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Can the EU be a Constitutional System Without Universal Access to Judical Review

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COMMENT

CAN THE EU BE A CONSTITUTIONAL SYSTEM WITHOUT UNIVERSAL ACCESS TO JUDICIAL REVIEW?

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INTRODUCTION

This Comment engages with a central dilemma about the legal order of the European Union: is the EU a constitutional system, a treaty system, or a hybrid system for which we must develop a new conceptual vocabulary?[1] Besides intrinsic interest, resolving this categorization problem is important for deciding a number of issues in European Union law. For example, are legal strategies that are normally available to parties in international law viable in the European legal order?[2] Should Community law be supreme over national law? If so, what limits should be placed on that

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1. TREVOR C. HARTLEY, CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION 128 (1999) ("The argument in favour of the proposition that Community law is a sub-system of international law is that it was created by a set of treaties and owes its continuing existence and validity to them. . . ."); HENRY G. SCHERMERS & DENIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES 89–95 (1987); Richard Plender, *The European Court as an International Tribunal*, CAMBRIDGE L.J. 279, 279 (1983) (noting that scholars have described Community law variously as "constitutional," "supranational," or as an exception to a "regular pattern of international law"); Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 1 (1981) (claiming that the Court of Justice has employed a constitutional rather than international mode of interpretation); Derrick Wyatt, *New Legal Order, or Old?*, 7 EUR. L. REV. 147 (1982).

2. *See* Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7 EUR. L.J. 125, 133 (2001) (discussing the Court of Justice's rejection of retorsions in *Commission v. Luxembourg and Belgium*).

supremacy, and "who should have the ultimate power to decide the boundaries of Community competence[?]"[3] Although some scholars have properly cautioned that the answer to these questions "do not inexorably follow from the choice between the competing visions of Community legal order," the categorization nonetheless suggests which alternative should more naturally follow.[4] One might compare this European issue to the ongoing debate in the American legal community about whether the Constitution is an agreement between the states or an agreement between the people independent of the states.[5] Although answering the question leaves much room for debate about the boundaries of federalism, it does suggest a great deal about one's orientation, and in some cases may even determine the ultimate outcome.[6]

In arguing against the idea that the EU is a constitutional system, some scholars have noted the difficulty individuals have in challenging acts of Community institutions as a particularly glaring fault.[7] This deficiency matters, so the argument goes, because the possibility of effectively challenging wrongful government acts is essential to the rule of law in any constitutional system, and if the EU does not have an effective system of challenging government acts then the regime cannot be considered constitutional.[8] EU defenders typically reply that there are no major deficiencies in the EU system with regard to individual standing, since the EU treaties give individuals a "complete system of remedies."[9] Moreover, even conceding that there are some gaps, the reply continues, these gaps are not significant enough to be relevant for the categorization problem, since it is just as hard for individuals to challenge government acts in many national legal systems as it is in the EU.[10]

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3. *Id.* at 134.

4. *Id.*

5. *See, e.g.*, Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996) (for a discussion on the current effect that the Tenth Amendment has on U.S. federalism).

6. *Compare* U.S. Term Limits v. Thornton 514 U.S. 782, 838–45 (1995) (Kennedy, A., concurring) (noting at the outset of his concurrence that the Constitution "created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it"), *with U.S. Term Limits v. Thornton*, 514 U.S. 782, 846–47 (1995) (Thomas, C., dissenting) (noting at the outset of his dissent that "[t]he ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.")

7. Case C-583/11, Inuit Tapiriit Kanatami et al. v. Parliament & Council, 2013 E.C.R. I___, ¶ 1 (noting the historical difficulty individuals have faced in finding a remedy against EU acts of general application) [hereinafter Kokott].

8. *But see* Craig, *supra* note 1, 126–27 (discussing Joseph Raz's views about the key features of constitutions, and claiming that "not all constitutions will necessarily contain all the features").

9. Case C-50/00, Unión de Pequeños Agricultores v. Council, 2002 E.C.R. I-668, ¶ 28.

10. Kokott, 2013 E.C.R. ¶ 38. The Inuit II case is central to this discussion. Case T-526/10, Inuit Tapiriit Kanatami and Others v. Eur. Comm'n, 2013 E.C.R. I___ [hereinafter Inuit II].

This Comment explores this debate by explaining the standing requirements for individuals who wish to challenge acts of Community institutions in light of the European Court of Justice's ("ECJ") recent judgment in *Inuit II,* which clarified the scope of the looser standing requirements introduced by the Lisbon Treaty. The Comment then compares these requirements to the equivalent requirements in several of the EU member states, finding that the EU's standing requirements are actually more friendly to individuals than the rules of several member states in certain respects, while not appreciably worse in others. Although this finding cannot settle the debate about what sort of individual standing rules are appropriate for a constitutional system, what it may do is suggest which side of the debate has more to prove. Those who would advance "gaps in standing" as an argument against the EU's constitutional status need to explain why the same gaps are not significant for the constitutional status of member states, or else find themselves arguing that several of the EU member states do not really have constitutional systems either.

The Comment proceeds as follows. Part I provides background information on the two types of challenges, direct and indirect, that private parties can bring against EU acts. Section I also introduces the two legal procedures in which such challenges are typically be brought, actions for annulment and preliminary reference proceedings. Part II describes the standing requirements for individuals challenging EU community acts in each procedure, identifying the potential "gap" that falls between the two. In order to evaluate how aberrant the gaps in standing are at the EU level, Part III analyzes the legal systems of several European countries, finding that standing gaps are also prevalent at the national level. The conclusion summarizes the findings of the study and points toward a future line of research.

I. Background on Individual Actions And Remedies in the EU

The EC treaties provide two pathways for individuals to challenge acts of Community institutions: direct and indirect challenges.[11] An individual can challenge the acts directly in a European court, either the General Court (formerly Court of First Instance) or the ECJ, in a procedure known as an action for annulment.[12] If the individual is successful, the European court will declare the act of the EU institution void and that institution will need to "take the necessary measures to comply with the judgment of

11. *See* Hartley, *supra* note 1, at 58; Policy Department C: Citizens, Rights and Constitutional Affairs, Standing up for Your Rights in Europe 32 (2012).

