CONTENTS

Acknowledgements ............................................................ v
List of contributors .......................................................... xvii
Abbreviations ................................................................. xxi

Introduction
Conflict of Laws and Laws of Conflict – An Introduction to the Research Agenda
Rainer Nickel ................................................................. 1
1. The Need for a New Approach to Supranational and International Law-Making. 1
2. The Development of a Notion of Supranational Conflicts Law ......................... 4
3. Mapping the Field: Conflict of Laws and Laws of Conflict ......................... 7

PART I. DELIBERATIVE SUPRANATIONALISM – LAW AND DEMOCRACY
IN THE POST-NATIONAL CONSTELLATION ........................................ 11

Chapter 1. Habermas on Constitutional and Social Democracy in
the European Union
John P. McCormick .......................................................... 13
1. EU Democracy as a Solution to Global Problems ............................... 15
2. The History of the State as a Guide to the Present .............................. 17
3. Critical-Historical Limits of Habermas’ Theory of EU Democracy ........... 23
4. Conclusion ........................................................................... 30

Chapter 2. Justice or Democracy? Power and Justification in the EU and other
International Organizations
Jürgen Neyer ................................................................. 33
1. Beyond the Democratic Deficit .................................................. 33
2. Transnational Justice as a Right to Justification ............................... 35
3. Obstacles to Transnational Justice ............................................. 38
## Contents

4. Supranationalism as a New Context for Justice .......................... 40  
   4.1. Transforming Bargaining into Legal Reasoning .................. 40  
   4.2. Safeguarding Executive Responsiveness ......................... 43  
   4.3. Healing the Achilles’ Heel ........................................ 44  

5. Multi-Level Legitimacy: Justice and Democracy ....................... 46  

Chapter 3. Can International Public Goods be Supplied without  
Multilevel Constitutional Democracy and “Constitutional Justice”?  

Ernst-Ulrich Petersmann .................................................. 49  

1. Introduction and Summary: From Realism to Multilevel Democratic  
Constitutionalism in International Law ................................ 49  

2. Cosmopolitan Reasonableness as a Requirement of UN Human  
Rights Law and European Law ............................................. 55  

3. Citizen-oriented Reasonableness as a Requirement of  
Constitutional Justice in International Law ............................ 57  

4. International Courts as Guardians of Public Reason in Modern  
International Law ............................................................ 59  

5. Constitutional Pluralism: Three Different Kinds of Multilevel  
Judicial Protection of Citizen Rights in Europe ....................... 62  
   5.1. Multilevel Judicial Protection of EC Law has extended the  
   Constitutional Rights of EC Citizens ................................... 63  
   5.2. Multilevel Judicial Enforcement of the ECHR: the Subsidiary  
   “Constitutional Functions” of the ECtHR .......................... 64  
   5.3. The Diversity of Multilevel Judicial Governance in Free Trade  
   Agreements (FTAs): the Example of the EFTA Court ............... 69  

for Worldwide Economic and Human Rights Law? ....................... 72  
   6.1. The “Solange method” of Judicial Co-operation among the German  
   Constitutional Court and the EC Court in the Protection of  
   Fundamental Rights ...................................................... 75  
   6.2. “Horizontal” Co-operation among the EC Courts, the EFTA Court  
   and the ECtHR in Protecting Individual Rights in the EEA ........ 78  

7. Conditional “Solange-co-operation” among International Trade and  
   Environmental Courts Beyond Europe? ............................... 81  
   7.1. The OSPAR arbitral award of 2003 on the MOX Plant dispute ... 81  
   7.2. The UNCLOS 2001 provisional measures and 2003 arbitral  
   decision in the MOX Plant dispute .................................. 82  
   7.3. The EC Court judgment of May 2006 in the MOX Plant Dispute. .. 82  
   7.4. The 2004 IJzeren Rijn Arbitration between the Netherlands  
   and Belgium .................................................................. 83  
   7.5. The “Solange method” as Reciprocal Respect for Constitutional Justice .. 83  

