

**ARE THE LISBON TREATY'S AMENDMENTS
SUFFICIENT TO ESTABLISH CONSTITUTIONAL ORDER
IN THE EU? A COMPARISON TO THE GERMAN
CONSTITUTION**

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ABSTRACT

The Lisbon Treaty's amendments to the European Union's (EU) founding treaties represents Europe's most recent and substantial step towards a politically unified EU. Since the Lisbon Treaty incorporated most of the provisions intended for Europe's failed draft constitution, some commentators view the resulting changes as sufficient to establish a European constitution. This note argues they are not. Instead, as a comparison to the German constitution illustrates, the Lisbon Treaty's amendments did not incorporate a strong enough statement of EU supremacy. In addition, the Lisbon Treaty's ratification process intentionally barred citizen input, so that the treaties do not establish legitimacy in the way that a constitution ratified by its citizens would. This note concludes that as the EU becomes more unified, the source of its power becomes significant: while an intergovernmental organization can be Treaty-based, a national government needs something more. If the EU truly hopes to have the power and legitimacy of a nation, it must take steps to establish a stronger constitutional base by strengthening Member State deference to EU supremacy and allowing the European people a stronger voice in EU affairs.

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INTRODUCTION

In the summer of 2005, European Union ("EU") Member States found themselves at a crossroads, forced to seriously reevaluate the future of European integration.¹ Two Member States, France and the

¹ Elizabeth F. Defeis, *The Treaty of Lisbon and Human Rights*, 16 ILSA J. INT'L & COMP. L. 413, 413 (2010).

Netherlands, had voted against ratifying a European constitution—the Treaty Establishing a Draft Constitution of the European Union (“Draft Constitution”).² The Draft Constitution, already ratified by sixteen of the EU’s twenty-five Member States,³ had represented the pinnacle of European integration.⁴ Salvaging what they could, Member States ratified the Treaty of Lisbon in 2009, which implemented most of the provisions intended for the failed Draft Constitution.⁵ Disagreement followed about whether the Lisbon Treaty was sufficient to establish a constitutional basis for the EU.⁶ While the Lisbon Treaty had resulted from a failure to ratify an EU constitution, the belief remained that “[i]f it looks like a constitution, if it smells like a constitution, if it reads like a constitution, so far as I’m concerned it’s a constitution.”⁷

However, a comparison of the EU treaty provisions and their implementation by the European Court of Justice (hereinafter “ECJ”) to provisions of the German constitution and their implementation by the German Constitutional Court suggests the opposite. The Lisbon Treaty’s amendments to the founding EU treaties are not sufficient to establish the equivalent of a European constitution. Germany, one of the original EU Member States with a clearly established constitutional order, provides an example of how constitutionalism works within the EU and is thus a useful comparison for an analysis of the constitutionalism of the EU.⁸

Just as in the summer of 2005, the EU currently finds itself at another crossroads. When Europe finally reaches the end of its current debt crisis, the EU will again face the same uncertainty about the ultimate extent of European integration.⁹ The Lisbon Treaty’s amendments leave wide open the question of what kind of organization

² *Id.*; Craig Whitlock, *Dutch Reject European Charter; 62 Percent of Voters to Follow French Lead*, WASH. POST, June 2, 2005, at A1.

³ *EU Constitution: Where Member States Stand*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/3954327.stm> (last updated Mar. 25, 2007, 1:21 PM)(providing a list as to what extent each of the Member States ratified the Draft Constitution as of March 25, 2007).

⁴ KRISTIN ARCHICK, CONG. RESEARCH SERV., RS21618, *THE EUROPEAN UNION’S CONSTITUTION* 2–3 (2005).

⁵ Defeis, *supra* note 1, at 413 (explaining that France and the Netherlands could ratify the Lisbon Treaty without putting it to a vote).

⁶ See, e.g., *In Quotes: EU Treaty Debate*, BBC NEWS (Jan. 21, 2008), http://news.bbc.co.uk/2/hi/uk_news/politics/7201422.stm.

⁷ *Id.* (quoting Austin Mitchell, a British Conservative Party politician).

⁸ See discussion *infra* Part II.

⁹ For a more detailed discussion of Europe’s current economic state, see sources cited *infra* note 255.

the EU seeks to become. In addition, as the EU accrues power and leaves behind its intergovernmental beginnings, it must reform the source of its power as well.¹⁰ Modern conceptions of legitimate governance require a document that manifests the direct conferral of power from the people to the governing bodies and protects democracy while safeguarding individual rights.¹¹ As a result, the widely held belief that “[t]he European Union has a legitimacy problem because some people think it has one, and react accordingly”¹² ignores larger fundamental issues regarding the source of EU power.

More importantly, by refusing to sign onto a document clearly labeled a “constitution,” the Member States have made the conscious choice to limit the EU to maintain a sense of national superiority.¹³ Similarly, the founding treaties’ lack of a strong and centrally placed statement of supremacy of EU law over Member State law manifests Member States’ commitment to maintaining their own sovereignty. While the supremacy of EU law is established in practice via ECJ jurisprudence, the lingering commitment to national sovereignty hinders EU competence, particularly in the international arena.¹⁴ Therefore, once the EU has managed its economic challenges, its Member States and its citizens will have to decide together what kind of European Union they hope to create.¹⁵ If the EU truly wants to become a European nation, it will need more than its Treaty-based system to support it. It will need a European constitution.

Parts I and II of this note provide background for the analysis. Part I first summarizes relevant constitutional theory and concludes what factors are essential to a functioning constitution. It then provides an account of how the EU developed as such a powerful supranational institution, where the founding treaties came from, and how the Lisbon Treaty’s amendments intended to change EU power structure. Part II examines Germany’s constitution and its implementation via decisions of the German Constitutional Court. It shows that Germany provides an

¹⁰ See sources cited *infra* note 255.

¹¹ See sources cited *infra* note 255.

¹² JUSTUS SCHÖNLAU, DRAFTING THE EU CHARTER: RIGHTS, LEGITIMACY AND PROCESS 1 (Michelle Egan et al. eds., 2006).

¹³ See discussion *infra* Part III.

¹⁴ See generally TINE VAN CRIEKINGE, EUROPEAN UNION AS AN INTERNATIONAL ACTOR *passim* (2012) (discussing the limited but expanding role of the EU in the international arena).

¹⁵ *Id.*

excellent example of how constitutional order should work and how courts can give the constitutional provisions full effect.

Parts III and IV then apply this background to conclude whether the EU's founding treaties are constitutional in nature. Part III analyzes the constitution-like elements of the EU's founding treaties and examines their implementation via ECJ decisions. It then compares the EU's treaties and Germany's constitution to show the weaknesses in the EU's founding treaties and to show that the Lisbon Treaty's amendments do not suffice to establish constitutional order in the EU. Instead, relics of the EU's intergovernmental beginnings persist and the founding treaties fall short of establishing constitutional order in three major ways. First, they only weakly incorporate a statement of EU supremacy, placed peripherally in a declaration appended to the treaties. Second, they lack a sense of permanency based on the need for unanimity to amend the treaties and the withdrawal clause. Third, and most importantly, EU citizens have not conferred power through the Treaties, since the ratification process was a clear attempt to avoid the need for popular support. Part IV concludes this note by outlining changes that the EU will have to implement if it truly wants to become a European nation.

I. THEORETICAL AND HISTORICAL BACKGROUND

A. CONSTITUTIONAL THEORY: CREATING A FUNCTIONING GOVERNMENT AND LEGITIMATE POWER SOURCE

A study of constitutionalism in the EU has two essential implications: the legitimacy of the EU's institutions and the effectiveness of the laws they create.¹⁶ Although the EU does not have a document that it formally calls its constitution,¹⁷ it may still have a constitutional base of power.¹⁸ The EU's treaties may in effect create an EU constitution because a constitution is the "legal rules that establish and regulate the lawmaking, applying, and adjudicating process . . . encompassed or not by a single, comprehensive formal document."¹⁹ This note will consider

¹⁶ See generally Michel Rosenfeld, *Constitutional versus Administrative Ordering in an Era of Globalization and Privatization; Reflections on Sources of Legitimation in the Post-Westphalian Polity*, 32 *CARDOZO L. REV.* 2339, 2341 (2011).

