Justice, only justice shalt thou pursue...(Deut.XVI:20)

THE JEAN MONNET PROGRAM

Professor J.H.H. Weiler

European Union Jean Monnet Chair

in cooperation with the

WOODROW WILSON SCHOOL OF PUBLIC AND INTERNATIONAL AFFAIRS AT PRINCETON UNIVERSITY

Provost Christopher L. Eisgruber

Laurance S. Rockefeller Professor of Public Affairs

Altneuland: The EU Constitution in a Contextual Perspective

Jean Monnet Working Paper 5/04

Luis Diez-Picazo

Treaty or Constitution? The Status of the Constitution for Europe

Papers included in this collection should be cited according to the following format.

Luis Diez-Picazo, Treaty or Constitution? The Status of the Constitution for Europe, *in* Weiler and Eisgruber, eds., Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper 5/04, [http://www.jeanmonnetprogram.org/papers/04/040501-11.html]

ISSN 1087-2221

New York University School of Law and
Woodrow Wilson School of Public and International Affairs at Princeton University

TREATY OR CONSTITUTION?

THE STATUS OF THE CONSTITUTION FOR EUROPE

Luis María Díez-Picazo

I

What does it mean to use the word "constitution" in relation to the European Union? This question can be approached in two different ways. In a substantive sense, one can examine the propriety of using the idea of constitution with regard to entities which are not states. This leads to the theme of the decline of the state as the main form of political organization (the well-known "end of the Westphalia system"), and it also leads to the debate about the unclassifiable nature of the European Union (1). On the other hand, in a formal sense, one can examine the legal force of a given document, such as the draft Constitution for Europe. Only this approach will be adopted in this paper.

To such end, it will be necessary to keep constantly in mind several basic features of the draft Constitution for Europe, as it has been produced by the Convention chaired by Valéry Giscard d'Estaing: 1) The document calls itself "Treaty establishing a Constitution for Europe." 2) The Constitution for Europe is done by "the will of the citizens and States of Europe" (Art. 1). 3) There is an explicit recognition of the principle of primacy of the Constitution for Europe (and more generally of European Union law) over Member States' law (Art. 10). 4) Both the amendment clause (Art. IV-7) and the entry into force clause (Art. IV-8) require ratification by all the Member

States according to their respective constitutional provisions. 5) The Constitution for Europe has unlimited duration (Art. IV-9).

II

The most striking aspect of the draft Constitution for Europe is that it aspires to be a treaty and a constitution at the same time. Early working documents spoke of a "constitutional treaty." In spite of appearances, this latter term was not subversive, because it was in perfect syntony with established case-law, which regards the current Treaties as the "constitutional charter" of the European Union (2). In other words, even if the foundations of the European Union are of international nature, there has been a "constitutionalisation" of the Treaties. This phenomenon can be seen in the methods used for interpretation, which take into account the Treaties' function as a check on power and a safeguard of citizens' rights (3). However, when "constitutional treaty" is replaced by "treaty establishing a constitution", the change is not purely stylistic. There seems to be a will to transform a metaphor into reality. Instead of a number of Treaties that are like a constitution, there is a Constitution albeit adopted by a treaty. Inevitaby this strikes contemporary lawyers, who have been educated in the notion that treaties and constitutions are different things (4).

In fact, it has been peaceful in 20th century legal theory that federations are a form of state defined by the fact that the bond among its members is established by domestic law. A federation is based on a federal constitution, not on an international treaty. This is why members of federations, whatever their official name (states, cantons, provinces, *Länder*, etc.), are not regarded as states in public international law,

and consequently do not enjoy legal personality within the international community (5). Contrary to federations, in other forms of states' unions, most notably confederations, the bond among members is established by international law. The notion of confederation, in addition, had a merely historical meaning in the 20th century, because all the examples which had existed in the past (Low Countries, United States, Switzerland, etc.) had either disappeared or transformed themselves into genuine federations. Beyond federations there was only cooperation among sovereign sates, sometimes permanently structured into international organizations. So far, 20th century legal theory.

