

# The Rise and Fall of the European Constitution

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## Introduction

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The Draft European Constitution could have been, and almost was, one of the defining constitutional events of the early part of the twenty-first century. It was certainly amongst the most ambitious. It drew elements from the constitutional traditions of the nation state, and applied these features to the European Union. Though the extent of its ambitions is debated in this volume, it can be seen both as an attempt to constitutionalise the Union, re-framing that project in the language of the state and as an attempt to stretch the boundaries of constitutionalism itself, re-imagining that concept to accommodate the *sui generis* European Union. The (partial) failure of this project is the subject of this collection of essays.

The launch of the project of the European Constitution is often considered to be the speech given by Joschka Fischer, the then German Foreign Minister, at Humboldt University on 12 May 2000, almost exactly 50 years after Robert Schuman, the then French Foreign Minister, delivered his famous Schuman Declaration on 9 May 1950.<sup>1</sup> While Schumann had insisted that ‘Europe will not be made all at once, or according to a single plan’,<sup>2</sup> Fischer, speaking in a private capacity, presented a grand plan for ‘the completion of European integration’.<sup>3</sup> He wanted a federation based on a constituent treaty, with a European Parliament and a European government grounded in a division of sovereignty between those institutions and the institutions of the nation state. Fischer was aware of the need to placate the Eurosceptics ‘on this and the other side of the Channel’, insisting that it was a long-term vision, and noting that there were ‘procedural and substantive problems’ which would need to be resolved before a federation could be realised.<sup>4</sup> In particular, Fischer argued that ‘it would be an irreparable mistake in the construction of Europe if one were to try to complete political integration *against* the existing national institutions and traditions rather than by involving them. Any such endeavour would be doomed to failure ...’.<sup>5</sup> Instead, his recommendation

<sup>1</sup> J Fischer, *From Confederation to Federation: Thoughts on the Finality of European Integration* (London, Federal Trust, 2000); P Norman, *The Accidental Constitution* (Brussels, Eurocomment, 2005) 12–14.

<sup>2</sup> M Burgess, *Federalism and the European Union: The Building of Europe 1950–2000* (London, Routledge, 2000) 64–65.

<sup>3</sup> Fischer, *From Confederation to Federation* (n 1) 9.

<sup>4</sup> *Ibid.*, 16.

<sup>5</sup> *Ibid.*, 17, emphasis added.

## 2 Introduction

was that the federal project would be workable '[o]nly if European integration takes the nation states along with it ... only if their institutions are not devalued or even made to disappear ...'.<sup>6</sup> The tensions between the push towards federalisation and the conflicting sovereignties of the Member States, tensions that were later to be played out in the Convention and the referendums on the Draft Constitution, were prefigured in Fischer's speech.

A few short months later, in December 2000, the Nice Intergovernmental Conference called for 'deeper and wider debate about the future of the European Union', a call that was formalised in Declaration No 23 annexed to the Treaty of Nice, which was signed on 26 February 2001.<sup>7</sup> The Declaration set out the aims of the upcoming Laeken European Council meeting, enjoining it to agree on 'appropriate initiatives' for continuing that debate, highlighting the need for a process which would address the allocation of competences in accordance with the principle of subsidiarity, the status of the Charter of Fundamental Rights, the need for simplification of the Treaties, and to reconsider the role of national parliaments.

Responding to these calls, the Laeken Declaration of 15 December 2001 announced the establishment of a Convention on the Future of Europe which would move 'towards a Constitution for Europe'.<sup>8</sup> The challenges facing the European Union were identified as (1) how to bring citizens, especially the young, closer to the European project; (2) how to organise politics after enlargement; and (3) how to develop the Union 'into a stabilising factor and a model in the new, multipolar world'. However, the mandate of the Convention began with a far more modest desire for simplification: there were too many treaties and too many powers and policies, the Declaration argued, and thus, for the sake of transparency, simplification was 'essential'. Immediately following this argument, however, the Declaration calls into question the distinction between the European Communities and the Union and the three pillars, moots the possibility of a basic treaty (with its own amendment and ratification procedures) and other treaty provisions, and raises the prospect of including the Charter in the Treaties and acceding to the European Convention on Human Rights, before going on to ask, with seeming restraint 'whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text'.

