Armin von Bogdandy and Jürgen Bast (eds). ***Principles of European Constitutional Law***. Oxford: Hart Publishing, 2nd edn, 2009. Pp. 856. £155. ISBN: 9781841138220.

After the entry into force of the Lisbon treaty on 1 December 2010, and right in the middle of the European response to the recent financial and economic crisis, the review of the second edition of Armin von Bogdandy's and Jürgen Bast's *Principles of European Constitutional Law* appears to be a timely and anything but anachronistic or cynical enterprise. The European effort to combat the financial crisis and set up a joint framework to regulate the banking sector shows the constant need for research on the 'founding principles of the polity' and the sources of its legitimacy (at 1). And indeed, the second edition of the book, too, provides a thorough examination of the main themes underlying a more closely connected Europe.

After the largely positive reviews of the first edition,[1] there is still some room for critical reflection, evaluation, and praise of the second. The editors have not given up on the idea of marketing the book as a textbook (at 3, 5); they remark that the volume is not intended as an introduction to the topic, but rather a reflection on the theoretical and doctrinal fundamentals within the current research (at 6). The book certainly lives up to this aim, although the editors' characterization of it as a textbook needs to be revisited. The tome numbers 806 pages, and thus it is suitable as selective further reading for students, but not as an introductory book on the topic.

The authors have taken previous critique seriously and significantly revised and restructured the book (at 5). Yet, its overall approach to the topic of European constitutional law remains unchanged. The editors, in particular von Bogdandy in his first chapter on 'Founding Principles', present the idea of a European constitutional law from the theoretical perspective of 'doctrinal' constructivism, and the introductory chapters in part one, several chapters throughout, as well as the closing remarks in part five approve of and adopt von Bogdandy's main principles as a constitutive part of the constitutional framework of the European Union.[2] Concerning methodology, von Bogdandy's first chapter identifies principles inherent in the positive national and European legal material and organizes them to 'further the coherence' of this so-called 'constitutional material' (at 14 ff). Theoretically, von Bogdandy locates the constitutional principles in an area of discourse and argument, between the spheres of natural law, i.e., theology and philosophy, and positive law (at 15). Their function is to 'identify and interpret, in the tradition of constitutionalism, those norms of primary law having a normative founding function for the whole of the Union's legal order'(at 21). According to Bogdandy, the 'principles laid down in Article 6(1) EU as well as the other principles located in Title I EU regarding the allocation of competences, loyal co-operation and structural compatibility' must be regarded as those founding principles (at 22). Particular principles which govern the relationship between the Community and the Member States (at 28 ff), are, for example, the rule of law (at 33) or the principle of effectiveness (at 29); those governing the relationship between the EU and the individual are, amongst others, equal liberty (at 43) and the principle of democracy (at 47). Von Bogdandy's understanding of these European constitutional principles is that they are not imperative; he sees them as 'negotiated results', representing a 'functional equivalent to common values', interacting with their national equivalents in a constant dialogue (at 54).

[1] Compare Arruego, 'Principles of European Constitutional Law', 19 *L and Politics Book Rev* (2009) 745, available at: www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/bogdandy-bast1009.htm; Everson, 'Is it just me or is there an Elephant in the Room?', 13 *European LJ* (2007) 136; *Thym*, Book Review, 44 *CMLRev* (2007) 837; Murkens, 'The Future of Staatsrecht: Dominance, Demise or Demystification?', 70 *MLR* (2007) 731; Peters, Book Review, 41 *CMLRev* (2004) 861.

[2] See, e.g., the chapters by Oeter, at 55–83; Grabenwarter, at 127–129; Everling, at 722–724, and Zuleeg, at 772–777.

