the German Federal Constitutional Court

A strong national view on the primacy issue first crystallized around *Internationale Handelsgesellschaft*.²³ For after the European Court of Justice had espoused its absolute view on the primacy of European law over national law, the case moved back to the German Federal Constitutional Court.²⁴ The Constitutional Court here clarified its perspective on the primacy question and famously

replaced the European Court's vision with its countertheory of relative primacy. The reasoning of the German court was as follows: while the German Constitution expressly allowed for the transfer of sovereign powers to the EU, such a transfer was itself limited and controlled by national constitutional law. Did this mean that national law would prevail over EU law? The response of the German Federal Constitutional Court was the famous *So-Long* Doctrine.

[I]n the hypothetical case of a conflict between [EU] law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Constitution, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of *fundamental rights in the Constitution prevails so long as the competent organs of the [Union] have not removed the conflict of norms in accordance with the Treaty mechanism.*²⁵

The Union legal order did indeed subsequently develop extensive human rights bill(s).²⁶ Yet with the constitutional conflict over fundamental rights settled, a second concern emerged: the ever-growing competences of the EU.

Who was to control and limit the scope of EU law? Was it enough to have the EU legislator be centrally controlled by the European Court of Justice? Or should the national constitutional courts be entitled to a decentralized ultra vires review? The EU view on this problem is crystal clear: national courts cannot disapply—let alone invalidate—EU law.²⁷ A national vision on the ultra vires issue was, however, expressed by the German Federal Constitutional Court's *Maastricht* decision.²⁸ The court here held as follows:

if European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany.²⁹

The German Federal Constitutional Court thus threatened to disapply EU law that it considered to have been adopted ultra vires.

p. 80 2.2 Contested hierarchies: federalism and constitutional pluralism

If constitutional law is the highest law within a legal order, will it not follow from the continued existence of *national* constitutional law that there cannot be any coexistent *European* constitutional law? Traditionally, classic constitutionalism indeed draws this conclusion: there can only be *one* supreme constitution within a legal order—be it either the national or the EU constitution.

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However, this ‘unitary’ or ‘monistic’ standard has never lived up to the constitutional practice of federal orders—like the US, where both the Union *and* the states were seen to have ‘constitutional’ claims.³⁰ Unlike the unitary constitutionalism within unitary States, where only a single level of government is generally recognized to have a constitutional claim,³¹ many federal unions have thus developed a federal or pluralist constitutionalism. Each of the two political bodies—the Union and its Member States—will have constitutional claims that may sometimes come into conflict with each other.³² Unlike unitary States in which the primacy and sovereignty issue is settled, federal unions are, on the contrary, characterized by a political equilibrium in which the locus of sovereignty remains ‘suspended’.³³ Wherever the sovereignty question is—eventually—answered in favour of the Union, the ‘Union’ is transformed into a sovereign State. (This is what arguably happened to the US after the Civil War.³⁴) Conversely, wherever the sovereignty question is—eventually—answered in favour of the Member States, the political existence of the federation disappears and the Union dissolves into an international organization. The normative ambivalence surrounding the location of sovereignty, and the consequent potential for constitutional conflicts, are the core of all—real—federations.³⁵

p. 81 ↵ This fundamental insight into the pluralist nature of unions of states as ‘multi-level’ or ‘federal’ constitutional orders has recently been rediscovered by an academic movement called ‘constitutional pluralism’.³⁶ The central claim behind this ‘new’ school is this:

EU law ... poses the most pressing paradigm-challenging test to what we might call constitutional monism. Constitutional monism merely grants a label to the defining assumption of constitutionalism in the Westphalian age ..., namely the idea that the sole centres or units of constitutional authorities are states. Constitutional pluralism, by contrast, recognizes that the European legal order inaugurated by the Treaty of Rome has developed beyond the traditional confines of inter-*national* law and now makes its own independent constitutional claims exist alongside the continuing claims of states.³⁷

The idea of constitutional pluralism thus accepts—like that of federalism—the coexistence of multiple constitutional orders that are not hierarchically ordered but may interact in a *heterarchical* way.³⁸ However, the absence of an ‘Archimedean point’ from which all legal authority can be explained is here—wrongly—hailed as a *sui generis* quality of the EU.³⁹ The theory of constitutional pluralism indeed speaks federal prose without being aware of it. For unlike the unitary and hierarchical constitutionalism that was developed for the modern sovereign State, both federal constitutionalism and constitutional pluralism accept the existence of alternative and contradictory answers to the primacy question and insist that sovereignty within a union of states is shared or suspended. And as we shall see in the next section, the distinction between State (unitary) constitutionalism and federal (pluralist) constitutionalism also helps us to analyse the democratic credentials of the EU.

3 Democratic constitutionalism I: popular sovereignty

3.1 Unitary constitutionalism: 'We, the People'

p. 82 Democratic constitutionalism insists that since 'the people' are sovereign, they must create the constitution. Popular sovereignty may thereby express itself either directly or indirectly. The former means that the people directly adopt their constitution through a referendum.⁴⁰ The softer version of popular sovereignty, by contrast, allows this task to be delegated to an elected assembly,⁴¹ which adopts the constitution 'on behalf' of the people.

What happens if we apply this unitary theory of popular sovereignty to the EU? Under this doctrine, only 'a people' can formally constitute itself into a legal sovereign. A constitution is regarded as a unilateral act of a democratic '*pouvoir constituant*':

it is inherent in a constitution in the full sense of the term that it goes back to an act taken by or at least attributed to the people, in which they attribute political capacity to themselves. There is no such source for primary Union law. It goes back not to a European people but to the individual Member States, and remains dependent on them even after its entry into force. While nations give themselves a constitution, the European Union is given a constitution by third parties.⁴²

In short, the EU would only have a constitution if the latter were adopted by 'the people'; and in the absence of an EU 'people'—or demos—the EU cannot have a European Constitution. A softer version of this argument has not denied that there 'is' a formal European Constitution but ultimately rejects the material legitimacy—the 'ought' to be—of that constitution:

In federations, whether American or Australian, German or Canadian, the institutions of a federal state are situated in a constitutional framework which presupposes the existence of a 'constitutional demos', a single *pouvoir constituant* made of the citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority the specific constitutional arrangement is rooted. ... In Europe, that precondition does not exist. Simply put, *Europe's constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos ... It is a constitution without some of the classic conditions of constitutionalism.*⁴³

p. 83 But is this—unitary—standard for what counts as a democratic 'validation' of the EU 'constitution' the right standard for the EU? Unitary constitutionalism insists on a unitary perspective: *one* people must form *one* State on the basis of *one* constitution. But what about federal or pluralist arrangements between peoples, States, and constitutions? Unitary constitutionalism is here unable to envisage *two* peoples living in the same territory—yet, this is generally the case in federal unions.⁴⁴ It is unable to envisage two 'sovereigns' operating in the same territory—yet, this is generally the case in federal unions. It is unable to envisage *two* constitutional orders existing within the same territory—yet, this is generally the case in federal unions.⁴⁵ And, finally, it is unable to envisage a pluralist *pouvoir constituant*—yet, this is generally the case in federal unions.⁴⁶

In sum, if unitary constitutionalism is not the right theoretical ‘fit’ for the non-unitary EU, let us see how a federal standard can explain the democratic credentials of the EU constitution.

3.2 Federal constitutionalism: ‘We, the Peoples’

Who is or are the popular sovereign(s) and who embodies the ‘constituent power’ within a federal or pluralist legal order? What are the historical and theoretical alternatives to the unitary focus on popular sovereignty?