However, the very idea of an insurmountable barrier between what is international and what is domestic (between what is conventional and what is constitutional) was relatively recent. It is a theoretical construction of the final decades of the 19th century. It is not an accident that, between 1870 and 1914, one of the classical themes among European constitutional lawyers was states' unions, their nature and their classification. Especially as a consequence of the unification of Germany, there was a real flood of writings on this subject (6). It is true that lawyers educated after the Second World War have always found picturesque their predecessors' concern for the distinction between federations and confederations, not to speak of monarchical unions (both personal and real). All that belonged to a dead world. But it is obvious that studies in that field had flourished because the dividing line between what is conventional and what is constitutional was not neat at that time, nor was it clear that both spheres ought to be mutually exclusive. The incompatibility between what is conventional and what is constitutional is an idea formulated by those lawyers that

studied and interpreted federations existing at the end of the 19th century, and particularly Germany.

In addition, this phenomenon was not peculiarly European. Something similar had happened in the United States. Let us remember that, for almost eighty years, the Constitution of 1787 was subjected to two radically opposed conceptions: whereas some regarded it as the supreme norm of a new polity, others regarded it as a simple agreement among sovereign states.

The latter conception had a precedent in the Antifederalists, who had opposed the ratification of the Constitution. But its most elaborate formulation is to be found in the "Kentucky and Virginia Resolutions" of 1798-99, whose inspirer (if not author) was nobody lesser than James Madison (7). These documents reflect the perception that Jeffersonian republicans had of the Union's nature and the bond among the States: the Constitution of 1787, for the drafting of which the Philadelphia Convention had lack an explicit mandate, should derive its binding force from the fact that it had been freely accepted by every State. Hence, the imprescriptible right of the States to control (and disapply) federal laws that seriously violate the fundamental terms of the agreement. These ideas ultimately helped to justify the South's secession, and in a milder version have survived until our own day in the doctrine of the so-called "States'rights" (8).

On the contrary, the conception of the Constitution of 1787 as the supreme norm of a new polity has always been maintained by the United States Supreme Court, even in those periods when the other branches of government were not dominated by federalist ideals. The classical reference in this respect is the well-known decision

McCulloch v. Maryland of 1819, in which the Supreme Court affirmed the unconditional supremacy of the federal Constitution over States' law (9). The justification of such supremacy is that the Constitution originated in the people of the United States. Consequently, the Constitution should be characterised not as an agreement among the States, but as a differentiated type of norm which belongs, of course, to domestic law. It is no coincidence that Chief Justice Marshall started his reasoning with a warning, that later became famous: "it is a Constitution we are expounding". In its historical context, this statement is clearly a diatribe against the conception of the Constitution of 1787 as an agreement among sovereign states, which was very popular at that time (10).

It is true that John Marshall's view ultimately prevailed, but only after the Civil War was his victory final. So, at least until 1865, the idea of an insurmountable barrier between what is conventional and what is constitutional had not been firmly rooted in the United States, either. Furthermore, it is significant that, when in his first inaugural speech President Lincoln had to justify that secession was illegal and seditious, his main argument was not that the Constitution had originated in the people of the United States. Such argument would not have been decisive against those who said that it was a simple agreement among sovereign states, given that the Constitution of 1787, despite the declarations of its preamble, had not been ratified by a single national body (national constituent assembly, national referendum, etc.) but by States' bodies. President Lincoln aimed at a higher target by rejecting the secessionits' basic premise. He recalled that the Union had existed before the States, because after the Declaration of Independence the former colonies adopted statehood following a recomendation passed by the Continental

Congress. From this point of view, it was the revolutionary assembly of all the colonies that decided their transformation into states (11).

