CONTENTS

Table of Cases	XVII
Table of Legislation	XXV
Abbreviations	XXXV
Introduction: Coming to Constitutional Terms	1
GENERAL PART Federalism in America and Europe	
Chapter 1 – Federal Tradition(s) and the European Union	13
Introduction: Federalism and (Inter)national Law	14
I. The Federal Principle: Three Legal Traditions	15
1. The Classic Tradition: The 'International' Format of the Federal Principle	16
 The American Tradition: The 'Mixed' Format of the Federal Principle The European Tradition: The 'National' Format of the 	22
Federal Principle	30
a. Conceptual Polarization: 'Confederation' versus 'Federation' b. Early Criticism: The European Tradition and the (missing)	31
Federal Genus	36
II. The European Union: American and European Perspectives	40
 The 'Supranational' Europe: A (Very) Brief History The European Union in the Light of the 	41
American Tradition	47
a. The Foundational Dimension: Europe's 'Constitutional Treaty' b. The Institutional Dimension: A European Union of States	48
and People(s)	52
c. The Functional Dimension: The Division of Powers in Europe d. Overall Classification: The European Union on Federal	56
'Middle Ground'	58
3. The European Union in the Light of the European Tradition	58
a. Posing the Sovereignty Question: The 'Maastricht Decision' b. Europe's Statist Tradition Unearthed: Three Constitutional Denials	60 63

Conclusion: The European Union as a	
'Federation of States'	69
Chapter 2 – Federal Philosophies and the Structure of	
American Law	75
Introduction: Federal Philosophies and	
Constitutional Structures	76
I. The 'New Nationalism': The Decline of	, 0
Constitutional Exclusivity	80
1. Expanding the Federal Universe: The Decline of State	
'Police Powers'	84
2. Changing Nature: From Exclusive to Concurrent Power	88
II. The 'New Federalism': The Decline of	
Legislative Exclusivity	94
1. From Concurrent to Shared Powers: The Decline of	
'Classic' Pre-emption	96
a. The Rise of the Modern Pre-emption Framework	98
b. Changing Judicial Philosophies: The 'New Federalism'	101
 Changing Nature: From Constitutional to Legislative Pre-emption 	105
Excursus—The Foreign Affairs 'Exception'	108
 Foreign Affairs and the Treaty-Making Power: Dual Federalism Constitutionalized 	109
	109
a. Constitutional Certainties: The Unitary Scope of the Federal Treaty Power	110
b. Constitutional Ambivalences: The Treaty-Making	
Powers of the States	113
2. Foreign Affairs and Internal Legislation: Dual Federalism	
De-Constitutionalized?	116
Conclusion: The Changing Structure of American Law	122
SPECIAL PART The Changing Structure of European I	Law
Chapter 3 – The Decline of Constitutional Exclusivity	129
Introduction: Federalism and Exclusive Powers	130

I. Europe's Expanding Sphere: The Decline of State 'Police Powers'	132
1. Europe's 'Necessary and Proper Clause': The Scope of	132
Article 308 EC	133
a. Internal Limits: Legislation Necessary in the Course of the Common Market	135
b. External Limits: The 'Constitutional Identity' of the European Community	139
2. Europe's 'Commerce Clause(s)': The Scope of Articles 94 and 95 EC	143
a. Internal Limits: Harmonization of National Laws for the Internal Market	144
b. External Limits: Constitutional 'Saving Clauses' for State 'Police Powers'?	149
3. The European Union and the Problem of Competence-Competence	151
II. Europe's Contracting Sphere: The Decline of Federal Exclusive Powers	156
1. Dual Federalism Constitutionalized: The Genesis of Exclusive Powers	157
a. Judicial Genesis no 1: The Common Commercial Policy b. Judicial Genesis no 2: The Conservation of Biological Resources of the Sea	158 162
2. Ontological Deformations: Restrictive Interpretation and	102
'Partial Exclusivity' 3. The Delegation Doctrine: How Exclusive are Europe's	167
'Exclusive' Powers?	173
 a. Delegation within the CCP: From Specific Authorization to Carte Blanche b. Delegation within the Conservation Policy: Cooperative 	175
Federalism at Sea?	179
Conclusion: European Federalism and Exclusive Powers	184
hapter 4 – The Decline of Legislative Exclusivity	189
Introduction: European Federalism and Shared Powers I. The Commerce Clause(s): Harmonization in the	190
Internal Market	192
 The Two Dimensions of European Legislation: Scope and Intensity 	194

