Does the Treaty of Lisbon Need

A European Version of the *Federalist Papers*?

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Introduction

There has been no lack of analysis and evaluation concerning the failure of the Treaty Establishing a Constitution for Europe (hereafter 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. Proponents hope that the new Treaty will be ratified in the 27 member states by the end of 2008 to have its provisions in place by the mid-2009 elections for the European Parliament and Commission.

However, this 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 dénouement of the TCE. Not all of these changes are positive. Further, an examination of what has changed in the text must be complimented by a survey of what has not changed. The defeat of the TCE is 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.

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 in name, content, and purpose. Schwarze (2007) argues that the TCE was simultaneously a treaty and a constitution. He states, “The expression being used is not only a matter of terminology-- it is a central theme

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\(^2\) 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 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. 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.”

Besselink (2007) 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.”

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.”

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.” However, Weiler adds an important qualifier to this claim. The problem is not so simple that a removal of the “C-word” would have

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3 Schwarze, 2007, 204.
5 Ibid.
6 Weiler, In Curtin, Kellerman, and Blockmans, eds. 2005, 3.
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.7

Scholarship has helped define the contours of the identity dilemma,8 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,9 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 (i.e., the ‘clean slate’), 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

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7 Ibid., at 6-7.
8 An excellent examination of the distinction between a treaty and a constitution, and how each is located within the EU legal structure, can be found in Grimm, 2004, 77-85. Mollers further develops the concept of a constitutional vocabulary and places its definition and application in historical, descriptive, and normative contexts. Mollers, 2004, 129-130.
9 See also Preuss, In Bellamy, Ed. (1996) for his fine comparative survey of the American, British, and French constitutional traditions. Pages 11-27, with particular attention to pages 18-23.
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” Member States to step away from the ratification process and avoid “no” votes in their own realm.

The length and detail of the document added to the TCE’s identity crisis. 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 selectively attack. In a certain sense, it was a form of political Rorschach test 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

10 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.
11 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.
12 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.
13 Ibid., at 131. The Rorschach test, commonly known at 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.
could read into them what they liked.”14 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.15 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.16 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.17

Leading up to the French and Dutch referenda,18 the government-sponsored “yes” campaigns could not overcome the perception that the constitution would lock in trends and developments with deeply negative consequences. Peter Hylarides’ survey of the Dutch referendum noted that, “The first opinion 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.

14 Bellamy, 2006. 185.
15 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.
16 See Milton and Keller-Noellet, 2005, 114, contending that “Much of this debate has been poorly informed, and frequently characterized by prejudice. Like many such debates it has become polarized, often ending up more as a reflection of internal political division than a serious attempt to grapple with the real issues.”
18 For an excellent overview of the ratification process and the role of referenda, see Shaw, 2005, 1-33.
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.”

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.”

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.” For European citizens, the TCE was a cipher.

As of early 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? It may not, as the Treaty of Lisbon may slowly, quietly pass through one affirming parliamentary vote after another, and secure ratification. It may be, as a recent study concluded, that “governments and public opinion have lost any appetite they

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19 Hylarides provides an excellent overview of the politics and economic issues leading up to the May, 2005 referendum in the Netherlands. 2006, 89-90.
20 Cohen-Tanugi, 2005, 56.
may have had for institutional debate and constitutional reform.” 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 popular involvement and popular approval as a more transparent, democratic, and legitimate process of ratification? As the next two sections will explore, democratic accountability and democratic responsiveness have been both won and lost in the framing and promotion of the Lisbon Treaty.

(Re-)Framing the New 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,

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and that produced a more complicated and less readable text. 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. 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.” 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. 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.

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23 Member of the European Parliament from the United Kingdom, and Member of the Constitutional Affairs Committee.
24 Member of the European Parliament from Spain, and Member of the Constitutional Affairs Committee.
26 Ibid.
27 Ibid., at 10.
28 And most Members of Parliament are proponents. The report on the Treat of Lisbon passed by a vote of 525 for, 115 opposing, with 29 abstentions.
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.”