The Laeken Declaration conceived that the Convention on the Future of Europe should debate 'as broadly and as openly as possible' in respect of the Union's future development and to identify 'various possible responses'. The Declaration noted that the European Council appointed Mr Valéry Giscard d'Estaing as Chairman of the Convention and Mr Giuliano Amato and Mr Jean-Luc Dehaene as Vice-Chairmen. In addition, the Convention was to be composed of 15 representatives

<sup>6</sup> Ibid, 17.

<sup>7</sup> Norman, *The Accidental Constitution* (n 1) 16–18.

<sup>8</sup> 'Presidency Conclusions of the Laeken European Council' EU Bull, No 12, Annex 1 (2001); Norman (n 1) 18–23.

of each of the Heads of States or national governments (one from each Member State), as well as 30 representatives of national parliaments (two from each Member State), 16 members of the European Parliament and two representatives of the Commission. The accession candidates<sup>9</sup> were to be represented in the same way as existing Member States (one government representative and two national parliament representatives) and allowed to freely participate in the discussions, without having the power to block any emerging consensus. Within this cohort of 106 Convention delegates, there was an inner circle, the Praesidium, which was composed of the Chairman and Vice-Chairmen as well as nine of the 106, the nine consisting of the representatives of the governments who held the Presidency of the European Council during the lifetime of the Convention, two national parliament representatives, two European Parliament representatives, and two Commission representatives. Three representatives of the Economic and Social Committee and three representatives of the European social partners, along with six Committee of the Regions representatives, and the European Ombudsman, were invited as observers. International experts were to be called to assist the Convention in its work as necessary. The inaugural meeting of the Convention was on 1 March 2002 and proceedings were to be completed after one year.<sup>10</sup>

Three of the contributors to this volume were directly involved in the Convention process. Giuliano Amato held the position of Vice-Chairman of the Constitutional Convention. Gisela Stuart was one of the UK parliamentary representatives to the Convention who was also a member of the Praesidium. Kalypso Nicolaidis, who served as chair of an international group of expert advisors to the Convention and as 'sherpa' to the Greek Foreign Minister before and during the 2003 Greek Presidency, which was the last Convention Presidency.

Following the Convention, the text was then reviewed by an Intergovernmental Conference, which completed its work in June 2004.<sup>11</sup> The IGC made a number of significant changes to the document, though it remained identifiably the work of the Convention. In the process, some of the provisions were renumbered, and two versions of numbering can be found in the literature: first, the 2003 text produced by the Convention, second, the 2004 text agreed by the Intergovernmental Conference.

A number of states either agreed to hold, or were legally required to hold, referendums on the Draft Constitution. In Spain and Luxembourg, the Draft Constitution was passed, but the votes in France and the Netherlands went against the proposal.<sup>12</sup> Proposed referendums in other countries, including the United Kingdom, were abandoned, as the Member States suspended the processes of ratification. In the aftermath of the French and Dutch referendums on 29 May and

<sup>9</sup> Bulgaria, Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia and Turkey.

<sup>10</sup> Norman (n 1) 19–21; PP Craig, *The Treaty of Lisbon* (Oxford, Oxford University Press, 2010) 1–2.

<sup>11</sup> Norman (n 1) ch 18; Craig, *The Treaty of Lisbon* (n 10) 16–20.

<sup>12</sup> J Dinan, *Europe Recast* (Basingstoke, Palgrave, 2014) 307–08.

#### 4 Introduction

1 June 2005, respectively, there was significant disquiet about why the referendums failed and, within weeks, a 'period of reflection' was announced following the European Council meeting in Brussels in June 2005.<sup>13</sup> Jean-Claude Juncker, the current President of the Commission, spoke then in his capacity as President of the European Council endorsing the position of those Member States who wished to suspend their ratification plans given the unstable position of the Constitution, saying that:

I would like ... to have now a more extended period of reflection, explanation, debate and, if necessary, controversy throughout the Member States ... We need to discuss Europe and I would like the institutions of the European Union, the European Parliament, the Council, the Commission, the Member States, civil society, trade unions, political parties and national parliaments to take part in this vast debate. ... I would like the Commission, which is the guardian not only of the treaty, but also, and above all, of the spirit of the treaty and of the European ambition, to be at the centre of this debate, not to give the impression that everything is inspired and dominated by Brussels, but to provide us with a common thread characterised by wisdom and ambition, in this national and Europe-wide debate.