2. Harmonization under the 'Old Approach': Shared Powers	100
and Dual Federalism	199
3. Harmonization under the 'New Approach': The Rise of	205
Cooperative Federalism	203
a. Reducing Europe's Scope: Cassis de Dijon and the Commission's 'New Strategy'	205
b. The 'New Approach' to Harmonization: From Vertical to	
Horizontal Legislation	207
II. The Common Agricultural Policy: A Policy Unlike	
Any Other?	215
1. The 'Old' CAP: Common Market Organizations as	
Vertical Legislation	217
a. The Exclusionary Effect of CMOs: Between 'Field' and 'Obstacle'	
Pre-emption	220
b. National Caveats: Delegated Community Powers or Autonomous	225
State Powers?	225
2. The 'New' CAP: From Vertical to Horizontal Legislation	230
a. Restructuring the CAP: From Product to Producer Support b. The Rise of Cooperative Federalism: 'Breaking up'	231
Occupied Fields?	235
Conclusion: European Federalism and Shared Powers	237
Chapter 5 – Cooperative Federalism Constitutionalized	241
Introduction: The Constitutional Safeguards of	
Cooperative Federalism	242
I. The Principle of Subsidiarity: A Political Safeguard	
of Federalism	243
1. Subsidiarity De Lege Lata: A Textual Genealogy	247
a. Constitutional Clarifications: From Edinburgh to Amsterdam	251
b. Judicial Clarifications: Subsidiarity and Proportionality	253
2. Subsidiarity De Lege Ferenda: Strengthening the	
Safeguards of Federalism	256
a. Strengthening the Political Safeguards of Federalism	257
b. Strengthening the Judicial Safeguards of Federalism	261
II. Complementary Competences: A Judicial Safeguard	
of Federalism	265
1. Environmental Policy: A Constitutional Commitment to	
Minimum Harmonization	270

	Contents	XV
a. Article 175 EC: Soft or Hard Constitutional Frame?		272
b. The Scope of Article 176 EC: Cutting Across the Treaty?		277
2. Public Health: Novel Constitutional Techniques		279
Conclusion: The Constitutional Safeguards of Cooperative Federalism		284
Cooperative rederansin		207
Chapter 6 – Excursus: A Foreign Affairs 'Exception'?		287
Introduction: The European Union and Foreign Affairs I. Europe's International Powers: Dual Federalism in th	ι Δ	288
External Sphere		290
1. Parallel External Powers: Existence and Scope		291
a. From ERTA to the 'Triumph of Parallelism'		292
b. Towards a Theory of Implied External Powers:		
Three Conceptions		297
2. Parallel External Powers: Essence and Exercise		303
a. The Theory of Subsequent Exclusivity: The ERTA Doctrin b. Political Safeguards: Mixed Agreements as a Federal Techn		305 308
II. Theory and Practice: Towards Cooperative Federalis	m?	311
1. Constitutional Theory: The Slowly Emergent Doctrine	of	
Community Supremacy		312
a. Normative Ambivalences: International Agreements betwee (all) Member States		313
b. A Flight into Dual Federalism: Member States' Agreemen	ts	220
with Third States 2. Constitutional Practice: The ERTA Doctrine and		320
Cooperative Federalism		329
Conclusion: The European Union and Foreign Affairs		340
Conclusion: Europe's Gemeinweg towards		
Cooperative Federalism		345
Bibliography		353
Index		381