Articles

THE EUROPEAN UNION AFTER LISBON: IS THE UGLY DUCKLING A SWAN YET?

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In the aftermath of the changes to the European Union (EU) brought about by the 1992 Treaty on European Union, or Treaty of Maastricht, J.H.H. Weiler asked whether the new clothes had an emperor. Almost two decades later, we have, in the Treaty of Lisbon, another apparently significant constitutional re-arrangement, and another of Hans Christian Andersen’s fairy tales springs to mind. The story of the Ugly Duckling contains two particular elements of note. First, the ugly duckling obviously always had the genes of a swan and was never really a duckling. Second, none of the surprisingly parochial barnyard animals apparently had ever seen a swan and thus had no idea what this creature in their midst really was.

I. FROM CONSTITUTION TREATY TO CONSTITUTIONAL TREATIES

A. The Confused Citizen

The history of the Communities and the EU is now a sixty-year epic going back to the foundation of the original Coal and Steel Community, now expired. We pick up the story in 2002. Over forty years after the birth of the European (Economic) Community and ten years after the creation of the separate but connected European Union, and after numerous reforms and frequent setbacks, the Governments of Europe declared themselves ready to recognize a defining moment, when the process of gradual integration through “functionalist” institutions matured into the finality of a constitutional settlement.1 By 2004, the work of an intergovernmental conference charged with this task produced a proposal for a Treaty Establishing a Constitution for Europe that would indeed replace the founding documents of the European Community and the existing European Union. Remarkably, perhaps, the Member States signed up

* I am honored and grateful to have the opportunity to acknowledge Professor John Murphy’s distinguished career by contributing to this Festschrift. John has been my long-time friend and my collaborator with respect to our casebook on European Union constitutional law. On several occasions we discussed the template proposed in this Essay, and it will finally find its way into our casebook via the upcoming third edition to be published in early 2012.

1. The need for finality was invoked in the oft-quoted speech given by the German Foreign Minister, Joschka Fischer, at Humboldt University in Berlin on May 12, 2000. See Joschka Fischer, Ger. Foreign Minister, From Confederacy to Federation: Thoughts on the Finality of European Integration, Address at Humboldt University (May 12, 2000).
without demur. Some governments felt that this new step was significant enough to warrant a referendum in their countries, though most did not. Then, after a “yes” vote in Spain and other ratifications without a popular vote, the project fell out of the sky in 2005 when the citizens of France and the Netherlands rejected it. Analysis of the votes showed a variety of reasons given by voters for the rejection in the two countries. According to the European Commission’s survey, the reasons given by those who voted “no” included:

- It will have negative effects on employment
- The economic situation in France is too weak/there is too much unemployment in France
- Opposes the national government/certain political parties
- Not enough social Europe
- Too complex
- Does not want Turkey in the European Union
- Lack of information
- I am against Europe/European construction/European integration
- I do not see what is positive in this text
- The draft goes too far/advances too quickly
- Opposition to further enlargement
- Not democratic enough
- Too technocratic/juridical/too much regulation
- I am against the Bolkestein directive
- I do not want a European political union/a European federal State/the “United States” of Europe
- The draft does not go far enough
- Loss of national sovereignty
- Europe is too expensive
- Opposition to further enlargement
- Economically speaking, the draft is too liberal (meaning market-based)
- The “Yes” campaign was not convincing enough
- This constitution is imposed on us
- The country must first settle its own problems
- I do not trust Brussels
- Loss of national identity
- There is nothing on human rights or on animal rights.


3. In France, at 31% this was by far the greatest reason for rejection. Flash Eurobarometer, *supra* note 2, at 17.
The debate leading up to these votes was, as to be expected, national in character, and in France at least, a significant overall factor was the unpopularity of the incumbent government. This seems to have then divided the camps along traditional ideological lines. It is evident from the list of reasons for rejection in both countries that very few had anything directly to do with the merits of the proposed Constitution Treaty itself.

After this rejection, the Member States retreated. The notion of a “Constitution for Europe” was quietly extinguished and bundled into a hastily dug grave. All mention of it in European circles was obliterated. After a “period of reflection,” the reforms of the (not-to-be-mentioned) treaty were rebranded as a sort of tidying up exercise not requiring a popular vote after all. They were tucked into the existing framework of treaties via a “reform” treaty that subsequently became known as the Treaty of Lisbon after its signature in that city on December 13, 2007.

The Lisbon Treaty was actually in all substantive respects the same proposal as before (establishing a unified organization called the European Union out of the former European Union and European Community) but without an entirely new document with a lofty and threatening title and stripped of the trappings of a “constitution” (a flag, a motto, an anthem, etc.). Somehow these almost cosmetic changes were supposed to make all the difference. Instead, the two existing treaties, i.e. The Treaty on European Union (TEU) and the Treaty Establishing the European Community (EC Treaty) were preserved, but, with the Community abolished and succeeded by the Union, the EC Treaty was renamed as the Treaty on the Functioning of the European Union (TFEU) (collectively, the Treaties). At first, it looked like the voters were not fooled. The Constitution of Ireland still required a referendum, and in the first ballot, the new approach was rejected. But, in reality, and as before, the obscurity of the proposal played into the hands of the opposition. The “No” camp let fly with a host of lies, half-truths, and mischaracterizations. People were encouraged to believe that “Europe” was undemocratic and a threat to Irish identity, neutrality, and sovereignty. Similar concerns had already surfaced in Poland, and then in the Czech Republic, where the President, Vaclav Klaus, compared the EU to the old Soviet Union. The German Constitutional Court struggled to reconcile the proposed changes with the German Basic Law and the German concept of the sovereign state and indeed required certain legislative changes before ratification could proceed.


5. In a speech to the European Parliament on February 19, 2009, Mr. Klaus also questioned the need for the Parliament itself. See Vaclav Klaus, President, Czech Rep., Address at the European Parliament (Feb. 19, 2009). Needless to say, the speech was not generally well-received by the audience.
Then, a second ballot in Ireland the next year produced a remarkable turnaround. With a more persuasive campaign by the Government, and in the midst of a severe economic reversal, the people voted by a huge margin in favor. This time the message was that Ireland needed the Union; the Irish did not want to end up as a nation on the periphery potentially falling back into the shadow of the United Kingdom. There was particular resentment at the involvement in the campaign of the United Kingdom Independence Party. Was this the sort of ally Ireland would be left with? No, they wanted to be a positive player in the world’s largest trading bloc. Thank goodness for Brussels.

B. The Root Cause of Hostility

The Communities and the Union have been a success in many ways, including the single market, the abolition of internal frontiers, the common currency (perhaps), and, underlying all this, the prevention of armed conflicts among its members. Indeed, in this latter respect, politicians who argued for the “Yes” camp during the referendum campaigns on that ground were derided for scaremongering: in effect, postulating the ridiculous notion that conflict among the Member States was still possible. Through its program of economic integration the Communities and now the Union brought a new era of prosperity to Europe. The Lisbon reforms enable the new Union to move on to strengthen ties between its peoples through the construction of an “area of freedom, security and justice.” The Union, even pre-Lisbon, has played important roles in preserving peace outside its borders, and again, the Lisbon reforms will enhance these capabilities.