In political terms, the period of reflection began with the convening of the group of 'wise men', otherwise known as the Amato group, in September 2006 and ended with the decision to 'abandon' the constitutional project in June 2007,<sup>14</sup> a conclusion which paved the way for the signing of the Lisbon Treaty on 13 December 2007. The Lisbon Treaty contained much of the substance of the Draft Constitution, though with many of the more ostentatious resemblances to state constitutions removed.

Within academia, however, it is not clear that the period of reflection ever properly started. With a number of important exceptions, there is relatively little scholarship reflecting seriously and carefully on the failure of the Draft Constitution and suspension of the constitutional project, rather than simply the failure of the French and Dutch referendums. The episode of the rise, fall and partial resurrection of the Draft Constitution repays study at a number of levels. At the most abstract level, it speaks to constitutionalism in general. It raises questions about the nature and purpose of constitutions, and their relationship with the state. Did the labelling of the document as a 'constitution' have any significance, and, if it did, was this an attempt to import the structures of the state into the European project? As a number of the contributors argue, this could be seen as a challenge to the unique nature of the European project, a political structure that some see as having transcended the state tradition and others see as complementing that tradition. More specifically, what lessons are there to be learned from

<sup>13</sup> Full text of Jean-Claude Juncker's speech, current President of the Council of the European Union, at the European Parliament, on the outcome of the Luxembourg Presidency and the European Council held on 16–17 June, Brussels, 22 June 2005 available at [www.eu2005.lu/en/actualites/discours/2005/06/22jclj-pe/index.html](http://www.eu2005.lu/en/actualites/discours/2005/06/22jclj-pe/index.html).

<sup>14</sup> German Presidency Conclusions, 21–22 June 2007.

the abandonment of the European Constitution and the inclusion of so much of its substance in the Lisbon Treaty? Did the decision to include so much of the Draft Constitution in Lisbon show sufficient respect for the votes of the French and Dutch peoples? Is there a case to be made that the rejection of the Constitution undermined the position of the European project more generally or, conversely, in the light of the Eurozone crisis, the immigration crisis and now the Brexit crisis, that the need for a constitution is greater than ever? If we once defended the theoretical possibility and sociological plausibility of a European Constitution existing alongside national constitutions, do we now believe that this view needs refinement, or do we contend that the constitutional moment simply had not arrived? These are conversations that need to be engaged in; the rejection of the Draft Constitution is not an episode that can simply be forgotten. Since there was such a heavy expense of academic time and expertise in the process of rethinking the traditional preconditions for a constitution in order to accommodate the idiosyncrasies of supranational constitutionalism in the first place, and given that that scholarship was characterised by great intellectual creativity, it seems that reflection on the lessons to be learned would be a worthwhile process. The contributions to this collection shatter that silence by engaging in the kind of explanation, debate and controversy that Juncker imagined. Our hope is that, in doing so, they revive a conversation that should never have been suspended.

The book opens with a contribution from one of the co-chairs of the Convention, Giuliano Amato. Amato recalls that the Convention was established in the context of the entry into force of the Euro and the imminent enlargement of the Union to the east, on the basis of the felt need for the Member States to agree a form of ‘deepening’ that would accompany that ‘widening’ in terms of the scope and membership. Yet despite the need for deepening, he notes that the Laeken Declaration did not give the Convention members a strong mandate to draft a constitution but only the much weaker invitation to consider possible avenues for the Union’s future. The decision to write a Constitution was proposed by Chairman Giscard d’Estaing but it was one which, Amato notes, the Convention members were happy to endorse. Nonetheless, the Convention witnessed the perennial tension between those who wished to proceed to constitutional *finalité* and those who opposed federalisation; the desire to deliver a Constitution was ultimately frustrated such that the document was the compromised Constitutional *Treaty*, which Amato maintains fell far below the goals of Joschka Fischer’s speech. Considering the current situation, and drawing on the functionalist perspective, Amato imagines an alternative series of thematic conventions each with mandates for institutional reform to be agreed sector by sector, a multi-speed Europe in which clusters of Member States could progress integration in monetary and fiscal matters but also security, defence and immigration, and only then a Convention to articulate a common framework for this ‘multi-cluster Europe’.

