

EUROPE'S SECOND CONSTITUTION

The process of European constitutionalization is met with extensive scepticism in current national legal and political spheres and in broader circles of public opinion across Europe. By shedding light on these concerns, this book reveals the widespread misunderstanding of constitutional federalism that permeates the Member State courts, popular media and many academic communities. A failure to address confusion over this fundamental concept is leading us towards impoverished development of the EU's 'Second Constitution', and even ensuring that the role of both domestic and European courts in enriching the constitutionalization process is overlooked and undervalued. In a bid to avoid such consequences, this book explores how federalism and further constitutionalization – rightly understood in a dialogue of the European courts – may actually change this process and allow a clearer advance towards Europe's Second Constitution for, but also with, the people of Europe.

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EUROPE'S SECOND CONSTITUTION

Crisis, Courts and Community

MARKUS W. GEHRING

University of Cambridge



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PREFACE

In both the court of public opinion and modern legal scholarship, the Europe of today appears to lurch from crisis to crisis, driven by socio-political, environmental and economic challenges. How might the European Union overcome these crises? Which obstacles should become Europe's central concerns? Which opportunities should be explored? To date, many political debates focus on the next feeble incremental steps to be taken towards formal inter-governmental amendments of the Constitutional Treaties. Yet to overcome what are, in their foundations, a series of constitutional crises shaking the EU, a more considered approach to further constitutionalization is required. In this book, I turn to an under-researched dimension of EU constitutionalization, one that not only provides opportunities to help overcome the current series of crises but also presents a new approach to integration that takes seriously the perceptions and understandings of European jurisprudence with regard to federalism and the European public sphere.

Through a detailed analysis of Member State court jurisprudence and associated literature, the study evaluates the most important *demos*, *civitas* and *ius* dimensions of European constitutionalization. *Demos* focuses on the populace of a democracy, as a self-perceived, aware and organized political unit, and the European *demos* dimension of European constitutionalization concerns the political cohesion of the people of the Union. It also concerns the potential for Europe to develop a common European citizenship, rely on common values and develop a common attitude towards religion. The analysis highlights the lack of a common European public space for deliberation and effective communications through discussions in intelligible working languages. *Civitas* stands for the collection of citizenship duties attributed to a member of a community, and in later years more broadly to a state, and the *civitas* dimension of European constitutional development invokes the potential for a functioning EU institutional citizenship as characterized by EU democratic elections, European political parties, the role of the president

in the EU, the function of the Council and the European Parliament, and the role of a foundational document. *Ius* refers to the rule of law and respect for rights, which also includes more broadly the mandates of legal authorities and the effective functioning of courts of justice, taking into consideration common structures in the law based on EU law, any general principles *Ius Commune Europaeum*, and the collection of rules and rule-making in Europe. In this sense, the *ius* dimension of European constitutionalization discusses the potential for a single rule of law in Europe, the structure of the EU court system, the criminal law and police force, the system of human rights protection and external relations law in the EU.

In these three dimensions, EU constitutionalization has been judged by many periphery courts to be either non-existent or deficient. At the root of these opinions, my research has revealed an impoverished understanding of federalism and its potential role in further European constitutionalization. Through case law analysis, it is revealed that many Member State courts on the periphery do not fully appreciate either the constitutional nature of federations or the lived experiences of federalism in other jurisdictions. This work demonstrates that the litany of obstacles commonly raised by Member State courts and academics have nearly all been overcome, or were never challenges in the first place.

Once many common concerns have largely been dismissed, my research identifies the most significant and potentially fatal remaining obstacle to EU constitutionalization: the absence of a strong and vibrant trans-European public sphere in which transparent, legitimate policy debates can occur, and corollary challenges such as lack of a pragmatic number of working languages, lack of unitary elections, and important gaps in the European central court's *Kompetenz-Kompetenz*. Overcoming *this* obstacle and its related challenges would do much to address the constitutional crisis and set Europe on a healthier path towards further constitutionalization.

This research leads me to further conclude that while a European 'constitutional moment' might be the most straightforward next step, it is not currently on the political horizon. Other constitutional adaptive mechanisms do, however, offer certain opportunities. Incremental formal treaty amendments and fundamentally changed constitutional practices have helped to address certain early obstacles. However, given embedded Member State privileges, they are unlikely alone to be effective in addressing *this* remaining hurdle. Rather, in conclusion it is argued that there is a crucially decisive challenge to be taken up in the

jurisprudence itself. Further constitutionalization can, in essence, be *prepared* by the concerted efforts of more courageous centre and periphery courts, through engaged and legitimate dialogues between the Courts of Europe themselves. Only by enabling and strengthening a vibrant pan-European public policy debate can Europe's Second Constitution one day become a reality.