¹⁷ *Id.* at 2341–42.

¹⁸ See ANDREW ARATO, *CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ* 62–63 (Dick Howard et al. eds., 2009)

¹⁹ *Id.* at 63 (emphasis added).

the EU's treaties in light of four essential characteristics of a constitution: (1) a grant of power in the document itself to the government that delineates a clear power hierarchy, (2) a commitment to democracy that limits government power, (3) a government duty to protect human rights, and (4) a direct conferral of power from the people to the government.²⁰

A constitution creates the basis for an effective, functioning government by creating institutions and branches of government with clearly circumscribed spheres of power.²¹ It also sets forth a hierarchy between those institutions, which solves all potential conflicts between those branches of government.²² Instead of delegating unlimited power, a constitution both authorizes and restricts government action.²³ It also binds the government to the democratic will of the people²⁴ and safeguards human rights by requiring the government to take affirmative acts to protect the individual from majoritarian oppression.²⁵ As a result, the constitution should create the infrastructure necessary for a functioning government while simultaneously establishing a legitimate basis for that government's power.²⁶ A government is legitimate when it can show that it is "entitled to speak and act" for both the state and its people.²⁷ The constitution forms the basis for government legitimacy by manifesting a contract between the people and government.²⁸ In theory, it thereby both serves and represents the will of the people.²⁹

²⁰ *See generally id.*. As a side-note, the existence of an independent judiciary with the power to enforce the constitution is also essential to establishing constitutional legitimacy. Linda Camp Keith, *Judicial Independence and Human Rights Protection Around the World*, JUDICATURE, Jan.–Feb. 2002, at 195, 195. The judiciary performs the crucial role of upholding the integrity of the constitution and protecting the commitment to individual rights and democracy that the constitution mandates. *Id.* at 196. However, it is beyond the scope of this note to establish the independence of judicial review in the EU. Instead, given the history of the ECJ using its power to uphold the values laid out in the founding treaties, *see* discussion *infra* Part III.a, this note will assume that in the EU context, the independence of judicial review is clearly established.

²¹ Rosenfeld, *supra* note 16, at 2344.

²² *See id.*

²³ *Id.*

²⁴ *See id.* at 2347.

²⁵ Rosenfeld, *supra* note 16, at 2346–47 (explaining that "laws are legitimate if they can be conceived as both self-imposed and binding.").

²⁶ *See id.*

²⁷ Jean D'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. INT'L L. & POL. 877, 878, 881–82 (2006).

²⁸ Rosenfeld, *supra* note 16, at 2343 ("Stripped of its essentials, the modern constitution is supposed to be that which the people, in whom sovereignty ultimately resides, gives itself as a charter for self government.").

²⁹ *Id.*

The EU has acknowledged its need for an EU constitution to establish a respected sense of EU authority.³⁰ The Cologne Mandate, which formed the impetus for the failed Draft Constitution and the subsequent Lisbon Treaty, set forth that “[p]rotection of fundamental rights is a founding principle of the European Union and an indispensable prerequisite for its legitimacy.”³¹ Thereby, the EU has expressly established as one of its goals and as the purpose of the Lisbon Treaty to provide for more protection of fundamental rights in an attempt to establish more legitimacy in light of its lack of a clearly established constitutional order.³²

In practice, however, the EU can function efficiently absent a legitimate constitutional source for its power.³³ Creating an EU constitution is arguably unimportant compared to the overriding goal of creating a functioning centralized government.³⁴ In addition, perhaps the EU is already legitimate because it is accountable to legitimate national governments.³⁵ If so, the EU should not waste its time taking on the difficulties of creating a constitution on a supranational level: establishing identity, unity, and democracy across vastly different legal cultures.³⁶ A constitution, however, makes the government legitimate because it is a contract between the people and the government,³⁷ and an agreement between national governments and the EU may not have the same effect.³⁸ Instead, “the question boils down, for the most part, to whether delegation ‘upward’ to a supra-national administrative regime can be deemed the functional equivalent to delegation ‘downward’ to a national administrative regime.”³⁹ Unfortunately for the European Union, it cannot. When the Member States give power to the EU, they hold the EU accountable to their national governments but not to the people

³⁰ SCHÖNLAU, *supra* note 12, at 3.

³¹ *Id.*

³² *See id.*

³³ *See* Rosenfeld, *supra* note 16, at 2347–50 (distinguishing between constitutional regimes that have a legitimate power source and “administrative regimes” that function just as efficiently but do not establish government accountability to the democratic will of its people or to individual rights).

³⁴ *Id.* at 2355.

³⁵ *Id.*

³⁶ *See id.* at 2351, 2355.

³⁷ *Id.* at 2344.

³⁸ *Id.* at 2355.

³⁹ *Id.*

directly.⁴⁰ The legitimacy aspect of a constitution cannot be fulfilled by the existence of Member State constitutions and Member State accountability to its citizens, who also happen to be EU citizens.⁴¹

B. A BRIEF HISTORY OF EUROPEAN INTEGRATION AND THE LISBON TREATY AS AN ATTEMPT TO IMPLEMENT THE FAILED DRAFT CONSTITUTION'S AMENDMENTS TO EUROPEAN UNION POWER

The 2009 Lisbon Treaty is the most recent agreement in a chain of agreements between European states that have built on each other to establish Europe's current centralized and supranational state-like power structure.⁴² The Lisbon Treaty amends the EU's two founding treaties, the Treaty on European Union and Treaty establishing the European Community.⁴³ These two treaties form the basis for European Union power.⁴⁴ They delegate authority upon which the EU may act to bind Member States and citizens.⁴⁵ The Member States thereby relinquish some elements of their national sovereignty to the EU.⁴⁶ At the same time, the treaties also limit the EU's capacity: the EU only has power to act when one of the founding treaties expressly confers that power.⁴⁷

The EU that exists today began as a limited agreement on coal and steel trade.⁴⁸ The Treaty of the European Coal and Steel Community, signed in 1951 in Paris (also known as the Treaty of Paris), established a fifty-year-long economic agreement between Belgium, Germany, France, Italy, Luxembourg, and the Netherlands.⁴⁹ Although this initial agreement was limited to coal and steel trade, it established an essential economic interdependence between France and Germany after the turmoil of World War II.⁵⁰ The Treaty of Paris set an essential precedent

⁴⁰ See discussion *infra* Part III.b.

⁴¹ See discussion *infra* Part III.b.

⁴² KLAUS-DIETER BORCHARDT, THE ABC OF EUROPEAN UNION LAW, at 11–12, U.N. Sales No. OA-81-07-147-EN-C (2010), available at http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf.

⁴³ EUROPEAN COMMISSION, YOUR GUIDE TO THE LISBON TREATY, at 15, U.N. Sales No. NA-78-09-931-EN-C (2009), available at <http://ec.europa.eu/publications/booklets/others/84/en.pdf> [hereinafter GUIDE TO THE LISBON TREATY].

⁴⁴ See Defeis, *supra* note 1, at 413.

⁴⁵ BORCHARDT, *supra* note 42, at 11.

⁴⁶ *Id.*

⁴⁷ See Defeis, *supra* note 1, at 413.

⁴⁸ BORCHARDT, *supra* note 42, at 11.

⁴⁹ *Id.* at 11–12.

⁵⁰ *Id.*

for cooperation that opened the door to a subsequent deepening of economic and political integration across all of Europe.⁵¹

In 1957, the Treaties of Rome took the next big step towards a deeper European integration by creating the European Economic Community and the European Atomic Energy Community (“Euratom”).⁵² They expanded the impact of these communities by including multiple new Member States in the agreements as well.⁵³ Membership within these communities carried a further commitment to a European integration, as it required allocation of even more sovereignty to the supranational union.⁵⁴ In 1993, new amendments came into force with the Treaty of Maastricht.⁵⁵ This treaty officially established the European Union as a legal entity for the first time, although in reality its power had already existed under the earlier treaties.⁵⁶ The Treaty of Maastricht also clearly delineated the EU’s institutions, including the European Parliament, Council, and Court of Justice.⁵⁷ It has been said that the Treaty of Maastricht “was a first step on the path leading ultimately to a European constitutional system.”⁵⁸

In the following years, the Treaties of Amsterdam in 1999 and Nice in 2003 came into force and reformed the institutions created at Maastricht to make them function more smoothly.⁵⁹ Until the ratification of the Lisbon Treaty in 2009, the agreement at Nice had been the controlling law for EU governance.⁶⁰ Notably, the Treaty of Nice still distinguished between the European Community and the European Union, two separate EU bodies that operated under different statutes and rules for decision-making.⁶¹ The Treaty of Lisbon has merged these two

⁵¹ *Id.*

⁵² *Id.* at 12.