All these 19th century disputes over the dividing line between what is international and what is domestic (between what is conventional and what is constitutional) were undoubtedly motivated by underlying political conflicts. However, at that time, there was also a remarkable level of conceptual confusion in this respect. And such confusion was due not only to the fact that federal constitutions in the modern sense of the word were something new, but also to the fact that international law itself was much less developed than today. The Peace of Westphalia of 1648 had affirmed the principle that all existing states are sovereign and equal. The consequence was that states could be bound only by their own will, either explicit (international treaties) or implicit (international custom). That will, in addition, used to be characterized as omnipotent and unlimited. The notion of a *ius cogens* that applies to international relations irrespective of states' consent was progressively introduced only in the 19th century. Furthermore, it seems that the first proper example of a multilateral treaty is the Final Act of the Vienna Congress of 1815 and, needless to say, the oldest international organizations appeared much later (12). It is not surprising, then, that the distinction between what is conventional and what is constitutional was far from being neat.

III

Nowadays, after the remarkable development of international law over the last hundred years, the differences between constitutions which set up a federation and treaties which establish an international organisation (as formally are the present

Treaties instituting the European Union) are more visible than in the 19th century, but they are not radical. If one takes into account the mechanisms of entry into force and amendment, which are the decisive criteria to determine the legal force of any given rule, one will realise that appearances are misleading. There are differences of degree, not of quality.

Concerning entry into force, it is clear that states are not bound by treaties to which they have not consented. So accession to international organisations must be voluntary. The same happens with constitutions which set up a federation by aggregation of pre-existing independent states. Thus, Art. 7 of the United States Constitution envisioned its entry into force once it had been ratified by nine States. Certainly, it did not required unanimity of all the States which had taken part in the Philadelphia Convention, and which were members of the Articles of Confederation. But nobody questioned that, in absence of unanimity, the Constitution would have entered into force, even though only for those (at least nine) States that had given their consent. This is was what actually happened, because Rhode Island delayed its ratification, and its accession to the United States took place once the Constitution was already in force (13). In the United States, in addition, the principle of free adherence has been sistematically applied to successive accessions, even though all of them (with the sole exception of Texas) have concerned territories which had never been independent states before (14). In Germany, the other great example of a federation originally set up by aggregation of pre-existing independent states, unification was decided by the consent of twenty two sovereign princes and the senates of three free cities. This led to the Imperial Constitution of 1871 (15).

One point should be clarified here. It is true that some federations have not been set up by free consent of all their members. But these are cases with no pre-existing independent states, either because they were countries subjected to colonial rule (Canada, Australia, India), or because they came off a previous bigger state (Austria), or because they replaced their old unitary structure with a new federal one (Belgium). These cases are not suitable for comparison with the establishment of international organisations, simply because they do not affect the independence of existing states.

Concerning amendment, neither federal constitutions nor treaties establishing international organisations necessarily require unanimity. Federal constitutions usually envision their amendment by some qualified majority of their members. For example, Art. 5 of the United States Constitution, which offers two alternative amendment procedures, requires ratification by three forths of the States in any event. Neither for the amendment of treaties establishing international organisations is unanimity always demanded. In fact, Art. 40 of the Vienna Convention on the Law of Treaties of 23 May 1969, which codifies customary international law in this field, regards unanimity as the subsidiary rule. In other words, only if a multilateral treaty does not regulate its own amendment procedure is it compulsory to obtain the consent of all parties (16). In practice, many international organisations do not require unanimity for the amendment of their institutive treaties (17). This point is extremely important because it shows that, even in the sphere of purely international relations, consent is unavoidable only to be obligated the first time: once one has voluntarily adhered to a club the rules of which allow for their non unanimous amendment, one will not be entitled to refuse obedience to those amendments to which one has not consented.