12. *See* George A. Bermann et al., Cases and Materials on European Union Law 129 (3rd ed. 2011). *See also How the EU Works*, European Union, http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm#case3 (last visited May 14, 2014) (noting that the European Court of Justice hears five types of cases, and that the purpose of an action for annulment is to challenge "EU laws thought to violate the EU treaties or fundamental rights").

the Court."[13] On the other hand, the individual can also use the action for annulment to challenge a Community act indirectly in the course of proceedings that have some other purpose, if the Community act's legality is relevant to the primary proceedings.[14] To take a concrete example, a company might challenge an EU institution's decision about the range of permissible prices for its product, and in the course of doing so might argue that the institution's authority to make that decision was based on an illegal regulation.[15] If the European court agrees that the related Community act is illegal, it will annul the act that is the subject of the proceedings, but will not annul the related Community act.[16] To return to the previous example, the court would invalidate the EU institution's decision about the range of permissible prices, but would not invalidate the regulation that provided the legal basis for that institution's decision, notwithstanding the fact that the reason to invalidate that decision was that the regulation is illegal. Hypothetically, then, the "illegal" regulation could still serve as the legal authority for future acts, and indeed this lack of resolution is inherent in the nature of the indirect action. By contrast, if the regulation had been challenged directly, then the regulation would have been the subject of the proceedings and, therefore, could be invalidated.

Although one might infer from this discussion that plaintiffs who engage in indirect challenges have made a legal misstep, there are two reasons this is not the case. First, individuals will often lack standing to challenge Community acts that have broader application, so indirect challenges will be their only recourse, at least in annulment actions.[17] Second, the difference between the outcomes of the direct and indirect action is, practically speaking, much less significant than it might be in theory.[18] For a significant difference to arise, one would have to assume that a Community institution would take legal action based on a norm that a European court has already decided is illegal, and scholars have reasonably supposed that such actions will be rare.[19] Moreover, as an additional protection, the

13. BERMANN ET AL., *supra* note 12, at 129 (quoting Consolidated Version of the Treaty on the Functioning of the European Union art. 266, 2008, 2008 O.J. (C 115) 163 [hereinafter TFEU]).

14. T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 411 (5th ed. 2003).

15. *See, e.g.*, Case 92/78, Simmenthal v. Commission, 1979 E.C.R. 777.

16. ALINA KACOROWSKA, EUROPEAN UNION LAW 447 (2013).

17. *See* Albertina Albors-Llorens, *Remedies Against the EU Institutions After Lisbon: An Era of Opportunity?*, 71 CAMBRIDGE L.J. 507, 528–29 (2012) (discussing the Inuit II case and its implications). The reason that individuals can fail to have standing to challenge acts of broad application are discussed in greater detail in Part II. Put simply, under EU law, an act must specifically target the plaintiff in order for the plaintiff to deserve the right to challenge the act directly in court, but acts of general application are usually not specific to any plaintiff.

18. The notion that there is a hypothetically, but not practically significant difference between direct and indirect annulment is advanced by some authorities, but not all. *Compare* BERMANN ET AL., *supra* note 12, at 182, *with* CHALMERS ET AL., *supra* note 25, at 437–38.

19. BERMANN ET AL., *supra* note 12, at 182.

ECJ has authorized national courts to consider indirectly challenged act as void.[20] For these reasons, it is unclear whether the ultimate remedy indirect challenges provide plaintiffs is in fact worse than the remedy they get via direct challenge.

Although one might assume that indirect challenges can only arise out of actions for annulment initiated in a European court, in fact other proceedings can also lead to indirect challenges.[21] From the individual's perspective, the most important additional avenue for indirect challenges is preliminary reference.[22] Preliminary reference is a procedure that allows national courts to ask European courts for an opinion on how to interpret the EU treaties or Community acts.[23] A preliminary reference results in an indirect challenge when, in order to answer the question posed by the national court, the court must decide on the validity of another EU act.

Because preliminary references are filtered through the national courts, they are a potentially precarious means for individuals to access European courts.[24] On the one hand, if a national court believes an individual's claim has no merit and believes that no other national court would disagree, it has no obligation to refer.[25] On the other hand, a national court cannot on its own declare the act of a Community institution invalid, even if clearly invalid, instead it must refer the matter to the European courts.[26] Arguably, this one-sided discretion "stacks the deck" against individuals who wish to challenge EU acts. When an individual draws an unsympathetic judge who declines to give a reference, the individual may be prevented from accessing the institution that can give relief.[27] Yet if the individual draws a sympathetic judge who does refer the case, the individual will have to convince another court that its position has merit, this time at the European level.[28]

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20. *See, e.g.*, Case 66/80, Int'l Chemical Corp. v. Amministrazione delle Finanze 1981 E.C.R. 1191.

21. HARTLEY, *supra* note 14, at 395.

22. *Id.* at 389.

23. *See* Alec Stone Sweet & Thomas Burnell, *Constructing a Supranational Constitution*, *in* ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 70–71 (2004).

24. CRAIG & DE BÚRCA, EU LAW TEXT, CASES, AND MATERIALS, 442, 506 (5th ed. 2011).

25. *See* Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health [hereinafter CILFIT], 1982 E.C.R. 3415, ¶ 21; Case 495/03, Intermodal Transports BV v. StaatssE.C.R.etaris van Financiën, 2005 E.C.R. I-8151, ¶ 1. *See generally* In re Société des Petroles Shell-Berre 1964 C.M.L.R. 462; DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW: CASES AND MATERIALS 174 (2013); CRAIG & DE BÚRCA, *supra* note 24, at 506.

26. Case 314/85, Firma Foto-Frost v. Hauptzollamt Lübeck-Ost, 1987 E.C.R. 4199, ¶¶ 17, 20.

27. Anthony Arnull, *The Use and Abuse of Article 177 EEC*, 52 MOD. L. REV. 622, 626, 631–36 (arguing that refusal to make reference because the law is "clear" is particularly common in the UK).

28. *See* Case C-50/00, Unión de Pequeños Agricultores v. Council, 2002 E.C.R. I-6681, Opinion of AG Jacobs, ¶ 42 [hereinafter Jacobs].