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This book is dedicated to my wife, Professor Marie-Claire Cordonier Segger, and to our sons, Jona and Nico, with thanks for their patience and inspiration, as well as to Ulli and Peter, Maike, Marit and their families whose support has been deeply appreciated.

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Thanks are also due to heads of two Cambridge colleges, Professor David Yates of Robinson College and Dr Anthony Freeling of Hughes Hall who opened the space and time needed to finalize this research; I

strongly value their support. I am also grateful to several student legal research assistants, especially Jacquelyn Veraldi, who helped in the final stretches of the project, and to my fourteen successful PhD students who endured countless discussions of these issues throughout their studies in Cambridge, EUI, Kisangani and Ottawa.

Finally, I am deeply indebted to the law team of Cambridge University Press, especially Finola O'Sullivan, for their encouragement, and also to the reviewers for their helpful comments. This book is about crises inside the European Union and now for the first time outside it, too. The Brexit process in the UK, that is, the process of one Member State leaving the Union, remains in my view one of the strongest expressions of the constitutionalization obstacles discussed in the volume. It serves as both a warning and a reminder that most constitutional structures change over time.

TABLE OF CASES

Dimensions / Obstacles	Cases EU	Cases Member States	Notes
Demos			
No homogeneity of citizenship	Case C-184/99, <i>Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies- Louvain-la- Neuve</i> [2001] ECR I-06193 Case C-109/01, <i>Secretary of State for the Home Department v. Hacene Akrich</i> [2003] ECR I- 09607 Case C-209/03, <i>The Queen (on the application of Dany Bidar) v. London Borough of Ealing and</i>	US Supreme Court, <i>Dred Scott v. Sandford</i> , 60 U. S. 393 [1857]	In <i>Dred Scott v. Sandford</i> , the US Supreme Court ruled that African Americans could not be citizens and that the fed- eral government could not regu- late slavery in the new states. In <i>Grzelczyk</i> , the Court pointed out that EU citi- zenship was 'des- tined' to provide the foundation statute for Member State nationals in other Member States.

(cont.)

Dimensions / Obstacles	Cases EU	Cases Member States	Notes
	<p><i>Secretary of State for Education and Skills</i> [2005] ECR I-02119</p> <p>Case C-158/07, <i>Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep</i> [2008] ECR I-08507</p> <p>Case C-135/08, <i>Janko Rottmann v. Freistaat Bayern</i> [2010] ECR I-01449</p> <p>Case C-256/11, <i>Murat Dereci and Others v. Bundesministerium für Inneres</i> [2011] ECR I-11315</p> <p>Case C-85/96, <i>María Martínez Sala v. Freistaat Bayern</i> [1998] ECR I-02691</p> <p>Case C-34/09, <i>Gerardo Ruiz Zambrano v.</i></p>		<p>In <i>Martínez Sala, Ruiz Zambrano, Akrich, Bidar, Förster, Rottmann and Dereci</i>, the Court elaborated on ‘genuine enjoyment of substance of citizenship rights’.</p>

(cont.)

Dimensions / Obstacles	Cases EU	Cases Member States	Notes
	<i>Office national de l'emploi</i> (ONEm) [2011] ECR I-01177		
No religious homogeneity	Case 41/74, <i>Yvonne van Duyn v. Home Office</i> [1974] ECR 01337 Case C-159/90, <i>The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others</i> [1991] ECR I-04685		In <i>van Duyn</i> and <i>Grogan</i> , the Court defended the right to religious tolerance.
No homogeneity of values	Case 294/83, <i>Parti écologiste 'Les Verts' v. European Parliament</i> [1986] ECR 013391 Case C-280/11 P, <i>Council of the European Union v. Access Info Europe</i> , Judgment of the Court (First Chamber) of 17		<i>Les Verts</i> suggests that homogeneity is not required, in contradiction of some national constitutional scholars. In <i>Access Info Europe</i> , the Court ruled in a straightforward way that democracy and transparency are