Along with the mechanisms of entry into force and amendment, there is one further confirmation that differences between constitutions which set up federations and treaties which establish international organisations are quantitative, rather than qualitative. It has to do with the attitude towards voluntary withdrawal or secession. Contrary to the prejudice of those who conceive sovereignty as a sort of divine attribute, the right of unilateral withdrawal from international organisations is neither absolutely free nor unlimited. Art. 56 of the Vienna Convention on the Law of Treaties allows unilateral withdrawal from a treaty only if it envisions such possibility (and, of course, with observance of its specific conditions), or if all the other parties give their agreement, or if unilateral withdrawal is inherent to the nature of the treaty. In any case, a twelve-month notice is needed. Consequently, sovereignty does not involve an absolute right to get rid of freely concluded agreements. And curiously there is no incompatibility, either logical or institutional, between federal constitutions and unilateral withdrawal. There are some examples in history. Art. 72 of the Soviet Union Constitution of 1977 gave every member republic a right of free secession. It is true that, in the context of a communist dictatorship, it was a purely rhetorical declaration, if not an exercise of cynicism. However, it should be recalled that, when the Soviet Union was on the verge of collapse, that constitutional provision was successfully invoked by the Baltic Republics to justify their decision to secede (18). Still more illuminating, given the unequivocally democratic context, was the advisory opinion delivered by the Supreme Court of Canada on 20 August 1998, concerning the admissibility of a potential secession of Québec. Far from considering secession radically incompatible with the Canadian Constitution, the Supreme Court concentrated in clarifying the conditions under which secession might be considered legitimate according to basic

standards of contemporary constitutional democracy: a clear majority of voters in Québec (not in Canada as a whole) should say yes to a clear question (19).

The foregoing considerations show that, concerning aggregations of states, not even today is neat and insurmountable the dividing line between what is conventional and what is constitutional. In connexion with this, it should not be underestimated that international treaties are a type of legal rule, and consequently they are defined only by their formal characteristics; i.e. they are basically an agreement between two or more states, or other entities with personality under international law. On the contrary, constitutions, both federal and unitary, are defined by a substantive characteristic; i.e. they are the supreme norm of a polity. No doubt, sometimes they are also a type of legal rule, as happens whenever a constitution is rigid in the sense that it may not be repealed or amended by ordinary legislation. In such case, constitutions are also defined by formal characteristics (entry into force, amendment, etc.). Probably this is what Chief Justice Marshall meant when he insisted that the thing under examination was a constitution. However, there is a long list of constitutions embodied in other types of legal rules. There are constitutions, like that of the United Kingdom, embodied in a series of customs, statutes and judicial precedents. There are constitutions, as often happened in 19th century Europe and still happens in Israel, embodied in ordinary legislation. There may be constitutions embodied even in legislation of another country, as was the case of Canada until 1982 when the Parliament of Westminster repealed the British North America Act of 1867. Why should it not be possible for a constitution to be embodied in an international treaty?

Summing up, the idea of constitution has to do more with contents than with containers. So, in order to verify the existence of a constitution, purely formal criteria are not sufficient. The identification of something as a constitution depends basically on substantive criteria, the most relevant of which is whether it is effectively perceived and accepted as the supreme norm of a genuine polity (20).

IV

Once established that it is not necessarily inconsistent for a text to aspire to be a treaty and a constitution at the same time, the next question concerns the kind of legal force that the draft Constitution for Europe will have if it is adopted.

Probably, the most promising starting point in this respect is to discuss the implications of the entry into force clause (Art. IV-8) and the amendment clause (Art. IV-7). In both cases, ratification by all the Member States according to their respective constitutional provisions is required. This goes beyond usual requirements not only in federal constitutions, but even in treaties establishing international organizations. As was said before, it is generally accepted that no sovereign state may be bound without its consent; but this does not mean that, in order to transform an international organization into a new polity (to speak of a "federation" is taboo in today's Europe), one has to obtain the consent of all those sovereign states that previously took part in such international organization. Let us remember that Art. 5 of the U.S. Constitution simply envisioned a minimum number of ratifications for its entry into force, of course only for consenting States. The others, as actually happened to Rhode Island for a time, would have remained outside.