Why then did so many show such disdain or indifference to the constitution proposal? There can be little doubt that the root cause of the rejection was that most voters did not understand very well what the Union and the Communities were, how they functioned, or what powers they possessed, or, more to the point perhaps, did not possess. Thus, they were unable to comprehend the purpose of the proposal on which they were being asked to vote and indeed why they were being asked to vote on it at all. The Treaties in their pre-constitution form were described, in 2001, as “confusing, jargon-ridden, occasionally ambiguous, and consistently impervious to ready understanding by the layman and specialist alike.”

6. In The Netherlands, according to one reading, this factor may even have been the immediate reason for a majority of voters. See Dehousse, supra note 4, at 156 (citing Flash Eurobarometer, supra note 2, at 17).

7. Had the treaty been more accessible, it might still have been rejected of course, but at least the attention of voters could have been more focused on the proposal itself and abstainers might have been more motivated to vote. In France, 60% of those who did not vote cited the difficulty of understanding the Treaty as one reason for their abstention. See Flash Eurobarometer, supra note 2, at 31. In The Netherlands it was 51%.

Constitution Treaty, while a great improvement, remained beyond the reach of most voters. Citizens were confronted with a perpetuation of many aspects of the pre-existing Treaties with their, by now, heavy use of euro-jargon and reference to concepts that scarcely related to their daily lives. Moreover, they were bound to have difficulty in understanding how the proposed “constitution for Europe” related to their own constitutions.

The root cause should not be equated with the actual reason given. The point is that because the proposal was so obscure to most voters, it enabled the “No” camp to diffuse attention away from the proposal and towards any number of distracting issues: the opposition was left with free rein to pick and choose any particular article or element as they pleased on which to vent their opposition. They could play on the fears of the voters about the implications of “Europe”—a Europe that already existed and was in many important respects only being consolidated by the new treaty. Voters were confronted with the option of voting for something that, at best, they did not well understand, or voting against it based on whatever particular issue was troubling them. So they did what voters usually do when they are confused, suspicious, or fearful. They threw it out.

If the Constitution Treaty was difficult to understand, the Lisbon Treaty, as an amending document that went line-by-line through the existing Treaties, changing words, sentences, numbering, and order, was completely impenetrable. And the founding Treaties, as now amended, while more rational in their organization, still merit the 2001 description, with over 400 articles, plus a multiplicity of protocols and declarations. The arrangement of provisions particularly in the TFEU is derivative of its original form and purpose, as the founding document of the EEC and then EC. It was focused on more or less precise steps for achieving a common market, and institutions were set up for that limited purpose. The TFEU has now completely outgrown that purpose. The TEU tries to set up a broader constitutional overview but this can seem particularly confusing because it is in places repetitive of TFEU provisions, while some TFEU provisions (such as the division of competences, or detail relating to the status of EU citizenship) seem like they really ought to belong in the TEU as the more generalized constitutional document. The doctrine of “direct effect,” mentioned later on, is not acknowledged. The primacy of EU law over state law (also discussed later) only gets a nod via a declaration, and we are still left only with the original sparse texts of the basics of the internal market—free movement of goods, labor, services, establishment, and capital—which do no justice at all to the hugely significant case law that has had such a profound influence on the development of the Union.

The general public continues to have great difficulty in understanding the Union and therefore in engaging with it. It has been built largely by their governments and bureaucrats and remains remote and seemingly elitist. In fact, their governments even extol this remoteness as a virtue,
since it is the only way that the European project has been able to progress:

[Ever more bigwigs have stated that the EU’s new treaty was deliberately made as unintelligible as possible so as to make it easier to win new powers for Brussels. That was the lesson they drew from the ill-fated EU constitution when it was voted down by French and Dutch voters in 2005. There is nothing new in claims that the EU is seizing power by stealth. What is novel is that they come from ardent supporters of EU integration. An early case was Valéry Giscard d’Estaing, a former French president who chaired the convention that drafted the constitution. Earlier this summer, as EU leaders gathered to salvage bits of his wrecked text, Mr. Giscard d’Estaing publicly declared that the plan was to “camouflage” the big changes that his constitution had tried to set out openly. “Public opinion,” he said, “will be led to accept, without realising it, provisions that nobody dared to present directly.”9

Both the attitude of this “European elite” and the complexity of the Treaties might be at least excusable if the Union still were only an advanced form of international organization that did not have daily effects on people’s lives. In that case, even the Constitution Treaty probably should never have been put to a popular vote. On the other hand, if indeed the Union now merited a constitution, then its citizens surely were entitled to a better explanation not only of the document that was presented to them, but also why it was necessary.10 The need for such explanation has not gone away with the Lisbon reforms since, as already noted, these were in all material respects the same as those embodied in the earlier proposal.

II. What Sort of Organization Is the European Union?

The foundation documents of the Union are international treaties (and even the constitution proposal itself was an international treaty). Thus, it is not beyond the bounds of reason to begin an inquiry into the question posed above by asking whether the Union is, despite its unique

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10. It must be acknowledged that many state constitutions are lengthy and complex documents also. However, citizens recognize that their state constitution is the foundation for the organization of their society and so, whether they understand it well or not, they certainly understand the need for it and why they should be asked to vote on it or on amendments to it. By contrast, the significance of the EU Constitution was consistently downplayed by governments. Jack Straw, then-British Foreign Secretary, observed that to call it a constitution was insignificant—even golf clubs have constitutions. See Neil Walker, Post-National Constitutionalism and the Problem of Translation, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 27, 31 (J.H.H. Weiler & Marlene Wind eds., 2003).
attributes, fundamentally still just a very advanced form of international organization, and as such, ultimately the instrument of its Member States. Whatever the legal experts may say, this is a notion to which the governments of the Member States still seem to adhere as a political matter, so it is important to examine it seriously.

A. Is the Union Merely the Instrument of the Member States?

Article 1 of the TEU post-Lisbon states, “By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION . . . on which the Member States confer competences to attain objectives they have in common. This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe.”

The elements of this article are first, that the Union is established by the Member States (describing themselves in the conventional language of international law and not as the representatives of their peoples). Second, it declares that the Member States confer competences on the European Union. What it expressly does not say is that the states thereby transfer some portion of their sovereign powers to the Union. All they have done, it seems, is agree that the Union will have the competence to exercise their collective sovereign powers. Their sovereignty remains intact; it is how it is exercised that changes. Third, the purpose of this conferral is to pursue their common objectives; and finally the treaty is another stage in the longer term project of furthering ever closer union among the peoples of Europe. Faced with this language, an interpretation of this article to the effect that the Union is the instrument of the Member States seems justified. In many respects the concept does indeed reflect the way the Union actually works as a matter of political reality. We can note the following features:

– The Member States maintain control over both legislative and executive authority through the Council. All legislative acts require approval of that body, the members of which are in reality the Member States themselves. Even in areas where the Union has “exclusive competence” such as competition policy,


12. Representation of the states in one of the federal legislative chambers is not necessarily inconsistent with the existence of a federation, witness the composition of the Bundesrat in the German Constitution and of course the pre-SevenTEENTH Amendment situation in the United States. In the Union, however, the Member States themselves are really the members of the Council since their representatives vary according to the subject matter of the meeting. See TEU, supra note 11, art. 16; Treaty on the Functioning of the European Union art. 238, Mar. 25, 1957, 2008 O.J. (C 115) 47, 153-54 [hereinafter TFEU]. The Council also serves as an important element of executive power, which certainly places it in a different position from the Bundesrat.
the Member States are very much involved through powers delegated back to them from the Union.

