
Did the Treaty of Lisbon Need a European Version of the *Federalist Papers*?

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The Treaty of Lisbon, successor to the failed Treaty Establishing a Constitution for Europe (TCE), is now before the Member States of the European Union for ratification. In the aftermath of the Irish “no” vote in June of 2008, the European Union has been thrown into a new period of uncertainty and turmoil. While critics complain that the Lisbon Treaty retains more than 90% of the TCE’s content, there are clear and significant differences between the two documents. Changes have been made to the new text, which enhance democratic accountability at both the institutional and federal levels. However, these shifts to greater substantive democracy have not been matched with a promotion of procedural democracy via referenda. Proponents of the Treaty of Lisbon hope it can quietly move through the ratification process without public attention, debate, or involvement. However, the Treaty of Lisbon remains vulnerable to the same misperceptions and criticisms that scuttled the TCE. This paper analyzes these factors, and suggests that an effort be made to promote and explain the new treaty: A European version of the *Federalist Papers* that helped ratify the American Constitution.

Introduction

In June of 2008, the Republic of Ireland voted to reject the Treaty of Lisbon. The referendum on the Treaty, a closely watched and vigorously contested affair, was the first and perhaps only time that European citizens would have a direct say in the ratification process. The surprisingly strong “no” vote has delivered a serious setback to the successor of the failed Treaty Establishing a Constitution for

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Europe (hereafter TCE), the original constitutional text. At present, a number of “what next” proposals are being proposed and debated. The future of the Lisbon Treaty, and further integration of the European Union, is uncertain.

There had been no lack of analysis and evaluation concerning the failure of the TCE in 2005 and the subsequent “period of reflection.” With the promulgation of the Treaty of Lisbon in December of 2007, a fresh round of ratification began among the 27 Member States of the European Union. Proponents had hoped that the new Treaty would be ratified and its provisions will be in place before the mid-2009 elections for the European Parliament and Commission.

However, the new document and this follow-up round of ratification votes are not simply “repeats” of the TCE text and the ratification debates that led to its rejection in mid-2005. The new treaty differs significantly from its predecessor, and is a product of the reactions and responses to the French and Dutch “no” votes. While it has been pointed out-- sometimes as an accusation-- that the Treaty of Lisbon’s content is close to 90% identical to the TCE, the differences in the remaining 10% are considerable. And, the ways in which this new document has been presented to the citizens of Europe-- its promulgation, promotion, and public relations-- bear little resemblance to that of the earlier constitutional document.

This essay will examine what has changed, both in the process of framing and in the plans for ratification, from one document to the other. It will identify and discuss the paradoxical ways in which these transitions have taken place, and will discuss the consequences of them. In the final section, this study will draw conclusions and offer a specific proposal to enhance the possibility that this new treaty will be ratified and put into force. A European version of the *Federalist Papers*-- the 85 essays that extolled the value and explained the content of the American Constitution-- will be recommended.

Naming the Text: An Ongoing Identity Crisis?

Given the variables and circumstances leading to the defeat of the TCE, what has changed with the Treaty of Lisbon? In terms of its substance, a considerable amount has changed in response to the 2005 “no” votes and the ensuing *dé-nouement* of the TCE. Not all of these changes are positive. Further, an examina-

tion of what has changed in the text must be complimented by a survey of what has *not* changed. The defeat of the TCE was not a neutral event, and a number of critically important questions remain unanswered about further enlargement and the distribution of power-- both vertically and horizontally-- within the European Union. As a consequence of this, the ways in which the Treaty of Lisbon is being presented and promoted leave it vulnerable to some of the same confusions and criticisms that the TCE suffered, with the possibility that it could be rejected in the year to come. Each of these areas-- content, context and implications-- will be examined in turn.

Words have meaning. Words confer meaning, and establish identity. In political life, how something or someone is named determines how that issue, event, or person is perceived. In early American constitutional history, the proponents of the newly drafted Constitution were able to successfully present themselves as *Federalists*, an interesting choice of name for those who sought a much more powerful, and centralized, national government. Of equal importance, they were able to label their opponents *Anti-Federalists*, and defined them through what they opposed rather than what they stood for. This has carried forward to the present day. To be “pro” is positive, and groups attach that word to their name. To the “anti” is negative, and it is best to attach that word to the opposing side.¹

The words “constitution” and “treaty” do not evoke such clear and recognizable distinctions as “pro” and “anti,” but they have defined and animated debate in the European Union over the last five years. Since the defeat of the TCE European leaders have stepped away from the word *constitution* and have sought to evoke a new understanding of the revised charter through exclusive use of the word *treaty*. However, the direction of this move has not been matched with a corresponding clarity or intensity. The Treaty of Lisbon continues to be called a constitution by EU leaders, the electronic and print media, and by the public at large. The identity crisis suffered by the TCE has shifted, but has not disappeared (Tanchev 2004, 131).

¹ See Milton and Keller-Noellet’s definitions of *federalists*, *realists*, and *skeptics* within the current struggle over European enlargement and integration. Milton and Keller-Noellet, 2005, 114. Kiljunen argues that further confusion has been wrought by the use and misuse of the terms *federal* and *confederal*. He concludes that “The ghost of the Philadelphia convention plagues European debate” Kiljunen 2004, 9.

There is no denying that the Treaty of Lisbon, like its predecessor, continues and enhances a constitutional architecture for the European Union. It defines and allocates powers to public officials and EU institutions, creates checks and balances for the exercise of those powers, and provides substantive and procedural protections for citizens against their unlawful or illegitimate use.² Whether the document is called a constitution, constitutional treaty, structuring document, treaty, or some other name, its constitutional *content* cannot be hidden or ignored. And, proponents argue, it should not be ignored, since the substantive and procedural provisions within the text potentially provide a significant degree of assurance to citizens-- supporters and skeptics alike-- that this Treaty would not usher in an overly powerful or intrusive European Union.

The “is it or isn’t it” (a constitution) question has persisted because the current Treaty of Lisbon, like the TCE before it, has a dual nature content, structure, and purpose. Schwarze argues that the TCE was simultaneously a treaty and a constitution. “The expression being used is not only a matter of terminology-- it is a central theme in discussions regarding the nature of the document itself. The Treaty combines elements of a classical treaty, as known to public international law, with elements of a constitution (Tanchev 2004, 128-137). “The term ‘constitution’ indicates that, in terms of its content, it aims to create a fundamental constitutional order, whilst the term treaty makes it clear that the coming into force of this document is dependent on the agreement of the Member States” (Schwarze 2003: 204). Besselink draws a different, though complimentary, distinction, arguing that:

“(S)chematically, there are two main types of constitution in Europe into which individual constitutions could be classified. The first are the constitutions of the ‘historic type, comprising the ‘old-fashioned,’ historically incremental constitutions which are mostly long-term constitutions.... These constitutions tend to incorporate various political and social changes and experiences, even where these are relatively dramatic, at least in the short term; these constitutions are non-formalistic and they are at least as much political in nature as legal. The formal constitution does not constitute political reality-- conversely, the reality of the political order determines the constitution (Besselink 2007: 114).”

² Note that the enumeration of powers and the creation of checks and balances are not the exclusive domain of constitutions. Mancini (2000) demonstrates that treaties do as well. See his excellent chapter entitled “The Making of a Constitution for Europe,” 1-16, with particular attention to pages 1-2.

In contrast,

“The second type of constitution is of ‘revolutionary’ character. The constitutions belonging to this group tend to have their origin in a revolutionary event, a political or social cataclysm which forms the ‘moving myth’ inspiring the constitution.... These constitutions have a blueprint character; they tend to be designed from a clean slate, as under the circumstances in which they originated one wishes to consign the past to history and design a new future (Ibid).”