⁵³ *See id.* *See also Enlargement: From 6 to 27 Members*, EUROPEAN COMMISSION, http://ec.europa.eu/enlargement/policy/from-6-to-27-members/index_en.htm (last updated Sept. 24, 2012) (providing a timeline of Member States joining the EU).

⁵⁴ BORCHARDT, *supra* note 42, at 11–12.

⁵⁵ *Id.* at 12.

⁵⁶ *See id.* at 11–12.

⁵⁷ *See generally EU Treaties*, EUROPA, http://europa.eu/about-eu/basic-information/decision-making/treaties/index_en.htm (last visited Dec. 5, 2011) [hereinafter *EU Treaties*] (providing an official list of the EU’s founding treaties).

⁵⁸ BORCHARDT, *supra* note 42, at 12.

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *See* GUIDE TO THE LISBON TREATY, *supra* note 43, at 15 (explaining that by merging the European Union and European Community, the Lisbon Treaty that amended the Treaty of Nice gives the EU for the first time “a single legal personality.”).

bodies in order to give the EU “a single legal personality” for the first time.⁶² With each new amendment to what began as a narrow coal and steel agreement, the centralized European structure became more clearly defined and accumulated more power to create and enforce rules that are binding on and within the Member States.⁶³

Member States have begun to acknowledge that as the EU’s power to supersede Member State law increases, the EU has taken on a much more state-like quality and will have to become more democratic and more efficient.⁶⁴ The resulting attempt at consolidating these treaties into a Draft Constitution rose out of exactly this concern.⁶⁵ The Draft Constitution would have contained “hallmarks of a Constitution,” such as a national anthem, flag, and the official title of “Constitution.”⁶⁶ More importantly, it would have restructured and consolidated the EU’s founding treaties into one document and provided for more direct democratic participation, as well as a more binding commitment to human rights.⁶⁷ In 2005, four years before the Lisbon Treaty came into effect in 2009,⁶⁸ France and the Netherlands turned down this proposed Draft Constitution via referenda.⁶⁹

The Member States intended the Lisbon Treaty to make the changes in EU legal structure that had been proposed in the Draft Constitution four years earlier.⁷⁰ In the wake of the failed Draft Constitution, the Member States sought to amend the founding treaties in a way to which all Members could agree.⁷¹ Describing the Lisbon Treaty, the EU’s official website states:

When European leaders reached agreement on the new rules, they were thinking of the political, economic and social changes going on, and the need to live up to the hopes and expectations of the European public. The Treaty of Lisbon defines what the EU can and cannot do, and what means it can

⁶² *Id.*

⁶³ *EU Treaties*, *supra* note 57.

⁶⁴ *See* Defeis, *supra* note 1, at 413.

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Gràinne de Búrca, *If at First You Don’t Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change*, 33 *FORDHAM INT’L L.J.* 1472, 1483 (2010).

⁷⁰ *See id.*

⁷¹ *See id.*

use. It alters the structure of the EU's institutions and how they work. As a result, the EU is more democratic and its core values are better served.⁷²

Thus the Lisbon Treaty had the same goals as the Draft Constitution: increased legitimacy and efficiency.⁷³

Whether and how the EU has achieved these goals is, however, less clear.⁷⁴ The general consensus is that while the Draft Constitution had aimed to make the basis of European law clearer, the Lisbon Treaty's amendments have done the opposite.⁷⁵ The amendments have been characterized as confusing, unintelligible, and impenetrable.⁷⁶ In addition, after the passage of the Lisbon Treaty, one newspaper article warned its readers that “[t]o hide the enormity of the change, the same name—European Union—will be kept while the Lisbon Treaty changes fundamentally the legal and constitutional nature of the Union” since the Lisbon Treaty transformed the EU into “a Union in the constitutional form of a supranational European State.”⁷⁷ The rest of this note will examine the accuracy of this opinion.

II. GERMANY AS AN EXAMPLE OF CONSTITUTIONALISM WITHIN THE EU

Germany provides an example of how one of the EU's original Member States organizes its government by a constitution.⁷⁸ Germany

⁷² *Treaty of Lisbon: Taking Europe into the 21st Century*, EUROPA, http://europa.eu/lisbon_treaty/take/index_en.htm (last visited Nov. 2, 2011).

⁷³ *See id.*

⁷⁴ *See* discussion *infra* Part III.

⁷⁵ *See, e.g., The Lisbon Treaty for Dummies*, INDEPENDENT.IE (MAY 15, 2008), <http://www.independent.ie/national-news/lisbon-treaty/the-lisbon-treaty-for-dummies-1376340.html>.

⁷⁶ *Id.* (“Confusing. Unintelligible. Impenetrable. This is the general reaction of anyone who has read or attempted to read the Lisbon Treaty, from politicians to pundits to ordinary people trying to find the facts.”).

⁷⁷ Anthony Coughlan, *These Boots Are Gonna Walk All Over You*, THE BRUSSELS JOURNAL (Dec. 13, 2007), <http://www.brusselsjournal.com/node/2773>.

⁷⁸ *See* Christoph Hickmann et al., *A German Referendum in Europe?: Merkel Eyes Constitution Revamp to Boost EU Powers*, SPIEGEL ONLINE INT'L (Nov. 14, 2011), <http://www.spiegel.de/international/europe/a-german-referendum-on-europe-merkel-eyes-constitution-revamp-to-boost-eu-powers-a-797584.html> (“Germany’s constitution is highly respected”); BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GERMANY I (2011), available at <http://www.state.gov/documents/organization/186566.pdf> (“Germany is a constitutional, parliamentary, democracy.”).

has a well-respected constitutional order established in a single document officially entitled a constitution.⁷⁹ Ratified in 1949,⁸⁰ the German constitution provides an example of what the European constitution could emulate.⁸¹ Germany's constitution clearly delegates spheres of power to the various government bodies while simultaneously legitimizing the government by commanding it to submit to the democratic will of the people and to protect human rights.⁸² If the goal of creating an EU constitution is to accord the EU the same level of legitimacy and functionality that each of the Member States has individually, then a comparison between the EU's treaties and Germany's constitution reveals both why the EU treaties are insufficient and why the EU needs a constitution.

**A. EFFECTIVENESS: GERMANY'S CONSTITUTION CREATES A
FUNCTIONAL GOVERNMENT BY GRANTING POWER TO THE STATE
AND ESTABLISHING A CLEAR POWER STRUCTURE AND HIERARCHY
BETWEEN LEVELS OF GOVERNMENT**

The German constitution provides an excellent example of how a constitution can grant power to the state by creating a clear power structure and hierarchy. Germany's constitution serves as the foundation for all government power.⁸³ As Article 20(3) declares, "[t]he legislature shall be bound by the constitutional order."⁸⁴ Moreover, the way in which the constitution distributes power establishes a clear hierarchy between the institutions themselves.⁸⁵ The bulk of the constitution—Chapters two through eight—clearly delegates circumscribed spheres of power to each

⁷⁹ See sources cited *supra* note 78.

⁸⁰ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] May 23, 1949, BGBl. I (Ger.). For an English translation of the German Constitution, see FED. MINISTRY OF JUSTICE & JURIS GMBH, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Christian Tomuschat & David P. Currie, trans., Christian Tomuschat & Donald P. Kommers, eds., 2012), available at http://www.gesetze-im-internet.de/englisch_gg/basic_law_for_the_federal_republic_of_germany.pdf.

⁸¹ See discussion *infra* Part II.a–b.

⁸² See discussion *infra* Part II.a–b.

⁸³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 16, 1957, 6 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 32 (Ger.) [hereinafter Elfes Case].

⁸⁴ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] art. 20(3) (Ger.).