We do find historical alternatives to unitary popular sovereignty in the constitutional history of the US. Believing that the 1787 US Constitution had ‘split the atom of sovereignty’,⁴⁷ early American constitutionalism was based on the idea that the constituent power underlying the American Union was exercised by a plurality of peoples. The 1787 Constitution had indeed been ratified ‘by the people, *not as individuals composing one entire nation*, but as composing the distinct and independent States to which they respectively belong’.⁴⁸ ‘Each State, in ratifying the Constitution, [was] considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act.’ The 1787 Constitution was therefore ‘a[n] [international], and not a national act’.⁴⁹ Yet the American Union had not been based on an ordinary international treaty. For instead of the ordinary state legislatures, the ratification of the 1787 US Constitution was achieved through state ‘Conventions’.⁵⁰

The famous phrase ‘We, the People’ must thus be read with two qualifications in mind. First, it did not refer to a popular referendum; and, secondly, it also did not refer to the ‘American people’ but instead to the peoples of the several states.⁵¹ The direct authority from the state peoples was seen to give the US Constitution a normatively higher status than that of the Union and state *governments*.

p. 84 ↵ The best theoretical generalization of this pluralist conception of the constituent power has come from Carl Schmitt.⁵² According to his federal theory, the normative foundation of every union of states is a ‘federal treaty’. This federal treaty is an international treaty of a constitutional nature.⁵³ ‘Its conclusion is an act of the *pouvoir constituant*. Its content establishes the federal constitution and forms, at the same time, a part of the constitution of every member state.’⁵⁴ Each union of states is seen as a creature of international and national law.⁵⁵ Unlike unitary constitutionalism, a federal constitutional theory will thus not locate the constitution-making power in a unitary body: the people. A federal constitutional theory replaces the idea of a *single* sovereign subject with that of a pluralist constituent power. From the perspective of democratic constitutionalism, the constituent power behind a union of states will thus be the state *peoples* instead of a single ‘demos’. This is also the reason why in true federal orders, there is a right of withdrawal from the Union—a right that, with regard to the European Union, can be found in Article 50 TEU.

How should the democratic validation of a federal or pluralist constitution be expressed? The most direct expression would be a series of constitutional referenda in the Member States. A less direct expression of popular sovereignty would be a ratification of the union constitution through state conventions. (This is what happened to the 1787 US Constitution, which was consequently seen as a ‘constitutional’—and not a merely ‘legislative’—text.) The least direct expression of popular sovereignty is to leave the ratification decision to the ‘ordinary’ state legislatures. And it is this third—parliamentary—version that is commonly used in the

constitutional practice of the EU. Genetically, then, the EU Treaties are ‘legislative’—not constitutional—treaties.⁵⁶ From a democratic point of view, they lack the ‘higher’ democratic status that theoretically legitimizes a constitution’s normative position above ordinary (state) legislation.

The EU is not alone in this ‘democratic deficit’ with regard to the adoption of its constitution,⁵⁷ and in any event, before we come to the conclusion that the Union falls short of its constitutional aspirations from a democratic point of view, we need to explore its second aspect: the democratic structure of its government.

4 Democratic constitutionalism II: popular representation

The foundational source of a constitution is only one aspect of democratic constitutionalism: indeed an undemocratically created constitution might still set up democratic institutions,⁵⁸ while a popular referendum might create an undemocratic regime.⁵⁹

p. 85 ↵ A governmental system is traditionally regarded as democratic when each governmental function reflects the will of the people. The modern ‘translation’ of this (ancient) democratic ideal is representative democracy.⁶⁰ Within a representational government, democracy means that the legislature, or even the executive and the judiciary, should be *elected* by the people. In essence, modern democracy means that the constitution delegates power to elected officials, which exercise public power ‘in the name of the people’.

Hardly any existing State constitution has created a completely democratic structure for all governmental powers. Not only is the judiciary often not elected, non-democratic elements can often be found even within the legislative branch.⁶¹ However, the democratic credentials of a governmental system will typically be measured by means of the powers possessed by ‘parliament’. Democratic constitutionalism here simply means ‘parliamentarism’, that is, a governmental regime in which parliament is the central and dominant actor. But what about the executive branch? Two models of democratic government have here developed: the parliamentary model and the presidential model. The parliamentary system is a model in which the (governing) executive—the prime minister and the cabinet—will be elected and controlled by parliament. By contrast, a presidential system will typically invest the—independent—executive with its own direct democratic legitimacy. This idea of a second democratic source took shape under the 1787 US Constitution.⁶²

What are the democratic credentials of the Union’s system of government? Article 10 TEU unambiguously demands: ‘The functioning of the Union shall be founded on representative democracy.’⁶³ But how democratic or representative are its legislative and executive branches?

4.1 Democratic legitimacy and the Union legislature

Within a unitary State with one people, parliamentary democracy demands that all legislative power should be placed in a parliament that is elected on the principle of ‘one person, one vote’. The British ‘Westminster system’ has come to be identified with this unitary standard.

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But is this—unitary—standard the appropriate yardstick for a compound polity that is characterized by a plurality of peoples? In a union of States, there will always be two democratic constituencies: each State will have its own ‘demos’, while the union will also have a ‘demos’ that is constructed out of the various State populations. Each of these democratic constituencies offers an independent source of democratic legitimacy; and a federal constitutionalism will have to take account of this dual democracy.

Within a union of States, one *institutional* expression of this dual democracy is the compound nature of the union legislator. It is typically made up of two chambers: a State chamber representing the State peoples is joined to a parliamentary chamber representing the union citizens as a whole.⁶⁴ Every union law is—ideally—legitimized by reference to two democratic sources: the consent of the State peoples and the consent of the union population as represented in the union parliament. As we have seen in chapter 3, the EU is based on this dual democratic legitimacy. Its legislative branch consists of two chambers: the European Parliament is formed through elections by the totality of the Union’s citizens, ↵ whereas the Council indirectly represents the Member States’ democratically organized peoples. When measured against a—federal—standard, the Union consequently does not suffer from a democratic deficit simply because one part of its legislative branch is not directly elected.⁶⁵

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But what about the democratic credentials of the European Parliament as such? How ‘democratic’ is its composition? Despite the insistence of the Treaties that the ‘Citizens are directly represented at Union level in the European Parliament’,⁶⁶ the distribution of seats within the European Parliament continues to be partly based on national ‘quotas’. Instead of ‘one person, one vote’, the Union legal order has preferred a system that is according to Article 14 TEU ‘degressively proportional’.⁶⁷ This means that the distribution of seats is proportionate to the size of the national populations; yet this proportionate system is qualified so as to allow smaller States’ populations to have some representation within the European Parliament. Each State will have a minimum number of six European parliamentarians, while the maximum number of ‘national’ seats is limited to 96.⁶⁸ The European Council originally offered the following definition of the Union’s degressive proportionality system:

In the application of the principle of degressive proportionality provided for in the first subparagraph of Article 14(2) of the Treaty on European Union, the following principles shall apply:

- the allocation of seats in the European Parliament shall fully utilise the minimum and maximum numbers set by the Treaty on European Union in order to reflect as closely as possible the sizes of the respective populations of Member States;
- the ratio between the population and the number of seats of each Member State before rounding to whole numbers shall vary in relation to their respective populations in such a way that each Member of the European Parliament from a more populous Member State represents more citizens than each Member from a less populous Member State and, conversely, that the larger the population of a Member State, the greater its entitlement to a large number of seats.⁶⁹

While the idea of national ‘quotas’ for parliamentary seats is designed to protect smaller States, it distorts the democratic principle of ‘one person, one vote’. The preference of a *degressively* proportionate system over a *purely* proportionate system therefore does constitute a—minor—democratic deficit of the Union. For since

p. 87 the EU Treaties charge the European Parliament to represent the Union citizens *directly*, its composition should not be mediated by the political existence of the Member States as States. This distortion in the democratic credentials has been subject to judicial scrutiny by the German Federal Constitutional Court. In its *Lisbon* decision,⁷⁰ the Court here held that the composition of ↵ the European Parliament meant that it still represented the peoples of the Member States as opposed to the EU citizens as such.