J.H.H. Weiler considered the TCE a “treaty masquerading as a constitution,” and claimed that all too much significance had been given to that misnomer. For Weiler, “the defining feature of Europe’s new Constitutional Treaty is a word, an appellation. It is not the content of the Treaty Establishing a Constitution for Europe which gives it epochal significance but the (mere) fact that an altogether run-of-the-mill Treaty amendment has been given the grand name: Constitution” (Weiler in Curtin, et al. 2005:3). However, Weiler adds an important qualifier to this claim. The problem is not so simple that a removal of the “C-word” would have changed popular perception of the TCE and with it the outcome of the referenda in France and the Netherlands. Rather, an established constitutional vocabulary had evolved that both supported and facilitated the EU’s establishment and development. Weiler explains this distinction and its implications as follows:

“For decades, it has been common ground, that despite its formal treaty format, the structural architecture of the Communities and subsequent Union were better explained with a constitutional vocabulary than with an international law one.... In a nutshell, long before Maastricht, Amsterdam, and Nice, let alone the more recent Convention and ensuing ‘Constitution’ with its explicit Supremacy Clause, the law of the Union was the supreme law of the land within all Member States, invokable by individuals and accepted as such by Member State courts. The decisional and institutional architecture, one could further argue, has also become increasingly ‘constitutional’ in the growing prevalence of binding majority voting in the Council and the gradual empowerment of the European Parliament to the position of co-legislator with the Council. On this reading, all that the current ‘Constitution’ does is to codify the constitutional *status quo* and to formalize the hybrid extant arrangement of a Treaty with constitutional features (Ibid: 6-7).”

Scholarship has helped define the contours of the identity dilemma (Grimm 2004: 77-85; Mollers 2004: 129-130), but offers little guidance in terms of simply, clearly, and effectively communicating these realities in a public format. These distinctions were either ignored or blurred as the TCE was promoted in 2004 into 2005. While in its content and structure it was most surely a ‘historic

type' of constitutional document (Preuss in Bellamy 1996: 18-23), it was given the name *constitution*, clothed with "revolutionary" constitutional garb (a motto, flag, and anthem), promoted as a summative text that would unify, codify, and replace all previous treaties, and featuring high-profile elements (a President, Supremacy Clause, and move to majority voting for a raft of policy areas) that invited comparisons with its American counterpart. It was described as a treaty, but promoted as a Constitution. And the names by which it was called, whether Treaty Establishing a Constitution for Europe, Constitutional Treaty, or European Constitution, did little to provide its audience with a clear sense of its identity, purpose, and ultimate meaning. By the middle of 2005, it was discussed, debated, and voted on as a "Constitution," a lengthy and complicated document that was perceived by critics as a vehicle for unbridled enlargement and a solidification of centralized power in Brussels. The French and Dutch votes stopped the ratification process in its tracks, and the surprisingly large margins of defeat made it possible for a number of "Euroskeptical"³ Member States to step away from the ratification process and avoid "no" votes in their own realm.⁴ In sum, the TCE was an historic-type constitution, but was promoted and perceived as a revolutionary-type one. However, its ratification lacked the political culture that both occasions and supports a constitutional moment when a revolutionary-type constitution is born.

The length and detail of the document added to the TCE's identity crisis.⁵ Its size and complexity meant that it was very difficult for citizens, groups, and even leaders to have a comprehensive grasp on its contents. Not only was it difficult to fully apprehend, but it was also relatively easy to either misrepresent or selec-

³ The term Euroskepticism points to a reaction and response to the process of European integration. Taggart (1998) defines it as "outright and unqualified opposition to the process of European integration." However, it is often used more broadly, to denote distrust toward any further accrual of power by the institutions of the European Union. See also Milton and Keller-Noellet's definitions, Footnote 1. Milton and Keller-Noellet, 2005, 114.

⁴ Here I speak of the United Kingdom, Denmark, and Poland, and to a lesser degree, Ireland and the Czech Republic. Much has been made of the fact that six Member states went ahead with ratification votes after the French and Dutch "no" votes in mid-2005, and that 18 Member States have now ratified the TCE. However, the seven remaining countries contained many of the most resistant, and it is likely that some of them would have voted against the Constitutional Treaty.

⁵ This section on the size and complexity of the constitutional instrument can also be found in a prior study on the ratification process in 2004-2005. See Boylan, 2007, 132-135.

tively attack. In a certain sense, it was a form of political Rorschach test⁶ that enabled groups across the political spectrum to read into it their long-standing disagreements about the direction and scope of European enlargement, integration and unification. Richard Bellamy observed that “the drafters side-stepped their disagreements by choosing formulations that were so abstract that all sides could read into them what they liked” (Bellamy 2006: 185). In France, resistance from the left focused on Part III, the existing body of EU law and policies that had developed since the 1950s. In essence, Part III contained little that was new or innovative. However, the French “Non” campaign was successfully able to describe that section of the TCE as the high road to further globalization and enlargement with the concurrent loss of French sovereignty and autonomy.⁷ The left coalition’s ability to link this section of the TCE with the British free-market economic model—with the attendant fears for the future of the French social welfare system—advanced a frightening “reading” of the text. Thus, a section of the text that did little more than formalize and streamline already existing arrangements became more a reflection of internal struggles than the text at hand (Milton et al.: 2005: 114). One writer observed that,

“With Part III recapitulating 50 years of European integration, moreover, the referendum gave voters their first-ever opportunity to challenge formally and directly core features of the EU: its competition policy, the freedom-of-movement rules in the single market (notably the liberalization of services), the euro and the EU’s monetary policy, and enlargement. The pre-referendum debates also reflected dissatisfaction with slow growth and high unemployment, immigration, enlargement and “social dumping” from new members, the prospect of Turkish membership, globalization, and the growing competition from China and the United States (Cohen-Tanugi 2005: 57-58).”

Leading up to the French and Dutch referenda, the government-sponsored “yes” campaigns could not overcome the perception that the constitution would lock in trends and developments with deeply negative consequences (Shaw 2005: 1-33). Peter Hylarides’ survey of the Dutch referendum noted that, “The first opinion

⁶ Ibid., at 131. The Rorschach test, commonly known as the “Ink Blot Test,” and named after Swiss psychiatrist Hermann Rorschach. It functioned as a personality analysis test in which the person being tested was asked to identify what is suggested to him by a series of ink blot designs of various shapes.

⁷ Note that there was as much resistance from the right-wing parties in France as there was from the left. The right’s fear of unbridled immigration and the resulting threat to job security, coupled with fears over Turkey joining the Union, helped bring about a coalition of the right and the left against ratification.

poll carried out in January on behalf of the government showed that only 30 per cent of the population was in favor of the constitution. More than 80 per cent of the electorate indicated that they had no idea what the constitution was about, whilst two-thirds thought the European constitution would replace the Dutch constitution” (Hylarides 2006: 89-90). The debates played on passions and fears, with little effort to delve into the structure and meaning of the text. In the end, “hardly any of the treaty’s new substance was debated during the French and Dutch referendum campaigns. The absence of a well-focused discussion only compounded the effect of the potent misrepresentation that surrounded the text from the beginning” (Cohen-Tanugi 2005: 56). It is clear that the document was large enough and complicated enough to enable interest groups and political parties to read whatever problems, crises, or threats into the text that they chose. As John Kay wrote in the *Financial Times* just prior to the French referendum, “The attempt to provide something for everyone has provided something for everyone to dislike” (Kay at johnkay.com). For European citizens, the TCE was a cipher.

As of mid-2008, little has changed. The Treaty of Lisbon has been put forward for ratification with little to distinguish it from the TCE. EU officials insist it is a treaty, not a constitution. Yet, the name “constitution” has become accepted and familiar shorthand, and its use is widespread. Whether it is a hybrid document, an “historic” model of constitution, or a treaty that rests on a constitutional vocabulary, Europeans by and large think of it as a constitution.

Does any of this matter? In the wake of the Irish vote, it is impossible to predict the outcome. If proponents have their way, the Treaty of Lisbon may slowly, quietly pass through one affirming parliamentary vote after another, be resubmitted to the Irish for reconsideration, and secure ratification. It may be, as a recent study concluded, that “governments and public opinion have lost any appetite they may have had for institutional debate and constitutional reform” (Joint Study 2007: 146). A vague, non-specific, view that something-is-better-than-nothing may enable the Lisbon Treaty to be ratified without great protest, or for that matter, interest. Yet, the persistence of the document’s identity as a constitution raises a sticky, and not easily answerable, question: if it remains a constitution, what happened to the promise of referenda? What happened to the promotion of popular involvement and popular approval as a more transparent, democratic, and legitimate process of ratification?

