

Table of Contents

<i>Table of Cases</i>	xv
<i>Table of Legislation</i>	xliii
<i>List of Contributors</i>	lxv
1: Constitutional Adjudication in the European Legal Space	1
<i>Armin von Bogdandy, Christoph Grabenwarter, and Peter M Huber</i>	
A. The Setting of this Volume	1
B. What's New?	4
C. The European <i>Verfassungsgerichtsverbund</i>	8
D. Beyond the Traditional 'European Model' of Constitutional Adjudication	12
E. Backlash Against Constitutional Adjudication	15
F. The Logic of this Volume	15
2: The Austrian Constitutional Court	19
<i>Christoph Grabenwarter</i>	
A. Introduction	20
B. Creation and Development	21
1. The Roots of Constitutional Adjudication in the Nineteenth Century	21
2. The Austro-German Constitutional Court	26
3. The Establishment and Early Work of the Constitutional Court under the Federal Constitution of 1920	27
4. The Constitutional Court Between 1925 and 1933—The Crisis and Failure of Constitutional Adjudication	32
C. The Current Legal Design in Context	34
1. Structural Features of Austrian Constitutional Adjudication	34
2. The Organization of the Constitutional Court	38
3. The Types of Proceedings and Decisions in Austrian Constitutional Adjudication	40
D. The Role and Functions of Constitutional Adjudication	55
1. The Relationship with the Legislature	55
2. The Constitutional Court and Civil, Criminal, and Administrative Jurisdiction	56
3. Compliance with the Decisions of the Constitutional Court on the Part of Courts and Administrative Authorities	59
E. Evaluation	59
1. The Public Perception of the Constitutional Court	59
2. The Reception of Constitutional Adjudication by Legal Scholars	60
3. The Role and Self-Understanding Within the European Legal Space	65
3: The Belgian Constitutional Court	71
<i>Christian Behrendt</i>	
A. The Creation and Development of Constitutional Jurisdiction in Belgium	72
1. 1831 and the Creation of the Belgian State	73
2. Further Development after the Second World War	75

3. The Debate of the 1970s Sparked by the Court of Cassation	76
4. The Creation of the Court of Arbitration in 1983	77
B. The Belgian Constitutional Court	79
1. A Permanent and Independent Court	79
2. The Composition and Organization of the Court	80
3. The Jurisdiction of the Court	83
4. The Proceedings Before the Constitutional Court	97
5. The Decisions and Their Effects	108
C. The Relationship with Other Courts	114
1. The Constitutional Court, the Court of Cassation, and the Council of State	114
2. The Constitutional Court, the CJEU, and the ECtHR	117
4: The Constitutional Court of Czechia	119
<i>David Kosař and Ladislav Vyhnanek</i>	
A. Introduction	120
B. The Historical Context	122
1. The Interwar Era (1920–1939): A Lost Opportunity	122
2. The <i>Reichsprotektorat Böhmen und Mähren</i> (1939–1945): An Abrupt End	125
3. The Post-War Desuetudo (1945–1989): A Non-Justiciable Constitution	125
4. The Federal Intermezzo (1989–1992): Setting the Stage	126
5. The Czech Constitutional Court (1993 until Today): The Rise to Power	127
C. The Institutional Design of the Czech Constitutional Court	128
1. Composition	128
2. The Selection of Justices	130
3. The Profile of the Justices	134
4. Judicial Independence	137
5. Law Clerks	140
6. The Secretariat	141
D. The Jurisdiction of the Czech Constitutional Court	143
1. Abstract Review	143
2. Concrete Review	144
3. Individual Constitutional Complaints	145
4. Separation-of-Powers Disputes	147
5. <i>Ex Ante</i> Review of International Treaties	149
6. Ancillary Powers	149
7. Implied Powers	151
E. The Proceedings Before the Czech Constitutional Court	152
1. Basic Principles and Basic Data	152
2. Decision Rules	154
3. Separate Opinions	157
4. Case Assignment and the Role of the Judge-Rapporteur	158
5. The Role of the President of the Constitutional Court	158
F. The Taxonomy of the Rulings of the Czech Constitutional Court and Their Features	160
1. A Brief Taxonomy of Rulings and Verdicts	160
2. The Effects of the Constitutional Court's Rulings	161
3. The Publication of the Constitutional Court's Rulings	163
4. Style, Form, and References	165
G. The Interaction of the Czech Constitutional Court with Domestic and Supranational Actors	166
1. The Constitutional Court and the Parliament	167
2. The Constitutional Court and the Executive	168