While this asymmetry might appear to be a significant lacuna in the system of remedies, there are at least two responses. First, the unfairness of one-sidedness is ameliorated by the fact that national courts of last resort have a duty to refer.[29] An individual who initially confronts an unsympathetic judge can appeal and eventually arrive at a national court that is required to forward the question to the European courts. The situation is not bad luck you lose; good luck play again, rather the situation is good luck play again; bad luck play again at least twice more. As a practical matter, however, it is possible that the duty may not apply to any national court.[30] In Sweden, for example, whether a court of appeals is the court of last resort depends on whether the highest court "grants certiorari," but applying for certiorari takes time and, if certiorari is declined, it may be too late for the court of appeals to refer.[31] Although one might suppose that the ECJ would try to guard against such a catch-22, so far it has not really done so, perhaps because it feels European courts are poorly positioned to begin "a complex and time consuming inquiry into the details of national procedural law."[32] Even in states where preliminary reference *is* eventually guaranteed, the need for multiple appeals seriously burdens individual parties.[33]

Given these concerns, the system of remedies in the EU requires a second defense. Arguably, the difficulty of having one's challenge heard via preliminary reference is simply a reason for individuals to prefer actions for annulment.[34] Given that actions for annulment do exist, indirect challenges via preliminary reference might be considered a superfluous means for challenging Community acts.[35] Since individuals enjoy unusual advantages in preliminary reference, including the avoidance of statutes of limitations, it is only fair for the Community to expect individuals to convince a national court that the matter is worth the European courts'

29. TFEU art. 267.

30. *See* CRAIG & DE BÚRCA, *supra* note 24, at 446. Craig and de Búrca propose two possible interpretations that explain when there is a mandatory duty to refer under Art. 267(3) of the TFEU. On the one hand, the "abstract theory" holds that only courts "whose decisions are never subject to appeal" are covered by Art. 267(3). In the alternative, the "concrete theory" holds that the duty applies whenever the court's decision is not "subject to appeal in the type of case in question." The abstract theory makes the duty to refer more restrictive. Since the goal of this paper is to identify standing gaps even if the most individual-friendly interpretation of the treaty is given, this discussion assumes that the "concrete theory" is the correct one. For what it is worth, Craig and de Búrca argue that this interpretation has in fact prevailed. *See also* Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585, 592; Case C-99/00, Judgment of the Court – Kenny Rolan Lyckeskog, 2002 E.C.R. I-4876, para. 19; Case C-210/06, Summary of the Judgment – Cartesio Oktató és Szolgáltató bt, 2008 E.C.R. I-09641, paras. 77–78.

31. BERMANN ET AL., *supra* note 12, at 340–41.

32. Jacobs, 2002 E.C.R. ¶ 52.

33. *Id.* ¶ 44.

34. Laurence W. Gormley, *Judicial Review: Advice for the Deaf?*, 29 FORDHAM INT'L L.J. 655, 665–72 (2006) (paraphrasing the AG Jacobs Opinion).

35. *But see* Case T-177/01, Jégo-Quéré et Cie SA v. Comm'n Eur. Cmtys., 2002 E.C.R. II-2365. *See generally* CRAIG & DE BÚRCA, *supra* note 24, at 502–07.

time.[36] The plausibility of that conception depends critically, however, on preliminary reference not being the primary or only means for some class of plaintiffs to access European courts. If preliminary reference is not a "backdoor" but rather the only door, then the difficulties individuals face in getting a preliminary reference from national courts is itself an access problem at the EU level.

II. Standing Requirements for Individuals Challenging Community Acts

With an understanding of the two procedures that get an individual into a European court, the inquiry may begin to focus on the standing requirements individuals face along each path. In regard to indirect challenges via preliminary reference, the standing requirements for the court of first instance depend on the standing rules in each member state, discussed in some detail in the next section. In regard to challenges made via annulment actions, the standing requirements for individuals were for many years codified in Article 230 of the TEU.[37] According to the ECJ's interpretation of this article, the standing requirements an individual faces depended critically upon the type of legal action that had been taken.[38] Since the Lisbon Treaty, the standing requirements have been codified in Treaty on the Functioning of the European Union (TFEU) Article 263, where the text has been changed, ostensibly with the purpose of lowering access barriers for individuals.[39] As the discussion will reveal, the Treaty revisions and their subsequent interpretation in *Inuit II* have expanded individual standing relative to what was realistically available under Article 230 and ECJ precedent, yet they have also made the test less flexible.[40] On the one hand, this development brings clarity by allowing courts to bypass the thorny characterization problems. On the other hand, with less flexibility to interpret Community acts in a certain way, the ECJ has arguably crystallized theoretical standing gaps that might have been maneuvered around under the Article 230 jurisprudence.

To evaluate the new requirements, a natural starting place is the text of the TFEU. The first standing requirement is that the challenged act fall within the scope of judicial review.[41] Giving an individual standing serves no purpose unless the court has the power to void the challenged act. Ac-

36. Case C-263/02, Comm'n Eur. Cmtys. v. Jégo-Quéré & Cie SA, 2004 E.C.R. I-3425.

37. Bermann et al., *supra* note 12, at 134.

38. *See* Craig & de Búrca, *supra* note 24, at 465, 486–88. *See, e.g.*, Anthony Arnull, *Private Applicants and the Action for Annulment under Article 173 of the EC Treaty*, 32 Common Mkt. L. Rev. 7, 19 (1995).

39. Kokott, 2013 E.C.R. ¶ 33.

40. The view that individual standing had expanded after the Lisbon Treaty was widely understood even before the Inuit II decision. *See, e.g.,* Chalmers et al., *supra* note 25, at 414; Craig & de Búrca, *supra* note 24, at 510. What was not necessarily known was how the ECJ would interpret "regulatory act." *See* Chalmers et al., *supra* note 25, at 414–15.

41. *See* TFEU art. 263.

cording to the first paragraph of TFEU Article 263, the European Court of Justice is empowered to engage in judicial review:

> [O]f legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.[42]

One noteworthy aspect of this paragraph is that the ability to exercise judicial review depends on both the type of act and the institution that acted.[43] For example, the ECJ apparently has no authority to review acts that are classified as recommendations or opinions and originate from the Council, Commission, or Central Bank.[44] One might be tempted to assume further that the ECJ lacks the power to review acts of Parliament that do not intend to produce legal effects with respect to third parties. Yet some of these same acts might be "legislative," since they do arise from Parliament, so no automatic categorization is possible. Individuals need not be too concerned that the scope of judicial review will prove a significant barrier, however, since the Court has broad latitude to consider acts intended to have third-party effects. It is hard to imagine an individual wanting to go to court unless there were some third-party effects the individual found objectionable.

Similar to the requirements of judicial review described in Article 263, paragraph 1, the individual standing requirements contained in Article 263, paragraph 4 vary depending on the kind of act being challenged. To understand why these requirements are so problematic, it is useful to have a taxonomy of the various kinds of acts that Community institutions can take. Community acts include opinions, recommendations, regulations, decisions, and directives.[45] The first two types of actions are not binding,[46] a fact that can help explain why they were placed beyond the scope of court review in Article 263, paragraph 1. Regulations are acts that apply generally and directly to individuals in the member states.[47] Decisions, on the other hand, "relate[ ] only to the one or more persons specifically addressed in it."[48] Directives are addressed to the member states and instruct them to achieve a result, but give the member states choice as to

42. *Id.*

43. CRAIG & DE BÚRCA, *supra* note 24, at 485–86.

44. *See, e.g.*, CILFIT, 1982 E.C.R. 3415. *See also* Inuit II, 2013 E.C.R. I___.