This is not to say that referenda are, substantively and procedurally, more legitimate and democratic than other forms of ratification. There is a robust debate on this topic, and the literature on the “democratic deficit” is full and varied (Maduro 2002, 91; Moravcsik 2002, 603; Weiler 1999, 264-270). While some scholars declare that any constitutional ratification or changes *require* referenda (Feld / Kirchgassner 2004, 205), others consider referenda problematic and sources of *dis*-integration (Auer 2007, 262). Auer frames the issue as follows,

The European Union has an ambivalent and potentially dramatic experience with direct democracy. On the one hand, the process of European integration during the last decade has been a strong factor in promoting the use of direct democratic devices, mainly the referendum, on the continent. On the other hand, the very use of these devices has brought about a serious threat to the process of European integration itself. Thus, the question arises whether direct democracy is an opportunity to finally provide the EU with the legitimacy it is said to be so badly lacking. Or is it rather a trap, which not only makes it impossible to implement necessary institutional reforms, but also blocks any further enlargement and might even endanger the legitimacy of both the EU and direct democracy (Auer 2007, 261)?

The European Union unites states whose preferences are often insular and inwardly focused. As a result, the Union must seek consensus and compromise as it makes decisions and crafts policy. Direct democracy via the referendum presents questions that must be answered yes or no: a binary choice that many contend is “singularly unsuitable to the complexity of issues” (Dehousse 2006, 160).

In this essay, the salience and legitimacy of the referendum as a remedy for the democratic deficit is neither championed nor attacked. The question is not about the virtues or pitfalls of direct democracy. It is, rather, based on the fact that referenda, within the process of constitutional framing and ratification, have been part of a deliberate attempt to compensate for the democratic deficit throughout the last 10-15 years. The TCE was an attempt to democratize the European Union, and its ratification was perceived and promoted as a way to promote identity formation via popular participation (Hurrelmann 2007, 343-344; 350-351). Such was the intent of the Laeken Declaration and a core theme of the Convention on the Future of Europe. And, as of mid-2008, these goals and aspirations have been neither repudiated nor repealed. To whatever degree referenda enhance or

inhibit democratic accountability and democratic responsiveness, the fact remains that the reasons behind the Convention and the push for referenda were based on a desire to legitimate the European regime (Maduro 2002, 91-92; Magnette 2003, 21). And, somewhere between the rejection of the TCE in 2005 and the emergence of the Treaty of Lisbon in late 2007, referenda have been both *disconnected* from discussions of democratic legitimacy and *discouraged* as an avenue for ratification by EU and national leaders.

(Re-)Framing the Text: Substantive Gains and Losses

If the Treaty of Lisbon is finding difficulty in detaching itself from the muddled identity of both treaty *and* constitution, how does it fare in terms of its substantive changes and adaptations? On one hand, it is clear that significant changes were made to the text in order to accommodate it to the fears and concerns expressed in the 2005 ratification votes and debates. The Treaty of Lisbon creates a less centralized, more democratic, and more participatory framework of governance. Yet, its framing could not have differed more from the Convention on the Future of Europe that wrote the TCE.

If the attentive public, or interest groups, or political parties, are seeking reasons to praise or condemn the new Treaty based on its framing, they can do either. Those who gaze into this latest iteration of the Rorschach test can find democratic responsiveness and a multitude of checks and balances to limit and channel power. Or, they can find a process of framing that was largely held in secret, was largely shielded from public comment and input, and that produced a more complicated and less readable text. The move from Convention to Intergovernmental Conference was clearly intended to reduce publicity and provide a “closed shop” setting. This is in contrast to the wide open Convention as a specific strategy to democratize the framing process (Hurrelmann 2007, 344-345). If the TCE was rejected for being, at once, too ambitious and too ambiguous, what types of resistance and criticism may spring up as ratification votes are held in Member States with an established history of skepticism toward the EU?

In the January 29, 2008 *Report on the Treaty of Lisbon*, Rapporteurs Richard Corbett and Inigo Mendez de Vigo identified the substantive changes made to the text due to the fact that, “following the results of the referendums in France and

the Netherlands, it was necessary, in order to secure a fresh agreement amongst the 27 Member States,” to incorporate certain changes (Corbett / Mendez de Vigo 2008: 9). These changes were made in deliberate and direct response to the TCE’s rejection, and the language of the report text adopted by the Parliament on February 20, 2008 clearly communicated that such changes were approved with “widespread regrets” and that an amending treaty “is inevitably less clear and readable than a codified treaty” (Ibid at 10). Parliamentary proponents of the Lisbon Treaty here sounded a note of pragmatism, recognizing the need for compromise and adaptation in order to salvage the core of the constitutional project.⁸ What is contained in the Lisbon Treaty? A survey of its contents reveals that the core of the TCE remains intact under three broad goals: assuring more democratic accountability, affirming the values and rights of citizens, and establishing greater effectiveness in performing Union-related functions. However, the text also introduces significant changes that may weaken or complicate these substantive and structural reforms.

The *Report on the Treaty of Lisbon* provides a clear survey and summarization of what has been carried forward from the TCE. Under the heading of democratic accountability the following provisions are worth noting:

Vertical and Horizontal Checks and Balances. “The adoption of all European Union legislation will be subject to a level of parliamentary scrutiny that exists in no other supranational or international structure. All European legislation will, with few exceptions, be submitted to the dual approval, in equal terms, of the Council (composed of national ministers accountable to their parliaments) and of the European Parliament (composed of directly elected MEPs). The prior scrutiny by national parliaments of all legislation of the Union will be reinforced as they will receive all European legislative proposals in good time to discuss them with their members before the Council adopts a position.”

Indirect Democratic and Cross-Institutional Involvement in the Election of the Commission President. “The President of the Commission will be elected by the European Parliament, on a proposal of the European Council taking into account the elections to the European Parliament.”

⁸ And most Members of Parliament are proponents. The report on the Treaty of Lisbon passed by a vote of 525 for, 115 opposing, with 29 abstentions.

Checks and Balances in Policy Making (Veto). “Democratic control in relation to legislative powers delegated to the Commission will be reinforced through a new system of supervision in which the European Parliament or the Council may either call back the Commission decisions or revoke the delegation of such powers.”

Advice and Consent Power. “The consent of the European Parliament will be required for the approval of a wide range of international agreements signed by the Union.”

Procedures for Amendment and Change. “The procedure for revising the Treaties will be, in future, more open and democratic, as the European Parliament will also acquire the power to submit proposals to that end, the scrutiny of any proposed revisions must be carried out by a Convention... while new simplified revision procedures are introduced for amending, by unanimous decision, certain provisions of the Treaty, with the approval of the national parliaments” (Corbett/Mendez de Vigo 2008: 9).

These provisions fulfill the intent of both the Nice and Laeken Declarations to bring about democratic institutional reform of the European Union (Duff 2007, 3; Maduro 2002, 92). In tandem with the following two sections, it creates a balance between the grant of power and the specific limitations placed on that power. “Thus, the same document that clearly intends to expand the scope and authority of the European Union concomitantly specifies a series of constitutional constraints and limitations on the autonomy of precisely those elites whose power is enhanced with this document” (Steinmo 2008, 5). The text of the *Report* makes clear that greater democratic accountability is the foundation on which all other reform proposals must rest.

The second section, affirming the rights and values of citizens, makes legally binding the EU Charter of Fundamental Rights. By enumerating rights and guarantees binding upon the institutions and actions of the EU, it ensures that “all provisions of EU law, and all actions taken by the EU institutions or based on EU law, will have to comply with these standards, while respecting the principle of subsidiarity” (Ibid at 6). This section also makes provision for a citizens’ right of initiative, and expands both the jurisdiction of and citizens’ access to the European Court of Justice. In addition, the following provisions are included:

A European 10th Amendment. “A Clear delimitation of the competences of the Union vis-à-vis the Member States is established, under the principle that all competences that are not conferred on the Union by the Treaties remain with the Member States.”