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.”

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.” 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.

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30 Ibid., at 6.
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. “In 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.”

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. 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 duplication 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

31 Ibid., at 6-7.
32 For an extended treatment of the institutional balances that have developed over time and are now codified in both the TCE and ultimately by the Treaty of Lisbon, see Chronowski, 2004, 77-84.
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.”

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. And, unless these provisions are discussed and presented within the broader context of the other two areas, it will be easy for observers to conclude that too much is being forfeited or given away within the Treaty. The French and Dutch referenda debates, discussed above, provide a cautionary tale for those who trust that these provisions will be self-explanatory. Much can go very wrong, very quickly. And, readers, scholars, observers, and the mildly curious will need to factor in the key changes made in the Treaty of Lisbon, and how these changes may impact the enumerated list above.

In certain areas, the changes made in the Treaty of Lisbon will make it more difficult to understand and discuss. Of signal importance, the Treaty of Lisbon is now an amending treaty, and will 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. 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

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33 Corbett and Mendez de Vigo, 2008, 8.
34 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 Phinnemore, 2006.
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.” 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. Finally, the use of the title “Foreign Minister,” a post and designation with further unifying connotations, has been replaced by the less definitive and threatening 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 “Ioannina Compromise”) 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.”

36 See, in this regard, Miller, 2007, 35.
37 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
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 Valery 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.”

Perhaps this is one of the reasons why EU leaders are conducting such a quiet effort to ratify the Treaty of Lisbon. 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 not clear that this strategy is a sound one.

**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.

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to the TCE, and therefore is a constitutional wolf in sheep’s clothing. To the extent that citizens in the various member states are paying attention, and certain interest groups are pointing fingers of accusation, the current “quiet” strategy may backfire.

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. In 2004-2005, a number of key member states (Spain, France, Netherlands) agreed to take the ratification question to the people through referenda. The United Kingdom had also promised a referendum, and Ireland was bound to do so as a national constitutional requirement. 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. 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. A number of 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

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40 For a discussion of the role of referenda in addressing the legitimacy problem, see Peters, 2005, 39-57.
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. 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.”

The 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 by totally different in form, that we are now submitting to national ratifications?41

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?” Thus far, the default answer has been yes.

Closing the legitimacy gap through the ratification process is no more. 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.

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

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43 Ibid., at 147.
efficiency, institutional responsiveness, and substantive rights. Yet, this improved and more “democratized” Treaty of Lisbon may run aground, suffering the same fate as the TCE, due to the claim that it is a Constitution-in-all-but-name and is being surreptitiously moved toward ratification in ways that bypass more democratic processes. 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 (and, by the way, neither was the TCE), that it therefore does not need intense public scrutiny, and that it requires only parliamentary review and approval. 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.44

This new approach virtually ignores 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.45

This strategy may succeed. However, in order to do so, 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.

45 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.
This criticism, whether couched as a statistic (the 90% identical content claim) or as a metaphor (the wolf in sheep’s clothing accusation) could have a deciding impact on the ratification process. Vivid images and easily-remembered statistics can be very influential. Note the statistic that the Dutch were the highest contributors to the European Union (as a percentage of GDP) leading up to the mid-2005 ratification vote in the Netherlands. The cost-benefit calculation was an easy one for voters to make. Note again the image (or specter) of the Polish plumber, representing to the French an assault on their jobs and employment security as a flood of low-cost labor would come to France seeking work as a consequence of EU integration. Will the 90% statistic or the constitution-in-disguise image resonate with enough citizens to bring about demands for more public discussions of the text and for referenda for approval? And, might one of those referenda result in a process-stymieing “no” vote? Despite the highest hopes and the best planning, the TCE’s defeat left its proponents surprised and unsure of what to do next. There was no “Plan B.” The recent past has demonstrated that symbolism can be more influential than substance, and that rules can determine outcomes.