The decision to use the label ‘constitution’ was controversial at the time, and the significance of this word remains a source of debate. Dieter Grimm reflects on implications of choosing to approach the reforms of the Treaties through a

purportedly constitutional document. As Grimm contends, at least one of the motivations for the invocation of the word was the hope that some of the lustre of state constitutions would be cast on the European Union; the label would bring with it some of the legitimating function it plays at the national level. But, Grimm argues, there is a crucial difference. Whilst state constitutions are grounded, more or less convincingly, in the will of their people, the European Union is grounded in the decisions of its Member States. There is no 'European society' that has produced the Treaties. So was the Draft Constitution truly a constitution? Crucially, in the Draft Constitution the power to amend the document remained in the hands of the Member States; constitutional power had not shifted, and the document remained a treaty, even if given the title of a constitution. Furthermore, Grimm argues Europe's lack of a constitution in the state sense has led to a failure to divide constitutional provisions from ordinary legislation. There is an 'over-constitutionalisation' of the European project, with the structures of the Treaties rendering it hard for Member States to change European law where they believe too much power has shifted to the Union level. This over-constitutionalisation insulates many areas of European activity from the political supervision of the Member States and the European Parliament. Reconfiguring the Treaties to allow a distinction to be drawn between a small number of constitutional norms and a far larger number of ordinary laws – which would be easier for the politically accountable parts of the European project to modify – might help fill this legitimacy gap.

Kalypso Nicolaidis provides an insider's view of the workings of the Convention and subsequent referendums. Starting with the pressures that led to the Convention, Nicolaidis then examines the operation of that body and explores the tensions within the Convention, in particular the stresses that emerged between the smaller and larger countries. Nicolaidis is sharply critical of the leadership shown by Giscard d'Estaing, arguing that he was unwilling to accommodate the claims of smaller states, and, more generally, failed to run the Convention in an inclusive manner. The failure of the Convention to engage with those outside of the Chamber may provide one of the explanations for the rejection of the Draft Constitution by the peoples of France and the Netherlands. Whilst Nicolaidis concedes that these referendum campaigns were dominated by local issues – with the merits of the Draft Constitution pushed into the background – she contends that this lack of interest was, itself, a product of the failure of the Convention to involve the peoples of Europe. When the time came to vote on the Draft Constitution, few voters cared much about that document, and the referendums became dominated by other issues.

The failure of the Dutch and French peoples to engage with the Draft Constitution during the referendum debates is also considered by Paul Craig, but he draws a different lesson. For Craig, the Convention should not be regarded as a waste of effort. The bulk of the rules produced by that body found a home in the Treaty of Lisbon and, given that the reasons for the rejection of the Draft Constitution in the Dutch and French referendums turned on local issues, it would be a mistake to regard these aspects of the Draft Constitution as having been

rejected by the Dutch and French peoples. Craig identifies a number of what he believes to be misconceptions about the Convention process. First, as he demonstrates, it is inaccurate to claim that the Draft Constitution was forced on Member States; in contrast, the process of the Convention was both animated by and dominated by the representatives of the Member States. Second, and contrary to some of the other contributors to this volume, he argues that the Draft Convention was not a step towards a federal Europe and did not embody statist ambitions. According to Craig, there is no reason why the label of a 'constitution' should be accorded this significance, and there was little of substance in the Draft Constitution that was truly novel; indeed, most of the new provisions in the Draft Constitution clarified and limited the competences of the Union, and enhanced Member State control of its institutions.

The Draft Constitution was an attempt to reshape the nature of the European Union. Erin Delaney and Nick Barber each examine that nature in light of the attempt to recast it. Delaney reflects on the nature of federalism and the ways in which the development of the European Union has moved that entity towards a federal structure. Starting with an examination of the philosophy of the founders of the European project, in particular Jean Monnet, Delaney examines the strategy of 'incremental federalism'. Rather than starting with an explicitly federal constitutional structure, incremental federalism aspired to move towards federalism in gradual steps – with social integration building on economic integration, and political integration then building on social integration. But, Delaney argues, there are limits to what can be achieved through this gradual process towards federation. The democratic structures needed to legitimate the project require a formal constitutional change, the production of an explicitly federal constitution, which cannot be brought about incrementally. For Delaney, the Convention and the Draft Constitution were the inevitable outcomes of incremental federalism, and – if Europe continues down this constitutional path – something like this process must, one day, be repeated.