3. The Constitutional Court and Ordinary Courts	169
4. The Constitutional Court and the ECHR	172
5. The Constitutional Court and EU Law	175
H. The Future of the Czech Constitutional Court—‘Winter is Coming’	178
5: Constitutional Review in Finland	183
<i>Kaarlo Tuori</i>	
A. The Origins and Development of Constitutional Review in Finland	183
1. Finland as an Autonomous Grand Duchy	183
2. The Form of Government of 1919	186
3. Europeanization and Constitutionalization as a Backdrop to the New Constitution of 2000	188
B. The Present System of Constitutional Review	193
1. Hybrid Models of Constitutional Review	193
2. <i>Ex Ante</i> Review by the Constitutional Law Committee	193
3. The Role of the President and the Supreme Court in <i>Ex Ante</i> Constitutional Review	202
4. <i>Ex Post</i> Judicial Review	203
C. Elements of Evaluation	206
1. Relations Between Parliament and the Judiciary: Judicial Review as a Last Resort	206
2. Signs of Juridification	213
3. The Role of German-Oriented Doctrine	214
D. Conclusion	219
6: Constitutional Justice in France	223
<i>Olivier Jouanjan</i>	
A. Introduction	224
B. Formation and Development	226
1. Constitutional Justice During the <i>Ancien Régime</i>	227
2. The Revolution and the Question of Upholding the Constitution	229
3. Constitutional Justice Between Caesarism and Constitutional Monarchy	230
4. Constitutional Justice and the Democratic Republic	232
C. The Constitutional Jurisdiction of the Fifth Republic: The Constitutional Council	235
1. How a Political Body Became a Court: A Brief History of a Constitutional Miracle	235
2. The Organization of the Constitutional Council	237
3. The Jurisdiction of the Constitutional Council	243
4. The Modalities and Effects of the Constitutional Review of Statutes	252
D. The French System of Constitutional Justice	267
1. The Ordinary Courts’ Participation in the Creation of Constitutional Jurisprudence and in the Constitutionalization of the Law	268
2. Constitutional Review, Conventionality Review, and the Law of the European Union: A Competitive Relationship	273
E. Conclusion	277
7: The German Federal Constitutional Court	279
<i>Anuscheh Farahat</i>	
A. Continuities and Contextuality: The Development of Constitutional Adjudication in Germany	280
1. The Path to Becoming the ‘Leading Court’: Precursors and Models	280