⁸⁵ See Elfes Case, 6 BVERFGE 32 (35–38) (Ger.).

government institution.⁸⁶ It creates the three branches of Germany's national government: the Bundestag,⁸⁷ the Bundesrat,⁸⁸ and the executive branch.⁸⁹ In addition to establishing a strong central government, Germany's constitution creates a federal system in which the states (the "Länder") retain some autonomy.⁹⁰ It also addresses Germany's EU membership and describes the circumstances under which EU law supersedes German national law.⁹¹

While Germany's constitution protects federalism⁹² and guarantees local governments the power to regulate local matters,⁹³ it also clarifies that federal law is supreme and supersedes state law.⁹⁴ Article 73 lists all areas of "exclusive" federal legislative power,⁹⁵ and Article 74 lists all areas of "concurrent" power.⁹⁶ When the federal government has exclusive power, the states may act only if the federal government consents.⁹⁷ When the federal government has concurrent power, the states may only act to the extent that the federal government does not.⁹⁸ Under Article 37, the federal government may enforce its supremacy by taking "the necessary steps" to force an individual state to "comply with its duties."⁹⁹

Germany's constitution also integrates EU law by making EU treaties and regulations the equivalent of a constitutional amendment.¹⁰⁰ Article 25 further establishes the supremacy of EU law over German national law, so long as the EU has acted within its grant of authority.¹⁰¹

By addressing the areas of potential overlap between state and federal law, the German constitution solves any conflicts or potential

⁸⁶ See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] arts. 20–91b (Ger.).

⁸⁷ *Id.* at arts. 38–48.

⁸⁸ *Id.* at arts. 50–53.

⁸⁹ *Id.* at arts. 62–69 (calling the executive branch the "federal government").

⁹⁰ *Id.* at art. 30 (asserting the sovereign power of the Länder in "the exercise of state powers and the discharge of state functions").

⁹¹ *Id.* at arts. 23, 25.

⁹² *See id.*

⁹³ *Id.* at art. 28.

⁹⁴ *Id.* at art. 31.

⁹⁵ *Id.* at art. 73.

⁹⁶ *Id.* at art. 74.

⁹⁷ *Id.* at art. 71.

⁹⁸ *Id.* at art. 72(1).

⁹⁹ *Id.* at art. 37.

¹⁰⁰ *Id.* at art. 23(1).

¹⁰¹ *Id.* at arts. 25, 23(1)–(7).

power struggles between Germany's institutions.¹⁰² The *Elfes* case, decided shortly after the constitution was drafted, explained that in the court's interpretation "'constitutional order' refers to the 'general legal order subject to the substantive and procedural provisions of the Constitution.'"¹⁰³ The court characterized Germany's constitution as a comprehensive document that is sufficient to solve all internal disputes.¹⁰⁴ The court held that it would look exclusively to the constitution when determining the scope of government power as well as the balance of power between governmental institutions.¹⁰⁵ In doing so, the court recognized the constitution as the ultimate source of government power in Germany.¹⁰⁶ The decision also stands for the order and government effectiveness that results from a constitution that clearly sets out spheres of government power.¹⁰⁷

**B. LEGITIMACY: GERMANY'S CONSTITUTION CREATES A
LEGITIMATE GOVERNMENT BY COMMITTING THE GOVERNMENT TO
DEMOCRATIC RULE WHILE IMPOSING GOVERNMENT
RESPONSIBILITY TO SAFEGUARD INDIVIDUAL HUMAN RIGHTS**

Germany's constitution creates a legitimate German government because it guarantees democratic participation¹⁰⁸ while protecting human rights¹⁰⁹ and was adopted by "the German people, in the exercise of their constituent power."¹¹⁰ As engrained in the text of Article 20, "[t]he Federal Republic of Germany is a democratic and social federal state" that derives all of its authority "from the people."¹¹¹ All citizens have

¹⁰² See *Elfes* Case, 6 BVERFGE 32 (40–41) (Ger.).

¹⁰³ DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 402–03 (3d ed. 2012); *Elfes* Case, 6 BVERFGE 32 (41–42) (Ger.).

¹⁰⁴ *Elfes* Case, 6 BVERFGE 32 (36) (Ger.).

¹⁰⁵ *Id.* at 42–45.

¹⁰⁶ *Id.* at 43.

¹⁰⁷ See *id.* at 42–44.

¹⁰⁸ See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] pmbL. (Ger.) (articulating Germany's commitment to democracy).

¹⁰⁹ See *id.* at arts. 1–17 (articulating Germany's commitment to human rights in Article one and enumerating other basic rights in Articles two through seventeen).

¹¹⁰ *Id.* at pmbL. See also discussion *infra* Part II.b. (discussing the source of government legitimacy).

¹¹¹ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] art. 20 (Ger.). See also *id.* at arts. 38–39 (setting forth the election procedures for the Bundestag); *id.* at art. 51 (setting forth the election procedures for the Bundesrat).

equal right to democratic participation.¹¹² At the same time, Germany's constitution calls for both directly and indirectly elected government actors.¹¹³ Citizens vote directly for their representatives in the Bundestag¹¹⁴ but do not vote directly for Bundesrat representatives,¹¹⁵ the President,¹¹⁶ or the Chancellor.¹¹⁷ Instead, the Bundestag members elect representatives to the Bundesrat¹¹⁸ and various members of the Bundestag appoint the President and Chancellor.¹¹⁹ By committing the government to democratic rule, Germany's constitution makes its government accountable to its citizens and its power is limited by the will of the people.¹²⁰

Germany's constitution also requires the government to protect human rights.¹²¹ In fact, Germany's version of the United States' Bill of Rights is preceded only by a short preamble.¹²² The constitution's first provision states that human dignity is inviolable and that the basic rights set forth in the constitution are binding "as directly applicable law."¹²³ In the following provisions, Article 2 protects "Personal freedoms," Article 3 guarantees "Equality before the law," and so on.¹²⁴ These provisions impose a government duty to guarantee that all citizens' human dignity and freedom are protected.¹²⁵ This includes among many other rights the

¹¹² *Id.* at art. 33 ("Every German shall have in every Land the same political rights and duties."). *See id.* at arts. 20, 38–39, 51 (guaranteeing the right to vote).

¹¹³ *See infra* notes 114–19.

¹¹⁴ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] art. 38 (Ger.).

¹¹⁵ *Id.* at art. 51.

¹¹⁶ *Id.* at art. 54.

¹¹⁷ *Id.* at art. 63.

¹¹⁸ *Id.* at art. 51.

¹¹⁹ *Id.* at arts. 54, 63.

¹²⁰ *See infra* Part I.a.

¹²¹ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] art. 1 (Ger.) (stating that "[h]uman dignity shall be inviolable" and that human rights "shall bind the legislature, the executive and the judiciary as directly applicable law").

¹²² *Compare id.* at pmbl. (providing first a preamble and then immediately establishing basic rights of citizenship), with U.S. CONST. amends. I–X (establishing the American Bill of Rights).

¹²³ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] art. 1 (Ger.).

¹²⁴ *See id.* at arts. 1–17. *See also id.* at art. 23 (requiring EU law to protect the basic rights as well).

¹²⁵ *Id.* at art. 19(2) ("In no case may the essence of a basic right be affected.").

right to peaceful assembly,¹²⁶ the right of association,¹²⁷ the freedom of movement,¹²⁸ the freedom of religion,¹²⁹ and the freedom of speech.¹³⁰

The importance of these inviolable human rights is highlighted by their prominent placement at the beginning of the constitution. In light of Germany's tarnished reputation after its history of National Socialism,¹³¹ this constitution was arguably an opportunity to establish a legitimate form of government and to engender international respect.¹³² The constitution acknowledges Germany's Nazi past and reaffirms the laws created for the "Liberation of the German People from National Socialism and Militarism" by incorporating them into Article 139.¹³³ Germany arguably exemplifies that, if drafted correctly, a constitution can have a drastic impact on a country's legitimacy as well as international reputation.

The German Constitutional Court has explained that the constitution specifically lays out rights to be protected.¹³⁴ In the *Lüth* case, the court decided a case involving the freedom of speech as set out in Article 5 of the German Constitution.¹³⁵ The defendant had sent an open letter to the press advocating a boycott of a particular film director and accusing the director of advocating Nazism.¹³⁶ The court held that the defendant's actions were constitutionally protected.¹³⁷ It emphasized that freedom of speech must be protected by the government under all circumstances.¹³⁸ This freedom is an essential right that every citizen is

¹²⁶ *Id.* at art. 8.