8. Multilevel Judicial Protection of Constitutional Rights as Pre-condition  
   for International Rule of Law and Democratic Supply of International  
   Public Goods .................................................................... 85
Chapter 4. The European Union and "Otherness": Can The European Union Reinforce Global Justice? A View from International Law

Alicia Cebada Romero ............................................................... 91

1. Introductory Remarks ....................................................... 91
2. The European Union as an "Open" Community ....................... 93
3. The Ways in Which the EU, as an International Actor, Can Propel Transnational Justice Forward: The Characterisation of the EU as a "Smart" Civilian Power ............................................. 96
4. The Subtle Influence of the European Union – the Pledge for Solidarity 100
  4.1. The External Side of the European Union’s Social Agenda ........ 103
  4.2 Examples of the Influence of the European Union:
      the Latin-American Case .................................................. 106
5. The Problems of the European Union to Stick to its Civilian Power Paradigm 110
6. Concluding Remarks .......................................................... 112

Chapter 5. On "Europe’s American Dream"

John Erik Fossum ................................................................... 113

1. Introduction ........................................................................ 113
2. The "Dream" ........................................................................ 116
   2.1. A New Beginning: The U.S as Polity Model ......................... 117
       2.1.1. Brief Description of the Phenomenon ......................... 117
       2.1.2. Justification for Why Europeans Would See This as Relevant to the EU ......................................................... 119
   2.2. The "City on the Hill" ...................................................... 120
       2.2.1. Description of the Phenomenon ............................... 120
       2.2.2. Justification for Why Europeans Would See This as Relevant to the EU ......................................................... 121
   2.3. The "Words of Power" ..................................................... 122
       2.3.1. Description of the Phenomenon ............................... 122
       2.3.2. Justification for Why Europeans Would See This as Relevant to the EU ......................................................... 123
   2.4. A Coherent Model? ......................................................... 124
3. The European Union ............................................................ 125
   3.1. Constitution-making European Style ................................. 125
   3.2. Not the City for Europe ................................................... 127
   3.3. The "Power of Words" ..................................................... 128
4. Canada – Closer to Europeans’ American Dream? .................... 129
   4.1. From Counter-Revolution to Charter Revolution .................. 129
   4.2. Canada – EU: Towards Post-National Convergence? ............. 131
   4.3. Canada – also Propounds the "Power of Words" .................... 132
5. Concluding Reflections .......................................................... 133
Chapter 6. European Citizenship and the Disillusion of the Common Man  
Michelle Everson ................................................................. 135  
1. Introduction ............................................................... 135  
3. The End of Nation and History within European Citizenship ...... 139  
4. Union Citizenship Fallito (1): Nation and History Bite Back ...... 143  
5. Union Citizenship Fallito (2): Class Bites Back .................... 146  
   5.1. The Empirical Traces of Class Exclusion ....................... 146  
   5.2. The Legal Consolidation of Class Exclusion ................... 150  
6. The Responsibilities of Legal Method in European Law .......... 153  

Chapter 7. About Deliberative Supranationalism, Comitology and other Heroes  
Ellen Vos .............................................................. 155  
1. “Comitology is Our Hero!” ............................................. 155  
2. DSN II, Comitology and Foodstuffs .................................. 159  
   2.1. Comitology as a Co-operative System ......................... 159  
   2.2. The Food Sector .................................................. 160  
3. Concluding Remarks: Another Hero ................................... 164  