2. The Federal Constitutional Court as the Court of a New Beginning?	284
3. The Crises and Challenges of a Founding Court	286
B. The Current Legal Setting: Chamber Court—Citizens’ Court—Court of Standards	299
1. The Institution: A Constitutional Organ and Court	299
2. ‘Citizens’ Court Plus’: The Constitutional Complaint as a Core Resource	313
3. The Decision: A Claim to Development and Rationalization	329
C. The Role and Function of the Federal Constitutional Court: A Reviewing or Guiding Authority?	339
1. The Influence on the Specialized Courts	339
2. Guidance Effects vis-à-vis the Legislative Branch	340
3. The Federal Constitutional Court as an Instrument of the Opposition	343
D. Evaluation: Guardians of the Basic Law or Guardians of Constitutional Law?	345
1. The Transformation of Statehood and the Precarious Resource of Legitimacy	345
2. Diversity and Decentralization: The End of Interpretational Authority over the Protection of Fundamental Rights?	348
3. The Necessity of a New Theory of Institutions in the European Legal Space	351
4. Does the Federal Constitutional Court Need to Reinvent Itself?	353
8: The Constitutional Court of Hungary	357
<i>László Sólyom</i>	
A. Origins and Development	358
1. Context and Antecedents—the Hungarian Constitutional Court and the Third Generation of European Constitutional Courts	358
2. The History of the Constitutional Court	369
B. The Current Legal Situation and its Context	394
1. The Institution	394
2. The Procedure Before the Constitutional Court	402
3. The Different Types of Proceedings—The Jurisdiction of the Constitutional Court and its Management	407
4. The Ruling	418
C. The Role of Constitutional Adjudication in the Hungarian Political System	437
1. The Relationship Between the Constitutional Court, Parliament, and Government	437
2. The Relationship of the Constitutional Court with Ordinary Courts	442
3. The Ideals and Accomplishments of the Constitutional Court Concerning its Political Role and the Doctrine of Constitutional Law	443
D. Evaluating the Court’s Development at a Historical Milestone	445
9: The Italian Constitutional Court	447
<i>Raffaele Bifulco and Davide Paris</i>	
A. Genesis and Development	448
1. The Court in the Deliberations of the Constituent Assembly (1946–1948)	448
2. The Establishment of the Constitutional Court (1948–1956)	453
3. The Development until Today (1956–2018)	455
B. The Constitutional Court Today	456
1. The Institution	456
2. The Principle of Collegiality	460

3. The Types of Proceedings	460
4. The Decision	476
C. The Role and Function of Constitutional Jurisdiction	482
1. The Constitutional Court and the Legislative Branch	482
2. The Constitutional Court and the Judiciary	485
3. The Constitutional Court and the Italian Parliamentary System	486
4. The Constitutional Court and Regionalism	488
D. Italian Constitutional Justice Within the European and International Legal Space	490
1. The Marginalization of the Court with Regard to Human Rights Protection	491
2. The Constitutional Court at the Service of Union Law and the ECHR	493
3. The Constitutional Court as Mouthpiece of the Italian Constitution and Guide for the Courts Within the European Legal Space	496
E. Conclusion	503
10: The Constitutional Court of the Republic of Latvia	505
<i>Ineta Ziemele, Alla Spale, and Laila Jurcēna</i>	
A. A Short Introduction into Latvian Constitutional History	506
1. Historical Challenges to Latvia's Basic Norm	507
2. The Constitutional Identity of Latvia	508
B. The Origins and Development of Constitutional Review in Latvia	510
1. Developing Awareness for the Need of Constitutional Review Following the Adoption of the <i>Satversme</i>	510
2. The Establishment of Constitutional Review Following the Reinstatement of the <i>Satversme</i>	512
3. The Stages of Development of Constitutional Review	514
C. The Institution of Constitutional Review	520
1. The Institution of the Constitutional Court	520
2. The Jurisdiction of the Constitutional Court	533
3. Models of Constitutional Review	538
4. Examining Cases at the Constitutional Court	542
D. The Role of the Constitutional Court in Democratic Society	548
1. The Constitutional Court as a Means for Protecting Human Rights	548
2. The Role of the Constitutional Court in Improving Legal Acts	550
3. The Role of the Constitutional Court in Resolving Conflicts of Jurisdictions	553
4. The Role of the Constitutional Court in the Process of Democratization	554
E. The Case Law of the Constitutional Court as Part of a Wider European Legal Discourse	557
1. The Reintegration into the Family of Western Democratic Legal Orders	557
2. International Law and European Law	559
3. The Economic Crisis and the Constitutional Court	561
4. The Sustainability Principle	561
5. Citizenship Issues	562
6. The Constitutional Court as an Effective Legal Remedy for Protecting Human Rights Within the Meaning of the ECHR	562
11: Constitutional Adjudication in the Netherlands	565
<i>Leonard Besselink</i>	
A. Introduction	566
B. Genesis and Development	568
1. The Development of the Relevant Provisions of the <i>Grondwet</i>	568
2. The Debate on the Prohibition to Review Acts of Parliament for Constitutionality	575