– Most significant Union legislative action occurs through harmonization—that is, alignment of national laws rather than creation of a federal body of law. The instrument of harmonization is the form of legislation known as a directive.

– Below a very high level, all executive action has to occur through the medium of the executive power of the Member States.

– Where the Union is authorized to pursue a policy (agriculture, competition, commercial, foreign and security, transport), it does so by common policies or common rules. A similar approach is now becoming evident in the evolution of the directive. Lisbon has confirmed that the Union now has the ability to adopt implementing measures at the Union level where uniform action—not “Union” action—is required.

– However peripheral, Lisbon now has recognized the formal participation of Member States’ legislative bodies in the Union legislative process.

– Although it is an autonomous legal system, Union law only takes effect within the legal systems of the Member States. It does not exist as a “federal” body of law external to them.

– The Union depends on the Member States for its sources of revenue. It has no power of taxation.

Explaining the Union in this way does not immediately account for the existence of the European Parliament. The Parliament exists as an institution outside the legislative framework of the Member States. To fit it into a notion of the Union as merely an international organization would require us to believe that it is not in fact a democratic body representing the people of Europe as a whole. Some would claim that the poor turnout for election proves this point. Moreover, the Parliament does not perform the role that people would expect of such a body. It has no exis-

13. The demise of the name “Community” produced something of a disconnect in this regard, since that term more accurately correlates with the notion of common action.

14. TFEU, supra note 12, art. 291.

15. This lack of taxation power has been criticized as a reason why citizens are seemingly mostly disinterested in European Parliament Elections and the activities of the Parliament. See, e.g., Philip Allott, Epilogue: Europe and the Dream of Reason, in European Constitutionalism Beyond the State, supra note 10, at 202, 221. Allott urges the conferral of a taxation power using a nice twist of a familiar mantra: “No representation without taxation.” One should note, however, that the most salient weakness of the Parliament is that its elections do not result in the formation of a government, similar to the mid-term elections in the United States, which have a historically low turnout.

16. See, e.g., Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-308DC, Apr. 9, 1992, Rec. 55 (Fr.) (re-ratifying European Union Treaty).
tence independent of the rest of the structure: It cannot function on its own. It does not house a parliamentary government. It has no European civil service to which it can look to enforce the laws that it adopts. On the contrary, the Member States alone can do that. It is dependent on proposals from the Commission for legislative initiatives (with some qualifications). It still does not have a uniform electoral process (although it is now required to draw up a plan for approval by the Council). And it is still dependent on the cooperation of the Council—the Member States in effect—for the passage of any Union measure.

It is also very much the case that even the post-Lisbon Union has not arrived at a finality as a constitutional order. It has flexibilities in many directions: the euro is the currency of only seventeen Member States; the UK and Ireland are not part of the “Schengen” arrangements regarding freedom of travel within the Union; and Poland and the UK have opt-outs (of dubious value, one might add) with respect to the full application of the Charter of Fundamental Rights. The Treaties recognize the possibility of multi-speed integration through the Enhanced Co-operation provisions (although these have never been used as such). Moreover, the continued process of enlargement of membership contributes to this lack of finality in the post-Lisbon Union.

There were, however, certain specific features of the Community, now inherited by the Union, that are hard to reconcile with the proposition that the Union is merely the “instrument” of the Member States.

First, over the course of its history the individual citizen has become progressively more engaged directly in the affairs of the Community, bypassing and indeed opposing the Member States. Thus, in the pre-Lisbon Community and now in the post-Lisbon Union:

– Individuals have the right as a matter of Union law (and therefore not derived from state law) to invoke at least certain provisions of the Treaties and directives in order to have conflicting state laws declared inapplicable;17
– Individuals have rights to recover compensation from a state that breaches Union law;18
– Regulations and some treaty provisions create obligations for individuals;19
– Individuals now enjoy the status of Union citizenship;20 and
– In their interaction with Union law, individuals enjoy the protection of the Charter of Fundamental Rights and, to the extent that national law is implicated, those rights override it.

19. See TFEU, supra note 12, arts. 101-02 (competition law); id. art. 157 (equal pay for men and women); id. art. 288 (effect of regulations).
20. Id. art. 20.
On a different plane, the introduction of the euro, supplanting one of the most fundamental attributes of sovereignty and national identity, has changed the relationship of citizens to the Union (or at least some of them) in both psychological and economic terms.

Second, notwithstanding the weaknesses noted above, it is a fact that through the European Parliament, Europe’s citizens can participate directly, and outside the state structure, in the adoption of European legislation and other important activities including the appointment of the Commission.21 I will revert to this in more detail later on.

Third, to assert that the Member States remain in control through the pivotal role of the Council is to overlook the essentially European nature of that body. Most areas of EU action now are subject to qualified majority voting, which is today declared to be the norm.22 For a sovereign state to be bound by a decision it has voted against is not in itself altogether unusual in the international order. But in the case of the Union, the result is that its citizens are also bound by, or derive rights under, legislative acts. Essentially then, the will of the majority has the force of law throughout the Union and the principle of exclusive territorial sovereignty of the dissenting states yields to the collective sovereignty with which the Union is endowed. Even amongst the majority this may be the case to the extent that compromises have been accepted to get a measure passed.

Fourth, while it must be acknowledged that the Member States remain “masters of the Treaties,” thus theoretically having the power to change the Union in any way they please, this process requires unanimity among all twenty-seven Member States and is now subject to the participation of the Parliament.23 Such considerations surely suggest that the Union is more than just an instrument of the Member States. The participation of the peoples of Europe, and the nature of the legislative process are manifestations in some sense of an independent will beyond just the will of the Member States.

This then prompts us to move to the next stage of the inquiry. Although many assert that the Union is “sui generis,” this is a singularly useless expression if we are trying to explain it to the non-expert. It is more helpful to frame the issue in terms of political structures that are at least to some degree familiar. Of the various structures available, the notions of confederation and federation seem the most probable.24

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21. Id. art. 289.
22. TEU, supra note 11, art. 16(3). The Member States still attempt to reach consensus as a practical matter, but this does not detract from the importance of the principle of majority voting.
23. Id. art. 48.
24. See also Francis Snyder, The Unfinished Constitution of the European Union, in European Constitutionalism Beyond the State, supra note 10, at 55, 57.
B. Is the Union a Confederation?