¹²⁷ *Id.* at art. 9.

¹²⁸ *Id.* at art. 11.

¹²⁹ *Id.* at art. 4.

¹³⁰ *Id.* at art. 5.

¹³¹ See generally Karl Loewenstein, *Law in the Third Reich*, 45 *YALE L.J.* 779 *passim* (1936).

¹³² See Bert Useem & Michael Useem, *Government Legitimacy and Political Stability*, 57 *SOCIAL FORCES* 840, 840 (1979) (explaining that government legitimacy is inextricably connected with a country's reputation).

¹³³ See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] art. 139 (Ger.).

¹³⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15. 1958, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 7, 198 (Ger.) [hereinafter *Lüth-Urteil*]. For an English translation of *Lüth-Urteil*, see Basil Markesinis et al., *Federal Constitutional Court (First Senate) 15 January 1958 BVerfGE 7, 198*, IUSCOMP GERMAN LAW ARCHIVE (Tony Weir trans., 1999), <http://www.iuscomp.org/gla/judgments/tgcm/v580115.htm>.

¹³⁵ *Id.* at 203.

¹³⁶ *Id.* at 200.

¹³⁷ *Id.* at 210.

¹³⁸ *Id.* at 205.

entitled to under most circumstances.¹³⁹ More importantly, the court explained, freedom of speech, along with the other personal freedoms set out in the constitution, “are the citizen’s bulwark against the state.”¹⁴⁰

In addition, the *Lüth* case also clarified that the constitution itself should be interpreted as dealing with conflicts internal to the document.¹⁴¹ The court explained that, “[b]ut far from being a value-free system the Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights.”¹⁴² Thus the constitution not only sets forth the rights that the government must protect but also ranks those rights. This decision stands for the proposition that by conferring power in a way that binds the government to the majority’s will while assigning the government the duty to protect individual and human rights, Germany’s constitution makes Germany’s government legitimate.

Germany’s constitution exemplifies how one of the EU Member States’ constitutions works to establish a smoothly functioning and legitimate government. If the EU seeks to create a level of governance that will act for all of Europe as the national governments act for the Member States, then it will need to take on the characteristics of the national governments, including their constitutional bases.¹⁴³ The next section of this note will explain why Germany’s example reveals that the EU treaties are not the equivalent of an EU constitution.

III. THE EU’S FOUNDING TREATIES AFTER LISBON’S AMENDMENTS AND A COMPARISON TO GERMANY’S CONSTITUTION

The European Court of Justice (ECJ) has mischaracterized the EU as a constitutional regime.¹⁴⁴ In *Les Verts v. Parliament*, the ECJ adamantly insisted that Member State action must always conform with the “basic constitutional Charter, the Treaty.”¹⁴⁵ It emphasized that the EU is a governing body based on the rule of law as set forth in the

¹³⁹ *Id.* at 210–11 (acknowledging freedom of expression while recognizing potential limits through a balancing of interests).

¹⁴⁰ Markesinis et al., *supra* note 134 (translating *Lüth-Urteil*, BVERFG 7, 198 (204) (Ger.)).

¹⁴¹ *Lüth-Urteil*, BVERFG 7, 198 (207) (Ger.).

¹⁴² Markesinis et al., *supra* note 134 (translating *Lüth-Urteil*, BVERFG 7, 198 (204–05) (Ger.)).

¹⁴³ See discussion *infra* Part IV.

¹⁴⁴ *E.g.*, Case 294/83, *Les Verts v. Parliament*, 1986 E.C.R. 1339, ¶ 23.

¹⁴⁵ *Id.*

treaties.¹⁴⁶ It also pointed out that specific articles set up a cause of action under EU law and conferred ECJ authority to rule on European legal issues.¹⁴⁷ In *Kadi & Al Barakaat v. Council*, the court also referred to “the basic constitutional charter, the Treaty.”¹⁴⁸ This section will reveal the inaccuracy of the ECJ’s conclusion that the EU is constitutional in nature by looking at how well the language of the treaties provides the same level of functionality and legitimacy that the German constitution does.

A. EFFECTIVENESS: THE EU EXISTS AS A FUNCTIONAL GOVERNING BODY DESPITE HOLES IN THE TREATIES’ DELEGATION OF POWER AS COMPARED TO GERMANY’S CONSTITUTION

In practice, the EU exists as a functional governing body in the same way as any other constitutional regime, including Germany.¹⁴⁹ This was true pre-Lisbon Treaty and is still true post-Lisbon Treaty.¹⁵⁰ The EU’s functional centralized government is, however, based only partly on the treaties’ delegation of power to the EU.¹⁵¹ Instead, broad ECJ interpretation of treaty provisions has significantly extended the reach of EU power.¹⁵² The Lisbon Treaty’s amendments have strengthened EU power but still not in the same way as a typical constitution – for example the German constitution.

Fitting with a constitutional regime, the EU’s founding treaties delegate power to the EU’s various institutions and define and circumscribe the powers of government. They establish the principle of loyal cooperation and EU competence.¹⁵³ Under the treaties, the EU may act only when the treaties expressly confer EU competence.¹⁵⁴ The treaties clearly delegate power to the EU institutions: the Council,

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (referring explicitly to articles 173, 177, and 184).

¹⁴⁸ Joined Cases C-402/05P & C-415/05, *Kadi & Al Barakaat v. Council*, 2008 E.C.R. I-6351, 3 C.M.L.R. 41, ¶ 81 (invoking the constitutional nature of the EU and its treaties as a justification for the ECJ’s power of judicial review).

¹⁴⁹ Achilles Skordas, *Is Europe an “Aging Power” with Global Vision? A Tale on Constitutionalism and Restoration*, 12 COLUM. J. EUR. L. 241, 253–59 (2005).

¹⁵⁰ *See id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Consolidated Version of the Treaty on European Union art. 4, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU].

¹⁵⁴ *Id.* at arts. 4–5.

Parliament, Commission, and European Court of Justice.¹⁵⁵ Furthermore, the Lisbon Treaty adds for the first time that “[t]he Union shall have legal personality.”¹⁵⁶ This is a step away from the idea of the Member States being the masters of the treaties. Instead, the EU is in its own right a legal entity separate from the Member States. Therefore, while the national governments have conferred the power to create the European Union, the EU itself has now taken on its own state-like quality and international identity.¹⁵⁷ Consequently, the treaties are distinguishable from a typical international treaty.¹⁵⁸ Member States have given up sovereignty. No reservations are allowed, and no state-specific opt-out options exist when issues arise after the fact.¹⁵⁹ The only way a state can assert autonomy when the EU has acted upon its conferred powers is through national enacting legislation.¹⁶⁰

In comparison to Germany’s constitution, the EU’s founding treaties establish a similar base for EU power. Both may act only when the founding document expressly delegates the power to do so.¹⁶¹ Both Germany’s constitution and the EU’s founding treaties create governments with legal personality¹⁶² and real power to enact binding legislation despite the existence of more local governing bodies.¹⁶³

At the same time, some relics of the EU’s intergovernmental beginnings persist, and the tension between national sovereignty and EU competence is still palpable.¹⁶⁴ For example, certain decisions must still be made unanimously.¹⁶⁵ Unanimity is a characteristic of

¹⁵⁵ *EU Institutions and Other Bodies*, EUROPA, http://europa.eu/about-eu/institutions-bodies/index_en.htm (last visited Mar. 7, 2012).

¹⁵⁶ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 1(55), Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

¹⁵⁷ Prior to Lisbon, the Treaties had set forth that the Community had a legal personality, but the Community represented only a part of the EU. See Consolidated Version of the Treaty Establishing the European Community art. 281, Dec. 29, 2006, 2006 O.J. (C 321) 37.

¹⁵⁸ Bùrca, *supra* note 69, at 1480–81.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ TEU arts. 2, 5; GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] art. 20(3) (Ger.).

¹⁶² Treaty of Lisbon art. 1(55); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] pmb. (Ger.).

¹⁶³ See Bùrca, *supra* note 69, at 1481; GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] arts. 31, 37, 73–74 (Ger.).