On reading von Bogdandy's introductory chapter as well as the topics included in the first part, it is evident that the book is not concerned with the *if* of constitutionalism. Instead, the main question is about the *how*. This is a problematic starting point, even from the perspective of doctrinal constructivism, since it presupposes that the listed principles are indeed valid and influential at the European level, without reflecting critically on the practices and realities in which they apply. The preface to the book also gives the impression of a more exploratory approach. The editors emphasize (at 6) that the volume is concerned with 'the theoretical and doctrinal fundamentals, with reflections on the state of research, with the elucidation of methodological approaches, with the clarification of diverse understandings and the identification of research *desiderata*'(*ibid.)*. It is mostly because of this seemingly more open agenda that Michelle Everson accused the previous edition of hiding the elephant of legal theory in the room.[3] Everson criticized the editors for building on the assumption that the legal discourse across and between national and European legal orders possesses an authority of its own, thus relying on a rationale which cannot explain which processes have transformed the values relied upon into legal principles.[4] In the present author's view, her view is correct: even the meta-level of constitutional doctrine has to engage with and conceptualize those changing social realities that trigger and cause fundamental changes in the law, in perceptions of underlying principles or governing values, as well as with the processes which govern the law's formation. A reaffirmation of the identified principles by the jurisprudence of the European Courts, as von Bogdandy suggests (at 18), does not provide an engagement of that sort. It reaffirms the factual use and existence of those principles, but does not necessarily provide an evaluation of their normative relevance as constitutional principles. Thus, even though von Bogdandy's first chapter in the second edition is explicit and open about the theoretical foundations of his approach (at 14 ff), Everson's critique still seems to hold. In their preface, even the editors wonder why 'epochal events like the enlargement of the EU by 12 states, . . . global stances of the Union after 9/11 and, . . . the drama about the failure of the Constitutional Treaty . . . did not have a deeper impact on the contributions . . ..' (at 7). Nonetheless, neither does von Bogdandy take much notice of those events in his own theory, nor have they inspired him and Bast to include in the book, for example, a contribution which critically reflects on the real influence and impact of principles like the rule of law or democratic decision-making on the European legal and institutional order. Other works on the constitutionalization of Europe have been slightly more exploratory and open in this regard, and critically reflected on the constitutional nature of the Lisbon Treaty or the failure of its predecessor, the Constitutional Treaty, as well as on the impact of that failure on the notion of European constitutionalism.[5] However, many contributions, such as Thym's discussion of the foreign affairs competences of the Union, take note of the EU's peculiarities (i.e., of the fact that the EU, after all, was created by the sovereign will of states, under public international law (at 323)) and well-crafted and investigative chapters mitigate more serious concerns about the rigidity of the overall approach.

The first edition's overall approach was also criticized for shifting between a constitutional account of European law (*verfassungsrechtlich*) and an institutional (*staatsrechtlich)* method, which are both used in the German constitutional debate.[6] Usually, the former is conceptualized

[3] Everson, *supra* note 1, at 136.

[4] *Ibid.*, at 140.

[5] Compare K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union* (2nd edn, 2009); D. Chalmers and A. Tomkins, *European Union Public Law* (2007), who at 44ff discuss the 'failure' of the Constitutional Treaty; J.H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes have an Emperor' and other Essays on European Integration* (1999).

[6] Murkens, *supra* note 1, at 734 ff.

as offering a view on the organization and competences of the state, the polity, and the citizen from the viewpoint of the constituting legal instrument.[7] By contrast, the latter concentrates on the law from the state's perspective and may encompass the discussion of secondary legislation, while also tackling both the state's organization and state competences.[8] Yet, both approaches are helpful in assessing and understanding the constitutional set-up of the EU. The institutional approach is needed when evaluating the performance and legal design of the EU's institutions. The constitutional approach, by contrast, may be of help when it comes to identifying some of the yardsticks which can guide the future development of European and international law.[9]

Because the book is written by German authors only, it remains an account of German legal scholarship on European constitutional law, a limitation for which the first edition was also criticized.[10] Yet, this approach has its merits: by providing an account of European law from a German perspective, it is possible for English-speaking readers to identify the theoretical angle of the German debate on European law.[11] The book allows us to look at Europe through German-coloured glasses. Thus, the book is highly recommendable to enable one to understand this important part of European legal doctrine, even though this perspective may further diminish the book's suitability as a textbook on European constitutional law.