I would note in the first place that, while the term “confederation” is sometimes used to describe the Union, this description proves to be unhelpful because there is no agreed definitional boundary to the term. On the one hand, it is not necessarily indistinguishable from the notion of federation. Consider the case of the Swiss Confederation, which has a federal constitution. On the other hand, many confederations of the past cannot be considered as having been more than loose alliances of sovereign states. Professor Wheare says of the term:

[It] may be used to describe a form of association between governments whereby they set up a common organization to regulate matters of common concern but retain to themselves, to a greater or less degree, some control over this common organization. It is often doubtful whether the common organization can be said to possess sufficient power to be called a government, and in that case it may be doubtful sometimes whether the document which establishes this common organization should be called a “Constitution”—it might properly be called an agreement, a covenant, or a treaty.25

At first sight, Wheare’s description does seem to fit the European Union as it is the creature of (what were originally at least) international treaties, not of a constitution. The Union does not have a government, at least not one capable of functioning in the way that a state government does. And it does appear that the Member States continue to maintain significant control over the Union.

At the same time, the EU has some important features that do not fit the description, nor do they match what are generally considered historical examples of confederations, such as the original Confederation of United States of 1778 or the German Confederation that replaced the Holy Roman Empire.

Alexander Hamilton, commenting in The Federalist on the original Confederation of the United States, observed, “the concurrence of thirteen distinct sovereign wills is requisite, under the Confederation, to the complete execution of every important measure that proceeds from the Union.”26 By that measure, the EU is actually more developed than a confederation. The existence of qualified majority voting takes it beyond the typical confederal structure Hamilton describes and certainly beyond the arrangements found in the 1778 Articles of Confederation of the United States.

Yet, the Union also falls short of the classic confederation model, because it does not serve the one purpose that normally propels states into a

confederation. This is surely to provide common security and the management of foreign affairs. To the contrary, Article 4 of the TEU declares in no uncertain terms that “[n]ational security remains the sole responsibility of each Member State,”27 and the Member States continue to exist as subjects of international law. The Union has no standing in organizations where membership depends on statehood, such as the United Nations, although the Member States are required to advance its policies. Admittedly, the Union has displaced the Member States in the conduct of international affairs within the scope of the Treaties. Lisbon introduced a new office of “President,” and formalized the role of the High Representative for foreign affairs. It has even provided for the creation of a Union diplomatic corps (“External Action Service”).28 The Member States are required to coordinate their policies within the United Nations and other international bodies.

For all that, neither the President’s nor the High Representative’s roles are quite what they sound. The President is not a head of state; instead, the role exists to marshal the Member States within the European Council—it is this body that might be viewed as a collective president for the Union. The High Representative is given the task of representing the Union, but clearly does not have authority to speak for the Member States outside of the Union’s competences or authorized policies, while any executive action remains dependent on the Member States.

More fundamentally, the critical point that Wheare was making was that confederations, being generally rather loose organizations of sovereign nations, cannot be said to have a founding document that can be called a constitution.29 Thus, to assert that the Union is a confederation does not enable us to determine whether it is no longer just an international organization or whether it deserves a constitution (and more likely would lead us to conclude that it does not).

C. Is the Union a Federation?

At first glance, we might conclude that the Union does not fit the federation model, for a very simple reason: It is generally understood that the nation state has sovereign power over its territory, while international law addresses the relations between those nation states.30 This is the contemporary “normal.”31 In current usage, then, the term “federation” de-

27. TEU, supra note 11, art. 4.
28. Id. art. 27(3).
29. WHEARE, supra note 25, at 24.
30. This can be described as the so-called Westphalian system, based on the Peace of Westphalia of 1648. Its continued viability has been the subject of much debate. See, e.g., RE-ENVISIONING SOVEREIGNTY: THE END OF WESTPHALIA? (Trudy Jacobsen, Charles Sampford & Ramesh Thakur eds., 2008).
31. As Bardo Fassbender states, “Images of sovereignty constructed in past centuries remain, much longer than was expected, or hoped for, in 1945. It seems that the power of those images was underestimated . . . .” Bardo Fassbender, Sover-
scribes the *internal* organization of a sovereign nation state, such as Switzerland, Germany, or the United States. As such, a federal state is no different *in international law* than a unitary state. It cannot be claimed that the Union is a state, so it would follow that it cannot be a federation.

Yet, the existence in the Union of a two-tier legislative and policy/decision-making structure (Union/states) surely requires us to try a little harder. Is it really necessary that the notion of federation must always imply only the internal structure of a state? I do not believe so. The absolutely essential characteristic of a federation is surely that there is an allocation of sovereign powers between the federal authority and the several states ("co-ordinate powers"). Such allocation necessarily requires both a single source of ultimate sovereign power and the primacy of the federal authority. While it is easier to locate a single source of sovereign power within a state, it does not follow that it cannot exist outside of one.

1. *The Starting Point: The Primacy of European Law*

The search for a single source of sovereignty for both the states and the Union begins with the legal history of the European Community as the

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32. For a detailed exposition and critique of this viewpoint, see *R. Schütze, From Dual to Cooperative Federalism: The Changing Structure of European Law* (2009).

33. There are some, particularly the more vocal opponents of the Union, who would assert that as a result of Lisbon, the Union has now become a state. Georg Sørensen tells us that a sovereign state requires a territory, a people, and a government. It is not disputed that the Union does not possess any territory—its legislation and executive acts have be to be carried through the medium of the administrations of the Member States. For the same reason it cannot be said to have a government. The requirement for a "people" might seem more easily satisfied, because nationals of the Member States automatically enjoy the status of Union citizenship. However, the requirement is not really satisfied because the critical connection between the individual and the state is nationality, not "citizenship." Furthermore, Union citizenship is imperfect: Member States retain the right to refuse entry or residence to non-nationals based on grounds such as national security, or the likelihood that they will become a burden on state resources (in the case of persons not enjoying the status of a worker or self-employed person).

34. Wheare says of this requirement:

Neither [state nor federal legislature] is subordinate to the other; both are co-ordinate . . . . In a federal Constitution the legislatures both of the whole country and of its parts are limited in their powers and independent of each other. Consequently they must not be able, acting alone, to alter the Constitution so far at any rate as the distribution of powers between them is concerned. They are not subordinate to each other but they must all be subordinate to the Constitution.

*Wheare, supra* note 25, at 19, 22.

35. Much thought has been given to this issue. It has brought into question the underlying established suppositions on which sovereignty rests. Is the system of state sovereignty still a valid description of the world order? Are states really sovereign?
predecessor of the Union in its post-Lisbon form. Those familiar with the history of the Community know well that the European Court of Justice (the Court or ECJ) long ago ruled that conflicts between state laws and Community (Union) laws needed to be resolved in favor of Union law.