¹⁶⁴ Stephen C. Sieberson, *Did Symbolism Sink the Constitution? Reflections on the European Union’s State-Like Attributes*, 14 U.C. DAVIS J. INT’L L. & POL’Y 1, 4–5 (2007).

¹⁶⁵ *Id.* at 5.

intergovernmental organizations, since it protects nation state sovereignty.¹⁶⁶ At the same time, no governing body can actually achieve meaningful results if it must wait for all members to agree before acting.¹⁶⁷ In the EU, unanimity is required in most foreign and security policy decisions, criminal matters, and decisions that impact the structure of the EU itself, among other decisions.¹⁶⁸ In addition, there must be unanimity to amend the treaties.¹⁶⁹ Another, and perhaps more important intergovernmental characteristic, is the withdrawal clause, which allows Member States to leave the EU if they so choose.¹⁷⁰ Allowing the Member States to withdraw or even threaten to withdraw from the EU grants them more power to assert national sovereignty and takes away from the constitutional character of the EU.¹⁷¹ Constitutions do not contain withdrawal clauses but instead create a permanent government structure.¹⁷² The failure of the Draft Constitution revealed Member States' and citizens' resistance to a strong central European government. This hesitation to create a stronger centralized governing body and weaker national government made its way into the Lisbon Treaty as well, in particular with the Lisbon Treaty's attempt at creating a strong and binding statement of EU supremacy.

While the EU is a functioning governing body with its roots in its founding treaties, the text of the treaties itself weakly establishes EU supremacy. In practice, when the EU acts upon conferred power, EU law is supreme.¹⁷³ But before the Lisbon Treaty, EU law supremacy was purely a court-created doctrine and had no basis in the treaties themselves.¹⁷⁴ The Lisbon Treaty has incorporated for the first time a declaration that expressly establishes EU supremacy.¹⁷⁵ Yet this declaration is in an addendum to the treaties and not incorporated into the

¹⁶⁶ *See id.* at 30.

¹⁶⁷ *See id.*

¹⁶⁸ *Id.* at 7; *see generally* TEU art. 50.

¹⁶⁹ TEU art. 48.

¹⁷⁰ *Id.* at art. 50 (“Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.”).

¹⁷¹ Sieberson, *supra* note 164, at 9–11.

¹⁷² *See, e.g.,* MICHELE BRANDT ET AL., INTERPEACE, CONSTITUTION-MAKING AND REFORM: OPTIONS FOR THE PROCESS, at v (2011) (providing tips on constitutional drafting and explaining that the best constitution “is a living document that will be relevant across the years”).

¹⁷³ TEU art. 4–5.

¹⁷⁴ *See* Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12.

¹⁷⁵ Treaty of Lisbon annex, declaration 17.

text and articles themselves.¹⁷⁶ In contrast, the German constitution clearly sets out supremacy of national legislation as one of the central points in its main articles.¹⁷⁷ The drafters at Lisbon aimed to create a similar expression of primacy of central authority.¹⁷⁸ In a way, they achieved their goal, since the declaration is binding.¹⁷⁹ Yet the fact that this power delegation exists only in an addendum to the treaties signifies the weakness of EU supremacy.¹⁸⁰ And the impact of the declaration is inherently limited, so that it “offers both an affirmation of the primacy principle and a continuing opportunity for scholars to debate its limits.”¹⁸¹ In addition, EU law supremacy has long existed in practice so that its incorporation into the treaties themselves is arguably symbolic.¹⁸²

Supremacy of EU law has long existed in practice due to broad ECJ interpretation of the treaties’ delegation of EU power.¹⁸³ The court has justified its broad interpretation of EU power by the concept of *effet utile*, which it first referred to in *Costa v. E.N.E.L.*¹⁸⁴ As the court explained in *Costa*, the treaties manifest a permanent transfer of sovereignty from Member States to the EU.¹⁸⁵ The Member States have created a new and separate entity with its own legal personality and realm of sovereignty.¹⁸⁶ And, Member States must be willing to acquiesce to this new entity’s decisions.¹⁸⁷ In order to implement the transfer of sovereignty, the court set forth the rule that “a subsequent unilateral act incompatible with the concept of the Community cannot prevail.” In *Costa*, the plaintiff claimed that Italy’s nationalization of electricity violated the Treaty of Rome.¹⁸⁸ Although this plaintiff did not

¹⁷⁶ *Id.*

¹⁷⁷ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] art. 31 (Ger.) (establishing supremacy of federal law).

¹⁷⁸ Sieberson, *supra* note 164, at 22.

¹⁷⁹ Treaty of Lisbon annex, declaration 17.

¹⁸⁰ Ingolf Pernice, *The Treaty of Lisbon and Fundamental Rights*, in *THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY?* 235, 239 (Stefan Griller & Jaques Ziller eds., 2008).

¹⁸¹ Sieberson, *supra* note 164, at 24.

¹⁸² *See id.* at 24 n.108.

¹⁸³ *Id.*

¹⁸⁴ Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585, 587, 594 (not explicitly characterizing its own rationale as *effet utile*; however, *Costa*’s justification has subsequently come to be known as *effet utile*).

¹⁸⁵ *Id.* at 587, 593–94.

¹⁸⁶ *Id.* at 593.

¹⁸⁷ *Id.* at 593.

¹⁸⁸ *Id.* at 588

win on the merits, the decision greatly expanded the reach of EU power.¹⁸⁹ The court held that an individual may raise a point of EU law against a national government in proceedings before municipal courts and that the national authorities cannot apply national law if it contradicts EU law.¹⁹⁰ In another landmark case, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, the ECJ applied the same rationale, adding that the individual is the beneficiary of the Treaty.¹⁹¹ The court reasoned that the treaties can only be effective if individuals can bring claims against their governments and if the court's main guiding principle is to give maximum effect to the treaties' provisions.¹⁹² The court held that it would look first and foremost at the objectives and purposes of the provisions and interpret them accordingly.¹⁹³

Effet utile has come to dominate ECJ interpretation of the treaties and application of EU law. For example, the ECJ used *effet utile* to justify its holding in *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (more commonly known as *Simmenthal II*).¹⁹⁴ In *Simmenthal II*, national law had required payment for veterinary and public health inspections of beef, which was contrary to the treaties.¹⁹⁵ The ECJ held that every national judge must ignore conflicting national law and apply community law even before the national legislation has been created.¹⁹⁶ Applying the *effet utile* principle, the court reasoned that EU law supremacy is only meaningful if national judges have the power under national law to declare a statute void.¹⁹⁷ Thus the ECJ has recognized the need for EU supremacy in order to establish a functional legal system.¹⁹⁸ It has interpreted the language of the treaties as requiring EU supremacy, even though pre-Lisbon Treaty, a literal (and perhaps more reasonable) interpretation could have concluded otherwise. It has also created means for implementing this supremacy even though these means are not established by the treaties themselves, even after the Lisbon Treaty came into effect.

¹⁸⁹ *See id.* at 599–60.

¹⁹⁰ *Id.* at 593–94.

¹⁹¹ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12.

¹⁹² *Id.* at 13.

¹⁹³ *Id.*

¹⁹⁴ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA (Simmenthal II)*, 1978 E.C.R. 629, 629 (1978).

¹⁹⁵ *Id.* at 631.

¹⁹⁶ *Id.* at 657.

¹⁹⁷ *Id.* at 633–34.

¹⁹⁸ *Id.* at 653–54.

Yet even if EU law supremacy has been long established in practice, the Lisbon Treaty's failure to strongly establish EU law supremacy still undermines its constitutional nature and its ability to guarantee the functionality a constitution would. The ECJ's use of the concept of *effet utile* seems to be its attempt at paralleling the German Constitutional Court's reasoning in the *Elfes Case*, in which the court explained that the constitution is sufficient to solve all conflicts and potential power struggles between Germany's various institutions.¹⁹⁹ The German Constitutional Court could look exclusively to the constitution's provisions, but the ECJ had to use more creative reasoning, by creating and invoking the concept of *effet utile*, to come to the same result.

