We the people: federalism and constitutional reform

Francisco Caamaño Domínguez

Public Law Department,
University of La Coruña, Spain
Email: franciscocaamanodominguez@gmail.com

Abstract: It was not by chance that the power of amendment was born with the first democratic and federal constitution in history. Its express recognition arose not only because of tensions between the minority and the majority, but also because of the need to articulate a formula of understanding between the peoples of the states and the federal nation. This latter perspective is what this article examines, from two fundamental axes. The first is based on the idea the constitutional recognition of the power of amendment replaces the classical right of rebellion – which became a right to secession – of member states with a 'constitutional right to block reform', one of the characteristics of federal states. The second axis of analysis is linked to the affirmation that the state is a reality that precedes and conditions the constitution as a law, which is why implicit limits may be inferred to the power of amendment from this pre-existence.

Keywords: constitutional theory; state theory; constitutional amendment; constitutional change; democracy; separation of powers; fundamental rights; rule of law; federal state; federalism.

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Biographical notes: Francisco Caamaño Domínguez is a Professor of Constitutional Law at the University of A Coruña. He has been a Lawyer at the Constitutional Court, the Director of the Democracy and Local Government Foundation, a Member of Parliament, Minister of Justice in the Spanish Government, and the President of the European Commission of Justice and the Interior. He is an author of many academic articles, and his books include: *El Mandato Parlamentario [The Parliamentary Mandate]* in 1991, *El Control de Constitucionalidad de Disposiciones Reglamentarias [The Control of Constitutionality of Legal Provisions]* in 1994, *La Garantía Constitucional de la Inocencia [The Constitutional Guarantee of Innocence]* in 2003, *Democracia Federal [Federal Democracy] Apuntes Sobre España [Notes on Spain]* in 2015.

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> "While the term 'people', has, in the English language, no plural, and is necessarily used in the singular number, even when applied to many communities or states confederated in a common union – as is the case with the United States. Availing themselves of this double ambiguity, and the omission to enumerate the states by name, the advocates of the national theory of the government, assuming that, 'we, the people', meant individuals generally, and not people as forming states." (Calhoun, 1851)

1 The people of the constitution

Constitutional reform exists because the people are not to be trusted. This is the bitter core of the most common justification. The list of traditional enemies of democracy must include the majority that occasionally decree the law. In the well-known tension that exists between constitutionalism and democracy, reform is the safety valve that is called on to dump excesses of heat, moving co-existence back to a mild zone, where democratic life can unfold.

Rubio Llorente (2009, p.33) perfectly explained this cause and effect relationship: "once the democratic principle completely displaced the monarchy and constitutional power was identified with popular or national sovereignty, flexibility gave way to inflexibility and constitutions began to include rules removing their reform from the will of the ordinary legislator."

This statement fits with the particular political history of Europe, but offers a perspective with a very limited depth of field, as it only addresses the tension between constitutionalism and democracy from the point of view of a people who share roots, or at least have common bonds, a people who are not in the process of construction, who recognise themselves as such and therefore do not need to debate their reality in the constitutional process, as no-one fears, as Calhoun (1851) said, "a great unified national democracy (…) whose government can assume and achieve the right to ultimately decide on the reach of its own power."

To put it another way: when the constitutional institution of reform is analyzed, the federal nature of the constitution, in whose heart it was born, is often ignored. Inattention to this federal variable leads us to fail to consider some of the elements inherent to its originating legal formulation, which are essential for a deep understanding of this genuine constitutional institution.

Reform came about as a legal solution by which to ensure the creation of a new people for a new state, and not solely as an instrument designed to make it difficult for the people to change their constitution through the ordinary legal process. Its original primary aim was not to contain the democratic principle against what Madison called, in Federalist Paper 49, "the danger of disturbing the public tranquility by interesting too strongly the public passions" but rather, above all, it was intended to ensure that the federal pact was legally consistent, stable and could be irreversible. This was the mandate given to the Philadelphia Convention to 'perfect' the 'Perpetual Union' previously established in the Articles of Confederation.

The first inflexible constitution was a constitution without a bill of rights, focused on the organisation of the new state and on the articulation of a system of institutional checks and balances. It is, therefore, the relationship between powers, and especially the inevitable tension between the states and the federation which explains the content of Article 5 and not the collateral concern of ensuring democratic stability and governance

in the face of the uncontrolled drive of the people as expressed through the force of the majority. This is because, among other reasons, at that time the North American people were technically and politically undefined. So some people were not trusted, either the 'people' who came before the states, or the future people born of the Union, following the ratification and enactment of the constitution. This distrust was produced in a different setting.