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Dimensions / Obstacles	Cases EU	Cases Member States	Notes
	October 2013, not yet reported Case 29/69, <i>Erich Stauder v. City of Ulm – Sozialamt</i> [1969] ECR 00419		constitutional values of Europe. In <i>Stauder and Nold</i> , the Court ruled that ‘the court is bound to draw inspiration from constitutional traditions com- mon to the Member states’.
	Case 4/73, <i>J. Nold, Kohlen- und Baustoffgroßha- ndlung v. Commission of the European Communities</i> [1974] ECR 00491		In <i>Volker and Eifert</i> and <i>Test-Achats</i> , the Court ruled that the Charter of Fundamental Rights serves as a basis to engage in legislative review of EU norms.
	Joined Cases C-92/ 09 and C-93/09, <i>Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09)</i> v. <i>Land Hessen</i> [2010] ECR I- 11063		In <i>Kadi</i> , the Court decided that even UN Security Council Resolutions and the UN Charter cannot trump the priority of fun- damental rights in the EU system.
	Case C-236/09, <i>Association Belge des Consommateu- rs Test-Achats ASBL and Others v. Conseil des</i>		

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Dimensions / Obstacles	Cases EU	Cases Member States	Notes
	<i>ministres</i> [2011] ECR I- 00773 Joined Cases C- 402/05 P and C- 415/05 P, <i>Yassin</i> <i>Abdullah Kadi</i> <i>and Al</i> <i>Barakaat</i> <i>International</i> <i>Foundation v.</i> <i>Council of the</i> <i>European</i> <i>Union and</i> <i>Commission of</i> <i>the European</i> <i>Communities</i> [2008] ECR I- 06351 T-112/98, <i>Mannesmannr-</i> <i>öhren-Werke v.</i> <i>Commission</i> , 20 February 2001, [2001] ECR II-729		
No social and linguistic homogeneity	Case C-361/01 P, <i>Christina Kik v.</i> <i>Office for</i> <i>Harmonisation</i> <i>in the Internal</i> <i>Market (Trade</i> <i>Marks and</i> <i>Designs)</i>		In <i>Christina Kik</i> , the Court of Justice defended a prag- matic approach to languages where a balance between official languages and

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Dimensions / Obstacles	Cases EU	Cases Member States	Notes
	(OHIM) [2003] ECR I-08283		economic expense for
	Joined Cases C- 274/11 and C- 295/11, <i>Kingdom of Spain and Italian Republic v. Council of the European Union</i> , Judgment of the Court (Grand Chamber) of 16 April 2013, not yet reported		translation ser- vices could be struck. In other words, the Court of Justice here embarked on a centralizing trend in language policy that was previously known only at the level of nation states.
	Case C-281/98, <i>Roman Angonese v. Cassa di Risparmio di Bolzano SpA</i> [2000] ECR I- 04139		In <i>Spain and Italy v. Council</i> , the Court resound- ingly rejected the notion that the exclusion of Italian and Spanish in an EU patent could constitute a mis- use of powers or violation of the enhanced coop- eration powers in Art. 20 TEU.
	Case No 51/2006, 19 April 2006, Belgian Constitutional Court, www .const-court.be/ public/f/2006/ 2006-051f.pdf.		In <i>Angonese</i> , the Court decided on the basis that lin- guistic diversity is a protected
	Case C-212/06, <i>Government of</i>		

(cont.)

Dimensions / Obstacles	Cases EU	Cases Member States	Notes
	<i>Communauté française and Gouvernement wallon v. Gouvernement flamand</i> , [2008] ECR I-01683		right in Europe that the requirement to use a particular language could be a restriction on free movement. In <i>Wallonia v. Flanders</i> , the Belgian Constitutional Court had made a preliminary reference to the CJEU, but the latter stated that constitutional decisions of linguistic politics should be left to national courts.
No common European public space for political debate	Case C-280/11 P, <i>Council of the European Union v. Access Info Europe</i> , Judgment of the Court (First Chamber) of 17 October 2013, not yet reported Case C-518/07, <i>European Commission v. Federal</i>	GFCC, <i>Lisbon Treaty</i> , BVerfG, 2 BvE 2/08 of 30 June 2009 GFCC, <i>Solange I</i> , BVerf 37 of 29 May 1974 GFCC, <i>Maastricht Treaty</i> , BVerfGE 89, 155 of 12 October 1993 GFCC, <i>European Stability</i>	In his Opinion in <i>Access Info Europe</i> , AG Cruz Villalon put forward a very participatory model of democracy for the EU. In the federal interplay between the Union and its Member States, Member States are not permitted