Enumeration of Power as a Limit Upon It. “ It confirms the specificity of the institutional organization of the Union, to which the Member States entrust certain of their competences that they consider to be better exerted through common mechanisms, while providing, for the avoidance of any doubts, sufficient guarantees that the Union will not become a centralized all-powerful superstate” (Ibid at 6-7).

Thus far, the framers of the Treaty of Lisbon have crafted a document that provides for a network of checks and balances upon power, enumerates a detailed listing of rights and guarantees, and enhances the role of judicial review to receive and respond to appeal by individual citizens and by groups. There are both horizontal checks, and the actions of one EU institution will be subject to review or a veto from another, and vertical checks, and the policies of the Union will be subject to the review and approval of the Member States (Chronowski 2004: 77-84). However, these sections provide a foundation of support for the third and final section on effectiveness. Where the first two sections provide assurances and guarantees, the latter section seeks to streamline, and concentrate power. It is this section that has received the most attention and criticism. The most important provisions within this section call for the following modifications:

Moving From Unanimity to Majority-Based Decision Making. “The areas in which the governments meeting in Council decide by qualified voting majority rather than unanimity will increase substantially, thus enabling the Union of twenty-seven Member States to function in more areas without being blocked by vetoes.”

An Executive Office of Long Duration. “The European Council will become a fully-fledged institution of the European Union and its six month rotating presidency will be replaced by a President elected by its members for a two-and-a-half-year term, thus allowing for more coherence in the preparation and continuity of its work.”

Unity of Voice in Foreign Relations. “The Union’s Foreign policy High Representative and the Commissioner for External Relations -- two posts causing du-

plication and confusion -- will be merged, creating a Vice President of the Commission/ High Representative for Foreign Affairs and Security Policy who will Chair the Foreign Affairs Council, and be able to speak for the Union on this subjects where the latter has a common position, thus ensuring more coherence in the external action of the Union.”

Less is Better? “The number of members of the Commission will be reduced, as of 2014, to 2/3 the number of Member States, thus making it easier for the Commission to act and making it even clearer that Commissioners are representatives of European interests and not those of their countries of origin, while a rotation system will continue to ensure equal participation of all Member States” (Corbett/Mendez de Vigo 2008:8).

It can be asserted that each of these three sections is designed to enhance the legitimacy of the European Union (Landy / Teles 2001, 416-418).⁹ The first two sections create checks and establish rules that provide for accountability and stability. In this final section, the Treaty seeks to enhance the efficiency of the European Union’s workings. The formula is a simple one: “Put simply, legitimacy converts power into authority” (Longo 2006, 176). Power is ceded to the Union, though in a checked and limited fashion. Landy and Teles observe,

It was the genius of the framers of the American Constitution to observe that competence it itself a critical source of popular legitimacy, and that maladministration is as often a source of the withdrawal of consent as is a positive violation of liberty. A republic must not only be fitted with the proper restraints on its ability to violate the rights of the people, nor merely with the most elegant forms of democratic accountability: it must be able to efficiently dispatch those duties which are within government’s responsibility (2001, 417).

It is easy to see where and how controversy may emerge concerning these provisions. Each can be perceived as a threat to national sovereignty, and as dilutions of national power and influence within the Union structure. Opponents can hold a magnifying glass selectively to the most complicated, threatening, or difficult passages. And, unless these provisions are discussed and presented within the broader context of the other two areas, it will be easy for observers to con-

⁹ See also in this regard Magnette’s five vectors of legitimacy and an excellent discussion of how they both inform and complicate the debate over the EU’s democratic legitimacy. Magnette, 2003.

clude that too much is being forfeited or given away within the Treaty. The French and Dutch referenda debates, discussed above, could have provided a cautionary tale for those who trusted that these provisions will be self-explanatory. In Ireland, they were not. The mere potential for rules and restrictions to be imposed from without on economic policy (as seen in the corporate tax rate) or greater liberalizations written into social policy (dealing with divorce and abortion laws) was enough to convince 54% of Irish voters that the Lisbon Treaty was too dangerous. .

Of signal importance, the Treaty of Lisbon is an amending treaty, and would not replace the previous texts. The single, structured text of the TCE has, in a sense, “reverted” to the multiple treaty arrangements that preceded the Convention on the Future of Europe.¹⁰ Also, the primacy, or “supremacy” clause has been eliminated. In direct response to the perception that EU power had developed “too far, too fast,” and that the TCE’s “Supremacy Clause” would become a vehicle for Union dominance over the affairs and policies of the Member States. With that, the Treaty of Lisbon “abandon(s) the constitutional approach and certain of its features, such as the notion of a Union based on the will of its citizens and Member States” (Corbett/Mendez de Vigo 2008: 9). The “we the people” language that linked European citizenship and national citizenship has been eliminated. The symbols that stood behind these movements: the flag, the anthem, and the motto-- also have been excised from the text. The text of the Charter of Fundamental Rights, while becoming legally binding, is no longer part of the text of the Treaty (Miller 2007: 35). Finally, the use of the title “Foreign Minister,” a post and designation with further unifying connotations, has been replaced by the less definitive and problematic name “High Representative.”

Other adjustments will both slow down reform and make the specifics of the Treaty harder to apprehend. The adoption of the Qualified Majority System in the Council is postponed until 2014, with further provisions are included (the

¹⁰ It is beyond the scope of this paper to fully describe the ways in which the Treaty of Lisbon has incorporated the three pillars and how the two treaties under consideration, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) contains the principles and provisions of Parts I, III, and IV of the Constitutional Treaty. For a more detailed explanation on the pillars, see Church and Phinmore, 2006.

“Ioannina Compromise”)¹¹ that will allow minority coalitions to postpone votes. Other restrictive mechanisms (emergency brakes) have been added to legislative procedures in some areas of competence. Some Member States have stood firm in rejecting any adaptations that might infringe on domestic policies and laws, and the Treaty of Lisbon incorporates “measures specific to individual Member States, such as the extension of the opt-in arrangements in relation to cooperation in police and criminal matters for two Member States, to protocol limiting the effect of the Charter on the domestic law of two Member States” (Corbett/Mendez de Vigo 2008: 9).

With just a cursory glance at these changes, a reader may detect a certain unraveling of the single, aggregating, unified text of the TCE. While many of the most important reforms have been retained, a number of substantive and symbolic changes have changed the scope, and clarity, and effectiveness of the text. At present it is uncertain how the modifications, opt-outs, qualifiers, and deletions will influence the whole. One is reminded of the caution voiced by convention chairman Valéry Giscard d’Estaing, as he warned the delegates against seeking to amend the document: “If you touch the equilibrium, the system collapses. If you try to gain by getting satisfaction here and there, the system collapses and you have the whole thing starting again” (In Mitchener 2003: A6).

Perhaps this is one of the reasons why EU leaders conducted such a quiet effort to ratify the Treaty of Lisbon until attention was drawn to the Ireland’s vote. If Member States look for fresh exceptions and concessions as the price of ratification, the whole project could implode, or the powers enumerated in the text could be qualified and appended to the point of meaninglessness. Despite the current arrangements and adaptations, a clear majority of EU leaders are still positive on the Treaty of Lisbon and wish to see it adopted. However, it appears to be accepted as an article of faith that this Treaty will be ratified because this Treaty *has to be ratified*. And it is now clear that this strategy is not foolproof.

¹¹ The Ioannina compromise takes its name from an informal meeting of foreign ministers in the Greek city of Ioannina on 29 March 1994. It provides “that if members of the Council representing between 23 votes (the old blocking minority threshold) and 26 votes (the new threshold) express their intention of opposing the taking of a decision by the Council by qualified majority, the Council will do all within its power, within a reasonable space of time, to reach a satisfactory solution.”