Lisbon's inclusion of a supremacy clause has a great impact on the EU's constitutional nature. It incorporates into the text of the founding treaties the functionality that a constitution should include. At the same time, the fact that the clause is contained in a declaration attached to the treaties and not in the articles of the treaties themselves makes it a much weaker statement of supremacy. Adding the declaration of EU law supremacy as an addendum to the Treaty not only takes away from its importance but more importantly shows that the people and national governments are not ready to acknowledge the level of power that the EU holds in practice.²⁰⁰ This clause's peripheral location detracts from the EU's constitutional nature. Germany's constitution more clearly sets forth the spheres of power but the EU's founding treaties do a sufficient job of providing constitutional functionality.

B. LEGITIMACY: WHILE LISBON'S AMENDMENTS STRENGTHEN THE EU'S COMMITMENT TO DEMOCRACY AND HUMAN RIGHTS, THE MEMBER STATES' INTENTIONAL CIRCUMVENTION OF PUBLIC OPINION UNDERMINES THE AMENDMENT'S IMPACT

The EU's founding treaties effectively establish spheres of power. However, they do not provide the same level of constitutional legitimacy. This lack of legitimacy is a widely criticized weakness.²⁰¹

Critics have long taken issue with the minimal direct democratic participation afforded within the EU, referring to it as a "democratic

¹⁹⁹ *Elfes Case*, 6 BVERFG 32 (40–41) (Ger.).

²⁰⁰ See Skordas, *supra* note 149, at 253–59.

²⁰¹ Bart M.J. Szewczyk, *European Citizenship and National Democracy: Contemporary Sources of Legitimacy of the European Union*, 17 COLUM. J. EUR. L. 151, 153–59 (2011).

deficit.”²⁰² They object to the majority of EU decision-making power belonging to the European Council, whose members are appointed and not directly voted for.²⁰³ Although citizens directly elect European Parliament members, the Parliament’s power was starkly limited before the Lisbon Treaty.²⁰⁴ One of the major goals of the Lisbon Treaty was to delegate more power to the Parliament in order to increase the impact of direct democracy on EU legislation.²⁰⁵ Article 2(265) increased the Parliament’s role significantly by expanding its role in setting the budget.²⁰⁶ As one scholar explained, “[i]n effect, the Parliament became a co-equal legislative institution relative to the Council.”²⁰⁷ As a result, the EU’s democratic deficit has been mitigated. Analysis of the German constitution shows that a constitution can legitimately set forth centralized government competence based on a combination of direct and indirect democratic participation by the people.²⁰⁸ The German system allows for both a Bundestag with representatives directly voted for by German citizens and an appointed Bundesrat, President, and Chancellor.²⁰⁹ The EU treaties thereby provide the same type of democratic legitimacy as the German constitution in terms of its provision for democratic participation.

In addition, the Lisbon Treaty has more strongly bound the EU to human rights. Lisbon binds the EU to the Charter of Fundamental Rights of the European Union for the first time.²¹⁰ Before the Lisbon Treaty, all Member States were party to the Charter, but EU legislation was not held to the same human rights standards.²¹¹ This was especially problematic given the supremacy of EU legislation as established by ECJ

²⁰² See, e.g., Janet Daley, *Europe’s Democratic Deficit Grows Wider by the Day*, THE TELEGRAPH (Nov. 5, 2011, 9:00 PM), <http://www.telegraph.co.uk/news/worldnews/europe/eu/8871980/Europes-democratic-deficit-grows-wider-by-the-day.html>.

²⁰³ Szewczyk, *supra* note 201, at 153–59.

²⁰⁴ *Id.*

²⁰⁵ Sieberson, *supra* note 164, at 446, 455–56 (discussing the Parliament’s limitations under the Treaty of Nice).

²⁰⁶ Treaty of Lisbon art. 2(265).

²⁰⁷ Szewczyk, *supra* note 201, at 223.

²⁰⁸ See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] arts. 38, 51, 54, 63 (Ger.); see also discussion *supra* Part II.a.

²⁰⁹ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] arts. 54–55 (Ger.).

²¹⁰ Defeys, *supra* note 1, at 414; Treaty of Lisbon art. 1(8)(1)–(2).

²¹¹ Defeys, *supra* note 1, at 416.

decisions.²¹² For example, the employment rights of women were protected under the Charter but not under the Treaty of Rome.²¹³ By binding the EU to this Charter, Lisbon sufficiently bound the EU to protect the human rights of its citizens. It is bound to the same Charter as the German government and provides the same level of protection as the German constitution.

However, the treaties do not manifest a contract between the people and the state. The ratification process means that the treaties are really just a compromise and agreement between national governments. The European people voted on a European constitution – and they turned it down.²¹⁴ France had a voter turnout of almost 70 percent and rejected the first Draft Constitution.²¹⁵ It is widely acknowledged that Lisbon was a compromise to circumvent the need for a popular vote in support of an EU constitution.²¹⁶ The plaintiff in *Ellis v. The Law Society* voiced this lack of legitimacy.²¹⁷ Ellis, a lawyer in the UK, was suspended from practice for comments that sharply criticized the EU's central government and judicial branch.²¹⁸ He made statements characterizing the EU government as inherently corrupt, as the people's rejection of the Draft Constitution manifested their desire to not pass the amendments that Lisbon incorporated without popular support.²¹⁹ According to Ellis, EU judges and politicians not only lack a legitimate basis for their authority, but there is also "clear evidence that they conspired to force it [their new basis for authority as set out in the Lisbon Treaty] on the people without consent."²²⁰ Ellis' reprimand was upheld at court.²²¹ As the court acknowledged, his position was extreme and overly critical.²²² At the same time, his criticisms voiced a major concern with Lisbon's ratification process.

Scholarly and news articles have been critical of Lisbon's ratification process as well. Recent literature cautions that consent of

²¹² *Id.* at 415.

²¹³ *Id.* at 414–15.

²¹⁴ Szewczyk, *supra* note 201, at 175–76.

²¹⁵ *Id.* at 175.

²¹⁶ *Id.* at 186.

²¹⁷ *Ellis v. The Law Society*, [2008] EWHC (Admin) 561, [2008] All E.R. (D) 317, [4] (Eng.).

²¹⁸ *Id.* ¶¶ 36–37.

²¹⁹ *Id.* ¶ 4.

²²⁰ *Id.*

²²¹ *Id.* ¶¶ 36–37.

²²² *Id.*

national governments does not manifest the consent of the people.²²³ As a result, from a legitimacy standpoint, there is no justification for EU law to supersede democratically created national legislation.²²⁴ In an article named *These Boots are Gonna Walk all over You* that appeared shortly after Lisbon came into force, the *Brussels Journal* warned that Lisbon's amendments expanded EU power significantly without obtaining the people's consent.²²⁵ It also warned that the people might not realize the significance of these changes.²²⁶ The Journal's fear reflects another issue with EU legitimacy based on the constitutional nature of the treaties. Even though EU power is limited to that specifically conferred by the treaties, the ECJ has significantly expanded this power by its implementation of the concept of *effet utile*.

At the same time, lack of constitutional legitimacy through a conferral of power to the people may not actually be as significant a problem as these critics describe. Theorists point to "functional" legitimacy as an equally sufficient source of legitimacy.²²⁷ According to the theorists, people are particularly critical of the EU but no other country is perfect either.²²⁸ Instead, the EU is democratic and has the trappings of constitutional legitimacy, and for a supranational organization, other forms of legitimacy may be the only realistic option.²²⁹ In reality, it does not matter what is necessary to meet the standard for democratic legitimacy; the EU will never be sufficient.²³⁰ At the same time, if citizens accept the EU's legislation and the ECJ's decisions as binding, the lack of constitutional legitimacy will not hinder EU functionality in practice and will be replaced by citizens' satisfaction with the results the EU can achieve.²³¹ Some EU legitimacy must result

²²³ Szewczyk, *supra* note 201, at 155.

²²⁴ *Id.*

²²⁵ Coughlan, *supra* note 77.

²²⁶ *Id.*

²²⁷ See generally Szewczyk, *supra* note 201, at 154 (discussing how legitimacy can be derived from working with the international community).

²²⁸ See *id.* at 154, 186.

²²⁹ See *id.* at 182.

²³⁰ *Id.* at 184.