Case study 4.2: The democratic deficit and the *Lisbon* decision of the German Federal Constitutional Court

The German Federal Constitutional Court has reviewed the democratic structures of the Union in a number of famous cases—the most important of which are its *Maastricht* and *Lisbon* judgments. In *Maastricht*,⁷¹ the court explored how EU laws could be regarded as legitimized through national democracy. This exploration was continued in its *Lisbon* decision.⁷² The court here held that in a Union with ‘clear elements of executive and governmental cooperation’ the primacy of national democratic legitimation could be justified; yet, were the Union to move towards a (federal) State, the national route would be blocked and a ‘structural democratic deficit’ would arise.⁷³

Why would the Union fail the democratic standard of a (federal) State? The court answered this question by concentrating on the democratic principle of ‘one person, one vote’; and held that the Union—even after Lisbon—‘lacks a political decision-making body created in equal elections by all citizens of the Union and with the ability to uniformly represent the will of the people’.⁷⁴ ‘Even in the new wording of Article 14.2 Lisbon TEU, and contrary to the claim that Article 10.1 Lisbon TEU seems to make according to its wording, the European Parliament is not a representative body of a sovereign European people.’⁷⁵ In light of the degressively proportionate allocation of seats, ‘the European Parliament factually remains a representation of the peoples of the Member States’.⁷⁶ Democratic representation within the Union was primarily *indirect* representation via the national States and peoples.⁷⁷

Did this mean the court identified a democratic deficit within the Union? It did not. For the court admitted that it should not judge Union democracy by a state standard, but by a democratic standard ‘commensurate with the status and the function of the Union’.⁷⁸ And: ‘In the present state of integration, it is therefore not required to democratically develop the system of the European institutions in analogy to that of a state.’ This meant, in particular, that ‘the composition of the European Parliament does not need to do justice to equality in such a way that differences in the weight of the votes of the citizens of the Union depending on the Member States’ population figures are eliminated’.⁷⁹

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What about the governmental powers of the European Parliament? The TEU today defines the powers of the Parliament in Article 14 TEU as follows: ‘The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.’⁸⁰ This definition distinguishes between four types of powers: legislative and budgetary powers as well as supervisory and elective powers.

p. 88 ↵ What are the legislative powers of parliament? Parliament may informally propose new legislation.⁸¹ However, it is not—unlike national parliaments—formally entitled to propose bills. The task of making legislative proposals is, with minor exceptions, a constitutional prerogative of the Commission. Like other federal legal orders, the Union legal order also acknowledges a number of different legislative procedures (see further chapter 5). The Treaties now textually distinguish between the ‘ordinary’ legislative procedure and a number of ‘special’ legislative procedures.⁸² The former is defined as ‘the joint adoption by the European Parliament and the Council’ on a proposal from the Commission.⁸³ This procedure reflects the federal idea of dual democracy with the European Parliament (more or less) *directly* representing the European people and the Council *indirectly* representing the national peoples. The structure of the ordinary legislative procedure thus fully satisfies the demands of democratic constitutionalism, while the same cannot be said about those ‘special’ legislative procedures in which the powers of Parliament are less than co-decision.

4.2 Democratic legitimacy and the Union executive

What are the democratic credentials of the Union’s executive branch? Modern constitutionalism typically distinguishes between ‘parliamentary’ and ‘presidential’ systems. Within the former the executive is elected by parliament, whereas in the latter the executive is elected independently from parliament. The EU’s governmental regime sits somewhere in between both constitutional models. It has a dual executive composed of the European Council and the Commission.⁸⁴ The former is composed of the heads of State or government, which—as a body—is not dependent on any parliamentary election, yet whose members will have received direct or indirect *national* democratic legitimation. As regards the Commission as the second branch of the Union executive, it is the European Parliament that has increasingly come to give *supranational* legitimacy to that body. Article 17 TEU describes the involvement of the European Parliament in the appointment of the Commission as follows:

Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members ... The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States ... The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.⁸⁵

p. 89 ↵ The appointment of the second branch of the EU executive is consequently built on a dual parliamentary consent. Parliament must—first—‘elect’ the President of the Commission. And it must—secondly—confirm the Commission as a collective body.⁸⁶ Once appointed, the Commission will continue to remain ‘responsible to the European Parliament’.⁸⁷ It must indeed enjoy the ‘confidence’ of the European Parliament; and where this parliamentary confidence is lost, Parliament may vote on a motion of censure. If this vote of mistrust is carried, the Commission must resign as a body. (The motion of collective censure thus mirrors Parliament’s appointment power, which is also focused on the Commission as a collective body.⁸⁸) In light of the European Parliament’s elective and censuring power, one is therefore justified in characterizing the Union’s governmental system as a ‘semi-parliamentary democracy’.⁸⁹

What about the governmental functions exercised by the Union executive? The traditional task of the executive branch is to enforce legislation; and in discharging this task the executive will generally act *under* the Union legislature. Moreover, due to its more indirect democratic credentials, democratic constitutionalism has traditionally insisted that the executive should not be given—autonomous or delegated—law-making powers. However, with the advent and expansion of the ‘administrative state’ in the twentieth century, executive law-making has today become the norm in many legal orders and the Union legal order has followed this evolution. But like many other constitutional orders, it has imposed constitutional safeguards to control the delegation of legislative power to the executive.⁹⁰

What are the constitutional or political safeguards of democracy imposed on delegated acts in the EU legal order? Constitutionally, the Union legislator is prohibited from delegating *essential* political choices to the executive.⁹¹ Yet even for *non-essential* powers, the Union legislator has been unwilling to delegate power without political control. These political safeguards of democracy can now be found in the second paragraph of Article 290 TFEU. The provision allows the European Parliament or the Council to revoke the delegation or to veto the adoption of a specific delegated act. In establishing an alternative—as opposed to cumulative—veto power for the two branches of the Union legislator, the EU’s constitutional safeguards for delegated legislation are here democratically stronger than their equivalent in the US.⁹² A less democratic system of executive law-making has been created for ‘implementing acts’. However, the constitutional logic here is not to protect the powers of the EU legislator but rather to protect the Member States ↵ within the Union’s system of executive federalism (namely the principle that, in accordance with Article 291 TFEU, the power to implement EU law in principle belongs to the Member States).⁹³

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5 Liberal constitutionalism I: separation of powers

5.1 The ‘classic’ separation of powers principle(s)

The central task of liberal constitutionalism is to establish limits to ‘the [i]nconveniences of [a]bsolute power’.⁹⁴ It aims to protect freedom by establishing a ‘government of laws, and not of men’.⁹⁵ For all governmental power, even democratic governmental power is dangerous when used arbitrarily.⁹⁶ One of the oldest constitutional devices of limiting absolute power is to split it, that is ‘balance[ing] the [p]ower of [g]overnment, by placing several parts of it in different hands’.⁹⁷

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However, the central question behind the separation of powers doctrine is this: which governmental *parts* should be placed into which governmental *hands*? Liberal constitutionalism has here built on a tripartite division that was originally developed by a French aristocrat: Baron Charles de Montesquieu. When he published *The Spirit of Laws* in 1748,⁹⁸ three powers were famously identified:

In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power.⁹⁹

Having acknowledged three governmental ‘powers’ or functions, Montesquieu then moved on to advocate their ‘distribution’ between different institutions:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.¹⁰⁰

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But did distribution here mean that each ‘separate’ power would need to be given to a ‘separate’ institution? Liberal constitutionalism has given two distinct answers to this question.

According to the *functional separation* version, each governmental institution must not be given more than one governmental function.¹⁰¹ This reading appears—at first sight—to be chosen by the founding fathers of the US. For all legislative power seems exclusively vested in ‘Congress’,¹⁰² the executive power solely vested in a ‘President’,¹⁰³ while the judicial power is reserved to the ‘Supreme Court’.¹⁰⁴ The heart of this version of the separation of power is the distinction between law-creation and law-application. The separation between the making of laws and their (administrative or judicial) execution is designed to create a ‘rule of law’ in which the men who made the law would also be subject to it. This idea was subsequently expanded to define the—liberal—constitutional prohibition on the legislature not to pass ‘individual laws’—that is, laws that are tailored for a single individual or a limited group of individuals.¹⁰⁵ The insistence on the general nature of parliamentary laws was to prevent the legislative branch from overreaching into the executive domain. At the same time, the executive is—theoretically—not allowed to exercise any law-making power, as this is an exclusive prerogative of the legislature.