At: http://europa.eu/scadplus/glossary/ioannina_compromise_en.htm

Approval and Promotion: The Stealth Campaign

In striking contrast to the ratification of the TCE in 2005, EU leaders and officials seem determined to fly the Treaty of Lisbon below the radar of public debate, with the continued claim that, as a treaty, it does not merit public scrutiny or public approbation. Meanwhile, opponents of the Treaty of Lisbon can claim that the text is over 90% identical to the TCE, and therefore is a constitutional wolf in sheep's clothing.

These differences are significant, not simply as a matter of historical interest, but also in very practical and concrete way, as the EU tries for a second time to approve a framework treaty. As has been previously discussed, use of referenda to both promote popular interest and to ratify the document had been seen as an important strategy. This view was buttressed by Nice, the Laeken Declaration, and the Convention. Thus, in 2004-2005, a number of key member states (Spain, France, Netherlands) agreed to take the ratification question to the people through referenda. In all, 10 Member States had promised referenda. An important reason for this was to address the issue of the "democratic deficit," and to secure popular approval for the next phase of integration. It was claimed that the decades of enlargement and integration had concentrated and centralized power in Brussels without a corresponding increase in accountability to the citizenry. It was broadly recognized that any further shift in power toward Brussels would need to address this legitimacy gap.

During the TCE's ratification process in 2005, it was hoped that referenda would spur spirited debates over and examinations of the proposed text (Peters 2005: 39-57). These national dialogues would, if successful, capture the interest of citizens, political parties, and organized groups, and would help to mitigate the perceived legitimacy gap.

The result was not as anticipated. The "no" votes from two of the EU's pivotal members scuttled the process, without any clear net gain in opinion or perception that the EU had drawn closer to its citizens or *vice versa*. Many evaluations of the 2005 ratification votes concluded that the French referendum process was dominated by the political extremes, and that the successful alliances of the far right and the far left came at the expense of a fuller, more representative debate over the substance and the merits of the constitutional treaty.

Now, with the drafting and approval of the Treaty of Lisbon, there is a transparent desire on the part of EU leaders to avoid referenda wherever and whenever possible. Leaders claim that enough has changed in the past two years—with the evolving of constitution into treaty—to avoid another complicated and unpredictable round of referenda.

Yet, this bypasses, and perhaps betrays, was what considered a key strategy for addressing the legitimacy gap and restoring faith in the process of integration and enlargement, without providing anything to take its place. It may be true that referenda are not appropriate for constitutional ratification. But their use has grown over time, and they are perceived as procedural mechanisms that mitigate the gap between power and accountability. The old message was, “let us examine the document, find common ground within it, and come together to secure its passage.” The new message appears to be, “trust us this time around... the new document does not require your time, attention, analysis, or approval.”

A November 2007 Joint Study on the Treaty of Lisbon was more pointed in its conclusion that something essential has been lost in the transition:

There is no need to underline that the future Reform Treaty is in practice the exact opposite of what was deemed necessary six years ago: we are faced with complex, unreadable texts, negotiated in secrecy, far from public scrutiny. Why did we move, in two or three years time, from a “constitutional” treaty, coherent if not concise, drafted in full transparency by a representative body of national and European elected officials, to the obscure document, substantially similar in content but totally different in form, that we are now submitting to national ratifications? (Joint Study 2007: 145)

The desire for legitimacy and the need to close the democratic deficit via the referendum process have disappeared. A focus on the ends has replaced a reliance on the means. What was a high-profile campaign touting the value of the TCE in 2005 has been succeeded by a less-public strategy to quietly and efficiently get the Treaty of Lisbon ratified. The question, of course, is whether this shift of focus and strategy will lead to a different, successful outcome. One editorial essay asked, “Does this mean abandoning the great objective, identified in the Laeken Declaration, of simplifying the structure of the foundational Treaties, and hence of the Union itself, so as to render it more comprehensible to those other

than Brussels professionals” (Editorial Comments 2007: 562)? Thus far, the default answer has been yes.

The Irish vote realizes the worst fears of those seeking to make the Treaty of Lisbon operative. Closing the legitimacy gap through the ratification process is no more. The focus on democracy has shifted from pre-ratification to post-ratification. An assumption that enhancing democracy (though greater grants of power to the EU Parliament and the national parliaments) within the text—a move to substantive democracy—is the new tack. The Joint Study on the Treaty of Lisbon recognizes this connection and couches its criticisms in an expression of hope:

The gradual emergence of a European political space or network, where democratic debate on issues of common interest can be pursued, would certainly bring citizens ‘closer to the European design and the European institutions’ as suggested in the Laeken declaration. The Reform Treaty goes in that direction when it introduces a new role for national Parliaments, politicizes the designation of the Commission President and creates the instruments of a common foreign policy (Joint Study 2007: 147).

But this must be obtained by limiting as much as possible what was earlier touted as a “democratic” process (the referendum) in order to achieve a more democratic political and institutional framework. While perhaps not dishonest, it is nonetheless ironic.

The transition from the TCE to the Treaty of Lisbon has resulted in a document with greater democratic provisions, mechanisms, and guarantees is being “eased along” to ratification in ways that seemingly ignore democratic elements and expectations. The revisions found in the Treaty of Lisbon have been designed to assure the majority of Europeans (or, more precisely and more importantly, the majorities of citizens in each of the member states) that its *constitutional* aspects will provide a workable balance of policy efficiency, institutional responsiveness, and substantive rights. Yet, this improved and more “democratized” Treaty of Lisbon may have been run aground in mid-2008, and potentially suffering the same fate as the TCE. The high-profile promotion of the TCE has given way to a strategy based on a number of contested assumptions: that the new document is not a constitution, that it therefore does not need intense public scrutiny, and that it requires only parliamentary review and approval. As a result,

there is no coordinated, proactive effort to promote it. Neil Walker's assessment is sobering:

Either it was all a profound strategic miscalculation, and an old-fashioned IGC process, with its familiar low-visibility, elite-driven compromise politics, would likely have delivered the goods; or, more probably, in the wake of Nice and an increasingly poor record of popular ratification of EU treaties in Western Europe, whatever the procedural route taken-- Treaty or Constitution-- high-level structural reform of the EU is just becoming more difficult, as too, crucially, is the possibility of approving such reform anywhere it may be seriously contested without resort to a referendum. If this is true, then to blame the (latest) constitutional messenger rather than the (long-term) message is perverse, and to contemplate a return to a sub-constitutional, elite-driven process for just those questions that are increasingly unlikely to slip below the radar of popular politics might be wishful (and self-defeating) political thinking (Walker 2006: 13).

This new approach virtually fails to discuss and promote the important substantive and procedural changes in the Treaty of Lisbon-- changes that reflect the goals and objectives of the European Union-- that have come about specifically to mitigate many of the fears and concerns of the Treaty's critics.¹²

This strategy may eventually succeed. If 26 member states proceed to ratify the Treaty-- all via parliamentary approval-- EU leaders can return to Ireland and ask its voters to take another look at their previous actions. However, along the way, politicians and leaders in favor of the new Treaty must consistently and convincingly ignore the claims of the critics: that with so much of its content the same as its predecessor, it is a constitutional wolf in "sheep's-treaty" clothing. The Irish vote may resonate within some of the more "euroskeptical" countries, and groups may opt for delaying tactics, constitutional challenges, or appeals via media outlets.

Before concluding this section, it must be recognized that what follows is, at best, theoretical. At the time of this writing, the Republic of Ireland is the only Member State that has held a referendum, and it is the only Member State that *must* do so. It is possible that the Treaty of Lisbon will be ratified by the remain-

¹² See also Steinmo's contention that the Treaty "Americanizes" constitutional arrangements in the EU, as power is now limited less by accountability via elections and more by enumeration and textural restraints. Steinmo, 2008, 5.

ing Members, and EU leaders will craft some package of concessions and guarantees that will allow the Treaty to move forward; an outcome similar to the Danish rejection of the Maastricht Treaty in 1992 and the Irish rejection of the Nice Treaty in 2000. If so, the section that follows may end up “much ado about nothing.”

