

Introduction

This book examines the role of the Court of Justice of the European Union as an institutional actor in EU integration. Its principal aim is to assess how far the Court complies with the EU Treaty framework in the exercise of its attributed functions. The book argues that the EU Treaties remain the principal touchstones for assessing the internal constitutionality, and hence legitimacy, of all Union institutional activity – including the work of the Court. The use of the EU Treaty framework to scrutinise the Court’s interpretative choices is an innovative approach to the study of EU judicial lawmaking and its limits. Legal scholars (and the Court itself) presently overlook the application *to the Court* of the EU Treaty framework as a tool to determine the internal constitutionality of its institutional activities. The core claim of this book is that such an entrenched perspective fundamentally obscures the Court’s position within the EU legal order *as an institution of the Union*. The implications of that claim are potentially transformative when coupled with the Court’s historically dynamic approach to the exercise of its interpretative functions.

The remainder of this introduction outlines the component parts of the core argument developed in this book. Section I frames the background to the discussion. It outlines the Court’s functions under the Treaty framework and the significance of its institutional contribution to the process of European integration. Thereafter, it points to a critical gap in the scrutiny of EU institutional activity for compliance with the Treaty framework. Specifically, the Court is identified as the only Union institution whose activities are presently not routinely scrutinised (by itself or by others) for compliance with the EU Treaties.

Section II introduces the intellectual framework developed in this book to scrutinise EU judicial activity for compliance with the Treaty framework. It offers an overview of the book’s original claims concerning the

status, function and limits of the EU Treaties as the principal touchstones for assessing the internal constitutionality of all Union institutional activity – including the work of the Court.

Section III precises the findings of the review of EU judicial activity for compliance with the Treaty framework as constitutional touchstone. More precisely, it foregrounds the argument that the Treaty framework and the Court of Justice have adopted and maintained fundamentally distinct statements on what this book defines as the three key issues for EU constitutionalism: *the formal status of Union law and the conditions under which it applies within Member States* (Constitutional Issue No. 1); *the locus of political authority within the EU legal order* (Constitutional Issue No. 2); and *the objectives, values and limits governing European integration* (Constitutional Issue No. 3). The Court's adoption, and subsequent robust defence, of its own distinct institutional statements on each of these three issues gives rise to paradigmatic examples of what this monograph conceptualises as acts of *constitutional contestation*.

Section IV summarises the book's conclusions. First, it details how this monograph uses the responses of the Court's interlocutors (Member States, national courts and EU scholars) to transform the identified acts of constitutional contestation into three contemporary problems for EU judicial lawmaking. Secondly, it links the existence of these problems with contemporary debates about EU integration, its limits and the democratic credentials of Union policymaking. Finally, it sets out four specific reform proposals in outline form as part of a constructive attempt to align the exercise of EU judicial functions more closely with the demands of the Treaty framework as constitutional touchstone. This process of alignment is absolutely critical. It serves directly to reinforce the legitimacy of the Court's contribution to European integration as an institution of the Union.

I The Court of Justice and European Integration

I.1 The Court's Functions under the EU Treaty Framework

The EU Treaties confer specific functions on the Court. These include competence to adjudicate on the validity of secondary EU law and competence to interpret both primary (Treaty) and secondary EU law.¹

¹ See, in particular, Art. 263 TFEU and Art. 267 TFEU.

Additionally, the Court is empowered to hear infringement actions raised by (usually) the Commission against Member States for alleged breaches of Union law.² Furthermore, the Court may also be engaged to rule on the compatibility of draft agreements concluded between the European Union and third countries and/or other international organisations.³ It also enjoys jurisdiction in a range of other specific instances, including in any dispute relating to the subject matter of the Treaties submitted to it under a special agreement concluded between Member States.⁴

In the exercise of its attributed functions, the Court of Justice is guided by an overarching mandate to ensure that, in the interpretation and application of the Treaties, the law is observed (Article 19 TEU). The Court's role in EU integration under the Treaty framework remains strikingly unchanged despite successive Treaty amendments.

I.2 The Court of Justice as the 'Motor' of European Integration

The Court of Justice's contribution to the EU integration process through the exercise of its conferred judicial functions is widely acknowledged, remarkable and enduring.⁵ Exercising its interpretative functions, the Court of Justice has radically recast the nature of the EU legal order and, in particular, the relationship between EU and Member State law. Furthermore, employing these same competences, the Court has continued to make significant contributions to the development of substantive Union law, including in the areas of intra-EU movement,⁶

² See Art. 258 TFEU. See also, by analogy, Art. 259 TFEU.