By contrast: according to the *institutional cooperation* version, each governmental function should be distributed over more than one institution. ‘To form a moderate government, it is necessary to combine the several powers; to regulate, temper, and set them in motion; to give, as it were, ballast to one, in order to

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enable it to counterpoise the other.¹⁰⁶ The exercise of the legislative function should thus ideally involve more than one institution: ‘The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.’¹⁰⁷ The idea behind this second conception is to create a system of checks and balances. And it is this—second—version of the separation of powers principle that truly informs the 1787 US Constitution.¹⁰⁸ American constitutionalism even went beyond Montesquieu by introducing the idea of judicial ‘checks’ on the legislative power. The US Supreme Court is thus entitled to check the ‘constitutionality’ of all governmental actions.¹⁰⁹

p. 92 ↵ What do the two versions of the separation of powers doctrine have in common? Both versions require that there exist *distinct* governmental institutions; and in order to be distinct institutions, there must be a *personal* independence from one another. The simplest expression of this principle is a constitutional prohibition that the same person(s) are part of separate institutions.¹¹⁰ Liberal constitutionalism may, however, go even further and require the *political* independence of each institution from all the others:

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, *it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.*¹¹¹

For liberal constitutionalism, as propagated by the founding fathers of the 1787 US Constitution (and de Montesquieu),¹¹² the selection of the executive by parliament represents a serious breach of the separation of powers doctrine. The modern English ‘parliamentary system’ would thus violate the separation of powers doctrine, since it is based on a ‘fusion’—not a separation—of the legislative and executive branch.¹¹³ A ‘thick’ liberal constitutionalism consequently recommends a ‘presidential system’, a system in which the executive branch is elected *independently*.

In light of this historical exegesis, what are the liberal constitutionalist credentials of the EU Treaties? Is there a separation of powers doctrine; and, if so, which one?

5.2 Separating ‘powers’ in the EU

When born in 1958 with the genetic code of an international organization, the EU could hardly be viewed in light of the classic *trias politica*.¹¹⁴ For while it had executive and judicial powers, its ‘regulatory’ competences were not immediately regarded as of a ‘legislative’ quality.¹¹⁵ The subsequent ascendancy of the European Parliament changed this; and ↵ today the EU Treaties formally acknowledge ‘legislative’ procedure(s) in the EU legal order.¹¹⁶ The legislative powers of the Union do, however, appear to allow for the adoption of legislative ‘decisions’,¹¹⁷ and the Treaties certainly allow for the delegation of legislative power to the executive;¹¹⁸ and in making these constitutional choices, the Union legal order seems to have rejected the functional version of the separation of powers doctrine.

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Has the Union adopted the second version of the doctrine and, if so, how? The Union legal order has indeed followed the institutional cooperation version of the ‘separation of powers’ principle; and the EU Treaties make this constitutional choice even clearer than the US Constitution. For while each Union institution also has ‘its’ article in the TEU, the latter expressly describes the various governmental functions in which each Union institution partakes.¹¹⁹ The European Commission will, for example, be involved in the legislative,¹²⁰ executive,¹²¹ and judicial process.¹²² Institutional cooperation is consequently required in the exercise of most governmental functions. Under the ordinary legislative procedure, the Commission must thus formally propose a legislative bill, and the Parliament and the Council must co-decide on its adoption. The Treaties have thus ‘set up a system for distributing powers among different [Union] institutions, assigning to each institution its own role in the institutional structure of the [Union] and the accomplishment of the tasks entrusted to the [Union]’.¹²³

This conception of the separation of powers principle informs Article 13(2) TEU. The provision is known as the principle of institutional balance and reads:

Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.¹²⁴

Article 13(2) TEU contains two constitutional commands. First, each institution must act within its powers as defined by the Treaties. This *ultra vires* doctrine is the horizontal expression of the vertical principle of conferral.¹²⁵ It is consequently not possible for an institution to extend its powers unilaterally through constitutional practice.¹²⁶ Nor may an institution transfer its powers to another institution—unless the Treaties expressly allow for such delegations of power. Secondly: ‘Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions’.¹²⁷ This principle of ‘mutual sincere cooperation’ between the institutions in Article 13(2) TEU is the horizontal extension of the principle of sincere—vertical—cooperation in Article 4(3) TEU.¹²⁸

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Case study 4.3: The European Parliament and judicial review

When the EU was born in 1958, the Treaty of Rome (the original treaty establishing the European Economic Community) only granted the European Parliament ‘advisory and supervisory powers’.¹²⁹ Its advisory powers permitted Parliament to be consulted on Commission proposals before their adoption by the Council. The authors of the Treaty had however felt that the right to be consulted was not ‘active’ enough to justify giving Parliament a constitutional right to judicially challenge Union acts that violated its prerogatives. The original provision on judicial review in the 1957 Treaty of Rome (ex Article 173 EEC) consequently only allowed two Union institutions—the Commission and the Council—to challenge the legality of Union acts before the European Court. This exclusion of the

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European Parliament remained in place even after the Single European Act (in force 1987)—despite the fact that the latter had provided Parliament in some instances with the active right to cooperate in the adoption of Union legislation.

Should the principle of institutional balance entitle Parliament to bring an action before the Court? In *Parliament v Council (Comitology)*,¹³⁰ the Court at first rejected this idea. While recognizing the new role of the Parliament in the legislative sphere, the Court felt that the EEC Treaty had conferred ‘specifically on the Commission the responsibility for ensuring that the Parliament’s prerogatives are respected and for bringing for that purpose such actions for annulment as might prove to be necessary’.¹³¹ This constitutional rationale assumed that the institutional interests of the Commission and the Parliament were always aligned—an assumption that soon proved mistaken. In *Parliament v Council (Chernobyl)*,¹³² the Court therefore changed its view and gave Parliament legal standing judicially to enforce its prerogatives.

According to the Court, the principle of institutional balance meant that each institution ‘must exercise its powers with due regard for the powers of the other institutions’, and this ‘require[d] that it should be possible to penalize any breach of that rule which may occur’.¹³³ The principle of institutional balance mandated that ‘Parliament’s prerogatives, like those of the other institutions, cannot be breached without *it* having available a legal remedy’. The parliamentary prerogative to participate actively in the drafting of legislative measures would consequently imply the power to ask the Court to ‘check’ and ‘control’ the other institutions. This constitutional solution was subsequently codified in the Maastricht Treaty (in force 1993); and ever since the Treaty of Nice (in force 2003) Parliament is recognized as a fully privileged applicant under Article 263 TFEU.

p. 95 ↵ Finally, what about the—personal and political—independence of the Union institutions? With regard to their ‘personal’ independence, this is indeed generally guaranteed by the Treaties; yet as regards their political independence this is not always the case. For some institutions are involved in the selection of another: Parliament, for example, is involved in the election of the President of the European Commission and also needs to consent to the appointment of the entire Commission.¹³⁴ The Commission’s political dependence on another EU institution—Parliament—goes, as we saw previously, even beyond parliamentary approval, since the Commission continues to ‘be responsible to the European Parliament’.¹³⁵ From a ‘thick’ liberal constitutionalist perspective, this constitutes a serious—albeit democratic—breach of the separation of powers principle.

6 Liberal constitutionalism II: fundamental rights

The idea of fundamental rights is an achievement of liberal constitutionalism. They are based on the discovery of the ‘individual’—a discovery that ultimately led to the protection of an inviolable private sphere.¹³⁶ This philosophical idea was first minted into constitutional form in the aftermath of the American Revolutionary War. The 1776 Virginia Declaration of Rights stated: ‘That all men are by nature equally free

and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity'.¹³⁷ This philosophy of inalienable rights was to inspire the adoption of the 'Bill of Rights' attached to the 1787 US Constitution; and it was subsequently expressed in the 1789 (French) Declaration of the Rights of Man and of the Citizen.¹³⁸ The declaration insisted on 'natural' rights that even bound the constitution-makers.¹³⁹ It soon became the symbol and stimulus for the liberal constitutionalism of the nineteenth century.