This means that the rule of unanimous ratification for the entry into force of the draft Constitution for Europe does not reflect any logical or institutional need. Probably, it is due to expediency. The weight of inertia (or, said in positive terms, respect for tradition) has been enormous. The procedure for amendment of the present Treaties, as codified by Art. 48 of the Treaty on the European Union, has been basically reproduced. However, along with expediency, there is an undeniable technical reason, related to the proclamation of the principle of continuity by Art. IV-3 of the draft Constitution for Europe. After the entry into force of the Constitution for Europe, present European Union legislation shall continue to be in force, and present rights and duties (both external and internal) of the European Union shall not be affected. If an entry into force by non-unanimous ratification were envisioned, those present Member States which eventually remained outside might legitimately oppose the full efficacy of the above-mentioned principle of continuity. Apart from apparently trivial problems, like the division of European Union property, someone could allege that the present Treaties are still in force, since those Member States which did not ratify the Constitution for Europe would not give, either, their consent to the repeal of the Treaties (Art. IV-2). Perhaps this difficulty would not be insurmountable form the point of view of international law, but it is obvious that the conflict would be rather complex (21).

It can be useful to open a parenthesis at this point, in order to take into account the Declaration in the Final Act of Signature of the Treaty establishing the Constitution: "If, two years after the signature of the Treaty establishing the Constitution, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council". There was a similar provision in the Treaty on the European Coal and Steel

Community of 1951. Its meaning, however, is not clear at all. Above all, it is an annexed declaration, not a protocol. For this reason, it lacks binding force in the proper sense of the term. It is, at best, "soft law". As for its substance, it seems that the European Council may study possible solutions that, without questioning the validity of ratifications already given, are conducive to the unblocking of the situation. But this does not amount to an authorization to dispense with the rule of unanimous ratification. It should be noticed, in addition, that Art. IV-7 contains an identical provision concerning the amendment procedure. Although in this case the binding force is undeniable, what may be done by the European Council is still obscure (22). So far, the parenthesis.

Art. 1 of the draft Constitution for Europe states that it derives from "the will of the citizens and States of Europe". In the light of what has been said about the entry into force, such statement sounds rhetorical. It is not true that the draft Constitution for Europe is founded simultaneously on two sources of legitimacy. Quite simply, the entry into force clause does not require approval by citizens. It is only the Member States, "in accordance with their respective constitutional requirements", that have to give their ratification. In other words, out of the Member states, there is no declaration of will by the citizenry. In fact, the European Council held in Thessaloniki on 20 June 2003 considered the possibility of inviting Member States to call national referendums of ratification, but no resolution was passed in this respect (23). The decision whether or not to call a referendum belongs exclusively to Member States, and one should not overlook that the attitude towards direct democracy varies considerably from one country to another.

V

Concerning the amendment clause, unanimous ratification by all Member States also goes beyond usual requirements in treaties establishing international organizations and, needles to say, in federal constitutions. In addition, contrary to what happens with the entry into force clause, here there is no technical reason to justify the rule of unanimous ratification. It is simple inertia. Thus, the draft Constitution for Europe is super-rigid. Furthermore, given that any Member State may veto its amendment, it is a sort of "perpetual covenant". One should be aware that, in a European Union with twenty five Member States, the rule of unanimous ratification could lead *de facto* to the impossibility to make any constitutional change.

It is worth stressing that, even before the Convention was set up, proposals circulated in Europe in order to soften the excessive rigidity of an amendment procedure based on the rule of unanimous ratification, as at present happens with Art. 48 of the Treaty on the European Union (24). There were basically two proposals. The first one was the introduction of two different procedures for constitutional amendment: one, still based on the rule of unanimous ratification, should be reserved to amend provisions of really fundamental value; the other would simply require ratification by a qualified majority of Member States, and would apply to the remaining constitutional provisions. The second proposal was the introduction of a new type of laws, that would be placed in an intermediate level between the Constitution and ordinary legislation. Such laws, under the name of *lois organiques* or *leyes orgánicas***,** already exist in countries like France or Spain. They are characterized by a more complex and solemn legislative procedure, including the requirement of absolute majority. The practical difference

between these two proposals is that the latter would demand a substantially shorter Constitution, which should include only those provisions of really "constitutional" importance and, consequently, suitable for the rule of amendment by unanimous ratification. Certainly, both proposals pose significant practical problems, that range from the choice of constitutional provisions that deserve amendment by unanimous ratification to the temptation of circumventing such dualism of procedures when "fundamental values" are at stake, not to speak of the risk of consociational democracy and inflation of *lois organiques* (25). Nevertheless, the adoption of any of these proposals would have averted the political danger of paralysis inherent to the rule of amendment by unanimous ratification.