My “American” Proposal: 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,46* 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 *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.”47 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 37-85.48

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

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46 The pseudonym was used in honor of Publius Valerius Publicola, a Roman consul of the 6th century BC, meant “friend of the people.”
47 Rakove, 2003, 2.
48 Ibid., at 25.
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. If the United Kingdom, Poland, Ireland, and Denmark— or a group of similar-sized states— reject the Treaty of Lisbon, 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-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 became a common text and exposition to be used in the state 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.” (Italics mine)49 The

49 Ibid., at 26.
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 serious 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 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. A group of “framers” 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. 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 product.

50 In the interests of disclosure, I should also add that I 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 bureaucrats about the Treaty of Lisbon. It was during this time that I looked at the Report on the Treaty of Lisbon as a prototype of my proposed “Lisbon Papers.”
Plus, if a project such as this has any hope of succeeding, it must happen quickly, as the ratification process has already begun. 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 it its citizens. Toward those ends, the Declaration concluded that simplification was essential. 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.

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 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.” Such an effort did not occur in 2005. It should be considered in 2008.

51 A handful of Member States have ratified the Treaty. See Appendix A.
52 See the text of the Laeken Declaration at: http://www.saxonbooks.co.uk/laeken_declaration.htm.
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.54

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.55

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.

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

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54 Duff, 2006, 12. For an expanded treatment of Mr. Duff’s assessment of the constitutional process and his proposals for constitutional reform, see Duff, 2005.
55 Ibid., at 13.
Constitution did not have the luxury of advance preparation time. 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.

The European Union is not lacking for talent, source material, or the administrative apparatus to make a similar project happen. 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 that the square peg of European constitutional development be jammed into the round hole of the American experience. 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.

Brussels, Belgium
March 30, 2008

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56 For a chart showing the dates, authorship, and content of each *Federalist* essay, see the constitution.org website at: http://www.constitution.org/fed/federa00.htm.
Appendix A: Ratification of the Lisbon Treaty.