The second edition retains the five-part structure of the first edition. Yet, the parts are now even more aligned with the major topics of the Lisbon Treaty, which benefits the book's overall layout. It now includes chapters on foreign affairs, as well as on judicial protection against the exercise of European Union powers. The individual components of European constitutionalism now appear in a mature, palatable, and comprehensible form, which certainly reflects the further development of the European Union itself. The book thus presents us with a holistic vision of a European constitutional law, addressing the European institutions and their interaction with the national and international levels, the position of the individual and the policing functions of the EU in the area of freedom, justice, and security, as well as the general framework of the social order and visions of the EU's further development.

The first part, with von Bogdandy's chapter on the 'Founding Principles', Stefan Oeter's chapter on 'Federalism and Democracy', and Christoph Grabenwarter writing on the relationship of national constitutional law with the EU, sets the ground for the following parts on the individual elements of European constitutional law. It introduces the constructivist approach of the book, as well as European constitutional law's constituent elements. The second part is concerned with the institutional set-up of the EU and tackles subjects such as political institutions and foreign affairs. It includes Bast's contribution on 'Legal Instruments and Judicial Protection' and Franz Mayer's on 'Multilevel Constitutional Jurisdiction'. The third part treats the position of the individual, with Stefan Kadelbach examining 'Union Citizenship' and Jürgen Kühling's contribution on 'Fundamental Rights'. It ends with Jörg Monar's piece on 'The Area

[7] J. Ipsen, *Staatsorganisationsrecht* (18th edn, 2006), marginal no. 21; C. Möllers, *Staat als Argument* (2000), at 173 ff.

[8] C. Degenhart *Staatsrecht I* (2007), at 1, marginal no. 1.

[9] Compare Ingolf Pernice's concept of Europe as an association of constitutions ('*Verfassungsverbund*'): Pernice 'Bestandssicherung der Verfassungen', in R. Bieber and P. Widmer (eds), *L'espace constitutionnel européen* (1995), at 261ff. On the matter of the constitutionalization of international law, compare the recent contributions of B. Fassbender *The United Nations Charter as the Constitution of the International Community* (2009); Paulus, 'From Territoriality to Functionality? Towards a Legal Methodology of Globalization', in I.F. Dekker and W.G. Werner (eds), *Governance and International Legal Theory* (2004), at 59–95.

[10] H. Aden, *Kritische Justiz* (2005), at 344.

[11] Compare Murkens, *supra* note 1, at 734 ff.

of Freedom Security and Justice'. This last chapter did not form part of the first edition. Yet, its inclusion is timely, not least in light of the European Court of Justice's decisions in the *Kadi* case.[12] The fourth part concentrates on the social order of Europe, with Armin Hatje addressing the economic constitution of the internal market, Florian Rödl writing on the labour constitution, and Josef Drexl investigating the particularities of competition law from a constitutional law perspective. The fifth part was updated, but has not undergone major structural change. Here, individuals like Ulrich Everling, Paul Kirchhof, and Manfred Zuleeg, who have all played roles in shaping the discussion on the European legal order,[13] address broader issues underlying the constitutional theme under the heading 'Contending visions of European integration'. The title clearly reflects the fact that this part deals mostly with individual opinions about the present and future development of Europe and exemplifies the overall theme of the book, which is to present an overview of German legal scholarship on European constitutional law matters.