Barber's chapter examines the contrast between federations and confederations, contending that, prior to the Convention, the European Union contained elements of each form of ordering. This permitted what Barber styles a 'Grand Bargain' between two rival visions of Europe – a vision of Europe as a federal state, and a vision of Europe as a new form of polity, a closely linked collection of sovereign states. The Draft Constitution unsettled this bargain by pushing the Europe towards the federal model. Barber argues this was unnecessary and counterproductive, dividing supporters of the European project by forcing upon them a decision that did not yet need to be made. Following the rejection of the Draft Constitution by the peoples of France and the Netherlands, the subsequent inclusion of much of the substance of that document in Treaty of Lisbon may have further weakened Europe's democratic credibility, giving the appearance that the elites of Europe were willing to ignore the results of these referendums.

The relationship between the Draft Constitution and the Treaty of Lisbon is a central theme in several of the contributions to the volume. Stephen Weatherill

identifies ‘competence creep’ as those situations in which the European Union acts outside the scope of the powers conferred on it by the Treaties or where it unnecessarily interferes with decisions that should have been left to the Member States. Competence creep is, in part, the result of the vagueness of the rules that empower the Union, and the corresponding weakness of those rules, such as proportionality and subsidiarity, that are intended to regulate the exercise of these powers. The result is that the Union may sometimes act, or appear to act, beyond its proper reach, harming its legitimacy in the eyes of its people. The Draft Constitution was, in part, an attempt to tackle the problems raised by competence creep by clarifying the powers possessed by the Union. Weatherill compares the Lisbon Treaty and the Draft Constitution and concludes that, in substance, the two documents are very similar. The decision to enact the Lisbon Treaty without fresh referendums in France and the Netherlands (and those other states promised a referendum on the Draft Constitution) deepened alienation from the European project. Weatherill concludes by considering ways in which the European Union could be made more politically accountable. Like Grimm, Weatherill contends that too many areas of European activity have become insulated from political control. First, competence creep could be tackled by permitting change through a combination of majority voting and opt-outs; this would allow for a clear articulation of the rules governing the Union. Second, it could be made easier for the political parts of the Union to reconsider rulings of the European courts – enabling surprising decisions to be reversed.

One of the most celebrated aspects of the Draft Constitution was the Charter of Fundamental Rights, which although not retained in the text of the Treaty of Lisbon, was given legal recognition therein. Dorota Leczykiewicz argues that the inclusion of the Charter was an attempt to ‘constitutionalise’ the Union, tying it to deeper constitutional values. Examining the Charter’s content and application, Leczykiewicz argues that it has failed in this aspiration, due to flaws in the text and in judicial interpretation. As a result, the Charter has done little to constrain the expansionist tendencies of the Court of Justice and instead broadened the Court’s capacity to render national laws incompatible with EU law. Leczykiewicz points out that while the Court has interpreted the field of application of EU law broadly (in the *Fransson* judgment), it has interpreted the field of application of national constitutional law narrowly (in the *Melloni* judgment). Moreover, when the vindication of fundamental rights and the effectiveness of EU law come into conflict, the Court has consistently put its weight behind the latter rather than the former. All in all, as Leczykiewicz demonstrates, the Charter and its use by the Court are failing to produce the sort of limited government and the guarantees of individual liberties that are the hallmarks of a truly constitutional order.

Perhaps ‘the most prominent casualty’ of the abandonment of Constitutional Treaty argues Gunnar Beck in his chapter, was the primacy clause, which was subsequently relegated to a declaration annexed to the Treaty of Lisbon. On one reading, it is surprising that such a fuss should have been made of a clause that codified the existing constitutional position which had been laid down by the Court of

Justice 40 years previously. As the chapter argues, it is because the primacy claim has always been controversial that its codification, *viz* entrenchment, constituted a distinct threat to the self-understanding of (some of) the national constitutional or supreme courts of the Member States. Nonetheless, the chapter also demonstrates that the line of cases handed down by the German Federal Constitutional Court from the *Solange 1* case in 1974 through to the *Honeywell* decision in 2010 and the Court's 2016 response to the Court of Justice's preliminary reference in relation to the Outright Monetary Transactions programme are testament to the fact that the German Court has accepted, in all but principle, that it is subservient to the Court of Justice. This position is then contrasted with that of the Danish Supreme Court, in the *Ajos* case in December 2016, which asserted the non-application of European law in the face of a conflicting national measure. All in all, Beck concludes that the idea of a European Constitution is likely to be resurrected in order to deal finally with this vexed question of *Kompetenz-Kompetenz*.