However, the Irish have voted and have soundly rejected the Lisbon Treaty. The lack of an in-depth, specific, clear presentation of the Treaty’s contents left it open to confusion and fear. Without a sense of confidence in the text, a majority of Ireland’s voters decided that approval was too risky. Did the lack of such debate *cause* the no vote? That can neither be known nor proved. All that can be said is that a comprehensive explication of the Treaty’s provisions may have turned public confusion into comprehension, and may have affected the outcome of the Irish vote.

An “American” Proposal: Create a European Version of the *Federalist Papers*

In the late 1780s, the proponents of the new American Constitution knew that they had a fragile, though workable new charter of government, and that it represented a clear departure from the government under the hidebound and ineffective Articles of Confederation. Ratification was not a foregone conclusion, as there were enough significant changes in the text to cause grave doubts among the advocates of states rights and state sovereignty. The American Constitution reflected a number of concessions and compromises by each of the member states gathered in Philadelphia, and no state got exactly what it wanted out of the Convention. Still, there was unity in the view that this new charter of government must succeed, and that occasioned a common, unified strategy for promoting the Constitution to each of the state ratifying conventions.

The Federalists did not waste time in beginning the process of promotion. Six weeks after the end of the Philadelphia Convention concluded, the *Independent Journal* of New York City published an essay that invited readers to consider both the value of the new Constitution and the specific provisions contained within it.

Signed by *Publius*,¹³ an avowed advocate of the proposed Union, it asked readers to thoughtfully and dispassionately consider the series of essays that would follow, and use them as a framework for debate and deliberation. The readers of these essays, it must be stressed, were citizens. While the prose of the *Federalist* would eventually be used in the state ratifying conventions, their intent, first and foremost, was to capture the interest of and convince ordinary voters.

The *Federalist* was co-authored by Alexander Hamilton, James Madison, and John Jay, each bringing to the project a unique set of intellectual gifts and political experiences. According to Historian Jack Rakove, “In writing *The Federalist*, Hamilton and Madison enjoyed the great advantage of having participated in every phase of the movement for constitutional reform (Rakove 2003: 2).” The 85 essays that were subsequently penned by these three thinkers first sought to present “a sustained brief for the value of the Union” in numbers 1-36 and then “as a comprehensive exposition of the Constitution” in numbers 37-85 (Ibid, at 25).

There was both a broad and a specific purpose behind these essays. The first, most immediate context for writing was that New York was a “big state,” and its ratification outcome was in some doubt. New York was a major hub of shipping and transport, and the vital center of the new nation’s sea-bound commerce. Further, its land mass could split a union of states into two separate territories. Thus, like the European Union of 220 years later, the United States under the Constitution faced the problem of a “no” vote from a member that it could not afford to lose. When the two founding nations of the European Community, France and the Netherlands, voted against the TCE in 2005, the project came to a halt. The Irish vote could occasion some form of resistance or rejection in one or more “euroskeptical” countries, and constitutional reform will come to a second, and perhaps long-term, finish. It is in these countries where the first, concentrated effort must begin.

For the American Federalists, New York was recognized as a key battle front for the push for ratification. But there was a larger agenda at work as well. Proponents knew that the state ratifying conventions would see spirited debates, and that the final votes would be close in many of the key states. Virginia held one-

¹³ The pseudonym was used in honor of Publius Valerius Publicola, a Roman consul of the 6th century BC, meant “friend of the people.”

fifth of the population and generated one-third of its commerce. Though not as “up for grabs” as New York, it remained essential. A union of two-thirds of the states that did not include Virginia would be in jeopardy. This is why Hamilton of New York and Madison of Virginia, who would end up in pointed disagreement over a number of issues in the 1790s, found a common cause and forged an alliance of necessity in writing the *Federalist* papers. Soon into 1788, the newspaper essays were printed in bound volumes and sent out to partisans in the other states, where they then became a common text and exposition to be used in the state ratifying conventions.

The *Federalist* papers were designed to be both informative and inspirational. They were meant to persuade as well as enlighten. And, “the authors directed their appeal to the moderate spectrum of public opinion: those who were inclined to support the Constitution but were troubled by some of the objections to its ratification, or those who were inclined to oppose it but might be open to persuasion *if their objections were answered*” (Rakove 2003: 26. Italics mine). The essays were targeted toward the unconvinced, and assumed that a careful exposition of the text and its meaning would address key concerns and win over the opinions of those without clear political commitments.

The European Union stands in need of its own version of the *Federalist*. Whether accurate or inaccurate, the Treaty of Lisbon is called a Constitution. Whether fair or unfair, it is portrayed by its detractors as a Constitution which has been whitewashed of its name and symbols. And, a coordinated, confident, well-crafted presentation of the Treaty’s contents has been conspicuous by its absence. The Treaty of Lisbon needs a persuasive, informative, readable, accessible commentary that addresses the concerns of the unconvinced and provides a common source for a desperately needed conversation.¹⁴ A group of “framers”

¹⁴ The validity and relevance of such a project could be brought into question if Ireland ends up being the only member state to use the referendum to ratify the Lisbon Treaty. Is such a project relevant if all other ratification votes are conducted by national parliaments? The American experience is instructive here. The newly framed Constitution of the United States was debated and decided upon in state ratifying conventions. Though separate from and different than the state legislatures, they were, by design, far more “parliamentary” than “popular.” And while most delegates to the ratifying conventions could be considered elites, they were cognizant of and responsive to mass opinion. Why else publish 85 essays in the New York City newspapers? The goal was to convince the citizenry, and let popular involvement and broad-based debate inform the convention debates. The impact of a European version of the *Federalist Papers* project could, it must be admitted, swing both ways. It could have convinced a majority of the Irish to ratify the

like Madison and Hamilton, who have been central to the project of European constitutional development, need to collaborate on a set of writings that will clearly set forth why the Treaty of Lisbon is essential to the ongoing task of enlargement and integration. The group could include national leaders, EU officials, and academics. Attention should be given to nationality, ideology, current position, and connectedness to the project.

A preceding section of this essay surveyed the provisions of the Treaty of Lisbon by quoting from the *Report on the Treaty of Lisbon* drafted by the EU Parliament's Committee for Constitutional Affairs and approved by that body when it convened in early 2008.¹⁵ Why not sift through the text of the Treaty itself? It was evident that the way in which the *Report* structured its presentation of the Treaty-- following the outline of the goals and objectives of the EU as found on the www.europa.eu web site (ensuring democracy, affirming rights and values, and enhancing effectiveness), made for a simplified, clear, and effective presentation. Plus, if a project such as this has any hope of succeeding, it must happen quickly, as the ratification process is underway.¹⁶ The *Report* provides a framework and a starting point.

The Laeken Declaration of 2001 was, in part, a response to the fact that "citizens are calling for a clear, open, effective, democratically controlled Community approach," and called for the European Union to become "more democratic, more transparent and more efficient" in its workings and in the way that it relates to its citizens. Toward those ends, the Declaration concluded that simplification was essential.¹⁷ The Treaty of Lisbon text, and the way in which it has been framed and approved, appear to be a step away from the reforms envisioned in the Laeken Declaration.

Treaty in the June referendum. But a series of commentaries on the Lisbon Treaty could have stirred more popular debate and political activity in countries where public interest and involvement was low, and that could have led to a different result in more than one parliamentary vote.

¹⁵ The author was granted a study visit to the European Parliament in March-April of 2008, and was able to interview and speak at length with both MEPs and administrative officials about the Treaty of Lisbon. The idea to use the *Report on the Treaty of Lisbon* as a prototype of the proposed "Lisbon Papers" emerged from the study visit.

¹⁶ A significant number of Member States have ratified the Treaty. See Appendix A.

¹⁷ See the text of the Laeken Declaration at:

http://www.saxonbooks.co.uk/laeken_declaration.htm.