Since the twentieth century, the protection of fundamental rights has become a central task of most constitutions.¹⁴⁰ Unlike the separation of powers principle that operates as a *political* safeguard of liberalism, the protection of human rights is typically conceived of as a *judicial* safeguard of liberalism that involves the judicial review of governmental action.¹⁴¹ A thin liberal constitutionalism thereby restricts judicial review to actions of the executive.¹⁴² A thick liberal constitutionalism, on the other hand, insists that even parliamentary legislation must be judicially reviewed in light of possible violations of fundamental rights.¹⁴³

The EU follows this second constitutional tradition.¹⁴⁴ But what are the sources of fundamental rights in the Union legal order? Originally, there was no 'bill of rights' in the EU Treaties. Two *constitutional* sources for fundamental rights were, however, subsequently developed. The European Court of Justice at first began distilling fundamental rights from ↵ the general principles of EU law. This unwritten bill of rights was—
p. 96 despite the reference to 'general principles'—not grounded in a natural rights philosophy. For as we shall see later, the European Court identifies the source of these fundamental rights in the *constitutional* traditions of the *Member States*. With the Lisbon Treaty, a second constitutional source has been added: the Charter of Fundamental Rights of the European Union. Yet again, the Charter proclaims no 'inalienable' natural rights but—modestly—'reaffirms' the fundamental rights as they result, *inter alia*, 'from the constitutional traditions and international obligations common to the Member States'.¹⁴⁵ EU fundamental rights are thus constitutional—not natural—rights.

6.1 Fundamental rights as 'general principles'

The birth of EU fundamental rights did not happen overnight. The Court had been invited—as long ago as 1958—to review the constitutionality of an EU act in light of fundamental rights. In *Stork*,¹⁴⁶ the applicant had challenged a European Commission decision on the ground that the Commission had infringed *German* fundamental rights. In the absence of an EU bill of rights, this claim drew on the so-called 'mortgage theory'. According to this theory, the powers conferred on the EU were tied to a national human rights 'mortgage'. National fundamental rights would bind the EU, since the Member States could not have created an organization with more powers than themselves.¹⁴⁷ This argument was—correctly¹⁴⁸—rejected by the Court. The task of the EU institutions was to apply EU laws 'without regard for their validity under national law'.¹⁴⁹ Thus, national fundamental rights could not be the direct source of EU human rights.

This position of the EU towards national fundamental rights has never changed. However, the Court's view evolved with regard to the existence of implied EU fundamental rights. Having originally found that EU law did '*not* contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights',¹⁵⁰ the Court subsequently discovered 'fundamental human rights enshrined in the general principles

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of [EU] law'.¹⁵¹ This new position was spelled out in *Internationale Handelsgesellschaft*.¹⁵² The judgment confirmed the existence of an 'analogous guarantee inherent in [EU] law'.¹⁵³ And accordingly, 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice'.¹⁵⁴

Whence did the Court derive these fundamental rights? The famous answer here was that the Union's fundamental rights would be '*inspired* by the constitutional traditions common to the Member States'.¹⁵⁵ While thus not a direct source, national constitutional rights constituted an indirect source for the Union's fundamental rights. What was the nature of this indirect relationship between national rights and EU rights? How would the former influence the latter? A constitutional clarification was offered in *Nold*.¹⁵⁶ Drawing on its previous jurisprudence, the Court held:

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↵ fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of [European] law.¹⁵⁷

In searching for fundamental rights inside the general principles of EU law, the Court thus draws 'inspiration' from the common constitutional traditions of the Member States. The Court also uses international agreements of the Member States to identify EU fundamental rights, and one such international agreement is the European Convention on Human Rights (ECHR). The Convention, indeed, soon assumed a 'particular significance' in identifying fundamental rights for the EU.¹⁵⁸ The Lisbon Treaty goes even further and requires the EU itself to accede to the ECHR.¹⁵⁹ Once this happens, the Union will be directly bound by the Convention; yet this binding effect will not be of a constitutional nature.¹⁶⁰

6.2 The EU Charter of Fundamental Rights

The desire for a written bill of rights for the EU was first expressed in arguments favouring the Union's accession to the ECHR.¹⁶¹ Yet an alternative strategy became prominent in the late twentieth century: the Union's own bill of rights.

The initiative for a 'Charter of Fundamental Rights' came from the European Council, which transferred the drafting mandate to a 'European Convention'.¹⁶² The idea behind an internal codification was to strengthen the protection of fundamental rights in Europe 'by making those rights more visible in a Charter'.¹⁶³ The Charter was proclaimed in 2000, but it was not at first legally binding. Its status (as regards the Union) was similar to the ECHR. It provided an informal inspiration but imposed no formal obligation on the EU institutions.¹⁶⁴ This ambivalent status was immediately perceived as a constitutional problem.¹⁶⁵ With the Lisbon Treaty, the Charter is today recognized as having 'the same legal value as the Treaties'. Article 6(1) TEU in effect 'appends' the—slightly amended original—Charter to the Treaties.

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p. 98 What fundamental rights are listed in the Charter? The Charter ‘reaffirms’ the rights that result ‘in particular’ from the constitutional traditions common to the Member States, the ECHR, and the general principles of EU law.¹⁶⁶ This formulation suggested two things. ↵ First, the Charter aims to codify existing fundamental rights and is not intended to create ‘new’ ones.¹⁶⁷ And, secondly, it codifies EU rights from various sources—and thus not solely the general principles found in the Treaties.

7 Conclusion

p. 99 The EU’s constitutional theory must be derived from its ‘physical’ constitutional principles and values—or else become a banal metaphysical formalism.¹⁶⁸ This chapter has tried to analyse the EU legal order, as established by the European Treaties, against three versions of constitutionalism: formal constitutionalism, democratic constitutionalism, and liberal constitutionalism. The liberal constitutional claim is the most easily satisfied: the Union has adopted a version of the separation of powers principle and also constitutionally ↵ protects fundamental rights. With regard to formal and democratic constitutionalism, on the other hand, the Union has had trouble in staking its constitutional claim. As we saw previously, this is, however, mainly due to the ‘unitary’ standard adopted by classic constitutionalism. When viewed in light of a ‘federal’ or ‘pluralist’ standard, this dramatically changes. For a federal standard is able to recognize the existence of two constitutional claims—the national and the European claim—alongside one another; and it can also account for a pluralist version of popular sovereignty (‘We, the Peoples’) as well as the bicameral structure of the Union legislator. Table 4.1 provides a brief summary of the—respective—constitutionalist claims when read across a unitary and a federal standard.

Table 4.1 Unitary and federal constitutionalism: an overview

	Unitary standard	Federal/pluralist standard
Formal constitutionalism	There is <i>one</i> constitution in <i>one</i> polity, where the primacy issue has <i>one</i> solution.	There are <i>two</i> (or <i>more</i>) constitutional levels in a <i>compound</i> polity, where the primacy issue has <i>multiple</i> solutions.
Democratic constitutionalism		
(a) Foundational origin	The Constitution is founded by <i>one</i> people (‘We, the People’).	The Constitution is founded on the basis of a <i>treaty</i> between multiple <i>peoples</i> (‘We, the Peoples’).
(b) Parliamentary structure	The legislator is (ideally) composed of <i>one</i> Parliament and represents <i>one</i> people.	The legislator is composed of <i>two</i> chambers, whereby the first represents the federal <i>people</i> and the second the State <i>peoples</i> .
Liberal constitutionalism		
(a) Separation of powers	There is <i>one</i> horizontal separation of powers.	There is a horizontal <i>and</i> a vertical separation of powers.