³ See Art. 218(11) TFEU.

⁴ See Art. 273 TFEU, interpreted in Case C-648/15, *Austria v. Germany (Double Taxation)* EU:C:2017:664. See also Arts. 272, 274 and 275 TFEU.

⁵ E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law*, 1; F. Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review*, 595; J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal*, 2403; J. Shaw and G. Moore (eds.), *The New Legal Dynamics of European Union* (Oxford: Oxford University Press, 1996); K. Alter, *Establishing the Supremacy of European Law* (Oxford: Oxford University Press, 2001); A. Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004) and H. de Waele, 'The Role of the Court of Justice in the Integration Process: A Contemporary and Normative Assessment' (2010) 6(1) *Hanse Law Review*, 3. See also, A. Rosas, E. Levits and Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (The Hague: T.M.C. Asser Press, 2013).

⁶ For discussion, see e.g., N. Nic Shuibhne (ed.) *Regulating the Internal Market* (Cheltenham: Elgar, 2006) and C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn) (Oxford: Oxford University Press, 2016).

competition law;⁷ data protection;⁸ external relations;⁹ and EU citizenship.¹⁰ The Court has also played a critical role in determining the internal constitutionality of acts of the EU institutions. This has included the development of an autonomous system of EU fundamental rights protection.¹¹ More recently, the Court has been called upon to rule on the constitutionality of the Union's responses to the Eurozone financial crisis and its efforts to accede to the European Convention on Human Rights.¹² In relation to the ongoing migrant crisis, the Court has also been requested to determine the impact of the arrival of an exceptionally large number of third-country nationals wishing to obtain international protection on the application of Regulation 604/2013 EU (the Dublin III Regulation).¹³

⁷ For discussion, see e.g., D. Gerber, 'The Transformation of European Community Competition Law?' (2004) 35 *Harvard International Law Journal*, 127; J. Goyder and A. Albers-Llorens, *Goyder's EC Competition Law* (5th edn) (Oxford: Oxford University Press, 2009) and N. Petit, 'The Future of the Court of Justice in EU Competition Law: New Role and Responsibilities' in Rosas, Levits and Bot, *The Court of Justice and the Construction of Europe*, n. 5.

⁸ See esp., Case C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and González* EU:C:2014:317 and Case C-362/14, *Schrems v. Data Protection Commissioner* EU:C:2015:650. For discussion, see e.g., L. Azoulai M. van der Sluis, 'Institutionalizing Personal Data Protection in Times of Global Institutional Distrust: Schrems' (2016) 53(5) *Common Market Law Review*, 1343 and T. Horsley, 'The Court Hereby Rules ...' – Legal Developments in EU Fundamental Rights Protection' (2015) 53(5) *Journal of Common Market Studies*, 108.

⁹ For discussion, see e.g., M. Cremona (ed.), *The European Court of Justice and External Relations Law* (Oxford: Hart Publishing, 2014).

¹⁰ For discussion, see e.g., E. Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45(1) *Common Market Law Review*, 13; M. Dougan, N. Nic Shuibhne and E. Spaventa (eds.), *Empowerment and Disempowerment of the European Citizen* (Oxford: Hart Publishing, 2012) and D. Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Oxford: Hart Publishing, 2017).

¹¹ See esp., Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114; Case 4/73, *Nold, Kohlen- und Baustoffgroßhandlung v. Commission* EU:C:1974:51 and Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* EU:C:1996:140.

¹² Case C-370/12, *Pringle v. Government of Ireland and Others* EU:C:2012:756; Case C-62/14, *Gauweiler and Others v. Deutscher Bundestag* EU:C:2015:400 and Opinion 2/13, *Draft Agreement on Accession of the EU to the European Convention on Human Rights* EU:C:2014:2454.

¹³ See Case C-490/16, *A.S. v. Slovenia* EU:C:2017:585 and Case C-646/16, *Jafari and Jafari v. Bundesamt für Fremdenwesen und Asyl* EU:C:2017:586. Regulation (EU) No. 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31.

I.3 A Blind Spot Overlooked

Among the EU institutions, the Court remains uniquely distinguished as an actor in the integration process. It is the only Union institution whose activities are not routinely scrutinised (by itself or by others) for compliance with the EU Treaties. The Treaty framework is employed without question to measure the constitutionality of acts of the EU legislative and administrative institutions (as well as the activities of the Member States).¹⁴ The exercise of political authority by the European Council, Council, Parliament and Commission is scrutinised against a range of normative limits set out in the Treaty framework.¹⁵ The applicable limits have steadily increased over time as a consequence of repeated amendments to the founding Treaty framework and include, *inter alia*, the principles of conferral (Article 5(2) TEU), subsidiarity (Article 5(3) TEU) and proportionality (Article 5(4) TEU) as well as the protection of national identity (Article 4(2) TEU).