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Dimensions / Obstacles	Cases EU	Cases Member States	Notes
	<i>Republic of Germany (Personal data processing)</i> [2010] ECR I- 01885 Opinion of AG Bot in Case C-300/ 11, ZZ v. <i>Secretary of State for the Home Department,</i> not yet reported	<i>Mechanism Treaty,</i> Decision of 12 September 2012 in 2 BvR 1390/ 12, 2 BvR 1421/ 12, 2 BvR 1438/ 12, 2 BvR 1439/ 12, 2 BvR 1440/ 12, 2 BvE 6/12, etc. Applications for the issue of a temporary injunction GFCC, OMT, 2 BvR 2728/13 of 14 January 2014 Polish Constitutional Tribunal, <i>Lisbon Treaty,</i> Case K 32/09	to argue that they should be treated as foreign sovereigns. In <i>Lisbon Treaty</i> , the GFCC expressed a more tradi- tional view of representative democracy. In <i>Personal data processing</i> , the Court considered that it sufficed that an institu- tion is bound by law to be consid- ered democratic as long as inde- pendent courts can review its decisions, in contradiction to the view of Germany. In ZZ, AG Bot con- firmed that democratic values should be given primacy to the extent that this would not result in 'suicide of democracy itself'.

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Dimensions / Obstacles	Cases EU	Cases Member States	Notes
			<p><i>Solange I</i> and <i>Maastricht</i> are relevant as to whether a homogenous European <i>demos</i> is required for constitutionalization of the EU.</p> <p>In the <i>Polish Lisbon Treaty</i> case, the Court warned that the Treaty must not undermine the identity of the Polish Constitution.</p> <p>In the <i>German Lisbon Treaty</i> case and the <i>ESM</i> case, the GFCC reiterated its conviction that real democratic legitimacy can only stem from the national legal order.</p> <p>In <i>OMT</i>, the GFCC referred a question to the CJEU for the first time.</p>

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Dimensions / Obstacles	Cases EU	Cases Member States	Notes
<i>Civitas</i>			
Lack of unitary elections	<p>Joined Cases C-393/07 and C-9/08, <i>Italian Republic and Beniamino Donnici v. European Parliament</i> [2009] ECR I-03679</p> <p>Case C-370/12, <i>Thomas Pringle v. Government of Ireland</i>, Judgment of the Court (Full Court) of 27 November 2012, not yet reported</p> <p>Case C-208/03 P, <i>Jean-Marie Le Pen v. European Parliament</i> [2005] ECR I-06051</p> <p>Case C-145/04, <i>Kingdom of Spain v. United Kingdom of Great Britain and Northern</i></p>	<p>GFCC, <i>5% Hurdle European Election</i>, 2 BvC 4/10 of 9 November 2011</p> <p>ECtHR, <i>Matthews v. United Kingdom</i> (Application No. 24833/94) (1991) 28 E.H. R.R. 361</p> <p>French Conseil d'Etat, <i>Nicolo</i> [1990] 1 Common Market Law Review 173;</p> <p>French Conseil d'Etat, <i>Assemblée, du</i> 20 octobre 1989, No. 108243</p> <p>English High Court, <i>The Queen on the application of Chester v. (1) Secretary of State for Justice and (2) Wakefield</i></p>	<p>In <i>5% Hurdle European Election</i>, the GFCC doubted the ability of the polity to develop constitutionally, given that only rudimentary EU legislation is in place for EU elections, which are largely governed by Member State rules. However, given that the European Parliament does not have many important or relevant government functions, a lack of cohesion engendered by fragmentation of voting rules and systems should not really prevent it from fulfilling its limited role at present. The specific functions of</p>

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Dimensions / Obstacles	Cases EU	Cases Member States	Notes
	<i>Ireland</i> [2006] ECR I-07917 Case C-300/04, <i>M. G. Eman and O. B. Sevinger v. College van burgemeester en wethouders van Den Haag</i> [2006] ECR I- 08055	<i>Metropolitan District Council</i> [2009] EWHC 2923 (Admin)	the European Parliament are not such as to require a stable majority. In <i>Donnici</i> , the CJEU clarified that the European Parliament has no power to challenge the administration of these elections, even when it believes that the Member State in question did not follow its own procedures. In <i>Pringle</i> , the Court stated that it had jurisdiction to ensure that the conditions for the simplified Treaty amend- ment procedure are observed. It seems that the post-Lisbon Court is at least willing to engage with the problem of the EU still

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Dimensions / Obstacles	Cases EU	Cases Member States	Notes
			<p>being largely driven as an elite project in which mainly governments have the overall and final decision-making power.</p> <p>In <i>Le Pen</i>, the Court maintained that it is the Member State decision in election matters that binds the EU institutions.</p> <p><i>Matthews v. UK</i> in the European Court of Human Rights declared the lack of organizing EU European Parliament elections in Gibraltar to be a human rights violation.</p> <p>In the <i>Gibraltar Election</i> case, the Court held that it was part of the constitutional tradition of the UK to grant nationals of the</p>