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	Unitary standard	Federal/pluralist standard
(b) Human rights	There is (typically) <i>one</i> Bill of Rights.	There is (typically) <i>one</i> federal and <i>one</i> State Bill of Rights.

Further reading

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A PETERS, *Elemente einer Theorie der Verfassung Europas* (Baden-Baden: Nomos, 2001)

S REHLING LARSEN, *The Constitutional Theory of the Federation and the European Union* (Oxford: Oxford University Press, 2021)

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R SCHÜTZE, 'Democracy in Europe: Some Preliminary Thoughts' (2022) 1 *European Law Review* 24

JHH WEILER, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999)

Notes

¹ In this 'descriptive' sense, there is no distinction between the 'government' and the 'constitution'. cf E Zoller, *Droit Constitutionnel* (Paris: Presses Universitaires de France, 1998) 10.

² cf T Paine, 'Rights of Man' in *Political Writings* (Cambridge: Cambridge University Press, 1997) 89: 'A Constitution is a thing antecedent to a government, and a government is only the creature of a constitution.'

³ A Lincoln, 'Gettysburg Address, 1863' in HS Commager and M Cantor (eds), *Documents of American History*, vol I (Upper Saddle River, NJ: Prentice Hall, 1988) 429.

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⁴ cf CH McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, NY: Cornell University Press, 1947).

⁵ cf 1789 Declaration of the Rights of Man and of the Citizen, Art 16 of which states: ‘Toute Société dans laquelle la garantie des Droits n’est pas assurée, ni la séparation des Pouvoirs déterminée, n’a point de Constitution.’

⁶ The EU legal order is not the only one suffering from this doubt. For the question of whether the UK has a legal constitution, see E Barendt, ‘Is There a United Kingdom Constitution?’ (1997) 12 *Oxford Journal of Legal Studies* 137.

⁷ On the Union institutions and overall governmental system, see chapter 3.

⁸ H Kelsen, *General Theory of the State* (Piscataway, NJ: Transaction Publishers, 2005) 115–116:

If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly. The validity of this first construction is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends. ... This is the basic norm of the legal order under consideration. ... The basic norm is not created in a legal procedure by a law-creating organ. It is not—as a positive legal norm is—valid because it is created in a certain way by a legal act, but it is valid because without this presupposition no human act could be interpreted as a legal, especially as a norm-creating act.

⁹ For illustrations of monarchic constitutions, see the 1814 French Charte, as well as the 1820 Vienna Final Act: ‘the entire authority of the state must, according to the basic concepts provided thereby, remain united within the head of state, and the sovereign can therefore only in the exercise of particular rights be constitutionally bound to the participation of the estates’ (ibid, Art 57).

¹⁰ On this (indirect) democratic creation, see section 3.1.

¹¹ On this form of international creation, see section 3.2.

¹² cf Art 263 TFEU and Case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339.

¹³ cf Case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 1. On the doctrines of direct applicability and direct effect, see chapter 6.

¹⁴ eg Art VI, cl 2 of the US Constitution states: ‘This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.’

¹⁵ The (failed) EU Constitutional Treaty (2004) would have added an express provision (Art I-6 CT): ‘The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.’ However, the provision was not taken over by the Lisbon Treaty.

¹⁶ Case 6/64 *Costa v ENEL* [1964] ECR 585.

¹⁷ Ibid, 593–594.

¹⁸ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹⁹ R Kovar, ‘The Relationship between Community Law and National Law’ in EC Commission (ed), *Thirty Years of Community Law* (EC Commission, 1981) 112–113. On the implications for the protection of human rights within EU law, see further chapter 9.

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²⁰ Case 294/83 *Parti Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339 at 1365, para 23: 'a [Union] based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.

²¹ For an historical overview of the relationship between EU and national law, see A Oppenheimer, *The Relationship between European Community Law and National Law: The Cases* (Cambridge: Cambridge University Press, 1994); as well as W Sadurski, "'Solange, Chapter 3": Constitutional Courts in Central Europe—Democracy—European Union' (2008) 14 *European Law Journal* 1.

²² On the (strange) German notion of 'competence-competence', see R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009) 34–36 and 151–156.

²³ *Internationale Handelsgesellschaft mbH* (n 18).

²⁴ BVerfGE 37, 271 (*Solange I (Re Internationale Handelsgesellschaft)*). For an English translation, see [1974] 2 CMLR 540.

²⁵ *Ibid*, 550–551, paras 23 and 24 (emphasis added).

²⁶ On this point, see section 6.

²⁷ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199. On the EU's judicial architecture, see further chapter 10.

²⁸ BVerfGE 89, 155 (*Maastricht decision*). For an English translation, see [1994] 1 CMLR 57.

²⁹ *Ibid*, 105.

³⁰ cf E Zoeller, 'Aspects internationaux du droit constitutionnel: Contribution à la théorie de la fédération d'états' (2002) 194 *Recueil des Cours de l'Académie de la Haye* 43. The same is true for Germany, where the 'Länder' have their own 'constitutions'.

³¹ Traditional unitary States are France and the UK; and even if the latter has increasingly recognized a degree of administrative 'devolution', this devolution does not recognize the 'constitutional' autonomy of the decentralized regions.

³² On the existence of constitutional conflicts in the US before and after the Civil War, see R Schütze, 'Federalism as Constitutional Pluralism: Letter from America' in M Avbelj and J Komárek, *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012).

³³ C Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 1993) 376–378 (trans R Schütze).

³⁴ cf E Katz, 'The Development of American Federalism, 1763–1865' in A Bosco (ed), *The Federal Idea*, vol I (London: Lothian Foundation Press, 1992).

³⁵ Schmitt, *Verfassungslehre* (n 33) 378.

³⁶ The movement gained momentum in the aftermath of the *Maastricht* decision by the German Federal Constitutional Court (cf J Baquero-Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 *European Law Journal* 389). One of the strongest proponents of this movement has claimed that '[c]onstitutional pluralism has been, perhaps, the most successful attempt at theorizing the nature of European constitutionalism' (MP Maduro, 'Three

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Claims of Constitutional Pluralism’ in Avbelj and Komárek (n 32) 68). Personally, I share the much more sceptical opposite views of G Davies, ‘Constitutional Disagreement in Europe and the Search of Pluralism’ in *ibid*, 269: ‘the investment in constitutional pluralism by scholars has not brought satisfactory returns’.

³⁷ cf N Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review* 317, 337.

³⁸ In the words of Maduro, ‘Three Claims of Constitutional Pluralism’ (n 36) 75: ‘While the empirical thesis of constitutional pluralism limits itself to state that the question of final authority remains open, the normative claim is that the question of final authority ought to be left open. Heterarchy is superior to hierarchy as a normative ideal in circumstances of competing constitutional claims of final authority.’

³⁹ In particular Walker, ‘The Idea of Constitutional Pluralism’ (n 37) 338. His—‘Eurocentric’—views strikingly ignore the American experience, in which the Union and the states were seen to have ‘constitutional’ claims and in which the ‘Union’ was—traditionally—not(!) conceived in statist terms (cf Zoeller (n 30) 43).

⁴⁰ For advocates of this direct democratic source, see Paine (n 2) 89: ‘The constitution of a country is not the act of its government, but of the people constituting its government.’ For the French expression of the same thought, see EJ Sieyes, ‘What Is the Third Estate’ in *Political Writings* (Indianapolis, IN: Hackett Publishing, 2003).

⁴¹ For illustrations of this indirect democratic source, see the 1791 French Constitution and the 1919 (Weimar) Constitution of Germany. The 1949 German Constitution was also originally adopted by the state parliaments.

⁴² D Grimm, ‘Does Europe Need a Constitution?’ (1995) 1 *European Law Journal* 282, 290. For a severe and brilliant early criticism of this view, see J Habermas, ‘Remarks on Dieter Grimm’s “Does Europe Need a Constitution?”’ (1995) 1 *European Law Journal* 303.