45. TFEU art. 288.

46. Case 151/88, Italy v. Eur. Comm'n, 1989 E.C.R. 1255, ¶ 21. *See also* HARTLEY, *supra* note 1, at 109 ("opinions and recommendations are not binding at all").

47. CHALMERS ET AL., *supra* note 25, at 98.

48. BERMANN ET AL., *supra* note 12, at 76.

how they will implement the measure.[49] Although these five types comprise the bulk of Community acts, they are not the only types of acts, as the text of the treaty and ECJ precedent have made clear.[50] Article 288 does not define "regulatory acts," for example, a kind of act for which there are different standing requirements, nor does it define "legislative acts," a concept that the ECJ has said is critical to understanding what regulatory acts even mean.

Besides the problem of *sui generis* terms like these, the ECJ has also grappled with acts that other institutions have described one way, yet for which the name does not really fit. What does one call a decision that has no addressee, for example? Although this possibility may sound hypothetical, roughly ten percent of all measures adopted have taken this form.[51] Indeed, the TEC implicitly anticipated such categorization problems when it gave individuals standing to challenge "decision[s] which, although in the form of a regulation or a decision addressed to another person, [are] of direct and individual concern to the former."[52] Given the treaty's recognition that form was not conclusive, it is unsurprising that the ECJ's jurisprudence held that an individual's access to court depends not on how the Community institution phrased the act, but rather what the act did.[53] A Community institution could not immunize its acts from challenge simply by phrasing its action as something besides a decision. As a result, determining the formal category to which the act belonged was an important step in judicial decision-making prior to the Lisbon Treaty.

The Lisbon Treaty did much to extricate standing requirements from difficult questions about how to properly taxonomize a Community institution's act. According to paragraph four of Article 263 TFEU, so long as the matter falls within the scope of the ECJ's powers of judicial review,

> Any natural or legal person may . . . institute proceedings [(1)] against an act addressed to that person or [(2)] which is of direct and individual concern to them, and [(3)] against a regulatory act which is of direct concern to them and does not entail implementing measures.[54]

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49. TFEU art. 288.

50. CHALMERS ET AL., *supra* note 25, at 98 (noting international agreements are not mentioned in this provision). *See also* Herwig Hoffman, *Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality,* 15 EUR. L.J. 482, 483 n.6 (2009) (noting that individual provisions of the treaties provide for such varied acts as "common strategies").

51. Armin Von Bogdandy et al., *Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis*, 23 Y.B. EUR. L. 91, 97 (2004).

52. Treaty Establishing the European Community art. 230, 2002, 2002 O.J. (C 325) 33 [hereinafter EC Treaty], *available at* https://www.ip-rs.si/fileadmin/user_upload/Pdf/EC_consol_Treaty_of_EC.pdf.

53. *See* Arnull, *supra* note 38, at 14. *See also*, HARTLEY, *supra* note 1, at 103.

54. TFEU art. 263.

Under the old TEU treaty, where phrase (1) now says "act" the text used to say "decision." As a result of the change, European courts no longer need to assess whether an act that was not labeled a decision nevertheless might be one for the purposes of standing.[55] Yet phrase (3) also introduces the notion of a regulatory act, "an expression that is not defined anywhere in the Treaties."[56] The ECJ's recent *Inuit* judgment, however, confirmed an interpretation first put forward by the Court of First Instance and endorsed by AG Kokott: "regulatory act[s]" are "acts of general application other than legislative acts."[57] While neither of these kinds of acts are described in Article 288, they both have determinate meanings based in the text of EU treaties and ECJ jurisprudence. Article 288 says that regulations have "general application," and case law tells us that this phrase means that the act's legal effects are not directed at any person in particular.[58] Meanwhile, the phrase "legislative act" is defined in Article 289 to refer to acts passed jointly by the European Parliament and the Council, or through one of a few other kinds of procedures.[59] The ECJ's interpretation of *regulatory act* in the *Inuit* judgment therefore does much to simplify the question of whether an individual is in situation (1), (2), or (3) of TFEU Article 263, paragraph 4.

While the ECJ's interpretation does bypass questions about which label the act should have, its achievement is arguably pyrrhic. By engaging with the question of whether an act was really a decision, the ECJ prevented Community institutions from circumventing judicial review.[60] However, with the interpretation given by the ECJ in the *Inuit II* judgment, Community institutions can block off one of the three pathways for individual challengers to having the act reviewed merely by following the legislative procedure. AG Kokott addressed this apparent danger by noting that it is reasonable to immunize legislative acts in this way, because these acts have democratic legitimacy derived from the approval of Parliament.[61] How satisfactory is this response? Even ignoring doubts about how much democratic legitimacy an act of Parliament carries,[62] it is telling that although this argument may justify a gap, it does not even attempt to show that the gap has been eliminated. Indeed, AG Kokott is quite explicit in defending the continued existence of standing gaps, stating post-Lisbon that "individuals are still not intended to benefit from easier access to legal remedies against legislative acts."[63] The difficulty of this position for de-

55. Trevor C. Hartley, The Foundations of European Union Law 373 (7th ed. 2010) [hereinafter Hartley's Seventh].

56. Kokott, 2013 E.C.R. ¶ 30.

57. *Id.* at ¶ 51.

58. Arnull, *supra* note 38, at 20–21.

59. TFEU art. 289. *See generally* Craig & de Búrca, *supra* note 24, at 121–33.

60. Jacobs, 2002 E.C.R. ¶ 11.

61. Kokott, 2013 E.C.R. ¶ 38.

62. Jacobs, 2002 E.C.R. ¶ 86.

63. Kokott, 2013 E.C.R. ¶ 39.

fenders of the *Inuit II* judgment is that "regulatory act" cannot be interpreted in such a way as to return individuals to the same position they had *before* Lisbon, particularly given that the clear intent of the third part of the paragraph on individual standing was to improve individual access to European courts.[64] AG Kokott tries to thread this needle by arguing that even with her gloss on "regulatory act," the Lisbon treaty has greatly improved the ability of individuals to challenge the acts of Community institutions, since "as a practical matter the vast majority of acts are not legislative."[65] For example, fishing companies that wish to challenge regulations implemented by the Commission that prevent the use of nets harmful to endangered species can now do so, even if they might not have gotten standing according to the conditions described in parts one and two.[66]

Moreover, while it is true that a national trade association challenging a disadvantageous change in the regulatory regime adopted by legislative procedure cannot do so under part three of the paragraph on individual standing, such individuals are not completely barred from accessing European courts. Instead, they just have to hope that they satisfy the requirements of the other two parts of Article 263, paragraph 4. In that case, however, their position is no better than it would have been prior to the Lisbon Treaty.[67]

Of the two other means of showing standing in Article 263, paragraph 4, the former is easier to establish. If the act is addressed to the person then standing is automatic.[68] Although one might expect there to be cases that push the boundaries of what being "addressed" means, this possibility has not materialized for two reasons. First, most individuals who come before European courts do so in order to challenge a decision specifically addressed to them.[69] Second, case law suggests that whether someone is a *de facto* addressee depends on a showing of direct and individual concern.[70] In other words, the discussion immediately moves to prong two of TFEU Article 263 paragraph 4.