In a famous passage, the Court declared that Community (now Union) law takes primacy, or has supremacy, over even subsequent national laws based on the need to assure the consistent application of Community law:

In truth, the executive strength of Community laws cannot vary from one State to the other in favour of later internal laws without endangering the realization of the aims envisaged by the Treaty in Article 5 [of the original EEC Treaty], and giving rise to a discrimination prohibited by Article 7 [of the same]. In any case, the obligations undertaken under the Treaty creating the European Community would not be unconditional, but merely potential if they could be affected by subsequent legislative acts of the signatories of the Treaty.36

We could perhaps still try to downplay the doctrine of supremacy by asserting that it merely creates a new rule within each Member State jurisdiction giving priority to Union laws. But this would not ensure the consistency of application of EU law that underlies the ECJ’s reasoning. It necessarily must exist as an autonomous body of law. Moreover, it inevitably requires that EU law override even national constitutions. The ECJ indeed confirmed this point in the Internationale Handelsgesellschaft37 case:

Recourse to legal rules or concepts of national law to judge the validity of instruments promulgated by Community institutions would have the effect of harming the unity and efficacy of Community law. The validity of such instruments can only be judged in the light of Community law. In fact, the law born from the Treaty, the issue of an autonomous source, could not, by its very nature, have the courts opposing to it rules of national law of any nature whatever without losing its Community character and without the legal basis of the Community itself being put in question. Therefore the validity of a Community instrument or its effect within a member-State cannot be affected by allegations that it strikes at either the fundamental rights as formulated in that State’s constitution or the principles of a national constitutional structure.

36. CASE 6/64, COSTA V. ENEL, 1964 E.C.R. 585.
In Van Gend en Loos v. Nederlandse Administratie der Belastingen, the ECJ had also ruled that individuals had the right as a matter of Community law to invoke certain provisions of the EEC Treaty against the applicability of national laws that conflicted with those provisions. This also was of a Community character in the ECJ’s view: it was not dependent on what each national constitution said about the direct effect of treaties in national law.

The doctrine of supremacy can only survive if it is derived from a grant of power beyond the acts or constitutions of the Member States (the “autonomous source” referred to by the Court). For how could the governments of the Member States ever have had the power to grant to the Union the right to override their own constitutions? They could not give what they did not have. Even though some constitutions do permit international law to prevail over national laws—even subsequent laws—this is only by permission of the constitution itself. Moreover, not all Member State constitutions have such provisions.

Additionally, the European Court must itself derive its legitimacy from such a source, for how otherwise would its rulings have the legal effect necessary to achieve the unity it describes as indispensable? It is logically impossible that it could be subordinated to any of the courts of the Member States.

The doctrine of supremacy satisfies one leg of the federation definition. Because this principle could not have been approved by the Member States under the authority of their own constitutions, it leads us immediately to the logical conclusion that the Union derives its powers from a source other than, or at least additional to, an act of the Member States, and that source must be the same source as that which granted legitimacy to their own constitutions, for otherwise there would be only conflict. In a democracy, this source obviously is “the people.”

So where might we look for approval by the people?

2. The EEC Treaty

Was the EEC Treaty really more than just an agreement between sovereign states? Might we actually conclude that the governments that signed it were representing their people rather than their states in a similar manner to the representatives of the thirteen American states who drafted the 1787 Constitution?


39. This is characterized as a question of who has competence to decide on how competence should be allocated, often described by the German shorthand “Kompetenz-Kompetenz.”

40. In democratic societies this is a given, but it does not exclude that the nature of the legitimizing act could be something other than a single “constitutional moment.”
In its *Van Gend* decision, the ECJ declared that:

The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that *this Treaty is more than an agreement which merely creates mutual obligations between the contracting states*. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.41

These views were presented as an essentially logical outcome of the original EEC Treaty contents, particularly its stated goals and its mechanisms for creating direct legal relationships with citizens through the direct applicability of Community regulations and decisions addressed to private parties. Although it would be a distortion of history to assert that the framers of the EEC Treaty actually thought of themselves as taking part in a European constitutional convention back in 1957, yet the treaty language undeniably manifested a consciousness of something beyond a mere compact between nation states. The same references to the peoples of Europe appear in the subsequent EC Treaty and the post-Lisbon TEU and TFEU.

Pre-Lisbon Treaty language was not at any rate inconsistent with a view that “the people” had somehow had a hand in the creation of the European Community. In the post-Amsterdam Treaty (1997) version of the EC Treaty, Article 5 provided that “[t]he Community shall act within the limits of the powers conferred upon it by this Treaty.”42 By referencing the source of powers as being the “Treaty,” the language is, in that specific context, actually neutral as to who is conferring such powers.

That position seems at first sight to be contradicted by the post-Lisbon language of the TEU, which in Article 1 very explicitly refers to competences conferred by the *Member States*.43 On one reading, this would arguably preclude the entire supremacy doctrine since it seems to assert that the grant of powers to the Union is attributable only to an act of the Member States. As we have seen, supremacy as articulated by the ECJ clearly implies some form of consent by the people outside of the legal

42. The original EEC Treaty made no reference to powers or competences being conferred on the Community itself (although Article 4 speaks of conferral of powers on the institutions).
43. See TEU, *supra* note 11, art. 1; see also id. art. 5(2) (explicitly inserting words “by the Member States”).
framework of the Member States. Three factors suggest a different interpretation:

- For the first time we have an affirmation of sorts in a treaty document that supremacy is part of EU Law—in the form of the Council’s opinion set out in Declaration 17.\footnote{Declaration 17 states: The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260): \textit{Opinion of the Council Legal Service of 22 June 2007} It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (\textit{Costa/ENEL}, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice. Final Act, 2007 O.J. (C 306) 231, 256 [hereinafter Declaration 17] (footnote omitted).}

- The Member States surely no longer had the right, just by amending the language of the treaty, to take back the sovereign powers that had already accrued to the Union and that could only be returned to them by some further act of “the People.”

- The TEU is explicit that candidate Member States must adopt the “\textit{acquis communautaire}” (accumulated achievements of the Community, now Union).\footnote{TEU, \textit{supra} note 11, art. 2, ¶ 5. An oblique reference to the concept of the general \textit{acquis communautaire} also appears in Protocol Nos. 21 and 22.} Such a requirement would make no sense if the existing Member States were not themselves bound by the \textit{acquis} including of course the doctrine of supremacy.

Perhaps, then, we should make sense of this language by reading the reference to the conferral of competences by the Member States as simply expressing the concept that the Union’s sovereign powers necessarily en-
tail the surrender of competences by the Member States, for that is where they resided before their transfer.46

It has been asserted that the original EEC Treaty itself contained the genes of an eventual constitution.47 It was always intended to evolve into something that would embody its declared aim of pursuing an ever closer union among the peoples of Europe. But, despite the treaty language and the Court’s interpretation, are we really convinced that we can attribute the signature of the EEC Treaty or its successors to an act of the people? Where else might we look for involvement of the people? The answer is to be found in the very factors that the Court used to justify its reasoning in support of supremacy and direct effect.