The next two chapters aim, in different ways, to situate the Constitution in a wider philosophical and political context. Neil Walker's chapter presents the idea that the Constitutional Treaty was (only) an overture which sets the scene for a more fulsome performance which has yet to be heard. While, the current climate might seem bleak, since the Union has faced the sovereign debt crisis followed by the migration and security crisis followed by the Brexit crisis in the last decade, Walker nonetheless makes the case that the present moment may be a moment of ripeness for constitutionalism because, as a result of those various crises, 'the constitutional register' has become more familiar and more indispensable. In conceptual terms, Walker proposes that we abandon the statist mind-set, and realise that constitutionalism may be 'a layered achievement' based on mutual dependencies within and between its legal-institutional and socio-political dimensions. While Europe has tended to focus, from its earliest foundations through to the development of the draft Constitution, on the legal-institutional dimension at the expense of the socio-political dimension, the present moment – in which the status quo is generally thought to be unsatisfactory, irreversible and demanding of a common response – may present a more apt opportunity for listening to the entire symphony.

Richard Mullender's contribution to the collection reflects on how certain of Nietzsche's ideas find resonance in the process of European integration and, specifically, the European Constitution. In particular, he identifies echoes of 'the compulsion to grand politics' – the drive to rise above concerns about corrective and distributive justice and to re-imagine and recreate society and culture in a more fundamental way – in the Constitutional Treaty; for example, in its bold ambition that 'the peoples of Europe are determined to transcend their ancient divisions and ... forge a common destiny'. Mullender highlights the Preface, the Preamble and the proportionality principle to support this argument. At the same time, according to Mullender, the Convention operated in a cross-pressured context because the compulsion to grand politics had to be balanced against practical political challenges that called for caution about integrationist ambition.

Thus although for Mullender the Draft Constitution was an expression and an appeal to 'good Europeanism', as Nietzsche describes it, it may have prioritised the pursuit of union at the expense of *politeia*: the use of law, politics and economics in ways that express a civilisational commitment to sustain the life of the community.

Having opened with Guiliano Amato's account of the Convention from the perspective of a co-chair, the collection closes with Gisela Stuart's account of the Convention from the perspective of a delegate of the United Kingdom Parliament. Stuart notes wryly that the delegates purported to draw inspiration from the example of the Founding Fathers of the US Constitution and yet singularly failed to achieve what the Founding Fathers did, namely, to create a system that promoted accountability through checks and balances and called forth 'a people' in whose name the Constitution was adopted. The problem, Stuart argues, is that the European Union systematically fails to inspire and motivate the people of Europe, which accounts for why the European *demos* 'stubbornly refuses to emerge'. The empowerment of the European Parliament has not ameliorated this situation at all and in fact has been an obstacle to the emergence of a European *demos*. Fittingly for the final contribution, Stuart's chapter ends by reflecting on the connection between the failure of the Constitutional Treaty and Brexit and on the post-Brexit position of the UK in Europe.

Irrespective of whether the failure of the European Constitution is judged to have been inevitable or contingent, reflection on its origins and unhappy fate helps illuminate the nature of the European project and, relatedly, the demands of constitution-making in an extraordinary context. The Constitution's legacy is disputed, as the diversity of this collection confirms, but it should have an important place in how scholars reflect on the EU's peculiar development. It may also be relevant, even if only as a negative example, to how Europeans reason about how best to respond to the EU's contemporary plight, whatever one's view is as to whether the main problem is an excess of constitutionalism, incomplete constitutional development, inadequate state capacity, or popular disengagement from the European project. In thinking through the shape and origin of these problems and about options for their resolution, the failure of the European Constitution may yet prove to be of use.