How does one show direct and individual concern? Direct concern relates to the idea that the act must cause the harm that the individual has suffered.[71] In this context, the most frequent causation problem is that an "autonomous will" may have intervened between the act of the community institution and the individual, in which case the concern would not be

64. *Compare* TFEU art. 263, *with* EC Treaty art. 230. *See generally* Albors-Llorens, *supra* note 17, at 517 (discussing revised Article 263).

65. Kokott, 2013 E.C.R. ¶ 50.

66. Kokott, 2013 E.C.R. ¶ 59. *See also* Jégo-Quéré, 2002 E.C.R., ¶¶ 22–25.

67. Kokott, 2013 E.C.R. ¶ 60.

68. Hartley, *supra* note 14, at 345.

69. Bermann et al., *supra* note 12, at 134.

70. Hartley, *supra* note 14, at 345.

71. Hartley, *supra* note 14, at 363. *See also* Mariolina Eliantonio et al., Standing Up For Your Right(s) in Europe 28 (2012).

direct.[72] To illustrate, consider the facts which gave rise to *Municipality of Differdange v. Commission*. The European Commission decided to permit Luxembourg to give state aid to steel firms, but only if Luxembourg also agreed to reduce their production capacity.[73] An important steel production center, Differdange, was not pleased with the prospect of factory closings or reductions in its tax base, and so challenged the decision. Differdange lacked the "direct" concern sufficient for standing, in the ECJ's view, because the Grand Duchy of Luxembourg still had to decide where the reductions in capacity would occur. The problem was not simply that there was an intermediary between Differdange and the Community institution An individual can show direct concern in spite of there being an intermediary, so long as the challenged act "leaves no room for any discretion,"[74] in other words, that the intermediary has no choice but to bring about the complained of effect. At times the Court has applied this test loosely, finding direct concern where there is no genuine doubt about how discretion would be used.[75]

The more onerous requirement is *individual concern*. The original formulation of the test comes from *Plaumann v. Commission*, Case 25/62, [1963] E.C.R. 95, where the ECJ said that to show individual concern the act must "affect [the applicant] by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons,"[76] and moreover, that these attributes must cause the act "to distinguish [the applicant] individually just as in the case of a person addressed."[77] The Court went on to say that a clementine importer cannot oppose a Community decision not to lower import taxes on clementines, because although the duties might in practice affect such an importer more than other individuals, in principle anyone could engage in the same commercial activity as the importer challenging the EU act.[78] As the interpretation of individual concern evolved, the ECJ began to find individual concern when an applicant was a member of a "closed category," which is to say a group whose members were fixed before the measure entered into force.[79]

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72. Case T-12/93, Comité Central d'Entreprise de la Société Anonyme Vittel v. Eur. Comm'n, 1995 E.C.R. II-1247; Case T-96/92, Comité Central d'Entreprise de la Société Générale des Grands Sources v. Eur. Comm'n, 1995 E.C.R. II-1213; Case T-509/93, Richco Commodities LTD v. Eur. Comm'n, 1996 E.C.R. II-1181. *See generally* HARTLEY, *supra* note 14, at 363; CRAIG & DE BÚRCA, *supra* note 24, at 491.

73. CRAIG & DE BÚRCA, *supra* note 24, at 492.

74. Case 294/83, Parti Écologiste "Les Verts" v. Eur. Parliament, 1986 E.C.R. 1357, ¶ 31. *See also* Arnull, *supra* note 38, at 20–21.

75. *See* Case 11/82, A. E. Piraiki-Patraiki and Others v. Eur. Comm'n, 1985 E.C.R. 227. *But see* Case 222/83, Mun. Differdange v. Eur. Comm'n, 1984 E.C.R. 2889, ¶ 12.

76. Case 25/62, Plaumann v. Eur. Comm'n, 1963 E.C.R. 96, at 107.

77. *Id.*

78. *Id.*

79. Arnull, *supra* note 38, at 26. CRAIG & DE BÚRCA, *supra* note 24, at 494–96.

Determining whether a group is closed is not always easy; however, the ECJ has tended to recognize a class as fixed when it consists entirely of individuals who have made a definite legal commitment prior to the Community act.[80] For example, in *Codorniu v. Council*, Case C-3098/89, [1994] E.C.R. I-01853, a Spanish producer of sparkling wine was not allowed to use the word "*crémant"* in the name of its product.[81] Since anyone can produce sparkling wine and call it "*crémant*," one would imagine that individual concern could not be shown, however the Spanish producer had trademarked its product using the word *"crémant"* and for the ECJ, this difference was enough.[82] To take another example, in *Sofrimport v. Commission*, Case C-152/88, [1990] E.C.R. I-2477, Chilean apple imports were temporarily suspended, and individuals who had applied for import licenses (even up to the day that the suspension was imposed) were granted standing.[83] Synthesizing these precedents, it appears that an individual does not get the right to initiate an action for annulment simply because a Community act intrudes on the field in which the individual happens to be operating. It is unsurprising, therefore, that environmental activists and other public interest groups also had a difficult time showing standing prior to Lisbon.[84]

With an understanding of the various standing requirements now in hand, it is possible to show how one can fail to have standing. First, an individual has no standing unless they were adversely affected by a Community act. Although this gap may not sound worrisome, it does burden those who wish to address adverse effects before they materialize.[85] In *IBM v. Commission,*[86] the ECJ asserted that efficacy concerns justified this burden, since allowing individuals to challenge a Community institution before it had committed to affecting their legal position would interfere with the ability of the institution to implement Community policy. Because most of the national legal systems in the EU have made a similar choice, critics of the EU's constitutional status will not find much purchase in claiming this gap is significant.[87]

Even assuming that the individual is adversely affected by a Community act, it can still be impossible for an individual to showing standing. For example, consider an act that does not require implementing measures and is not expressly addressed to the individual affected. If the act emerges from legislative procedure, then it cannot be a regulatory act. The fact that there is no need for implementing measures then it is unlikely

80. HARTLEY, *supra* note 14, at 349–62.

81. Case C-309/89, Codorniu SA v. Council, 1994 E.C.R. I-01853. *See also* HARTLEY, *supra* note 14, at 355.

82. HARTLEY, *supra* note 14, at 355.

83. Case C-152/88, Sofrimport SARL v. Eur. Comm'n, 1990 E.C.R. I-2479. *See also* HARTLEY, *supra* note 14, at 368.

84. ELIANTONIO ET AL., *supra* note 71, at 42–43.

85. *See, e.g.,* Case 60/81, IBM v. Eur. Comm'n, 1981 E.C.R. 2640.