Having said this, it should be stressed that the draft Constitution for Europe is not as super-rigid as it appears at first sight. In fact, super-rigidity is alleviated by some constitutional provisions. First, there is room for the establishment of "enhanced cooperation", whereby some Member States may seek a higher level of integration (Art. 43). This would allow to widen the sphere of European Union competences only with respect to some Member States, thus introducing a "two-speed Europe". Secondly, there is an important number of *pasarelles*, i.e. constitutional provisions that leave open the possibility to lighten the majority needed to pass legislation in certain fields, without requiring a previous constitutional amendment. See, among others, Arts. 42, 39, etc. This possibility disguises a simplified amendment procedure in a very sensitive point, as is the majority needed to pass legislation. Thirdly, and most crucially, there is an explicit recognition that every Member State has a right of voluntary withdrawal from the European Union (Art. 59). Somehow, it means that, even if technically speaking amendment of the Constitution for Europe will be conditioned to the possible veto of

any Member State, attitudes of radical resistance towards further progress in European integration will lose much of their substantive justification. A Member State reluctant to follow the vast majority of its partners will always find an open exit-door.

To have a complete view of the legal force of the draft Constitution for Europe, and closely related to what has just been said, reference should be made to the principle of primacy. It is proclaimed by Art. 10: "The Constitution and the law adopted by the Union's institutions in exercising competences conferred on it, shall have primacy over the law of the Member States". This is the first time in the history of European integration that the principle of primacy is given explicit recognition. So far, it was only case-law. It is true that the doctrine of primacy, as established by the well-known decision *Costa v. Enel* of 1964 (26), is one of the cornerstones of the European Union, and the European Court of Justice has never deviated from it. It is also true that the principle of primacy had already obtained some indirect recognition in the great reform adopted in Maastricht in 1992. Art. 2 of the Treaty on the European Union actually speaks of the maintenance and development of the *acquis communautaire*, which undoubtedly includes the European Court of Justice's case-law. However, these considerations should not lead to underestimate the crucial step forward made by the explicit proclamation of the principle of primacy. At least, for two reasons. On one hand, an explicit and unequivocal constitutional recognition of the principle of primacy excludes any way back. Although it is very unlikely that the European Court of Justice reconsiders its case-law in this respect, it would be theoretically possible under the present Treaties. And in a more plausible scenario (especially after the enlargement of the European Union to twenty five Member States), one cannot exclude temptations to introduce nuances into the principle of primacy, which so far has been absolute and

unconditional. On the other hand, the proclamation of the principle of primacy by the Constitution for Europe will involve its explicit acceptance by Member States. Thus, a limit will be imposed on those national constitutions (and on those courts that apply them) whose vocation is to be the ultimate legal authority. And, to use the well-known formula of the German Constitutional Court, Member States will no longer be entitled to present themselves as the "masters of the Treaties" (27). If one takes also into account the mandate to preserve the *acquis communautaire* (Art. IV-3), a further consequence will be the constitutionalisation of the mechanism that, according to the European Court of Justice's case-law, governs the functioning of the principle of primacy: first, the duty of any national court to disapply, immediately and by its own authority, any domestic rule inconsistent with European Union law; second, the prohibition imposed on any national court to control or review the constitutionality of European Union legislation (28).

VI

The conclusion of this analysis is clear: the legal force of the draft Constitution for Europe is comparable to that of most federal constitutions. If one looks at things attentively, reservations about the genuinely "constitutional" nature of the draft Constitution for Europe do not derive so much from the form of the text, as from the absence of a federal state. In other words, what happens is that, irrespective of its characterisation, the Constitution for Europe will not be a "state constitution". Even if the European Union becomes a really new polity, it will not be a super-state, among other reasons because it lacks what a tradition of thought started by Max Weber has considered the really defining element of statehood: the claim to monopolise the

legitimate use of coercion. Member States are the armed branch of the European Union (Art. 36).