With the 1787 North American Constitution, for the first time in history, a group of people had themselves democratically legitimised the complete government of the community (H. Kelsen would say *Gesamtstaat* or 'total state') through the functional decoupling of the political participation of the citizens in two nations. 'We the people', far from being the simple statement it appears, is Janus at the door of the constitution, announcing a transition to uncertainty: one face positive, inviting entry suggesting the truth (Janus Patulcius); and the other, rather more negative (Janus Clusivius) warning of the error of going through when one does not want to or cannot return. 'We the people' is the illusion of a genetically dualistic monism that was able to be realised largely thanks to the legal and political effects initiated by Article 5 of the constitution. In the face of the ambiguity of the subject, the dissuasive content of the amendment procedure appeared. Merely arriving at that, one reaches an understanding of why the – people/peoples – of the constitution make up, in the well-known words of *Chief Justice* Salmon Chase, in *Texas v. White* (74 US 700, 1869), "an indestructible union of indestructible states."

A union forged through a constitution that, being democratic, could not be immutable, obliged the establishment of certain rules governing future changes. The institution of reform was not only born, as often stated, to ensure the southern states twenty more years of slavery (to be precise, until 1808), offering them a clear incentive to ratify the constitution. It was also useful in avoiding the failure of the new federal nation, created as a reality distinct from the mere agglomeration of the will of the states. The regulation of the amending power ended up being essential in ensuring its continued political and legal existence.

The inflexibility of the constitution was the way of responding in law to this reasonable unease about the federal nature of the constitution. Meeting this need first, the constitutional institution of reform was also extended to other additional uses, in particular the democratic tension between the will of the majority and the rights of minorities. With the passage of time and the transposition to other places, it must be recognised that the additional uses have become the primary uses. However, origins always help us to understand, and it is no coincidence that the first inflexible constitution in history was also the first federal constitution.

Before us, a different perspective opens in the analysis of constitutional reform, limited to politically decentralised states, which in my opinion should address at least two main points.

On the one hand, what we can call the tension between the federal constitution and the right of secession, understood as a contextualised version of the traditional right to resistance. I will maintain that the institution of reform is an essential piece for the legal configuration of a functionally diverse people within a single state.

On the other hand, we must examine whether the federal constitution is affected by a sort of preliminary statehood, which would additionally justify the existence of implicit limits to the power of amendment. This second test puts before us one final question whose methodological wrapping hides one of the most direct, intelligent attacks that has been aimed at the democratic basis of the constitution.

If we conclude that in federal states one cannot and should not infer implicit limits to constitutional reform derived from the state reality previously attributed to some or all of the agents involved in the constitutional process, then by rights we should affirm the strength of this premise when it is applied to states in which only the citizens are recognised as direct owners of constitutional power.

Nonetheless, there are many defenders of an interpretation of the federal constitution who reject or minimise anything that might condition the power of reform coming from the intended pre-constitutional statehood of the territorial entities that ratify it, with the aim of freeing the federal population from the old ties of history which, at the same time, can sustain the advisability and existence of implicit limits to constitutional reform derived from previous, purely cultural and abstract statehood. They advocate for a dogmatic, permanent statehood – as if there had been prior federal statehood in the states, while they repudiate all eventual loopholes of an originating, historically situated state.

2 The irreversibility of the federal pact and the right to block reform

The words *foedus* and *fides* come from the same Indo-European root: *bheidh*, which means that which is done as an act of faith. From there we get the Latin phrase "fidusta a fide dominata, quae maxime fedei errant" (alliances made in faith are worthy of the highest trust). A pact was considered federal when the parties did not need to demand compliance, because whoever betrayed the faith placed in it would be punished by the gods. Once agreed, it cannot be terminated or decided unilaterally. The commitment made is not of this world, it transcends it.

Mutatis mutandi, thanks to reform, federal constitutions have been able to emulate the divine, replacing the wrath of the gods with a much more human assurance.

Arriving at this solution was an arduous task. Since antiquity, there had been a logical sequence between just government and the right to resistance which legitimised the people opposing tyranny. This type of legitimate popular defence against abusive, non-consented laws became a collective right thanks to the Dutch revolt against the Spanish monarchy in the 16th and 17th centuries, which would go on to be one of the causes of the 30-years' war (1618–1648). In this context, Grocio's *De iuri belli ac pacis* was published, in which he justified the right of the people to resist despotic and tyrannical rule.