For the international lawyer certain chapters stand out. Von Bogdandy's finely crafted introductory first chapter has already been discussed. Oeter's assessments of federalism and democracy in the second chapter takes up von Bogdandy's constructivist methodology. He conceptualizes various federal and democratic approaches and applies them to the EU in order to illustrate a vision of the EU which can incorporate both notions. Oeter's chapter would have been most suited to an evaluation of some of the recent general challenges to the EU, like the failure of the Constitutional Treaty or the impact on the EU and its institutions of global and local security policies after 9/11. Nonetheless, his contribution remains abstract. He concludes that '[t]he solution [for the EU] is not a return to the traditional policy-making at the national level, but ought to be the creation of an international treaty regime enabling the institutionalized co-operation of states' (at 74). Based on that premise, he finds a union of states to be the most adequate conceptualization of the EU (at 82).

Grabenwarter's third chapter presents a nuanced view of the relationship and interaction of national constitutional law with the EU. After painting a detailed picture of the relevant constitutional provisions of the Member States and findings of their constitutional courts on the relationship of the state with the EU, he concludes that the current situation between the Member States and the EU might best be described as 'reciprocal constitutional stabilisation', which German literature has translated into the concept of the *Verfassungsverbund* (composite of union[14]) (at 128). Pursuant to this concept, under 'the increasing influence of European law, national constitutions have started to approximate each other in central areas'(*ibid.*), even if certain national differences prevail. In his view, this is essentially furthered by both the concept of the homogeneity clause of the Constitutional Treaty and now Article 2 TEU, which purports to state that national constitutional legislation must be formulated in accordance with the common European standard concerning democracy, fundamental rights, and the constitutional state (at 128). The reciprocal nature is bolstered by the threat of sanctions pursuant to Article 7 TEU, and the fact that the national constitutional bond may not be severed unilaterally, at least pursuant to the constitutions of some states (*ibid.*). Grabenwarter closes by saying that those mutual effects have created a unique *sui generis* connection of the national constitutions with the EU, which will determine the further relationship of EU law with national constitutional law (at 129).

[12] Joined Cases C–402/05 P and C–415/05 *Kadi et al. v. Council and Commission* [2008] ECR I–6351.

[13] Ulrich Everling and Manfred Zuleeg were both judges at the European Court of Justice (ECJ) and Paul Kirchhof is a former judge of the Federal Constitutional Court (*Bundesverfassungsgericht*) and one of the co-authors of the famous *Maastricht* decision (Federal Constitutional Court, Judgment No. 2 BvR 2134, 2159/92, 12 Oct. 1993).

[14] Compare von Bodandy, at 38–42.

Robert Uerpmann-Wittzack's fourth chapter on the constitutional role of international law in the EU (at 113 ff) follows nicely both the principled and the constitutional approach of the book. Although this may not be evident to the reader unfamiliar with the German constitution, the author applies to the EU the Basic Law approach to the incorporation of international law into domestic law.[15] He first assesses the direct effect of international law within EU law (at 135–152), and then the transformation of international law into EU law (at 153–159). The first part investigates the incorporation of (customary) international law into EU law (at 135–137), as well as the relationship of the EU to the ECHR (at 147–153) and the WTO (at 137–146). In particular the practicalities relating to the second aspect, namely the accession of the EU to the ECHR, i.e., delimitation of jurisdictional competences, the scope of judicial review to be exercised by either the ECJ or the ECHR, have become an issue since the coming into force of the Lisbon Treaty, which establishes the legal basis for this accession. Uerpmann-Wittzack rightly points to the main legal issue raised by an accession: the concurring jurisdictions of the ECJ and the ECtHR on human rights matters. Yet, he depicts this problem as a threat to the independence of the ECJ as the 'highest protector of Community law'. He also argues that an accession would ultimately decrease the significance of the Member States, because the EU would usurp their role as guarantor of individual rights in many areas (at 148). Those fears may be slightly overrated. The ECtHR has already made it quite clear that it will not intervene in EU matters as long as human rights protection at the EU level is equivalent to the standards of the ECHR.[16] Even though this approach certainly needs revisiting after an accession, it indicates that the ECtHR will not intervene wildly in EU matters. Nonetheless, Uerpmann-Wittzack rightly points out that the ECtHR's approach in the *Bosphorus* case puts a certain pressure on the ECJ to adjudicate on cases involving the direct effect of EU acts on individuals (at 153).