However, the Constitution for Europe will greatly transform the nature of Member States themselves. In accepting explicitly the unconditional primacy of the Constitution for Europe, they will not be able to call themselves "masters of the Treaties" any longer. In those fields over which the European Union is competent, Member States' sovereignty will be suspended, dormant. As long as a Member State does not decide to exercise its constitutional right of voluntary withdrawal, it will have to accept that, in matters of European Union's competence, ultimate legal authority lies in the Constitution for Europe.

NOTES

(1) The idea of constitutionalism in organizations different from states has been largely studied in latest years. See, for example, S. Cassese, *Lo spazio giuridico globale*, Laterza, Roma/Bari, 2003; R. Dahl, "Is Post-National Democracy Possible?", in S. Fabbrini (ed.), *Nation, Federalism and Democracy*, Compositori, Roma, 2001, p. 35 ff.; R. Dehousse, "Un nouveau constitutionnalisme?", in R. Dehousse (ed.), *Une Constitution pour l'Europe?*, Presses de Sciences Po, Paris, 2002, p. 19 ff.; G. della Cananea, *L'Unione Europea (Un ordinamento composito)*, Laterza, Roma/Bari, 2003; y A. Stone Sweet, "What is a Supranational Constitution?", in *Review of Politics*, vol. 56 (1994), p. 441 ff.

(2) This term was first used by the decision *Parti écologiste-Les Verts c. Parlamento Europeo* (C. 294/83) of 23 April 1986.

(3) See the classical analysis done by J.H.H. Weiler, *The Constitution of Europe*, Cambridge University Press, Cambridge, 1999, p. 39 ff.

(4) A good example of such surprise can be found in an intelligent article written by a Ph.D. student of the European University Institute, recently published in the newsletter of that academic institution. See K. Caunes, "Constitutionalism in Europe in the Era of the Draft Treaty Establishing a Constitution for Europe", in *EUI Review*, Winter 2003, p. 10-11.

(5) White Russia and Ukraine, despite their integration into the former Soviet Union, were admitted to the United Nations in their own right. It was a concession, due to reasos of balancing votes between blocks. In any case, it did not imply their general recognition as members of the international community. See M. Díez de Velsaco, *Instituciones de Derecho Internacional Público*, 3rd ed., Tecnos, Madrid, 1976, p. 181.

(6) For a comprehensive analysis in this respect, see M. García Pelayo, *Derecho Constitucional Comaprado,* 2nd ed., Alianza, Madrid, 1984, p. 205 ff.

(7) The text of those resolutions can be consulted in R. Hofstadter, *Great Issues in American History*, vol. 2, Vintage Books, New York, 1958, p. 176 ff. On the evolution of Madison's thought in this respect, see B. Schwartz, *Main Currents in American Legal Thought*, Carolina Academic Press, Durham, 1993, p. 92.

(8) See A.E. Keir Nash, "Sate Sovereignty and States' Rights", in K.L. Hall (ed.), *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York/Oxford, 1992, p. 830 ff.

(9) *McCulloch v. Maryland* 4 Wheat (17 U.S.) 316 (1919).

(10) See R.G. McCloskey, *The American Supreme Court*, The University of Chicago Press, Chicago/London, 1960, p. 65 ff.

(11) See R. Hofstadter, *op. cit.*, p. 390 ss.

(12) On the idea of treaty at the beginning of the 19th century, see J.C. Carrillo Salcedo, *El derecho internacional en perspectiva histórica*, Tecnos, Madrid, 1991, p. 27 ff.; and M. Panebianco, "Trattato (diritto intermedio)", in *Enciclopedia del diritto*, vol. XLIV, Giuffrè, Milano, 1992, p. 1364-1366.

(13) See G.B. Tindall y D.E. Shi, *America (A Narrative History)*, 3rd ed., Norton and Co., New York/London, 1992, p. 286-288.