By contrast, the constitutionality of EU judicial activity is rarely discussed with direct reference to the Treaty framework.¹⁶ The judgments in *Gascogne Sack Deutschland GmbH* and *Guardian Europe v. European Union* in the sphere of competition policy remain the exception. In both decisions, the Court ruled, with reference to the EU Charter, that the Union was liable to compensate undertakings for losses incurred as a result of the General Court's undue delay in hearing competition proceedings.¹⁷ Beyond that set of cases, however, the potential impact of the Treaty framework in connection with assessments of EU judicial activity and its legitimacy is rarely examined.¹⁸ Discussion of the Court and the Treaty

¹⁴ From a long list of illustrations, see e.g., Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising)* EU:C:2000:544; Case C-370/12, *Pringle*, n. 12; Opinion 2/13, *Draft Agreement on Accession of the EU to the European Convention on Human Rights*, n. 12; Case C-409/13, *Council v. Commission (Macro Financial Assistance)* EU:C:2015:217 and Case C-62/14, *Gauweiler and Others*, n. 12.

¹⁵ See Art. 263 TFEU. See also Art. 218(11) TFEU.

¹⁶ None of the leading textbooks on EU law or works on the Court of Justice addresses the application of the EU Treaty framework to the Court as a source of normative restraint on the exercise of its attributed functions.

¹⁷ Case T-577/14, *Gascogne Sack Deutschland GmbH* EU:T:2017:1 and Case T-673/15, *Guardian Europe v. European Union* EU:T:2017:377. See also, Case T-479/14, *Kendrion v. European Union* EU:T:2017:48.

¹⁸ See, G. A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 *Columbia Law Review*, 331; T. Schilling, 'Subsidiarity as a Rule and a Principle' (1994) 14 *Yearbook of European Law* 203; G. de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36(2) *Journal of Common Market Studies*, 217; P. Craig,

framework is typically focused on analysing the strength of the Court's role in the enforcement of Treaty norms against other Union institutions and/or the Member States.¹⁹ Elsewhere, EU scholars reflect in great detail on the enduring impact of the Court's interpretative choices on both the vertical and horizontal balance of competences within the EU legal order.²⁰ With respect to the exercise of its own attributed functions, however, there is no sustained discussion of the potential impact of the Treaty framework on the scope of the Court's authority.²¹ Analyses of EU judicial power – and its limits – look to other sources of normative restraint.

For most EU legal scholars, the legitimacy of the Court's activities continues to be assessed primarily with reference to generally accepted (Western) standards of good constitutional adjudication.²² As Adams et al. summarise, the dominant approach in the literature remains focused on assessing: 'Whether the [Court's] judgments display sufficient consistency, whether the outcomes are well-founded, whether the results were reasonably predictable and whether the ECJ defers to the EU legislature and the Member States whenever appropriate.'²³ Crucially, this

'The ECJ and the Ultra Vires Action: A Conceptual Analysis' (2011) 48 *Common Market Law Review*, 395; T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Policymaking' (2013) 50 *Common Market Law Review*, 931 and E. Cloots, *National Identity in EU Law* (Oxford: Oxford University Press, 2015).

¹⁹ See e.g., A. von Bogdandy and J. Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for Its Reform' (2002) 39 *Common Market Law Review*, 227; S. Weatherill, 'Competence Creep and Competence Control' (2004) 23(1) *Yearbook of European Law*, 1; S. Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law Has become a "Drafting Guide"' (2011) 12 *German Law Journal*, 827 and S. Adam and F. J. M. Parras, 'The European Stability Mechanism through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle' (2013) 38(6) *European Law Review*, 848.

²⁰ See recently, e.g., H. W. Micklitz and B. de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States* (Antwerp: Intertec, 2012); M. Adams, H. de Waele, J. Meeusen and G. Straetmans (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford: Hart Publishing, 2013) and M. Dawson, B. de Witte and E. Muir (eds.), *Judicial Activism at the European Court of Justice* (Cheltenham: Elgar, 2013).

²¹ For the principal exceptions, see n. 18 and the literature cited therein.