Conclusion

The Treaty of Lisbon needs a series of “*Lisbon Papers*” to open up its meaning, promote its passage, and fulfill Laeken’s intent. These writings should reflect participation across the Member States, but should have the quality of a unified, single voice of endorsement. They could be widely disseminated and could provide a framework for discussing and debating the content, meaning, and validity of the new Treaty. The publication of these “papers” could work to remedy the potential pitfalls that face the Treaty of Lisbon, and provide a higher probability of its success across twenty-seven separate ratification votes. Writing in 2004, Schmitter concluded, “If and when they agree upon a definitive ‘constitutional treaty,’ its proponents are going to have to mount an effort similar to that of the authors of *The Federalist Papers* to convince the citizens of Europe to ratify their product” (Schmitter 2004: 11). Such an effort did not occur in 2005. It should be considered in 2008.

One of the most prominent and articulate members of the European Parliament, Andrew Duff, has pointed to something similar to this in his writing on the subject.

What lessons can be learned from these painful experiences in France and Holland? First, Europe needs a common template to which its political discourse must relate. Narrowly focused national debates, conducted in any language, no longer serve the interests of Europe’s emerging post-national political society. We should try to address the same questions, electoral calendars permitting, at the same time. Europe’s parliaments and political parties, social partners, civil society and media should make more of a self-conscious effort to embrace the European dimension (Duff 2006: 12).

Looking back at the failed effort to ratify the Constitutional Treaty in 2005, he is unsparing in placing blame at the top of the EU leadership structure.

The leaders declined to organize a common European campaign for the constitution they jointly and ceremoniously signed. The lack of coordination meant that twenty-five different national ratification processes began to emerge. The failure at the top to write a single story about the constitution meant that the EU citizen was faced with a show that was confusing and contradictory (Ibid at 13).

Mr. Duff strongly supported the ratification of the TCE, and now supports the passage of the Treaty of Lisbon. He recognizes that there is no “other” plan or strategy in place if the Treaty of Lisbon is rejected.¹⁸

All but eight of the *Federalist* papers were written in four months, from late October of 1787 through the beginning of April, 1788. Their writing and publication took place during the state ratifying conventions (see Appendix B), as the Federalist supporters of the Constitution did not have the luxury of advance preparation time.¹⁹ This can still happen within the European Union as the impact of Ireland’s “no” vote is absorbed. The *Federalist* provided the “single story” that enabled the United States Constitution to be ratified by the requisite number of states, and by the essential “big” states.

A project such as this would face two key challenges. First, the writers would have to make clear-- consistently and repeatedly-- that the Treaty is not a ploy to establish a unitary state, or a way to impose a “federal template” onto the future actions and development of the European Union. Second, “publishing” the *Lisbon Papers* would need to take practical politics into account. Given that the average knowledge of the European Union and its workings is at best limited, the obstacles are considerable (See especially Dehousse 2006, 158-159). Duplicating the past and writing editorial page essays simply will not do. The European Union is not in the midst of a revolutionary or constitutional “moment,” and the promotion of the Treaty of Lisbon must take the current context and culture into account. Proponents must find a way to bring about a quality debate into the public eye. The most effective form of publication may come through televised images rather than printed pages.

The European Union is not lacking for talent, source material, or the administrative apparatus to make a similar project happen (Moravcsik 2002, 604). It lacks only the clear recognition that the stealth campaign to ratify the Treaty of Lisbon is a step in the wrong direction, and the will to make its case to the peoples of Europe via its own version of the *Federalist* papers. This is not to insist

¹⁸ Note that Mr. Duff has put words into action by publishing a short, concise guide to the Treaty of Lisbon. See his “True Guide to the Treaty of Lisbon” at: <http://www.alde.eu/fileadmin/files/Download/True-Guide-NEW.pdf>

¹⁹ For a chart showing the dates, authorship, and content of each *Federalist* essay, see the constitution.org website at: <http://www.constitution.org/fed/federaoo.htm>.

that the square peg of the American experience be jammed into the round hole of European constitutional development (Lacorne 2001, 428). However, EU leaders may want to take a second look back across the Atlantic and back across time if the current treaty is to be ratified as the new charter of government and successfully implemented in the years to come.

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Appendix A: Ratification of the Lisbon Treaty.

Completed Ratification Dates in Bold Print

Member State	Ratification Procedure	Date	Majority required
Austria	Parliament	Ratified 24 April 2008	2/3 majority in both chambers
Belgium	Parliament	Ratified 10 July 2008	Simple majority in 7 regional & federal chambers
Bulgaria	Parliament	Ratified 21 March 2008	Simple majority
Cyprus	Parliament	Ratified 3 July 2008	Absolute majority (presidential veto)
Czech Republic	Parliament	Delayed pending ruling by constitutional court.	Simple majority (if 'no transfer of powers'), or else 3/5 in Parliament & Senate
Denmark	Parliament	Ratified 24 April 2008	Simple majority (provided over 50% of MPs present)
Estonia	Parliament	Ratified 11 June 2008	Simple majority
Finland	Parliament	Ratified 11 June 2008	2/3 majority
France	Parliament	Ratified 7 February 2008	Constitutional amendment, simple majority in both chambers and 3/5 in Congress
Germany	Parliament	Ratification pending ruling by constitutional court.	Simple majority in both chambers
Greece	Parliament	Ratified 12 June 2008	Simple majority
Hungary	Parliament	Completed 17 December 2007	2/3 majority
Ireland	Referendum	Rejected in referendum 12 June 2008	Simple majority in Parliament & over 50% of vote in popular referendum
Italy	Parliament	Ratified 31 July 2008	Simple majority in both chambers
Latvia	Parliament	Ratified 8 May 2008	Simple majority in two readings
Lithuania	Parliament	Ratified 8 May 2008	Simple majority
Luxembourg	Parliament	Ratified 28 May 2008	Simple majority
Malta	Parliament	Ratified 28	Simple majority

		January 2008	
Netherlands	Parliament	Ratified 8 July 2008	Simple majority in both chambers
Poland	Parliament	Ratification on April 1 and 2, 2008 awaits signature of President	Simple majority (if 'no transfer of powers'), or else 2/3 majority of over 50% of members of both chambers)
Portugal	Parliament	Ratified 23 April 2008	Simple majority
Romania	Parliament	Ratified 4 February 2008	Simple majority
Slovakia	Parliament	Ratification Bill signed May 12 2008	3/5 majority
Slovenia	Parliament	Ratified 29 January 2008	2/3 majority
Spain	Parliament	Ratified 15 July 2008	Absolute majority (Congress) & simple majority (Senate)
Sweden	Parliament	November 2008	Simple majority
United Kingdom	Unknown	Ratified 18 June 2008	Unknown

Source: *European Policy Centre*

Appendix B: Ratification Timetable for the US Constitution.

Ratification of the Constitution				
	Date	State	Votes	
			Yes	No
1	December 7, 1787	Delaware	30	0
2	December 12, 1787	Pennsylvania	46	23
3	December 18, 1787	New Jersey	38	0
4	January 2, 1788	Georgia	26	0
5	January 9, 1788	Connecticut	128	40
6	February 6, 1788	Massachusetts	187	168
7	April 28, 1788	Maryland	63	11
8	May 23, 1788	South Carolina	149	73
9	June 21, 1788	New Hampshire	57	47
10	June 25, 1788	Virginia	89	79
11	July 26, 1788	New York	30	27
12	November 21, 1789	North Carolina	194	77
13	May 29, 1790	Rhode Island	34	32