3. The Reception of the Review of Acts of Parliament Against Treaties and Decisions of International Organizations	582
C. The Actual Legal Setting in Context	585
1. The Judicial Competence to Review Legislative Acts	585
2. Institutional Aspects	601
D. The Roles and Functions of Constitutional Review	610
1. Ordinary Courts as Constitutional Courts	611
2. Ordinary Courts as Agents of the EU Legal Order	611
3. Ordinary Courts as Agents of the International Legal Order	613
E. Aspects of Evaluation	614
1. Shifting the Focus from the <i>Grondwet</i> to the Constitution	614
2. The Future of Constitutional Review in the Netherlands	615
3. The Netherlands Within the European Legal Space	616
12: The Polish Constitutional Tribunal	619
<i>Piotr Tuleja</i>	
A. The Historical Development	620
1. The Origins in the First and Second Polish Republic	620
2. The Rejection in the Communist State (1945–1989)	621
3. The Transformative Role of Constitutional Jurisprudence (1989–1997)	622
4. The Constitutional Tribunal and the Creation of the New Constitution	623
B. The Constitutional Tribunal as an Institution	625
1. The Composition of the Constitutional Tribunal	625
2. Electing the Justices of the Constitutional Tribunal	626
3. Judicial Profiles	628
4. Judicial Independence	629
5. The Office of the Constitutional Tribunal	632
C. The Different Proceedings before the Constitutional Tribunal	632
1. Judicial Review	633
2. Other Types of Proceedings before the Constitutional Tribunal	639
D. Proceedings before the Constitutional Tribunal	640
1. The Course of Proceedings	640
2. General Procedural Principles	641
E. The Judgments of the Constitutional Tribunal	643
1. ‘Simple Judgments’	644
2. ‘Interpretative Judgments’	645
3. ‘Area Judgments’	646
4. ‘Application Judgments’	647
5. ‘Subsequent Unconstitutionality’	647
6. ‘Indicative Judgments’	648
F. The Role and Tasks of the Constitutional Tribunal	649
1. The Constitutional Tribunal and the Legislature	649
2. The Constitutional Tribunal and the Courts	651
3. The Constitutional Tribunal and Academia	654
4. The Constitutional Tribunal and European Law	656
5. The Evolution of the Position of the Constitutional Tribunal	657
G. The Crisis of Constitutional Adjudication in Poland	658
1. The Genesis of the Crisis	658
2. The Dispute over the Constitutional Tribunal	660
3. The Constitutional Crisis	669