²³¹ See Martin Nettesheim, *Developing a Theory of Democracy for the European Union*, 23 BERKLEY J. INT'L L. 358, 370 (2005) (explaining that the EU has essentially implemented Fritz Scharpf's theory of output-oriented legitimacy); see also Presidency Conclusions, Laeken European Council 20–21 (Dec. 14–15, 2001), available at http://ec.europa.eu/governance/impact/background/docs/laeken_concl_en.pdf (explaining that the EU believes what its citizens really want from the EU is results).

from the trust of European citizens in EU decision-making.²³² Polls have revealed a higher level of trust in the EU (at forty-three percent) than in national governments (at thirty-one percent on average) and national parliaments (also at thirty-one percent on average).²³³ Perhaps even more significantly, the EU has continued to grow in size and in power despite outspoken criticism of its inadequate legitimacy.²³⁴

IV. GUIDING THE COURSE OF EUROPEAN INTEGRATION: CREATING A EUROPEAN NATION

The implications of the EU's lack of a constitution extend far beyond the theoretical. As the EU amasses more power, the source of this power becomes significant: while an intergovernmental organization can be Treaty-based, a national government needs something more.²³⁵ The EU is a supranational organization of a type that has never before existed.²³⁶ And, as exemplified by the failed Draft Constitution in 2005, the future course of the extent of EU integration is not completely clear.²³⁷ But if Europe truly does want to become a nation, it will need to undertake a complete overhaul of its Treaty-based system. It will need a constitution.

The weaknesses of the EU's Treaty-based system lie less in resulting functional issues than in legitimacy shortcomings.²³⁸ The Lisbon Treaty's amendments took important steps towards strengthening EU competence by, most importantly, incorporating for the first time a binding statement of EU supremacy.²³⁹ In addition, it also took steps towards constitutionality by strengthening the role of direct democratic participation.²⁴⁰ It increased Parliament's power and bound the EU to the Charter of Fundamental Rights of the European Union.²⁴¹ However, these changes do not go far enough. To become a nation, the EU needs a much stronger statement of EU supremacy as one of the central

²³² Szewczyk, *supra* note 201, at 170.

²³³ *Id.* at 170–71 (providing more detail in Table 2).

²³⁴ *Id.* at 176.

²³⁵ See *supra* Part II.a.

²³⁶ See generally Rosenfeld, *supra* note 16.

²³⁷ See *supra* Part II.b.

²³⁸ See *supra* Part III.a–b.

²³⁹ See Treaty of Lisbon annex, declaration 17.

²⁴⁰ See *id.* at art. 2(265).

²⁴¹ See *id.*

provisions of its founding document.²⁴² This supremacy cannot be based on either ECJ decisions or on a declaration addended to the founding document. Just as importantly, the EU's founding document must convey a sense of permanency. If Member States have the option to leave the EU at any time, the EU will never be seen as a lasting government.²⁴³ Most importantly, the EU's founding document must be one ratified by the European citizens.²⁴⁴

The treaties' major downfall is that they are not sufficient to establish a legitimate centralized government. While the content of Lisbon's amendments provide more democratic legitimacy,²⁴⁵ Lisbon's ratification process undermines their impact. The fact that Member States intentionally circumvented public opinion to create EU power makes the EU's commitment to democracy less meaningful. The context of the German constitution's ratification exemplifies how important establishing constitutional legitimacy can be to establishing a government's reputation.²⁴⁶ If legitimacy is "the widespread public belief that the society's governing institutions and political authorities are worthy of support,"²⁴⁷ then establishing legitimacy was intertwined with reestablishing Germany's tarnished reputation in the wake of the Second World War.²⁴⁸

In addition, the EU's need to quash citizen input reveals an underlying uncertainty among the European people about what kind of European nation they hope to create.²⁴⁹ Part of what is lacking is a direct connection between the European people and the European government that an increased role of Parliament will not create. The unusually high voter turnout for the Draft Constitution demonstrates that the people want to be heard.²⁵⁰ The EU needs to create a meaningful connection to

²⁴² See discussion *supra* Part IV.b.

²⁴³ See discussion *supra* Part IV.a.

²⁴⁴ See discussion *supra* Part IV.b (explaining that the Lisbon Treaty's ratification was a clear strategic attempt to avoid citizen input).

²⁴⁵ See Treaty of Lisbon art. 2(265).

²⁴⁶ See generally Useem & Useem, *supra* note 132, at 840.

²⁴⁷ *Id.*

²⁴⁸ See generally HANS SPEIER, FROM THE ASHES OF DISGRACE: A JOURNAL FROM GERMANY 1945–1955 *passim* (1985) (providing accounts of the world's perceptions of Germany directly following World War II); see also Severin Weiland, *Fears of Damage to International Reputation: Germany Considers Event Remembering Neo-Nazi Victims*, SPIEGEL ONLINE INT'L (Nov. 16, 2011, 1:39 PM), <http://www.spiegel.de/international/germany/0,1518,798160,00.html> (discussing that Germany still has concerns about how World War II impacts its reputation).

²⁴⁹ See discussion *supra* IV.b.

²⁵⁰ See Szewczyk, *supra* note 201, at 175–76.

its citizens by involving citizens more in daily affairs as well as the decision-making about the future course of the EU itself. The EU can never be a legitimate nation until it undergoes a ratification process for a European constitution that values citizen input. Moreover, the people will not agree to a stronger EU with a strong constitutional base unless they know that they will have that input.²⁵¹

Yet perhaps European citizens truly meant that they do not want the EU to become a nation.²⁵² Maybe Member States, likewise, do not seek to create a national European government either. For example, adding the declaration of EU law supremacy as an addendum to the treaties not only detracts from its significance but more importantly shows the Member States' unwillingness to put to paper the level of power that the EU holds in practice.²⁵³ If Member States choose to limit EU functionality, that is their prerogative. However, they must still provide a legitimate base for the power structure they create. The legitimacy issues will persist unless the EU provides an opportunity for more citizen input.²⁵⁴

Whatever Europe's current goal, the future course of EU power will undoubtedly depend heavily on how well it navigates its current economic challenges.²⁵⁵ The debt crisis has put extreme economic pressure on the EU Member States and diverted their attention for the time being.²⁵⁶ Once the EU mitigates these economic challenges, however, Europe will have to make a conscious choice about the direction it wants to head. So while an overhaul of the EU's Treaty-based system is not currently feasible, perhaps this crisis will provide the impetus that the EU needs to make necessary underlying structural

²⁵¹ *Id.* at 176.

²⁵² This would be one very logical conclusion from the fact that France and the Netherlands voted down the Draft Constitution. *Id.* at 175.

²⁵³ See discussion *supra* Part IV.a.

²⁵⁴ See discussion *supra* Part II.a.

²⁵⁵ Europe's crisis began in 2009 as a result of crippling Member State sovereign debt. Matthew C. Turk, *Implications of European Disintegration for International Law*, 17 COLUM. J. EUR. L. 395, 405 (2011). In particular, Greece's economy faced complete economic collapse absent EU intervention, resulting in a \$116 billion bailout. *Id.* The bailouts have not only put extreme pressure on all of Europe's economies but have also put pressure on Europe's political integration as well. E.g. Adam Davidson et al., *It's the Economy: Europe's Financial Crisis*, in *Plain English*, N.Y. TIMES MAG., Dec. 4, 2011, at MM20. For more information about Europe's current economic climate, see *Commission Report – European Economy, Economic Crisis in Europe: Causes, Consequences and Responses* (July 2009), available at http://ec.europa.eu/economy_finance/publications/publication15887_en.pdf (providing a detailed background on Europe's economic crisis).

²⁵⁶ See generally Turk, *supra* note 255, at 396–99.

alterations. It might force European citizens to recognize how interdependent they are. And if the EU really does want to become a nation – a strong governing body with the legitimacy and authority of any other nation state – it will have to create an underlying constitution.

V. CONCLUSION

The Lisbon Treaty's amendments to the EU's founding treaties do not establish the equivalent of a European constitution. Instead, as a comparison to the German constitution illustrates, the Lisbon Treaty's amendments did not incorporate a strong enough statement of EU supremacy. In addition, the Lisbon Treaty's ratification process intentionally barred citizen input, so that the treaties do not establish legitimacy in the way that a constitution ratified by its citizens would. This analysis reveals that the EU can never become a strong, unified nation unless it strengthens Member State deference to EU supremacy and gives the European people a stronger voice in EU affairs.