86. *See id.*

87. ELIANTONIO ET AL., *supra* note 71, at 67.

that some intermediary will have to exercise discretion. If there is no discretion on the part of an intermediary, then the concern is direct. But even if the concern is direct, there is no obvious reason to believe that the challenger will be capable of showing that its concern is individual. If the challenger does not have that, then it will not have standing for an action for annulment.

An example helps illustrate how a challenger wandering through his byzantine fortress of legal terminology might unwittingly fall into a standing gap. Such a case could arise, for example, if the EU used the legislative procedure to ban a product in such a way as to not require implementing measures. For example, the EU could decree that trade in stem cells is prohibited. In this case, no one is expressly addressed by the ban. Moreover, because the legislative procedure was used, the ban is not a regulatory act. As a result, the only hope for an individual to challenge such a law is by showing direct and individual concern. But this requirement, of showing direct and individual concern, is exactly the same as the requirement that existed before *Lisbon*. Therefore, the same standing problems that the revision of Article 263 was designed to address may reoccur. There are many reasons showing individual concern could be difficult in the case of a product ban, even if there was a substantial interest. For example, in the case of stem cells, an inventor could have invested substantial resources researching an idea for making stem cell production less costly, but the inventor's ideas could still be not quite ready for patenting, yet alone whatever clinical trials would be necessary to actually put the stem cells to use.[88] Such an individual has only made preparations to make a commitment, and does not have anything sufficiently solid to differentiate himself from anyone else who might want to benefit from a trade in stem cells. Indeed, in a certain telling, the Inuit who wish to continue making a livelihood by selling traditional products made from seal-pelts also fit this mold, since one might think they have a significant interest in continuing to make their living from such products, but all their sales are highly prospective. In principle they are no different from the clementine importers in *Plaumann*. What these examples show, therefore, is that although the Lisbon reform may result in the loosening of the standing requirements many plaintiffs face, if an objectionable norm is enacted via the legislative procedure, the standing gaps that existed prior to Lisbon can still materialize.

Those who claim the EU offers a complete system of remedies would argue that the continued exclusion of a number of interested parties even after Lisbon is not nearly as grave as it appears. First, prohibitions like the one described usually require the executive to enact some implementing measure before the prohibition becomes enforceable, and these measures will fall into the looser requirements that apply to "regulatory acts."[89] The only requirement upon individuals who wish to directly challenge such an

88. Case C-34/10, Oliver Brüstle v. Greenpeace eV, Opinion of AG Bot, 2011 E.C.R. I-09821.

89. *See* Kokott, 2013 E.C.R. ¶¶ 51–52, 56.

implementing measure is establishing *direct concern*, and this showing will not be difficult if the executive's act is the last one necessary for the set of rules to be complete, in other words that there are no intermediary agencies that still must act. Indeed, the Inuit who were denied standing to challenge the legislative act banning seal fur imports will have the opportunity to indirectly challenge the same legislative act in their direct action against the Commission's implementing regulation.[90] Individuals who wish to challenge legislative acts after Lisbon will not be shunted away from European courts, with preliminary reference as the only way back in, rather their remedies against legislative acts will involve indirect challenges via annulment actions.

In fact, public interest groups like Greenpeace may *also* have standing to challenge such acts, since non-legislative regulatory acts are only subject to the requirement of showing direct concern, and the ECJ has previously tended to emphasize individual concern as the primary impediment for such groups have standing.[91] For the moment at least, one can argue that access to remedies in the EU might be significantly better for such groups than in some member states, such as Hungary, Belgium, France or Germany,[92] although one can imagine that the requirement of showing "legal interest" will be further developed in coming years so as to re-exclude public interest groups.[93]

If indirect challenges in actions for annulment will play a key role in the complete system of remedies after Lisbon, it is worth exploring the assumption that indirect challenges will always be possible. Yet, the strongest argument for why indirect challenges *will* always be possible is deeply unsatisfactory. If an individual violates a norm established by the EU, then someone responsible for enforcing the rules will respond, at which point the individual will have an act that they can challenge in an annulment proceeding.[94] Many consider this possibility unacceptable: a legal system cannot require individuals to violate the law in order to challenge it.[95] For this very reason, AG Kokott's Opinion in *Inuit II* suggested that there might be another way an individual could force into being a non-legislative action.[96] For example, an individual could write a letter to authorities in charge of enforcement asking if a certain norm applied to

90. *See id.* ¶ 71.

91. *Compare* Case T-262/10, Microban Int'l Ltd. & Microban (Europe) Ltd. v. Eur. Comm'n, 2011 E.C.R. II-07697 (standing to challenge regulatory act upheld as the former only requires direct concern) *with* Case T-583/93, Greenpeace & Others v. Eur. Comm'n, 1995 E.C.R. II-2205 ¶ 56 (standing to challenge act of general application found lacking, prior to Lisbon treaty, because of absence of individual concern). *See also* ELIANTONIO, *supra* note 71, at 42–43.

92. ELIANTONIO ET AL., *supra* note 71, at 57–60.

93. KOEN LENAERTS & DIRK ARTS, PROCEDURAL LAW OF THE EUROPEAN UNION 250–51 (Robert Bray ed., 1st ed. 1999).

94. *See* Kokott, 2013 E.C.R. ¶ 118–20.

95. *See id.*

96. *See id.*

them.[97] Once the authorities said yes, then the individual would have the right to a day in court.

However, there are several inadequacies with AG Kokott's letter-writing idea. For instance, what happens if the agency entrusted with enforcement fails to respond to the request? Even assuming that the authorities do respond, if the responsible agency is national, as they often will be,[98] then one must sue in national court, meaning that the preliminary reference procedure is the only path to having the law challenged. Moreover, giving such response letters the same legal weight as decisions,[99] as AG Kokott suggests they should be, could have the effect of eliminating standing requirements entirely. Individuals would be able to give themselves standing simply by write a letter asking if the law applies to them.