Daniel Thym's chapter on foreign affairs is new to the second edition. Its addition reflects the expansion of EU competences. The chapter contains an important part on the ECJ and international law, taking up the issues addressed in the *Kadi* case.[17] Thym rightly remarks that the ECJ's jurisprudence on international law lacks doctrinal clarity, a defect which will hopefully be remedied by future research by European constitutional lawyers (at 323). Thym's contribution is structured according to the various levels involved, supranational and national, and it addresses the topic of foreign affairs at both levels, while also touching upon intergovernmental foreign policies (at 330 ff). Concerning the decision-making processes at the supranational level, his contribution also addresses the notorious parliamentary deficit of the EU. Thym makes out the 'particularities of the law of treaties' as one of the main reasons for the limited involvement of the parliament. He opines that any constitutional analysis of the foreign affairs provisions has to be carried out in light of public international law (at 323). Thym illustrates this finding with a reference to Article 300 EU, which excludes parliamentary participation for the benefit of the observation of diplomatic customs and the requirements of the international law of treaties (at 324). In the present author's view, Thym's analysis is correct: any reading and analysis of the constitutional foundations of European foreign affairs is well advised to take due note of the persistent public international dimension of this area of law.

The legitimacy deficit of the Parliament is also addressed by Philipp Dann's contribution on the political institutions (at 237 ff). Even though his chapter discusses the competences of all three European institutions, Parliament, Commission, and Council, he is concerned only with

[15] Compare Art. 25 Basic Law for the Federal Republic of Germany, available at: www.gesetze-im-internet.de/englisch_gg/index.htmlhttp://www.gesetze-im-internet.de/englisch_gg/index.html.

[16] App. No. 45036/98, *Bosphorus Hava Yollari Turzim v. Ireland,* ECHR 2005-VI No. 106, at paras 149ff, which is sometimes termed the 'Solange' approach of the ECtHR.

[17] *Supra* note 12.

the concept of parliamentary democracy[18] and does not address further issues revolving round the legitimacy of all European institutions.[19] Without delving right into the different schools on legitimacy here, it appears worthwhile to reflect upon the issue whether democratic representation can or should be the only determinant in discussions on the exercise of institutional powers.

A final remark is owed to Mayer's chapter on multilevel constitutional jurisdiction (at 399 ff). Mayer's contribution provides an excellent account of the jurisprudence of the German Constitutional Court on its powers to review EC acts (at 410–415),[20] which certainly facilitates an understanding of the rather complex relationship between this constitutional court and the ECJ, followed by a helpful overview of the roles and individual powers of other national constitutional courts (at 415–420) to review acts of the EU. This prepares the ground for his analysis of the relationship between the German Constitutional Court and the EU and some broader account of a theory of European constitutional adjudication. He opines that the relationship between the different courts in the EU may be described and analysed following legal theorems, such as the composite of union (*Verfassungsverbund*), cooperation between courts, or the multilevel system (at 435). Hence, rather than pointing to the ensuing conflicts, he favours conceptualizing the relationship between the European judiciaries as a multi-level relationship in which responsibilities are shared on the basis of co-operation (at 434). He points out that several open questions remain. For example he warns that one should keep in mind that every attempt to conceptualize problems of multi-level constitutional adjudication leads back to questions about the conceptualization of the use of public power in an era of globalization and internationalization (at 437). Sadly, Mayer's contribution barely touches the third dimension of EU multilevel adjudication, which is the international level, and thereby some of the more recent issues revolving round EU constitutional adjudication. He only hints at the possible problems which may result at this level (at 435 ff). Overall, the proper role and delimitation of competences of the EU and national constitutional courts *vis-à-vis* the UN Security Council, or other international regimes such as the WTO, remain undiscussed. Even though Uerpmann-Witzack and Thym touch upon those issues from an institutional perspective and from a viewpoint which centres on the EU's competences and the ECJ's relationship with international law, the proper role of the adjudicative bodies involved in those issues still needs to be defined.