Chapter 8. The Significance of General Administrative Law for European Administrative Law  
Karl-Heinz Ladeur ............................................................. 167  
1. The Development of a “Europeanised General Administrative Law” ... 167  
   1.1. Learning Processes between General and Specific Administrative Law on the National Plane ......................... 167  
   1.2. Disruption through European Law? ............................. 170  
2. Europeanised Administrative Law as a Consequence of the Pluralisation of the Public Interest ....................................... 172  
   2.1. Does the Principle of Effet Utile make the General Administrative Law a Quantité Négligeable? .............................. 172  
   2.2. The Standardisation of General Administrative Law without an “Ordering Principle”? .................................. 174  
   2.3. The EC as an Association of States and the Need for a Novel Law of Conflicts ............................................. 175  
   3.1. EC Law as Conflicts Law: Transnational Administrative Acts . 179  
   3.2. A New Supervisory Law for the Delimitation of Divergences amongst the Association of States ................................. 180  
   3.3. Mutual Learning inside a Pluralised Administrative Legal Order ... 181  
   3.4. Differentiation through the Europeanisation of Administrative Law. The Example of the Precautionary Principle ............. 183
Contents

   4.1. A Practical Example for a Productive Irritation of the German Administrative Law through European “Influence” ............... 184
   4.2. The Organisation of “Information Networks” as an “Ordering Idea” of a Europeanised Administrative Law .................. 186
5. Synopsis .................................................................................................................. 187

Chapter 9. Formalisation or De-formalisation through Governance?
   Poul F. Kjaer ........................................................................................................... 189
   1. Introduction ........................................................................................................... 189
   2. The Expansion of Knowledge .............................................................................. 190
   3. The Evolution of European Science Co-operation ............................................. 191
   4. The European Research Area .............................................................................. 193
   5. The OMC in Research and Development ............................................................. 195
   6. The Function of the OMC .................................................................................. 197

PART II. TRANSNATIONAL REGULATION AND SOCIETAL CONSTITUTIONALISM:
CONFLICT OF LAWS OR LAWS OF CONFLICT? ..................................................... 201

Chapter 10. The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-determination
   Gunther Teubner ....................................................................................................... 203
   1. Private Juridification: Corporate Codes as Law without the State ..................... 205
   2. Civic Constitution: Elements of a Communal Constitution ............................... 208
   3. International Judicialisation: Corporate Codes in Conflict with State Laws ...... 210
   4. Regulatory Hybridisation: The Mixing of Private and Public Policy .................. 211
   5. Inter-organisational Co-operation: The Extension of the Corporate Codes into Production Networks ............................ 212

Chapter 11. Taking Constitutionalism Beyond the State
   Neil Walker ................................................................................................................ 215
   1. Introduction .......................................................................................................... 215
   2. The Statist Legacy and the Problem of Definition .............................................. 216
   3. The Frames of Transnational Constitutionalism ................................................. 222
   4. The Five Frames Considered .............................................................................. 224
   5. The Five Frames in Transnational Context .......................................................... 230
   6. The Antinomies of Transnational Constitutionalism .......................................... 233
## Chapter 12. Transnational Borrowing Among Judges: Towards a Common Core of European and Global Constitutional Law?

*Rainer Nickel* .......................................................... 239

1. Introduction ................................................................. 239
2. The U.S. Sonderweg: Parochialism, or the Fight against ‘Juristocracy’? .......... 242
3. The New Senator Class in Action: Venice Commissions, Constitutional Court Conferences, and Global Constitutionalism Seminars ...................... 247
   3.1. The Council of Europe and its Venice Commission ................... 249
   3.2. Networking ......................................................... 250
   3.3. Academic Support ............................................... 252
4. European Constitutionalism: From Borrowing and Lending to Hierarchisation? .......................................................... 253
5. Casework: The Practice of European Constitutionalism ......................... 256
   5.1. The *Omega* Case (European Court of Justice) ..................... 256
   5.2. The Case *Von Hannover v Germany* (European Court of Human Rights) ....... 258
6. Constitutional Conflicts Law ............................................. 260

## Chapter 13. Regime-Collisions, Proceduralised Conflict of Laws and the Unity of the Law: On the Form of Constitutionalism Beyond the State

*Florian Rödl* ................................................................. 263