⁴³ JHH Weiler, ‘Federalism without Constitutionalism: Europe’s Sonderweg’ in K Nikolaidis and R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford University Press, 2001) 56–57 (emphasis added). In my opinion, Professor Weiler seriously mistakes the American case. For neither of the two constitutions of the United States was ratified by a ‘federal demos’ in the form of ‘the’ American people.

⁴⁴ cf O Beaud, ‘The Question of Nationality within a Federation: A Neglected Issue in Nationality Law’ in R Hansen and P Weil (eds), *Dual Nationality, Social Rights, and Federal Citizenship in the US and Europe* (Oxford: Berghahn Books, 2002).

⁴⁵ On this point, see section 2.

⁴⁶ On this point, see section 3.2.

⁴⁷ *US Term Limits, Inc v Thornton*, 514 US 779 (1995), 838 (Justice Kennedy).

⁴⁸ J Madison, ‘Federalist No 39’ in J Madison et al, *The Federalist*, ed T Ball (Cambridge: Cambridge University Press, 2003) 184 (emphasis added).

⁴⁹ *Ibid*, 185.

⁵⁰ On the novel (American) technique of constitutional ‘Conventions’, see G Wood, *The Creation of the American Republic: 1776–87* (Chapel Hill, NC: University of North Carolina Press, 1998) ch 8. These Conventions were composed of delegates who were elected to represent(!) their constituency. Unlike popular referenda, they operate as single-issue ‘parliaments’ that are solely called into being to decide whether the Constitution should be adopted.

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⁵¹ The original 1787 draft preamble indeed read: 'We, the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following constitution for the government of ourselves and our posterity.' However, due to the uncertainty about which of the 13 states would succeed in the ratification (according to Art VII of the Constitution-to-be, only nine states were required for the document to enter into force), the enumeration of the individual states was dropped by the 'Committee of Style'. cf M Farrand, *The Framing of the Constitution of the United States* (New Haven, CT: Yale University Press, 1913) 190–191.

⁵² Schmitt, *Verfassungslehre* (n 33) esp Part IV.

⁵³ *Ibid*, 367 and 368 (trans R Schütze).

⁵⁴ *Ibid*. This idea was subsequently taken up by Pernice's concept of 'Verfassungsverbund' or 'multilevel constitutionalism'. cf I Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 *Common Market Law Review* 703.

⁵⁵ Schmitt, *Verfassungslehre* (n 33) 379.

⁵⁶ It is difficult—if not impossible—to accept that 'the founding treaties as well as each amendment agreed upon by the governments appear as the *direct* expression of the common will of the [national] peoples of the Union' (Pernice (n 54) 717 (emphasis added)). National ratifications are—with the exception of a few Member States—only indirect expressions of the common will of the national peoples of the Union. National consent is typically expressed through national legislatures.

⁵⁷ On the adoption of the 1949 German Constitution by the state legislatures, see n 41.

⁵⁸ The 1949 German Constitution is again a case in point.

⁵⁹ The 1852 Constitution of the Second French Empire was ratified by a plebiscite; and yet it established an undemocratic government.

⁶⁰ M Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2012) 284.

⁶¹ eg in the UK, the second chamber (the House of Lords) is not elected.

⁶² Another illustration of a presidential (democratic) system is the 1958 Constitution of the French Republic.

⁶³ Art 10(1) TEU.

⁶⁴ cf A Gerber, 'Les Notions de Représentation et de Participation des Régions dans les Etats Fédéraux', LLM thesis (European University Institute, 1993).

⁶⁵ In this sense also, see RA Dahl, 'Federalism and the Democratic Process' in JR Pennock and JW Chapman (eds), *Nomos XXV: Liberal Democracy* (New York: New York University Press, 1983).

⁶⁶ Art 10(2) TEU.

⁶⁷ Art 14(2) TEU. See European Council, Decision establishing the composition of the European Parliament (OJ [2013] L181/57); European Parliament, Resolution on the composition of the European Parliament (OJ [2008] C227/132); and now for the 2019–24 term, see European Council, Decision establishing the composition of the European Parliament (OJ [2018] L165 I/1).

⁶⁸ Art 14(2) TEU.

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⁶⁹ European Council (2013) Decision establishing the composition of the European Parliament (n 67) Art 1.

⁷⁰ BVerfGE 123, 267 (*Lisbon decision*). For an English translation, see http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>.

⁷¹ BVerfGE 89, 155 (*Maastricht decision*). The following discussion refers to the English translation of the judgment: [1994] CMLR 57 (*Maastricht decision*).

⁷² *Lisbon decision* (n 70).

⁷³ *Ibid*, para 264.

⁷⁴ *Ibid*, para 280.

⁷⁵ *Ibid*.

⁷⁶ *Ibid*, para 284.

⁷⁷ *Ibid*, para 286.

⁷⁸ *Ibid*, para 266. In the words of para 271: ‘Because and in so far as the European Union itself only exercises derived public authority, it need not fully comply with the requirements.’

⁷⁹ *Ibid*, para 278.

⁸⁰ Art 14(1) TEU.

⁸¹ Art 225 TFEU.

⁸² Special legislative procedures cover various degrees of parliamentary participation. These procedures will be discussed in more detail in chapter 5 below.

⁸³ Art 289(1) TFEU.

⁸⁴ In the past, there was a third institution—the Council—that was heavily involved in the executive function. This has changed with the Lisbon Treaty (see further chapter 3), although the latter continues to contain elements of the former regime (cf the possibility of Council implementing acts, as set out in Art 291(2) TFEU; on this, see further chapter 5).

⁸⁵ Art 17(7) TEU.

⁸⁶ However, Parliament may request each nominated Commissioner to appear before Parliament and to ‘present’ his or her views. This practice thus comes close to ‘confirmation hearings’ (D Judge and D Earnshaw, *The European Parliament* (2nd edn, Basingstoke: Palgrave Macmillan, 2008) 5).

⁸⁷ Art 17(8) TEU.

⁸⁸ However, unlike the appointment power, Parliament has been able to sharpen its tools of censure significantly by concluding a political agreement with the Commission. Accordingly, if Parliament expresses lack of confidence in an individual member of the Commission, the President of the Commission ‘shall either require the resignation of that Member’ or, after ‘serious’ consideration, explain its refusal to do so before Parliament. On this point, see Framework Agreement on Relations between the European Parliament and the European Commission (OJ [2010] L304/47), para 5.

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⁸⁹ P Dann, 'European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy' (2003) 9 *European Law Journal* 549 (emphasis added).

⁹⁰ B Schwartz, 'Delegated Legislation in America: Procedure and Safeguards' (1948) 11 *Modern Law Review* 449.

⁹¹ On the constitutional limits imposed on a delegation of legislative power, see R Schütze, "'Delegated" Legislation in the (New) European Union: A Constitutional Analysis' (2011) 74 *Modern Law Review* 661, 669 *et seq.* See further chapter 5.

⁹² *Ibid.*, 663 *et seq.*

⁹³ R Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' (2010) 47 *Common Market Law Review* 1385. On implementing acts, see further chapter 5.

⁹⁴ J Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 2005) § 107 = 338.

⁹⁵ J Harrington as quoted in WB Gwyn, *The Meaning of the Separation of Powers* (Leiden: Martinus Nijhoff, 1965) 13.

⁹⁶ In the famous words of J Madison in 'Federalist No 51' (see n 48):

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

⁹⁷ Locke (n 94) § 107 = 338.

⁹⁸ Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws*, trans and ed T Nugent, rev J Prichard (London: Bell, 1914), available at <http://www.constitution.org/cm/sol.htm> <<http://www.constitution.org/cm/sol.htm>>.

⁹⁹ *Ibid.*, Book XI, ch 6.

¹⁰⁰ *Ibid.*

¹⁰¹ The theory of a functional separation of powers finds (almost) no matching constitutional practice. It has been said to contradict the British constitutional idea of parliamentary sovereignty: cf AV Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis, IN: Liberty Fund, 1992) 3–10.

¹⁰² Art I, Section 1 US Constitution: 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.'

¹⁰³ *Ibid.*, Art II, Section 1: 'The executive Power shall be vested in a President of the United States of America.'