13: The Portuguese Constitutional Court	673
<i>Maria Lúcia Amaral and Ravi Afonso Pereira</i>	
A. Formation and Development	674
1. Constitutional Review in Portugal and Europe	674
2. The Review for Constitutionality as a Self-Evident Practice	677
3. Constitutional Review in Constitutional Texts	680
4. The Founding of the Portuguese Constitutional Court	685
B. The Current Legal Design in Context	686
1. The Constitutional Court as an Institution	686
2. The Types of Proceedings	689
3. The Effects in Law of Judicial Review	700
C. The Role and Functions of Constitutional Adjudication	702
1. The Relationship with Political State Bodies	702
2. Constitutional Adjudication and the Ordinary Courts	706
D. Aspects of Evaluation	708
1. The Public Perception of the Constitutional Court	708
2. Constitutional Adjudication in National Constitutional Scholarship	711
3. The Understanding of the Role Within the European Legal Space	714
14: The Spanish Constitutional Tribunal	719
<i>Juan Luis Requejo Pagés</i>	
A. Genesis and Development	720
1. Historical Precursors	720
2. The Spanish Model of the Judicial Protection of the Constitution	724
B. The Current Legal Configuration in Context	728
1. The Institution	728
2. Procedure	731
3. The Decision	750
C. The Role and Functions of Constitutional Adjudication	757
1. The Relationship with the Political State Bodies	757
2. Constitutional versus Ordinary Jurisdiction	759
3. The <i>Poder Judicial</i> , and Arguing with the Constitution	763
4. Constitutional Adjudication in Constitutional Scholarship and Theory	764
D. Aspects of Evaluation	766
1. The Work of the <i>Tribunal Constitucional</i> and its Public Perception	766
2. The <i>Tribunal Constitucional</i> and Politics	770
3. The Function of the <i>Tribunal Constitucional</i> in the European Legal Space	772
4. Final Remarks	776
15: Constitutional Adjudication in Switzerland	779
<i>Giovanni Biaggini</i>	
A. The Development and Characterization of Constitutional Adjudication in Switzerland	780
1. Switzerland: A State Without Constitutional Adjudication?	780
2. The Development of Constitutional Adjudication since the Creation of the Federal State	782
3. The Protection of Constitutional Rights Through the Public Law Appeal	786
4. The Characteristics of Constitutional Adjudication from a Rule-of-Law Perspective	791

5. Restrictions on Constitutional and Administrative Adjudication	794
6. Unsuccessful Attempts to Extend Constitutional Adjudication to Federal Legislation	797
7. The Most Important Characteristics of Constitutional Adjudication at a Glance	800
B. The Federal Supreme Court as the Supreme Judicial Authority and Main Organ of Constitutional Adjudication: The Current Legal Design in Context	800
1. The Position of the Federal Supreme Court and its Justices	800
2. Procedure and Decision-Making	808
C. The Roles and Functions of Constitutional Adjudication	819
1. The Federal Supreme Court and its Place in the Constitutional Fabric	819
2. The Relationship with the Federal Assembly and Federal Council	819
3. The Relationship with the Cantons	821
4. Interactions in the Federalist Fabric Based on the Separation of Powers	822
5. New Conflicts in the Relationship with the Constitutional Legislator	824
6. The Relationship with other Judicial Authorities	826
7. Milestones of Past and Recent Constitutional Case Law	828
D. Aspects of Evaluating Federal Supreme Court Practice	831
1. Restraint and Moderate Development of the Law	831
2. Shifts in the Relationship Between Constitutional Adjudication and Democracy: Relativizing the 'Immunity' of Federal Legislation	832
3. The Federal Supreme Court in the European Legal Space	836
E. Concluding Remarks	838
16: The Influence of the United States Supreme Court on Judicial Review in Europe	841
<i>Peter E Quint</i>	
A. Introduction	842
B. The United States Supreme Court and 'Decentralized' Judicial Review	843
C. The Supreme Court and Judicial Review in the Early Nineteenth Century	847
D. Early Influence in Europe—The Example of Germany	847
E. The Supreme Court's 'Lochner Era' Jurisprudence and its Influence in Europe	850
1. Acceptance in Norway	851
2. Rejection in France and Elsewhere in Europe	852
F. Hans Kelsen and 'Centralized' Judicial Review	856
G. European Constitutional Courts of the Postwar Era	858
1. Germany	860
2. Italy	862
H. Constitutional Review in France	864
I. The New Constitutional Tribunals in Eastern Europe after 1989	866
1. Constitutional Review in Poland	867
2. Rejecting American Advice on Social and Economic Rights	869
3. The Activist Decade of the Hungarian Constitutional Court	871
J. The Influence of the American Supreme Court on Decisions of European Courts	872
1. The Influence of American Supreme Court Decisions on European National Courts and on the European Court of Human Rights	873
2. The Court of the European Union: The ECJ	881
K. Conclusion	886
<i>Index</i>	889