3. The European Parliament

I have already noted the involvement of the people as a whole in the work of the Union through the European Parliament. The Parliament started out as an assembly of delegates from national parliaments. It gained the right to be directly elected by the citizens of Europe in 197648 and the first elections took place in 1979. Almost immediately, it took on the Council and the Commission over agricultural spending in exercise of its increased budgetary powers.49 It subsequently began to make its voice heard in other ways even though, until the Single European Act of 1986, its powers remained largely those of consultation in the adoption of laws by the Council. From that date, it saw a stepwise increase in its legislative powers, which now entail the ability to block EU legislation, thus overriding the will of the Member States acting in the Council. One may also note its rights with respect to the appointment of the Commission and the adoption finally in 2007 of a statute that gave it the power to regulate the pay and conditions of its Members.50 It now commands the respect of the other institutions as well as of world leaders who have chosen to make speeches in that forum as a way of addressing Europeans as a whole. Even

46. This surrender of competences operates in the same way that the several states must have surrendered powers to the United States by execution and ratification of the U.S. Constitution.

47. The fledgling was always going to be a swan (whatever a swan is). I thank KAREN ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW (2001), who mentions Trevor Hartley’s foreshadowing of this metaphor in his article, The European Court, Judicial Objectivity and the Constitution of the European Union, where he described the most activist ECJ judges’ views that the EEC Treaty had been “genetically coded to develop into the constitution of a fully-fledged federation.” Trevor Hartley, The European Court, Judicial Objectivity and the Constitution of the European Union, 112 LAW Q. REV. 95, 107 (1996).


50. This has been vividly documented in SIR JULIAN PRIESTLEY, SIX BATTLES THAT SHAPED EUROPE’S PARLIAMENT (2008).
those who are vociferous opponents of the Union have chosen to voice their opposition by seeking election to the Parliament, as witness for example the United Kingdom Independence Party and the right wing groups from central Europe. Despite its weaknesses, already noted, the Parliament is indeed the medium through which the people of Europe can influence and direct the Union (including now submission of petitions for legislative action) and it is now making ever greater efforts to educate the people about itself and what it can do for them.

The growth of the Parliament’s power and influence could not have occurred without the consent of the governments of the Member States, of course, but their willingness to cede power has been driven by the demands from interest groups of many kinds for increased democratic control over Union activities. Once democratic rights have been acquired, it becomes impossible to take them away. The process is irreversible for as long as the Union itself continues to exist.

4. Assertion of EU Legal Rights

Private parties have not been slow to assert the rights granted them by the Treaties and under EU legislation, both against their governments and in the courts of the Member States. These rights, as we saw earlier, are extensive. In addition to the ability to invoke the provisions of the Treaties on free movement within the internal market, individuals can rely on their EU citizenship status and other fundamental rights where their governments are implementing Union law. They may also have damages claims against Member States that commit serious breaches of EU law. National courts have not always been enthusiastic supporters of this trend and indeed, surely if put to the ultimate test, they would still favor their own constitution over Union law. Yet they have gone out of their way to avoid such confrontations by all kinds of legal devices including interpretation, constitutional amendments, and the creation of new legal doctrines. They might even go so far as to accept the subordination of their constitution as a practical matter, recognizing however that in the case of an eventual insoluble conflict, their Member State could withdraw from the Union.

5. Motivations: Why Would the Member States Want to Give Up Sovereign Powers?

Within the Union, one could of course point to the astonishing economic and societal advances that the Union has enabled for the benefit of

51. See Alter, supra note 47. This work is a masterful study as to how the process has worked on the whole to reinforce the doctrine of supremacy over the last thirty-five years or so.

52. See id.

its citizens. But the aspirations voiced in the preamble of both Treaties regarding an ever closer Union reflect a more profound, if sometimes reluctant, realization that the concept of the sovereign state is outmoded for people who in reality share so much common heritage and live in such close proximity to each other.54 The original initiative of the European Coal and Steel Community of 1951 and then of the EEC and European Atomic Energy Community Treaties was a pro-active reaction to the appalling death and destruction of two European wars. These wars were the nemesis of the nation state for Europeans. The initial reaction (“this must never happen again”) has now mutated into an affirmative justification for a unified Europe based on respect for and mutual understanding of national differences.55 As the post-war generation gives way to those who have no memory of the earlier terrible conflicts, there is no suggestion that the Union has become unnecessary, indeed quite the contrary.

External forces increasingly are forcing European states to act together even in areas where they might not want to go. This was evidenced in quite a remarkable way by the sovereign debt and banking crises of 2009 and 2010. For, in order to shore up the single currency, the Member States of the eurozone took steps to provide financial support to threatened countries that were in principle prohibited by the Treaties.56 Although many commentators foresee the forced withdrawal of some members from the eurozone, this is not an acceptable outcome for the Union. The Treaties do not permit it, so technically a state in such a predicament would have to withdraw from the Union altogether.57 It is far more likely that a solution will be found that creates a degree of fiscal discipline intended to prevent such crises in the future while maintaining a short-term mechanism for dealing with the ongoing difficulties of some countries.

6. The Effect of Lisbon

The pre-Lisbon history of the Communities already permitted us to conclude that they possessed the key characteristics of a federation. Yet, for as long as the above analysis was applied to the pre-Lisbon structure, the term “federation” still seemed rather far-fetched, even though the basic logic was the same. The Community (as the most “federal” of the pre-Lisbon “pillars” of the Union) was an organization with a limited purpose.

54. This might be seen as a modern reflection of the pre-Westphalian order, where the peoples of Europe were often connected or divided by continent-wide forces that pre-dated the existence of the nation state: religion; the proprietary nature of sovereign power interlinked by marriage; and culture, geography, and climate.

55. For an eloquent exposition of this principle, see J.H.H. Weiler, In Defense of the Status Quo: Europe’s Constitutional Sonderweg, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, supra note 10, at 7. The concept of mutual respect has deep roots in the philosophical constructs of Immanuel Kant.

56. See TFEU, supra note 12, art. 125. However, some support for the action might be found in TFEU art. 122.

57. TEU Article 50(1) does now permit withdrawal from the Union.
It did not formally exhibit the normal attributes of a federal power. For example, there was nothing in the EC Treaty specifically describing its law-making powers as “legislative”: there was no clearly defined division of competences; and it did not have an official “head of state” since the European Council was a Union body only, not a Community institution. Moreover, the Treaties contained no explicit evidence of the doctrine of EU law primacy.

Lisbon has changed all this. The fusion of the former Union and the Community into the new Union extends the reach of Union competence (however limited) beyond the original purpose of the Community so that, today, it has a much more generalized federal power at least in the legislative sphere. The TFEU now formally enumerates and categorizes the powers of the Union, and there is a clear definition of what constitutes a legislative act of the Union. The European Parliament’s participation in legislation has been greatly broadened and generalized. And, as noted above, the Treaties now contain at least a grudging acknowledgment of the doctrine of the primacy of EU law in the form of Declaration 17.58

Perhaps of the most profound importance is the introduction into EU law of the Charter of Fundamental Rights. This is significant in at least two ways.