Bibliography

- Auer, A. 2007. "National Referendums in the Process of European Integration: Time for Change." In Albi, A. / Ziller, J. (eds.) *The European Constitution and the National Constitutions: Ratification and Beyond*. The Netherlands: Kluwer Law International. European Monographs. 54. 261-271.
- Bellamy, R. 2006: "The European Constitution is Dead, Long Live European Constitutionalism." *Constellations*. Vol. 13, No. 2. 181-189.
- Besselink, L. 2007: "The Dutch Constitution, the European Constitution, and the Referendum in the Netherlands." In Albi, A. / Ziller, J. (eds.) *The European Constitution and the National Constitutions: Ratification and Beyond*. The Netherlands: Kluwer Law International. European Monographs. 54. 113-123.
- Blankart, C. / Mueller, D. 2004: "Bringing the European Union Closer To Its Citizens: Conclusions from the Conference." In Blankart, C. / Mueller, D. (eds.) *The Constitution for the European Union*. CESifo Seminar Series. Cambridge, MA: The MIT Press. 237-255.
- Boylan, T. 2007: "The Ratification of the EU Constitution: An American Constitutional Perspective On Why It Failed." *Journal of Political Science*. Vol. 35, No. 1. 125-158.
- Chronowski, N. 2005: *Constitution and Constitutional Principles in the EU*. Budapest: Dialog Campus Kaido.
- Church, C. / Phinnemore, D. 2006: *Understanding the European Constitution*. London: Routledge.
- Cohen-Tanugi, L. 2005: "The End of Europe?" *Foreign Affairs*. Vol. 84, No. 6. November-December. 55-67.
- Corbett, R. / Mendez de Vigo, I., (Rapporteurs). 2008: "Report on the Treaty of Lisbon." European Parliament Session Document A6-0013/2008. Committee on Constitutional Affairs. Brussels.
- Dehousse, R. 2006: "The Unmaking of the Constitution: Lessons From the European Referenda." *Constellations*. Vol. 13, No. 2. 151-164.
- Duff, A. 2008: "True Guide to the Treaty of Lisbon." PDF version available at the web page of the Alliance of Liberals and Democrats at: <http://www.alde.eu/fileadmin/files/Download/True-Guide-NEW.pdf>

- Duff, A. 2006: "Plan B: How to Rescue the European Constitution." *Notre Europe. Studies and Research* No. 52.
At: http://www.notre-europe.eu/uploads/tx_publication/Etud52-en.pdf
- Duff, A. 2005: *The Struggle for Europe's Constitution*. London: The Federal Trust.
- Editorial Comments. 2007: "What Should Replace the Constitutional Treaty?" *Common Market Law Review*. Kluwer Law International. Vol. 44. 561-566.
- European Parliament resolution of 20 February 2008 on the Treaty of Lisbon*. Procedure No. 2007/2286. Document No. A6-0013-2008. Strasbourg, France.
- Feld, L. / Kirchgassner, G. 2004. "The Role of Direct Democracy in the European Union." In Blankart, C. / Mueller, D. (eds.) *A Constitution for the European Union*. Cambridge, MA: The MIT Press. 203-235.
- Grimm, D. 2004: "Treaty or Constitution? The Legal Basis of the European Union After Maastricht." In Eriksen, E. / Fossum, J. / Menendez, A. (eds.) *Developing a Constitution for Europe*. London: Routledge. 69-87.
- Hurrelmann, A. 2007. "European Democracy, the 'Permissive Consensus' and the Collapse of the EU Constitution." *European Law Journal*. Vol. 13, No. 3. 343-359.
- Hylarides, P. 2005: "Voters in the Netherlands Defy the European Constitution." *Contemporary Review*. August. 86-91.
- Joint Study. 2007: "The Treaty of Lisbon: Implementing the Institutional Reforms." Centre for European Policy Studies, EGMONT--The Royal Institute for International Relations, and the European Policy Centre. November. At: http://www.egmontinstitute.be/SD/Joint_Study_complet.pdf
- Kay, J. 2005: "A French No Would Be Best." *Financial Times*. May 10. Online version at: <http://www.johnkay.com/political/389>.
- Kiljunen, K. 2004. *The European Constitution in the Making*. Brussels: Centre for European Policy Studies.
- Lacorne, D. 2001. "European Citizenship: The Relevance of the American Model." In Nicolaidis, K. / Howse, R. (eds.) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*. Oxford: Oxford University Press. 427-437.
- Landy, M. / Teles, S. 2001. "Beyond Devolution: From Subsidiarity to Mutuality." In Nicolaidis, K. / Howse, R. (eds.) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*. Oxford: Oxford University Press. 413-426.
- Longo, M. 2006. "The European Union's Legitimacy." In *Constitutionalizing Europe: Processes and Practices*. Chapter 7. Hampshire, UK: Ashgate Publishing.

- Maduro, M. 2002. "Where to Look for Legitimacy?" In Eriksen, E. / Fossum, J. / Menendez, A. (eds.) *Constitution Making and Democratic Legitimacy*. ARENA Report No. 5. Brussels. 81-110.
- Magnette, P. 2003. "Will the EU be More Legitimate After the Convention?" In Shaw, J. / Magnette, P. / Hoffman, L. / Bausili, A. *The Convention on the Future of Europe: Working Towards an EU Constitution*. London: The Federal Trust.
- Mancini, G.F. 2000: *Democracy and Constitutionalism in the European Union: Collected Essays*. Oxford: Hart Publishing.
- Miller, V. 2007: "EU Reform: A New Treaty or and Old Constitution?" Research Paper 17/64. London: House of Commons Library. At: www.parliament.uk/commons/lib/research/rp2007/rp07-064.pdf.
- Milton, G. / Keller-Noellet, J. 2005: *The European Constitution: Its Origins, Negotiation, and Meaning*. London: John Harper Publishing.
- Mitchener, B. 2003: "Birth of a Nation? As Europe Unites, Religion, Defense Still Stand in the Way," *Wall Street Journal* 11 July. A1, A6..
- Mollers, C. 2004: "The Politics of Law and the Law of Politics." In Eriksen, E. / Fossum, J. / Menendez, A. (eds.) *Developing a Constitution for Europe*. London: Routledge. 129-139.
- Moravcsik, A. 2002: "In Defense of the 'Democratic Deficit': Reassessing Legitimacy in the European Union." *Journal of Common Market Studies*. Vol. 40, No. 4. 603-624.
- Peters, A. 2005: "Referendums on the Constitutional Treaty 2004: A Citizens' Voice?" In Curtin, D. / Kellerman, A. / Blockmans, S. (eds.) *The EU Constitution: The Best Way Forward?* The Hague: TMC Asser Press. 39-57.
- Preuss, U. 1996: "The Political Meaning of Constitutionalism." In Bellamy, R., (ed.) *Constitutionalism, Democracy, and Sovereignty: American and European Perspectives*. Aldershot: Avebury Press. 11-27.
- Rakove, J. 2003: *The Federalist: The Essential Essays*. Boston: Bedford/St. Martins.
- Schmitter, P. 2004: "Is Euro-Federalism the Solution or the Problem? Tocqueville Inverted, Perverted, or Subverted?." In Dobson, L. / Follesdal, A., (eds.) *Political Theory and the European Constitution*. London: Routledge.
- Schwarze, J. 2007: "The Treaty Establishing a Constitution for Europe: Some General Reflection on its Character and Prospects for Ratification." In Albi, A. / Ziller, J. (eds.) *The European Constitution and the National Constitutions: Ratification and Beyond*. The Netherlands: Kluwer Law International. European Monographs. 54. 203-214.

- Shaw, J. 2005: "The Constitutional Treaty and the Question of Ratification: Unscrambling the Consequences and Identifying the Paradoxes." In Xuereb, P., (ed.) *The Constitution for Europe: An Evaluation*. Valletta, Malta: European Documentation and Research Centre. 1-33.
- Steinmo, S. 2007: "The Democratic Dilemma." *EUI Review*. Florence: The European University Institute. Winter. 3-5.
- Taggart, P. 1998: "A Touchstone of Dissent: Euroskepticism in Contemporary Western European Party Systems." *European Journal of Political Research*. Vol. 33, No. 3 363-388.
- Tanchev, E. 2004. "Wine -Bottling Legitimacy or EU Legitimation by a Written Constitution." In Curtin, D. / Kellerman, A. / Blockmans, S. (eds.) *The EU Constitution: The Best Way Forward?* The Hague: TMC Asser Press. 105-144.
- Walker, N. 2006: "Big 'C' or Small 'c'?" *European Law Journal*. Vol. 12, No. 1. 12-14.
- Weiler, J.H.H. 2005: "On the Power of the Word: Europe's Constitutional Iconography." In Curtin, D. / Kellerman, A. / Blockmans, S. (eds.) *The EU Constitution: The Best Way Forward?* The Hague: TMC Asser Press. 3-20.
- Weiler, J.H.H. 1999: *The Constitution of Europe*. Cambridge: Cambridge University Press.