¹⁰⁴ *Ibid.*, Art III, Section 1: 'The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'

¹⁰⁵ For the US Constitution, see Art I, Section 9: 'No Bill of Attainder or ex post facto Law shall be passed.' For C Schmitt, the prohibition for the legislature not to pass individual laws represents the cornerstone of the liberal State (*Verfassungslehre* (n 33) 146).

¹⁰⁶ De Montesquieu (n 98) Book V, ch 14.

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¹⁰⁷ Ibid.

¹⁰⁸ cf Madison, 'Federalist No 47' (n 48) 234 *et seq.*

¹⁰⁹ *Marbury v Madison*, 5 US 137 (1803).

¹¹⁰ cf de Montesquieu (n 98): 'There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.'

¹¹¹ Madison, 'Federalist No 51' (n 48) 251 (emphasis added).

¹¹² De Montesquieu (n 98): 'But if there were no monarch, and the executive power should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both.'

¹¹³ W Bagehot, *The English Constitution* (Oxford: Oxford University Press, 2001) esp 11.

¹¹⁴ For the literature on the separation of powers in the Union legal order, see P Pescatore, 'L'executif communautaire: justification des traités de Paris et de Rome' (1978) 4 *Cahiers de droit européen* 387; W Hummer, 'Das institutionelle Gleichgewicht als Strukturdeterminante der Europäischen Gemeinschaften' in H Miehsler et al (eds), *Ius Humanitatis: Festschrift zum 90. Geburtstag von Alfred Verdross* (Berlin: Duncker & Humblot, 1980); K Lenaerts, 'Some Reflections on the Separation of Powers in the European Community' (1991) 28 *Common Market Law Review* 11; P Huber, 'Das institutionelle Gleichgewicht zwischen Rat und dem Europäischen Parlament in der künftigen Verfassung für Europa' (2003) *Europarecht* 574; JP Jacqué, 'The Principle of Institutional Balance' (2004) 41 *Common Market Law Review* 383; and G Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17 *European Law Journal* 304.

¹¹⁵ Early commentators therefore speak of the 'decision law' of the Community (see H Wagner, *Grundbegriffe des Beschlußrechts der Europäische Gemeinschaft* (Cologne: C Heymanns, 1965)). This argument has had a (partial) renaissance in the work of G Majone and his disciple P Lindseth (see *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford: Oxford University Press, 2010)). The main error within these recent works appears to me to be the absence of any conceptualization of the notion of 'legislation' and 'legislative power'.

¹¹⁶ Art 289 TFEU.

¹¹⁷ According to Art 289(1) TFEU, the acts that can be adopted under the Union's legislative procedure(s) include the instrument of 'regulation, directive *or decision*' (emphasis added). This wording seems to suggest that the adoption of individual decisions by the Union legislature is possible.

¹¹⁸ On this point, see section 4.2.

¹¹⁹ This is normally the first section of the TEU article dealing with the (respective) institution. See further chapter 3.

¹²⁰ Art 17(2) TEU: 'Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.'

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¹²¹ Art 17(1) TEU: ‘The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties.’

¹²² Art 258 TFEU.

¹²³ Case C-70/88 *Parliament v Council (Chernobyl)* [1990] ECR I-2041, para 21.

¹²⁴ Art 13(2) TEU.

¹²⁵ Jacqu , ‘The Principle of Institutional Balance’ (n 114) 383: ‘From a legal point of view, the principle of institutional balance is one manifestation of the rule that the institutions have to act within the limits of their competences.’ On the concept of conferral, see further chapter 5.

¹²⁶ Case 149/85 *Wybot v Faure* [1986] ECR 2391, esp para 23.

¹²⁷ Case C-70/88 *Parliament v Council (Chernobyl)* [1990] ECR I-2041, para 22.

¹²⁸ See generally chapter 5.

¹²⁹ Art 137 EEC.

¹³⁰ Case 302/87 *Parliament v Council (Comitology)* [1988] ECR 5615.

¹³¹ *Ibid*, para 27.

¹³² *Parliament v Council (Chernobyl)* (n 127).

¹³³ *Ibid*, para 22.

¹³⁴ Art 17(7) TEU. For an analysis of this point, see earlier in the text.

¹³⁵ Art 17(8) TEU.

¹³⁶ E Wolgast, *Geschichte der Menschen-und B rgerrechte* (Stuttgart: Kohlhammer, 2009) 33.

¹³⁷ 1776 Virginia Declaration of Rights, Art 1.

¹³⁸ For an analysis and historical interpretation of the declaration, see Wolgast (n 136) ch 2.

¹³⁹ These rights were not ‘founded’ but simply ‘declared’—hence the title: ‘Declaration’—by the constitutional assembly.

¹⁴⁰ On human rights as constitutional rights, see A Saj , *Limiting Government* (Budapest: Central European University Press, 1999) ch 8.

¹⁴¹ See M Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis, IN: Bobbs-Merrill, 1971).

¹⁴² Traditionally, this is the case for the UK.

¹⁴³ The classic example here is the US.

¹⁴⁴ On the power of constitutional/judicial review, see chapter 10.

¹⁴⁵ EU Charter, Preamble 5.

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¹⁴⁶ Case 1/58 *Stork & Cie v High Authority of the European Coal and Steel Community* [1958] ECR English Special Edition 17.

¹⁴⁷ As the Latin legal proverb makes clear: ‘*Nemo dat quod non habet*’.

¹⁴⁸ For a criticism of the ‘mortgage theory’, see R Schütze, ‘EC Law and International Agreements of the Member States – An Ambivalent Relationship?’ (2006–07) 9 *Cambridge Yearbook of European Legal Studies* 387, 399–402.

¹⁴⁹ Case 1/58 *Stork v High Authority* (n 146) 26.

¹⁵⁰ *Ibid*, 439 (emphasis added).

¹⁵¹ Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, para 7.

¹⁵² Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1979] ECR 1125.

¹⁵³ *Ibid*, para 4.

¹⁵⁴ *Ibid*.

¹⁵⁵ *Ibid* (emphasis added).

¹⁵⁶ Case 4/73 *Nold v Commission* [1974] ECR 491.

¹⁵⁷ *Ibid*, para 13.

¹⁵⁸ See Joined Cases 46/87 and 227/88 *Höchst v Commission* [1989] ECR 2859, para 13.

¹⁵⁹ Art 6(2) TEU states: ‘The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.’

¹⁶⁰ On the status of international treaties concluded by the Union, see chapter 26.

¹⁶¹ Commission, ‘Memorandum on the Accession of the European Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (1979) *Bulletin of the European Communities*, Supplement 2/79, esp 11 *et seq*.

¹⁶² On the drafting process, see chapter 9, and further G de Búrca, ‘The Drafting of the European Union Charter of Fundamental Rights’ (2001) 26 *European Law Review* 126.

¹⁶³ EU Charter, Preamble 4.

¹⁶⁴ See Case C-540/03 *Parliament v Council* [2006] ECR I-5769, para 38: ‘the Charter is not a legally binding instrument’.

¹⁶⁵ The Charter was announced at the Nice European Council in December 2000, and its status was one of the questions in the 2000 Nice Declaration on the Future of the Union.

¹⁶⁶ EU Charter, Preamble 5.

¹⁶⁷ See Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, Preamble 6: ‘the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles’.

¹⁶⁸ The problem with much contemporary European ‘constitutionalism’ is that it has escaped into the realm of the metaphysical and mysterious. For the perfect example of this imperfect constitutional theory, see N Walker, ‘Postnational Constitutionalism and the Problem of Translation’ in JHH Weiler et al (eds), *European Constitutionalism*

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Beyond the State (Cambridge: Cambridge University Press, 2003). In the words of N Krisch, 'Europe's Constitutional Monstrosity' (2005) 25 *Oxford Journal of Legal Studies* 321, 326: 'at [Walker's] level of generality, all the particular content of constitutionalism, all its connections to particular historical and social circumstances, are lost'.

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