Since the ECJ did not endorse AG Kokott's proposal, it is not worth belaboring her idea. In its defense, however, at least it was *an idea*. The *Inuit* judgment does not refute the notion that conscientious violation of the law is the only guaranteed way for individuals with significant individual interest to get standing to challenge Community acts via the annulment procedure. Indeed, the ECJ seems to suggest indifference to this possibility, perhaps rightly so given that the problem may be purely hypothetical. For any legislative act there will surely exist another non-legislative act that individuals can use as a vehicle for challenging whatever legislative act proves bothersome.[100] In situations where implementation occurs at the national level and the procedural rules do not safeguard an effective right of challenge, the ECJ seems to suggest it is not their fault, but rather member states that have a responsibility for making the system an effective system of remedies.[101]

Rightly or wrongly, purely hypothetical or subject of actual concern, the gap in judicial protection does exist in the European system. Legislative acts that need no implementing measures are potentially immune from challenge by a significant class of individuals, which includes the majority of the commercial and public interest groups with the resources to challenge such acts. To assess whether such standing gaps are uncharacteristic of genuinely constitutional systems, this paper now turns to the legal systems of the EU member states.

III. Standing Gaps in the EU Member States

One of the primary difficulties when comparing administrative law across many countries is that no two systems are quite alike, and even attempting a comprehensive account could occupy hundreds of pages. Yet the discussion in the previous section has substantially focused the scope

97. *See id.*

98. *See id.*

99. *See id.* ¶ 122.

100. *See* Case C-583/11, Inuit Tapiriit Kanatami & Others v. Eur. Parliament & Council of the E.U., 2013 E.C.R. II-0000, ¶ 93.

101. *Id.* ¶ 103.

of inquiry to the following questions. Do "legislative acts," or their rough equivalent in the member state system, have more onerous standing requirements than other acts? If so, how difficult is it for individuals such as trade associations or environmental groups to surmount this difficulty through other means?

Modern judicial review of the constitutionality of government acts falls principally into one of two families: "diffuse systems" where any court can exercise judicial review, and "concentrated systems" where judicial review is entrusted to a single institution.[102] The former model originated in the United States and is pervasive throughout Scandinavia.[103] The later model was instituted in Austria in 1920, and subsequently spread to Germany, Italy, and Spain.[104] There are a few EU member states—Great Britain, the Netherlands, Finland, and Luxembourg—where judicial review of legislative acts is relatively inchoate.[105]

Although one might assume that "diffuse systems" would offer individuals robust protection from parliamentary acts, at least as a practical matter they do not. In Norway, for example, the Supreme Court has only struck down twenty to thirty laws in its whole history, while the Danish Supreme Court has hardly, if ever, used its power to declare a law unconstitutional.[106] Although the Swedish Supreme Court hears constitutional challenges to laws passed by parliament, it has also never invalidated one.[107] This pattern is not explained by onerous standing requirements, but rather the highly deferential attitude of the courts to their parliaments as well as a lack of substantive principles against which the courts can assess the constitutionality of the law.[108] Far from supporting the claim that judicial review of legislative acts is essential to a constitutional system, the realities of the diffuse system tend to suggest that the theoretical possibility of review is perhaps less important than the chance that a challenger will succeed on the merits.

Turning to the concentrated systems, some systems only allow constitutional review to be triggered by litigation on another issue.[109] This procedural arrangement is similar to the one that the ECJ seemed to envision

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102. Allan R. Brewer-Carías, Judicial Review in Comparative Law 91–92 (1989).

103. Vicki C. Jackson & Mark V. Tushnet, Comparative Constitutional Law 465, 475 (2d ed. 2006).

104. *Id.* at 466.

105. Louis Favoreau, *Constitutional Review in Europe, in* Constitutionalism and Rights: The Influence of the United States 46 (Louis Henkin & Albert J. Rosenthal eds. 1990).

106. *Id.* at 476.

107. *Id.* at 477.

108. Louis Favoreau, *Constitutional Review in Europe, in* Constitutionalism and Rights: The Influence of the United States 47 (Louis Henkin & Albert J. Rosenthal eds., 1990).

109. Brewer-Carías, *supra* note 102, at 92.

after the *Inuit II* judgment.[110] Several systems do not grant the constitutional court original jurisdiction to hear cases of individuals, instead the litigation must be initiated in another court and only after the case has been referred by the first court can the organ empowered with judicial review act.[111] In such systems, a procedure not unlike preliminary reference is the only way for individuals to have legislative acts challenged.[112] Until recently, France only allowed constitutional review of legislation prior to promulgation.[113] Yet there are concentrated systems that are much more like the European Union, allowing both reference from other courts and original actions. In Germany, for example, constitutional cases may be referred to the Constitutional Court or brought to the court by individuals.[114] Although the vast majority of cases brought by individuals are against adverse judgments of other courts, a significant number involve statutes or regulations, and over six hundred of these challenges have actually succeeded in convincing the court to invalidate the law.[115] In order to lodge a constitutional complaint in Germany the individual must exhaust other remedies, unless doing so would "entail a serious and unavoidable disadvantage for the complainant."[116] Complaints against laws are not admissible, however, unless the law "personally affect[s] the claimant's fundamental rights, in a direct and current way, without the need for further administrative application of the norm."[117] Although this formulation resembles the idea of "directly concern," the notion of "personal affect" in Germany is broader than the understanding of individual concern found in *Plaumann*.[118]

Thus, individuals in general should have an easier time challenging legislative acts in Germany than they would in the EU. From the perspective of public interests groups like Greenpeace, it is noteworthy that the ECJ's standing requirements as applied to non-legislative acts are, at least for the moment, more friendly than Germany's, given that in Germany the possibility of defense of general interests has to be provided for by sector-

110. *See* discussion *infra*, at 19–20.

111. Brewer-Carías, *supra* note 102, at 92.

112. *See id.* at 220–22.

113. *Id.* at 251.

114. Donald P. Kommers & Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany 31–32 (3d ed. 2012).

115. *Id.* at 32, 36.

116. Gesetz über das Bundesverfassungsgericht [BVerfGG] [Federal Constitutional Court Act], Jul. 16, 1998, BGBL. I at 1823, art. 90(e) (Ger.), *available at* http://www.iuscomp.org/gla/statutes/BVerfGG.htm#1.