Completed Ratification Dates in Bold Print

<table>
<thead>
<tr>
<th>Member State</th>
<th>Ratification Procedure</th>
<th>Date</th>
<th>Majority required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Parliament</td>
<td>June 2008</td>
<td>2/3 majority in both chambers</td>
</tr>
<tr>
<td>Belgium</td>
<td>Parliament</td>
<td>Summer 2008</td>
<td>Simple majority in 7 regional &amp; federal chambers</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Parliament</td>
<td>Completed 21 March 2008</td>
<td>Simple majority</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Parliament</td>
<td>Unknown</td>
<td>Absolute majority (presidential veto)</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Parliament</td>
<td>Unknown</td>
<td>Simple majority (if 'no transfer of powers'), or else 3/5 in Parliament &amp; Senate</td>
</tr>
<tr>
<td>Denmark</td>
<td>Parliament</td>
<td>June 2008</td>
<td>Simple majority (provided over 50% of MPs present)</td>
</tr>
<tr>
<td>Estonia</td>
<td>Parliament</td>
<td>May 2008</td>
<td>Simple majority</td>
</tr>
<tr>
<td>Finland</td>
<td>Parliament</td>
<td>Autumn 2008</td>
<td>2/3 majority</td>
</tr>
<tr>
<td>France</td>
<td>Parliament</td>
<td>Completed 6-7 Feb. 2008</td>
<td>Constitutional amendment, simple majority in both chambers and 3/5 in Congress</td>
</tr>
<tr>
<td>Germany</td>
<td>Parliament</td>
<td>May-July 2008</td>
<td>Simple majority in both chambers</td>
</tr>
<tr>
<td>Greece</td>
<td>Parliament</td>
<td>March 2008</td>
<td>Simple majority</td>
</tr>
<tr>
<td>Hungary</td>
<td>Parliament</td>
<td>Completed 17 Dec. 2007</td>
<td>2/3 majority</td>
</tr>
<tr>
<td>Ireland</td>
<td>Referendum</td>
<td>June 2008</td>
<td>Simple majority in Parliament &amp; over 50% of vote in popular referendum</td>
</tr>
<tr>
<td>Italy</td>
<td>Parliament</td>
<td>Unknown</td>
<td>Simple majority in both chambers</td>
</tr>
<tr>
<td>Latvia</td>
<td>Parliament</td>
<td>April 2008</td>
<td>Simple majority in two readings</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Parliament</td>
<td>Unknown</td>
<td>Simple majority</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Parliament</td>
<td>June 2008</td>
<td>Simple majority</td>
</tr>
<tr>
<td>Malta</td>
<td>Parliament</td>
<td>Completed 28 Jan. 2008</td>
<td>Simple majority</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Parliament</td>
<td>Autumn 2008</td>
<td>Simple majority in both chambers</td>
</tr>
<tr>
<td>Poland</td>
<td>Parliament</td>
<td>February 2008, but vote was</td>
<td>Simple majority (if 'no transfer of powers'), or else 2/3 majority of over</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Country</th>
<th>Parliament</th>
<th>Date</th>
<th>Majority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portugal</td>
<td>Parliament</td>
<td>23 April 2008</td>
<td>Simple majority</td>
</tr>
<tr>
<td>Romania</td>
<td>Parliament</td>
<td><strong>Completed 4 Feb. 2008</strong></td>
<td>Simple majority</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Parliament</td>
<td>Postponed indefinitely</td>
<td>3/5 majority</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Parliament</td>
<td><strong>Completed 29 Jan. 2008</strong></td>
<td>2/3 majority</td>
</tr>
<tr>
<td>Spain</td>
<td>Parliament</td>
<td>2nd half of 2008</td>
<td>Absolute majority (Congress) &amp; simple majority (Senate)</td>
</tr>
<tr>
<td>Sweden</td>
<td>Parliament</td>
<td>November 2008</td>
<td>Simple majority</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Unknown</td>
</tr>
</tbody>
</table>

*Source: European Policy Centre*
Appendix B: Ratification Timetable for the US Constitution.

<table>
<thead>
<tr>
<th>Date</th>
<th>State</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>December 7, 1787</td>
<td>Delaware</td>
<td>30</td>
<td>0</td>
</tr>
<tr>
<td>December 12, 1787</td>
<td>Pennsylvania</td>
<td>46</td>
<td>23</td>
</tr>
<tr>
<td>December 18, 1787</td>
<td>New Jersey</td>
<td>38</td>
<td>0</td>
</tr>
<tr>
<td>January 2, 1788</td>
<td>Georgia</td>
<td>26</td>
<td>0</td>
</tr>
<tr>
<td>January 9, 1788</td>
<td>Connecticut</td>
<td>128</td>
<td>40</td>
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<tr>
<td>February 6, 1788</td>
<td>Massachusetts</td>
<td>187</td>
<td>168</td>
</tr>
<tr>
<td>April 28, 1788</td>
<td>Maryland</td>
<td>63</td>
<td>11</td>
</tr>
<tr>
<td>May 23, 1788</td>
<td>South Carolina</td>
<td>149</td>
<td>73</td>
</tr>
<tr>
<td>June 21, 1788</td>
<td>New Hampshire</td>
<td>57</td>
<td>47</td>
</tr>
<tr>
<td>June 25, 1788</td>
<td>Virginia</td>
<td>89</td>
<td>79</td>
</tr>
<tr>
<td>July 26, 1788</td>
<td>New York</td>
<td>30</td>
<td>27</td>
</tr>
<tr>
<td>November 21, 1789</td>
<td>North Carolina</td>
<td>194</td>
<td>77</td>
</tr>
<tr>
<td>May 29, 1790</td>
<td>Rhode Island</td>
<td>34</td>
<td>32</td>
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Bibliography