First, it is a Union act of some sort. Although originally drawn up more than ten years earlier by the Union, it was formally “adopted” by signature and proclamation of the Council, Commission, and Parliament on the day before signature of the Lisbon Treaty.59 This form of act, not provided for in the Treaties, represents a form of autonomy of action on the part of the Union on a matter of fundamental constitutional importance for European citizens. Since the Charter overrides secondary Union legislation and legal acts, as well as the acts of the Member States in the implementation of Union law, it can arguably be viewed as the first constitutional act of the Union itself.60

Second, the creation of a catalogue of rights on par with the EU Treaties ought finally to dispel objections to Union sovereignty—particularly from Germany—on the grounds that the Union’s existence outside the state constitutional structure would deprive their citizens of fundamental rights protection over a wide body of law that creates obligations for them. There was always a certain degree of discomfort with the ECJ’s position

58. See Declaration 17, supra note 44.
59. As the Parliament itself states: “This event provides a legal basis for the article which refers to the Charter in the EU Reform Treaty (the Lisbon Treaty).” Proclamation of the Charter of Fundamental Rights by the Three European Institutions, EUR. PARLIAMENT (Dec. 17, 2007), http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20071210BRI14639&secondRef=ITEM-005-EN&format=XML&language=EN. The Charter had originally been proclaimed in a somewhat similar manner at the European Council meeting in Nice on December 7, 2000, but was not endorsed at that time by a Treaty amendment.
60. Inevitably there are caveats. Per Protocol No. 30, the Charter has a modified scope of application in the United Kingdom and Poland.
that fundamental rights were in any event always part of the EU legal system. This was perceived in some quarters to fall somewhat short of the quality of protection available in the Member States. Indeed, the Court’s ability to elaborate on what those rights are is essentially limited to those rights that could affect the legality of EU legal acts or implementing measures of the Member States and does not obviously enable affirmative descriptions of rights such as the right to vote in parliamentary elections. In other words, the Charter is necessarily more than just a summary of case law. By enshrining these rights in a separate document, the proclamation has made them accessible to, and indeed the property of, the population at large.

I would note, too, that the requirement, now enshrined in the Treaties, for the Union to accede to the European Convention on Human Rights61 closes the gap between the extra-constitutional protection afforded by the convention to citizens in each Member State (in varying degrees) and the absence of such protection at the Union level.

D. Conclusion

All in all, there is plenty in the history of the last forty-odd years to permit us to validate retrospectively the Court’s seminal language in Van Gend and Costa—that the original EEC Treaty was more than a compact between the Member States. Admittedly we are missing the “act of the people” or “constitutional moment” that would give us the certainty we would perhaps rather have. Qualitatively we do not have the power of a majority vote. One would have to admit that for the most part, Europe’s citizens have merely acquiesced rather than taken an active role. Yet, the flow of power from national governments to the citizens of Europe acting within the European Union framework of laws and institutions has allowed the people, to the extent that they so wish, to become active participants in the dispersal of their (ultimate) sovereignty between their national governments and the Union. If one is presented with the option of denying that this makes any difference, or of accepting that the Union and the Member States as a practical matter today operate within a system of coordinate sovereignties sanctioned in some measure by the people, surely the latter is the better conclusion. (One might perhaps even venture to suggest that these developments provide a retroactive mandate to the original framers of the EEC Treaty to act on behalf of the people. That would then give us our constitutional act.) I have acknowledged that the Union does not fit the notion of a “federation” as the term is used conventionally today. Perhaps to avoid confusion, we might call it an international, or supranational, federation.

61. See TEU, supra note 11, art. 6, ¶ 2.
III. THE CONSTITUTIONAL TEMPLATE

The nature of federations is that they require a formal legal structure to manage the complexities that arise in a system of divided sovereignty. In other words, they need a constitution. So the European Union ought to have one. Unfortunately, with the demise of the Constitution Treaty, there is no document that overtly calls itself the Constitution of the Union. What we have instead are the TEU and the TFEU.\(^{62}\) Though much improved after Lisbon, the organization and technical complexity of these Treaties remain serious obstacles to any kind of popular understanding.

Valiant attempts have been made, particularly by the European Commission, to describe the Union in a narrative form as a means of aiding popular understanding. Experience in teaching the subject has told me that these efforts produce only confusion. What students actually need is a point of reference that advances the ability to compare the Union with familiar constitutional forms. This requires an educational tool that extracts the key constitutional tenets and reorganizes them so that they look more like a federal constitution.\(^{63}\) This is what I propose: a “constitutional template” that strips out unnecessary detail, and re-orders the text into something that actually reads like a constitution.

There is of course no generic form of federal constitution on which we can draw as a model. Every constitution is unique. Some are, in their original form at least, brief (such as the United States), others are extraordinarily lengthy, and even at their inception, given to inordinate detail, such as the Constitution of India. Most have acquired an accretion of sometimes entirely unsuitable subject matter for a constitution due to amendments over time.\(^{64}\) Some federal constitutions are almost unitary in their operation (Wheare cited Brazil, Mexico, and Argentina as examples of such at the time of writing\(^{65}\)). Some are a rather confusing mixture of federal and loose confederal arrangements, such as the Canadian Constitution. Even the more pure examples (such as the United States, Germany, Switzerland) are far from uniform in their formal treatment of the relationship between federal and state authority (not to mention how that

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62. The Charter of Fundamental Rights is of course also now a foundational document declared to have equal weight with the TEU and TFEU, but as already noted, its legal existence and effects are dependent on its incorporation into EU law through the Treaties.

63. A previous attempt (in 2001) at simplifying the Treaties was offered by the European University Institute at the request of the Commission. This was reproduced in A SIMPLIFIED TREATY FOR THE EUROPEAN UNION, published by the Federal Trust for Education and Research. The EUI proposal did not have the benefits of the organizational changes introduced by the Lisbon Treaty. It therefore lacked some of the key constitutional clarifications including the definition of a legislative act and the enumeration of competences.

64. Witness the Swiss Constitution, which contains provisions relating to a consumption tax on motor fuels and the promotion of Swiss film making; or, in the case of the United States, the Prohibition Amendments.

65. See Wheare, supra note 25, at 22.
relationship varies in practice over time). The German Constitution (Grundgesetz) might seem a logical choice since, like the EU, it embodies a form of cooperative federalism, i.e., involvement of the states (L¨ander) in the federal legislative process (through the Bundesrat). In various respects, particularly the allocation of competences, it is clearly the model for the European Union Treaties. Structurally, however, it reflects a choice of parliamentary government. By comparison, the Union does not have a “government,” while at the same time it does possess legislative, policy making (executive), and judicial functions.

The United States Constitution (in its original form) might also serve as a potential model.66 Apart from its strong federal structure, it contains probably the purist constitutional embodiment of the separation of powers. Adopting this concept provides an excellent analytical tool for understanding the Union’s institutional roles and powers, even if applied to an organization that displays no evidence of the concept.67

In the end, we cannot really base a template on any particular model because the Union is indeed unique. However, federal constitutions do exhibit commonality in describing the three branches of government whether there is a formal separation of powers or not. They also necessarily specify how powers are divided between federal and state authorities, and they lay out rules for relationships among the constituent states. More generally, as foundational documents, they speak in terms of powers, rights, and duties.