1. The “Conflict of Laws” Approach in Constitutionalism Beyond the State .......... 263
2. Universalism versus Particularism in Private International Law Theory ............ 265
   2.1. Classical and Modern Universalism .................................. 265
   2.2. The Political Particularism Prevailing Today ..................... 268
3. The Form of Conflict of Laws in Constitutionalism beyond the State ................ 268
   3.1. Fischer-Lescano’s and Teubner’s Law of Regime-Collisions .......... 268
      3.1.1. Epistemically Grounded Particularism .................... 269
      3.1.2. The Reason to Submit Regimes to Conflict Rules ............ 271
      3.1.3. Really an Anti-Universalism? ............................ 272
   3.2. Joerges’ Proceduralised Law of Conflict of Laws ................... 274
      3.2.1. The Reason to Submit Legal Orders to Conflict Rules .......... 274
      3.2.2. A Plea against Judicial Dominance .......................... 275
      3.2.3. Underlying Teleological Universalism .................... 276
4. Conclusion ..................................................................... 277

## Chapter 14. The Chameleon State. EU Law and the Blurring of the Private/Public Distinction in the Market

*Miguel Poiares Maduro* ...................................................... 279

1. The Concept of an Undertaking .......................................... 280
2. Article 10 and Competition Rules Granting Public form to Private Behaviour ........ 284
PART III. SOCIAL RIGHTS AND SOCIAL JUSTICE –
CAN “THE SOCIAL” SURVIVE EUROPEAN INTEGRATION? ............... 293

Chapter 15. From *Effet Utile* to *Effet Neolibéral* A Critique of the New
Methodological Expansionism of the European Court of Justice
Christoph U. Schmid ................................................................. 295
1. Introduction ................................................................. 295
2. Judicial Expansionism in the Elaboration of the European
Economic Constitution .................................................. 297
3. Recent Judicial Expansionism Translating into Neoliberal Results .......... 299
   3.1. The Court’s Articulation of Fundamental Rights and
       Market Freedoms .................................................. 300
       3.1.1. Freedom of Services Versus Trade Unions’ Right to
              Collective action: the Viking, Laval and Rüffert Cases ..... 302
   3.2. The Excessive Application of the Pre-emption Doctrine in
       Secondary Law .................................................. 307
       3.2.1. The Posted Workers Directive ................................. 308
       3.2.2. The Interpretation of the Posted Workers Directive in
              *Laval* and *Rüffert* .............................................. 310
       3.2.3. Methodological Critique ..................................... 311
   3.3. Evaluation ............................................................... 312
4. A Plea for a New Constitutional Role of the EC in the European
   Multi-level System .................................................. 313

Chapter 16. Public Service, Autonomy and Community Law
Nina Boeger ................................................................. 315
1. Introduction ............................................................... 315
2. Public Service, Law and Autonomy ......................................... 317
3. Community Law and the Community “Compact” .......................... 320
4. Continental and Anglo-Saxon Public Service Traditions ................. 322
5. Liberalisation and the Community Legislation .................................. 325
6. What Public Service Obligations Do and Do Not Do ....................... 327
7. Conclusion ..................................................................... 333

Chapter 17. Services of General Economic Interest (SGEI) and Universal
Service Obligations (USO) as an EU Law Framework for Curative Health Care
Wolf Sauter ................................................................. 335
1. Introduction ............................................................... 335
   1.1. Article 86(2) as an Exception to the Treaty Rules for Undertakings .... 335
   1.2. The Research Question in Detail ..................................... 336
1.3. Scope .............................................................. 337
1.4. Structure .......................................................... 337

2. The Legal Basis and Basic Purpose of Article 86(2) .......................... 337
2.1. Legal Basis ......................................................... 337
  2.1.1. Article 86 EC ................................................. 337
  2.1.2. Article 16 EC .................................................. 338
  2.1.3. Article 36 Charter on Fundamental Rights .................. 340
2.2. The Role and Structure of Article 86 EC ................................ 340