117. Brewer-Carías, supra note 102, at 210. *See* Sigrid Born, *Instructions on Lodging a Constitutional Complaint with the Federal Constitutional Court*, Law on the Federal Constitutional Court (Ger.) art. 3(3) (Martin Fry trans. 1996), *available at* http://www.iuscomp.org/gla/literature/Instrcc.htm.

118. *See, e.g.*, Gotthard Wöhrmann, *The Federal Constitutional Court: An Introduction*, *in* Law on the Federal Constitutional Court (Sigrid Born ed. Martin Fry trans. 1996), *available at* http://www.iuscomp.org/gla/literature/Inbverfg.htm#Bii5 (noting three admissible cases by individuals in open categories).

specific regulations.[119] This analysis suggests that even in the member state with arguably the most robust judicial review, individuals do not necessarily have an easier time challenging government action than they do in the European Union. Meanwhile, in the concentrated systems with weaker judicial review, there is no possibility for direct challenges to any government acts, let alone acts of parliament, and reference proceedings do all the work.

Although most EU member states fall into one of these two categories, there are a few states that are harder to characterize. The UK, for example, has no written constitution, yet does have a set of norms that have constitutional status and judges do exercise a kind of judicial review.[120] Although judges are not allowed to invalidate acts of parliament, if parliament wants to abridge "constitutional rights" such as freedom of assembly and right to property, it must do so specifically.[121] That being said, this rule is arguably less a form of judicial review than a canon of construction. The situation has become more complicated in the UK since the Human Rights Act of 1998 was adopted and declared a "constitutional statute" that could only be repealed by unambiguous language.[122] As a result, parliamentary legislation must be interpreted in such a way as to conform with the European Convention on Human Rights. Moreover, in the event that such interpretation is impossible, the high courts are now allowed to declare legislation incompatible with the treaty, although this declaration has no binding effect.[123]

In contrast to the UK, which has no written constitution, the Netherlands has two foundational documents, a Constitution and a Charter. It is worth noting that the judiciary does not check to make sure that legislative acts comply with either.[124] In fact, the Constitution explicitly states "the constitutionality of acts of parliament and treaties shall not be reviewed by the courts."[125] Similar to the UK, the fact that Dutch courts lack the power to set aside parliamentary acts does not prevent courts from declaring that they conflict with constitutional principles.[126] In practice, however, the courts are reticent to take this step.[127] The feature of the Dutch system that is most like constitutional review is the ability of courts to deem legislative regulations inapplicable when they conflict with provisions of treaties, or even binding resolutions made by international institu-

119. ELIANTONIO ET AL., *supra* note 71, at 126.

120. GERHARD VAN DER SCHYFF, JUDICIAL REVIEW OF LEGISLATION: A COMPARATIVE STUDY OF THE UNITED KINGDOM, THE NETHERLANDS AND SOUTH AFRICA 12 (2010).

121. *Id.* at 16.

122. *Thoburn v. Southerland City Council* [2002] EWHC (Admin) 195, [paras. 60–67], Q.B. 151 (Eng.).

123. VAN DER SCHYFF, *supra* note 120, at 19–20.

124. Gw. art. 120 (Neth.); L.F.M Besselink, Fundamental Structures of the Constitution of the Netherlands (2008), http://dspace.library.uu.nl/handle/1874/25731.

125. VAN DER SCHYFF, *supra* note 120, at 24.

126. *Id.* at 25.

127. *Id.*

tions.[128] Indeed, individuals are allowed to sue a regulatory agency in tort so long as they can plausibly claim an injury, and thereby obtain review of an act of parliament for conformity with international law.[129]

This tour through the legal systems of several European member states has revealed that structural barriers that prevent plaintiffs from effectively challenging legislative acts are hardly uncommon. The difference in the ability of parties to challenge legislative acts between the EU and the Netherlands is roughly analogous to the difference between the EU and Germany: individuals who are substantially affected, but not a member of a closed class would be able to challenge a legislative act in the latter, but not the former. Yet these are only two countries, and indeed it seems that they are the exception. In concentrated, diffuse, and the harder to classify member states, the general rule is that legislative acts are difficult to challenge directly, and indirect means are what individuals must utilize.

Conclusion

This Comment began by posing the question of whether the European Union legal order is a constitutional system, a treaty system, or a hybrid. This comparative exercise in treaty interpretation and administrative law has contributed to this debate by debunking a claim made by those who would insist that the EU is a treaty system, because the system of remedies it offers is significantly less complete than what one would find in a national constitutional system. Although it is true that gaps in standing exist and, as such, prevent some individuals from having access to courts in the EU, the same incompleteness in regard to remedies against legislative acts affects many of the EU's member states. Judicial review of legislation may be one of "the hallmarks of constitutionalism,"[130] but an absolute right to such review is not. The EU system of remedies is, at least in theory, no less complete than many of the member states. Even if the ECJ does decide to narrow its interpretation of *direct concern* in the context of regulatory acts so as to avoid a deluge of suits from pressure groups, doing so would in no way introduce a constitutionally significant lacuna. Germany and other member states often significantly constrain actions in the public interest.[131]

Going forward there are nonetheless serious questions to be asked about the effectiveness of judicial remedies in the EU, however, the discussion should shift its concern from *access gaps* to *access barriers*. While the legal requirements individuals must satisfy to have standing before the European Court are not atypical when compared with similar require-

128. *Id.* at 94.

129. Tom Zwart, *Standing to Raise Constitutional Issues In the Netherlands*, *in* Standing to Raise Constitutional Issues: Comparative Perspectives 341, 346 (Richard S. Kay ed., 2005).

130. van der Schyff, *supra* note 120, at 2.

131. Eliantonio et al., *supra* note 71, at 138.

ments in member states, the practical difficulties of litigating before the European Court might be. In short, the strategy going forward for those who would resist the EU's constitutional status might be to argue that although the EU is in theory a complete system of remedies, the reality is far from it. There is much work to be done assessing whether this line of attack has any merit, but identifying the practical stumbling blocks is no less important for EU reformers than for EU critics. If the ECJ is going to realize the Lisbon Treaty's goal of making it easier for individuals to initiate proceedings in an EU court, then it needs to know the practical difficulties that individuals face in challenging the acts of EU institutions. On paper, at least, the system of remedies that the EU offers its citizens is sufficiently robust to reach a constitutional standard. Yet if the actual barriers to access are such that parties cannot effectively challenge the acts of EU institutions, it is hard to see how the EU could really deserve to be called constitutional. Even so, the theoretical standard is worth something. It justifies the presumption in cases that the EU system of remedies is designed to be no less complete than that which one would find in a constitutional system, and that in turn suggests that it is plausible to evaluate a broader set of issues with the presumption that the EU is more a constitutional system than a treaty system.