In the case of the EU, the Treaties mix up the truly constitutional aspects with lengthy digressions into descriptions of policies, provisions for establishing the internal market, and all sorts of detailed matters such as the exact form of majority required in a given case, all of which detracts greatly from their ability to serve as a robust constitutional statement. In rearranging and simplifying them so that they speak more like a constitution—in terms of powers, rights, and duties—my proposed template produces a significantly alternative perspective. Unfortunately, space considerations have prevented the inclusion of the template itself as part of this Essay.

The template rearranges the two Treaties into one document with nine basic themes represented by nine articles. It includes some summaries of case law where Treaty provisions no longer are sufficient to convey the significance of the Court’s decisions. Otherwise it mostly uses Treaty

66. I confess some self-interest here. As a teacher of EU law to American law students, I find it particularly helpful to draw comparisons with U.S. constitutional precedents.

67. Put in somewhat more forceful terms by Vibert, speaking of the pre-Lisbon texts: “[C]larifying principles, such as the separation of powers or a parliamentary fusion of powers or even the separation of the judicial (or quasi-judicial) from other functions, are conspicuous by their absence.” Frank Vibert, Re-organisation of the Treaties: The Failure to Clarify the EU’s Constitutional Set-Up, in A SIMPLIFIED TREATY FOR THE EUROPEAN UNION?, supra note 8, at 43. This aspect has not been altered as a result of Lisbon.
language, but stripped of detail. For example, it does not need to repeat all the provisions that elaborate on the basic allocation of powers. Nor does it need to repeat the precise form of legislative procedure (majority, qualified majority, unanimous votes). These are of course important matters, but since all relevant Treaty provisions are cross-referenced, the reader can retrieve the second-tier detail as necessary.

Article 1: Foundations of the European Union. This article contains an explanation about the Union itself, including its origins, principles, purpose, and membership. This might be viewed in part as a rather extensive equivalent of the Preamble to the United States Constitution. It declares the principle of conferral, faithfully—if regretfully—emphasizing the Member States’ continued insistence that the Union is dependent on the grant of power by the Member States and its role as a means to further their purposes. Yet it incorporates also the language from the decision of the ECJ in the Van Gend case where it spoke of institutions “endowed with sovereign rights” and in the Costa case where it spoke of the “transfer of powers” to the Community. The article also lists the institutions and other bodies that provide the Union with its own stand-alone structure and organization. A description of the foundations of the Union necessarily should include also a statement as to its legal autonomy as evidenced by the primacy of Union law and the existence of the Union as a separate legal person able to receive transfer of sovereign rights from the Member States.

Article 2: The Components of Union Law. This article describes the various sources of EU law. It deals first with the Treaties themselves. It notes the legal equality of the Charter on Fundamental Rights while recognizing that the Charter was not an act of the Member States. It makes clear also that the Charter applies within the scope of EU law and does not bind the Member States except when implementing EU law, thus demonstrating that there is no “Fourteenth Amendment” set of Union constitutional rights that are applicable outside the Union context (though we might stretch the notion of that context). The provisions on how the Treaties can be amended also speak to the degree of control exercised by the Member States. Then, the article addresses legislative, rulemaking, and executive acts—regulations, directives, decisions, and treaties.

Article 3: The Union’s Legislature. This article contains a description of the EU legislature—the composition, procedures, and functions of the two principal institutions involved: the Parliament and the Council. (The role of the Commission as initiator is mentioned; however, the composition of that institution is found in the next article, since the Commission is primarily an executive body.) The role of the Member States in the Council emphasizes their ability to exercise tight control over the EU legislative

process. At the same time, the existence of qualified majority voting on laws that affect their citizens supports the truly European (Union) nature of Council acts. The juxtaposition of this with the provisions addressing the Parliament’s composition and powers brings out the contrasts between the two institutions. The article describes also the rather complicated processes for adopting legislative acts either through an ordinary or a special procedure.

Article 4: Executive Powers. The executive powers described here contrast very clearly with those of sovereign state constitutions, for it is plain that there is no unified executive power, and therefore no government in the conventional sense. This article describes the numerous institutions and officers that make up the “Executive” and their powers of action. Most of their activity involves policy making in defined areas; these bodies have almost no executive power in the administrative sense. To understand how Union law is implemented, it is vital to include the role of the Member States in this picture, since they are responsible for virtually all execution activity. That only serves to emphasize that the Union may have a federal legislature, but in general does not have a full federal executive beyond policy and decision making powers.

Article 5: Judicial Powers. In addressing the judicial power, the limited function of the Court of Justice of the European Union is made clear. Again it is important to address the role of the courts of the Member States as an integral feature of the EU system, which of course underscores the lack of any such judicial power vested in the Union itself.

Article 6: Division of Competences Between the Union and the Member States. The various powers attributed to the United States Congress in the United States Constitution find a sort of parallel here with a detailed description of various kinds of competences conferred on the Union. Two contrasts can be made. First, in the EU, the competences are conferred on the Union rather than on the legislative body. The reason for this is that the competences are not necessarily legislative—for example, the Common Foreign and Security Policy is described as a Union competence but legislative action is specifically prohibited. Second, the TFEU draws a distinction between exclusive, shared, and supportive competences. This actually mirrors in a specific way the United States doctrine of preemption in its various iterations over the decades.

Article 7: Treaty Limitations on the Exercise of Member State Competences. This article describes the limitations imposed on the Member States to preserve the EU’s internal market. Again, it is helpful to contrast this approach with the general conferral on the United States Congress of powers to regulate interstate and foreign commerce. The detailed provisions relating to the preservation of the internal market found in the TFEU might be viewed as a detailed exposition of aspects of the United States dormant commerce clause doctrine transposed to the EU; it also serves to
emphasize the vital role of the Member States themselves in achieving the integration of their economies.

**Article 8: Rights and Duties of the Individual Under Union Law.** This article begins by describing the status of EU citizenship and the more detailed rights attaching to those who exercise economic activity. It then proceeds to lay out the rights and obligations of the individual under Union law. In the EU system a detailed description of rights and duties under the Treaties and Union legislation is necessary to demonstrate that Union law is not by any means pervasive—EU laws dovetail with the laws of the Member States rather than standing separate from them, as they would in a federal system.

**Article 9: Relations Between the Member States.** This article contains various provisions dealing with the relationship among the Member States as continuing sovereign powers. This includes the now rather infamous provision prohibiting Member States from bailing each other out of financial difficulties. Also included is a sort of full faith and credit provision and specific obligations of the Member States to resolve differences related to the Treaties within the Union court structure (but not other differences, which may be resolved under international law in other forums).

### IV. What Comes Next?

Lisbon has clearly turned the ugly duckling into a more mature and complete creature of some kind. The template highlights its strengths and its weaknesses, particularly as regards the absence of an EU government. Can it survive in this form? Or will it necessarily have to continue to grow and mature? And if it does, will it retain its uniqueness or eventually settle down as a conventional federation?

I do not believe we have achieved finality, but we have probably reached the limits of integration based on intergovernmental treaties. Political union, proposed in 2011 by German Chancellor Merkel as the solution to the euro crisis, ought surely to be endorsed by the people of Europe.
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