3. The Debate on Services of General Economic Interest ......................... 342
3.1. Scope of the Debate .............................................. 342
3.2. Position on Services of General Economic Interest of the Main Actors .. 344
  3.2.1. Commission ................................................... 344
  3.2.2. Member States ................................................ 345
  3.2.3. The Court of Justice ........................................ 345

4. Definition Issues .................................................. 346
4.1. Overlapping and Incomplete Definitions .................................. 346
  4.1.1. Focus on Services of General Economic Interest and Universal Service Obligations ....................... 347
4.2. The Lack of a Definition of Services of General Economic Interest .... 347
  4.2.1. Act of Entrustment ........................................... 349
  4.2.2. Existence Derived from Broader Legal Context ............ 350
4.3. The Definition of Universal Service ................................ 350

5. Services of General Economic Interest, Universal Service Obligations and Market Failure .................................................... 353
5.1. Examples of Universal Service Defined at EU Level .................... 353
  5.1.1. Natural Gas .................................................. 353
  5.1.2. Electricity .................................................... 353
  5.1.3. Postal Services .............................................. 354
  5.1.4. Electronic Communications ................................ 354
5.2. Services of General Economic Interest in Relation to Universal Service Obligations ...................................................... 355
  5.2.1. Proportionality ................................................ 355
  5.2.2. Public Service Compensation ................................ 356
5.3. Services of General Economic Interest and Market Failure ............. 357

6. Scope of the Article 86(2) EC Exemption ................................... 359
6.1. The Concepts of Undertaking and Solidarity ............................... 360
  6.1.1. Undertakings .................................................. 360
  6.1.2. Solidarity ..................................................... 361
  6.1.3. Rule of Reason ................................................ 362
6.2. EU Law Rules Affected by Article 86(2) EC ................................ 362
6.3. Proportionality and Pre-emption ...................................... 363
6.4. A Three Step Approach .......................................... 366
  6.4.1. Choice of Organisation ...................................... 367
7. Compensation for Public Service Obligations ................................................. 368
   7.1. Four-Part Test ............................................................................ 368
   7.2. The Commission Notice and Decision ........................................ 369
8. Particular Reasons for Researching Services of General Economic Interest
    in Hospital Care .............................................................................. 370
9. Conclusion ......................................................................................... 373

PART IV. CONCLUSIONS .............................................................. 375

Chapter 18. Integration Through Conflicts Law. On the Defence of
the European Project by Means of Alternative Conceptualisation of Legal
Constitutionalisation
Christian Joerges .............................................................................. 377

1. Introduction ...................................................................................... 377
2. Structuring the Argument ............................................................... 378
3. The Social Deficit within the Integration Project ......................... 379
   3.1. The De-Coupling of the Economic from the Social Constitution .... 379
   3.2. Europe as Agent of Reform ....................................................... 381
4. The De-coupling of Economic and Social Constitutions as a Challenge
   to Law .............................................................................................. 382
   4.1. The Internal Market as Agent of Inter-statal Redistribution ....... 383
   4.2. The De-Coupling of the Social from the Economic Constitution
       as a “Social” Integration Compromise ........................................ 385
   4.3. The Project of the Constitutional Treaty .................................... 387
5. The Conflicts Law Alternative .......................................................... 389
   5.1. European Law as Supranational Conflicts Law ......................... 389
   5.2. Exemplary Application ............................................................. 392
       5.2.1. Viking and the Relationship between Economic and Labour Law .. 393
       5.2.2. Viking and the Strike as a Social Right ............................... 395
       5.2.3. Laval and the Limits to the Doctrine of Pre-emption ............ 395
       5.2.4. Rüffert and the Determination of the Purpose of National Laws . 398
   5.3. The ECJ as Pouvoir Constituant? ................................................. 399
6. Conclusion ......................................................................................... 399