The need for some further thought on the exercise of power by the European authorities is addressed by Kirchhof in his account of the European Union of states in the final part of the book (at 757 ff). He views the new issues regarding the relationship between EU organs and national organs as perfect ground for the application of the concept of separation of powers (at 757). He finds, 'The element of separation of powers that is the object of the co-operation between Member State and European Union gains an even greater significance since the traditional separation of powers in a parliamentary system of political parties appears weakened and threatened in a parliament-poor European Union' (at 758). Yet, his call for more legitimacy remains sketchy. Similarly, Manfred Zuleeg's contribution on the advantages of the European constitution (at 763–786) addresses the requirements of the rule of law and the separation of powers,

[18] Compare J. Thomassen, *The Legitimacy of the European Union after Enlargement* (2009); H. Schmitt and J. Thomassen, *Political Representation and Legitimacy in the European Union* (1999).

[19] Compare F. Scharpf, *Governing in Europe. Effective and Democratic?* (1999); Grimm, 'Does Europe Need A Constitution?', 1 *European LJ* (1995) 278; Habermas, 'Staatsbürgerschaft und nationale Identität' in J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992), at 632–660. At the international level, Thomas Franck's theory of legitimacy has gained a certain prominence: Franck, 'Legitimacy in the International System', 82 *AJIL* (1988) 705, at 712; for an overview of the international legitimacy debate see R. Wolfrum and V. Röben (eds), *Legitimacy in International Law* (2008).

[20] Nonetheless, his contribution does not include the important Lisbon Treaty Decision, Bundesverfassungsgericht, 2 BvE 2/08, Judgment, 30 June 2009, available at: www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, which is probably left for a third edition of this book.

i.e., principles deeply rooted in the German constitutional tradition, yet without drawing from those concepts conclusions to be applied to some of the EU's current problems.

The last two contributions point to a further contribution which is yet to be included in a further edition of this valuable compendium of European constitutional law: the book certainly lacks a chapter which both tests and challenges its overall constructivist approach and its individual elements. It would certainly be worthwhile to elaborate on the approach's theoretical as well as conceptual specificities and on its ultimate ability to address some of the pressing problems of the European constitutional system. Apart from this reservation, one can only recommend the purchase of this excellent second edition.

Individual Contributions

Armin von Bogdandy and Jürgen Bast, The Constitutional Approach to EU Law;
Armin von Bogdandy, Founding Principles;
Stefan Oeter, Federalism and Democracy;
Christoph Grabenwarter, National Constitutional Law Relating to the European Union;
Robert Uerpmann-Wittzack, The Constitutional Role of International Law;
Christoph Möllers, Pouvoir Constituant—Constitution—Constitutionalisation;
Ulrich Haltern, On Finality;
Philipp Dann, The Political Institutions;
Armin von Bogdandy and Jürgen Bast, The Federal Order of Competences;
Daniel Thym, Foreign Affairs;
Jürgen Bast, Legal Instruments and Judicial Protection;
Franz C Mayer, Multilevel Constitutional Jurisdiction;
Stefan Kadelbach, Union Citizenship;
Jürgen Kühling, Fundamental Rights;
Thorsten Kingreen, Fundamental Freedoms;
Jörg Monar, The Area of Freedom, Security and Justice;
Armin Hatje, The Economic Constitution within the Internal Market;
Florian Rödl, The Labour Constitution;
Josef Drexl, Competition Law as Part of the European Constitution;
Ulrich Everling, The European Union as a Federal Association of States and Citizens;
Paul Kirchhof, The European Union of States;
Manfred Zuleeg, The Advantages of the European Constitution

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