²² See e.g., Adams et al., *Judging Europe's Judges*, n. 20 and Dawson et al., *Judicial Activism at the European Court of Justice*, n. 20 and N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford: Oxford University Press, 2013).

²³ M. Adams et al., 'Introduction: Judging Europe's Judges' in Adams et al., *Judging Europe's Judges*, n. 20, at p. 8.

highly developed body of work overlooks the Treaties' function as principal touchstones on the internal constitutionality of EU judicial activity.²⁴ It takes its cue instead from the Court's own jurisprudence, specifically its institutional positions on the three key issues for EU constitutionalism (see further Section III).

I.4 A Fundamental Omission in Existing Legal Analyses of the Court

The absence of a comprehensive and rigorous Treaty-based critique of EU judicial activity in the scholarship is striking for two reasons. First, the Treaty framework provides no basis whatsoever to justify differentiating between the Court and the Union's administrative and political institutions with regard to compliance with its demands. The Court is formally designated an institution of the Union under Article 13 TEU. As such, along with the Union's political institutions, it is irrefutably subject to compliance with the EU Treaties.²⁵ Indeed, as the Court of Justice has repeatedly stated, 'the [Union] is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the [Treaties].'²⁶ Secondly, and more strikingly still, existing criticism of the Court and its role in EU integration raises concerns that the EU Treaty framework directly addresses. In particular, the principal interlocutors (Member States, national courts and EU scholars) voice concerns that the Court of Justice often plays fast and loose with the

²⁴ The same is true of other strands of the scholarship on the Court – examined in Chapter 6. See e.g., H. Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff Publishing, 1986); J. Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford: Oxford University Press, 1993); P. Neill, *The European Court of Justice: A Case Study in Judicial Activism* (London: European Policy Forum, 1995); T. Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 *Law Quarterly Review*, 95; G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Publishing, 2013) and S. Sankari, *European Court of Justice Legal Reasoning in Context* (Groningen: Europa Law Publishing, 2013). See also, though to a lesser extent, G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012).

²⁵ See esp., Art. 13(2) TEU.

²⁶ Joined Cases C-402/05 P and C-415/05, *P Kadi and Al Barakaat International Foundation v. Council and Commission* EU:C:2008:461 at para. 281; Case 294/83, *Parti écologiste "Les Verts" v. European Parliament* EU:C:1986:166 at para. 23 and Opinion 2/13, *Draft Agreement on Accession of the EU to the European Convention on Human Rights*, n. 12 at para. 163.

basic character of the EU legal order as a system of limited, attributed competences (see Article 5(2) TEU).²⁷ As Sharpf summarises: ‘Whilst the Court’s contribution to European integration is widely considered beneficial in politically correct discourses, its impact on the constitutional balance of the multilevel European polity does raise serious problems.’²⁸ Similarly, the Court is also routinely criticised for undermining democratic processes at both Union and national level through its approach to the judicial review of EU and Member State measures.²⁹ Grimm, for example, directly links the Court’s case law, and its role in driving the process of ‘constitutionalising’ the EU legal order, with the European Union’s chronic democracy deficit.³⁰ On his analysis, ‘[the Court’s] confusion of elements of constitutional law with elements of ordinary law in the treaties favours the unelected and non-accountable institutions of the EU over the democratically legitimised and accountable organs’.³¹

This book addresses the persisting failure to scrutinise EU judicial activity for compliance with the demands of the Treaty framework as constitutional touchstone. In so doing, its primary contribution is to correct the asymmetry that presently arises between, on the one hand, analysis of the internal constitutionality of EU administrative/legislative activity and Member State measures and, on the other hand, assessments of the Court’s institutional choices.

²⁷ See e.g., Rasmussen, *On Law and Policy in the European Court of Justice*, n. 24; Neill, *The European Court of Justice: A Case Study in Judicial Activism*, n. 24; Hartley, ‘The European Court, Judicial Objectivity and the Constitution of the European Union’, n. 24; Conway, *The Limits of Legal Reasoning and the European Court of Justice*, n. 24 and Beck, *The Legal Reasoning of the Court of Justice of the EU*, n. 24. See also in the popular press, R. Herzog and L. Gerken, ‘Stop the European Court of Justice’, *EU Observer*, 10 September 2008.

²⁸ F. Scharpf, ‘Perpetual Momentum: Directed and Unconstrained?’ (2012) 19(1) *Journal of European Public Policy*, 127, at p. 134.