(14) Such principle of free adherence derived from the "Northwest Ordinance" of 1787, a law adopted under the Articles of Confederation. It exercised a deep and permanent influence on the shaping of the United States. It basically implied a renunciation to possess colonies, because any new territory under the jurisdiction of the United States was expected to constitute itself as a state as soon as it met the required conditions. See

B. Schwartz, *The Reins of Power (A Constitutional History of the United States)*, Hill and Wang, New York, 1963, p. 28-29, 68 y 132.

(15) See H.W. Koch, *A Constitutional History of Germany*, Longman, Harlow/New York, 1984, p. 116 ff. The case of Switzerland, another classical example of formation of a federal state by aggregation, is more complex. The transformation of the confederation into a federation decided by the Constitution of 1848 was not peaceful. It followed a period of civil war. Formally speaking, however, the pre-existing cantons gave their consent to the new constitutional charter. See M. García Pelayo, *op. cit.*, p. 530-532.

(16) Even though the United States have not ratified the Vienna Convention on the Law of Treaties, it acknlowledges its declaratory character of customary international law in this field, and consequently accept its substantive provisions. See T. Buergenthal y H.G. Maier, *Public International Law*, 2nd ed., West Publishing Co., St. Paul, 1990, p. 92.

(17) See R.J. Dupuy, *Manuel sur les organisations internationales*, Martinus Nijhoff, Dordrecht, 1988, p. 42-43.

(18) See M. Suksi, "Ondate baltiche? L'evoluzione costituzionale di Estonia, Lettonia e Lituania", in *Quaderni costituzionali*, vol. 3/92 (1992), p. 510 ss.

(19) See A. Ruiz Robledo y C. Chacón Piqueras, "Comentario del dictamen del Tribunal Supremo canadiense de 20 de agosto de 1998 sobre la secesión de Québec", in *Teoría y Realidad Constitucional*, vol. 3 (1999), p. 275 ff.

(20) Needless to say, the literature on the concept of constitution is unlimited. Let it suffice to say that on the point under consideration (i.e. that the idea of constitution has to do more with contents than with continents) there is a basic agreement between normativists and realists. See, to quote only big names, H. Kelsen, *Teoría General del Estado* (translation by L. Legaz Lacambra), Editora Nacional, México D.F., 1979, p. 325 ff.; and C. Schmitt, *Teoría de la Constitución* (translation by F. Ayala), Alianza, Madrid, 1982, p. 29 ff.

(21) I owe this idea to Prof. Jacqueline Dutheil de la Rochère, President of Université Paris II (Panthéon-Assas).

(22) See J. Ziller, *La nuova Costituzione europea*, Il Mulino, Bologna, 2003, p. 171-172. On the entry into force clause, see also S. Bartole, "A proposito della revisione del trattato che istituisce la costituzione dell'unione Europea", in *Diritto pubblico*, vol. 3/03 (2003), p. 771 ff., and B. de Witte, "Entry into Force and Revision", in B. de Witte (ed.), *Ten reflections on the Constitutional Treaty for Europe*, European University Institute, Florence, 2003.

(23) See J. Ziller, *op. cit.*, p. 170.

(24) See J. Ziller, *op. cit.*, p. 56 ss.; and A. Tizzano, "Prime note sul progetto di Costituzione europea", in *Diritto dell'Unione Europea*, vol. 2-3/03 (2003), p. 265-268.

(25) On this kind of problems in previous constitutional experiences, see P. Biscaretti di Ruffia, *Introduzione al diritto costituzionale comparato*, 6th ed., Giuffrè, Milano, 1988, p. 666 ff.; and, in a more general theoretical perspective, C. Klein, *Théorie et pratique du pouvoir constituant*, Presses Universitaires de France, Paris, 1996, p. 123 ff.

(26) *Costa c. Enel* (C. 6/64) of 15 July 1964.

(27) This formula derives from the judgement of the German Constitutional Court of 12 October 1993, which dealt with the conformity of the Maastricht Treaty with the German Basic Law.

(28) The classical decisions are respectively *Simmenthal* (C. 106/77) of 9 March 1978 and *Foto-Frost* (C. 314/85) of 22 October 1987.