²⁹ See e.g., D. Grimm, ‘The Democratic Costs of Constitutionalisation: The European Case’ (2015) 21(4) *European Law Journal*, 460; Scharpf, ‘Perpetual Momentum: Directed and Unconstrained?’, n. 28 and D. Ritleng, ‘Does the European Court of Justice take Democracy Seriously? Some Thoughts about the Macro-Financial Assistance Case’ (2016) 53(1) *Common Market Law Review*, 11. Similarly, the Court is also criticised for its lack of deference to Member States on sensitive matters of cultural, moral, ethical and redistributive policy. See e.g., C. Newdick, ‘Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity’ (2006) 43(6) *Common Market Law Review*, 1645; S. Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2011) 17(1) *European Law Review*, 80 and F. de Witte, ‘Sex, Drugs & EU law: The Recognition of Moral and Ethical Diversity in EU Law’ (2013) 50(6) *Common Market Law Review*, 1545.

³⁰ Grimm, ‘The Democratic Costs of Constitutionalisation’, n. 29.

³¹ *Ibid.*, at p. 471.

II The Treaty Framework as Constitutional Touchstone

II.1 The EU Treaties as Constitutional Touchstones

A central claim of this book is that the EU Treaties should be viewed as the principal statements on the internal constitutionality of all EU institutional activity. This includes, as a matter of principle, the activities of the Court of Justice – an EU institution the activities of which are presently not routinely scrutinised for compliance with the Treaties. The argument that the EU Treaties apply to the *Court* as a source of normative restraint on the exercise of its institutional functions is easily constructed. It follows expressly from the EU Treaties and also finds explicit confirmation in the Court's case law (Section I.4).

Internal constitutionality is not, of course, the only possible baseline against which the legitimacy of EU judicial activity may be measured. The legitimacy of the Court of Justice's role in the EU legal order, and European integration more broadly, may be (and is) assessed from a range of complementary and/or competing perspectives.³² The alignment of internal constitutionality (i.e., legality) with discussion of the legitimacy of EU judicial activity in this book addresses an important gap in existing legal research on the Court of Justice. More crucially, however, it also finds deeper foundations. Above all else, it acknowledges the fundamental value that Member States, through the EU Treaties, have always attached – and continue to attach – to the nature of the EU legal order as a system of limited, attributed competences.³³

II.2 The Treaty Framework and the Three Key Issues for EU Constitutionalism

As constitutional touchstone, the EU Treaty framework performs an important normative function. It provides clarity on what this book defines as the three basic issues for EU constitutionalism. These three

³² Legitimacy may be assessed, for example, not only in terms of legality, but also from a range of political, sociological and moral perspectives. For an overview of the main legitimacy models applied to the study of EU judicial activity, see e.g., R. Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts' in Adams et al., *Judging Europe's Judges*, n. 20 at pp. 198–202.

³³ See Art. 5(2) TEU and Art. 13(2) TEU.

issues are representative of questions that a public lawyer may ask, in adapted form, of any legal system based on the rule of law. They address the *how*, *who* and *what* of European integration. The first issue references *the formal status of Union law and the conditions under which it applies within Member States* (Constitutional Issue No. 1); the second addresses *the locus of political authority within the EU legal order* (Constitutional Issue No. 2); and the third is focused on identifying *the objectives, values and limits governing European integration* (Constitutional Issue No. 3).

The EU Treaty framework's statements on each of these three constitutional issues have remained strikingly consistent over time.³⁴ To a considerable extent, Member States, as Treaty signatories, have repeatedly (re)ratified remarkably clear positions on the fundamentals of EU integration that trace their origins back to the founding EEC Treaty. The principal changes to the EU Treaty framework over time have primarily concerned the objectives, values and limits of EU integration (Constitutional Issue No. 3). These have undergone a process of broadening and deepening. In addition, successive waves of Treaty amendment have also radically adjusted the disposition of policymaking competence between the three key political institutions (Constitutional Issue No. 2) – to enhance, first and foremost, the position of the European Parliament.

II.3 Limits to the EU Treaty Framework as Constitutional Touchstone

The EU Treaties form the centrepiece of the broader constitutional context that structures EU integration. However, they do not capture that context exhaustively. The wider context is conditioned by what this book defines as acts of *constitutional supplementation* and *constitutional contestation*.

The first of these concepts, constitutional supplementation, references acts of the EU institutions (and also Member States) that elaborate – but do *not* fundamentally contest – the EU Treaties' basic statements on the three key issues for EU constitutionalism (Section II.2). Examples include

³⁴ See also, G. de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis' in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) at p. 57.