From then on, this right was deployed widely, and, as it appealed to the people, it became wrapped in a democratic mantle. On the one hand, its traditional dimension as a right to rebellion was strengthened (see The Declaration of the Rights of Man and the Citizen of 1789 and Art. 33 of the 1793 French Constitution: "resistance to oppression is the consequence of the other rights of man", or the current Art. 20.4 of the Constitution of the Federal Republic of Germany). On the other, it acquired, through the beginning of the decolonisation program, a specific presence in international relations as the people's right to self-determination.

In the area of politically decentralised states, the germ of the idea of the right to rebellion is viewed, from the perspective of federated entities, as a right to secession – nowadays partially remodelled as 'the right to decide' – against a central power which it views as unjust. Just like the right of rebellion, the derivative, the right of secession also appeals to democracy as a presupposition of natural justice prior to the positive legal order created by the law. The people of that community or member state proclaim their

different political identity from the federal populace and judge that this existential recognition is sufficient to oppose federal laws they did not consent to or a union that was accepted in the past but now feels unjust.

Obviously, the North American constitutionalists understood this perfectly well when they wrote and argued about the right of rebellion, and many of them had declared themselves staunch defenders of it, as the last guarantee against an arbitrary, unfair government. John Locke's influence on them is well known (Zuckert, 1994; Tully, 1993; Pangle, 1998). In his second treaty on civil government, Locke, who was well aware of the repression of religious dissidents, formulated his theory on the right of rebellion. To his mind, the right of the people to defend themselves against aggressions of tyranny was the only valid response to protect society from a government that has rebelled against it, betraying the power it has been granted. Rebellion is born in the breakdown of trust between the governors and the governed.

Both the writers of the Articles of Confederation and, with more clarity, the delegates to the Philadelphia Convention were fully aware that including any mention of secession in the constitution would mean legally formalising a lack of confidence in the future of the Union, and as such, a renunciation of an agreement that they thought merited being considered federal (as an act of faith). It became essential to articulate some compensatory mechanism that would allow this obstacle to be overcome; a ratchet that could not be reversed, only advance slowly. If the states could tacitly renounce their right to secession and to construct a new, permanent 'people', perfecting a union that had already been defined as 'perpetual', how could they know that this federal nation would not end up annulling the self-governing space of those who created it?

The answer is found in Art. 5 of the Constitution: the federal state cannot change the constitution if the text approved by Congress or the convention is not ratified by three quarters of the states, and that "no state, without its consent, shall be deprived of its equal suffrage in the Senate." Constitutional reform, although articulating a difficult and well known balancing act between congress and the states, was born with the intention of offering 'security' to the latter. The implicit legal consequence which accompanied this incentive – the bonus hidden by the operation, would be the transformation, by denaturing, of the old right to secession. As Dellinger (1983), put it, Article 5 "represents a domestication of the right to revolution."

The 'federal compact' provided by the constitution stripped secession of its inherited intellectual condition of being a 'right' and as such removed all support from it in the idea of justice. Secession stopped being a right and became an event. The reform of the constitution had converted it into a fallen angel. The reform clause ensured that the states' self-government and their right to participate in the federation via the Senate could not be modified unilaterally by the federal government. Through the inflexibility of the constitution, the federal pact became viable: the states indirectly renounced secession in exchange for a legally guaranteed status quo. In the well-known words of James Madison (*The Federalist*, núm. 39) the writer of the substitution amendment that gave rise to the definitive text of Article 5, the result is "neither wholly federal, nor wholly national."

The power of amendment transformed the traditional right of rebellion/secession into a right to block reform. Everything that goes beyond the line of constitutional blocking included in the amending power would belong to the area of 'non-law'. It is interesting to emphasise Madison's insistence on this point, in what he himself called 'the forms of the constitution': both the proponent subjects and the diverse routes established to amend the constitution constitute the single legal procedure by which an express change to the

constitution can be made, because appealing to the people would be an "implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability" (*The Federalist*, núm. 49). Power comes from the people, but the people cannot amend the constitution except by the established procedure [vid. Leser v. Garnett, 258 US 130, 137 (1922) and Trombetta v. Florida, 353 F. Supp. 575 (1973): "A court will not countenance an unconstitutional attempt effectively to remove the Article V power from legislators and place it in the hands of the people, thus substituting popular will for the will of the independent 'deliberative assemblage' … envisioned by the framers of the constitution."].

The inflexibility of the constitution makes the existence of a single state with diverse peoples democratically possible and legally manageable.

Certainly, this 'right to block reform', federally substituting for the former right of secession, would be hypothetically configured from an accepted position of reciprocal institutional compensation (I cannot leave/you cannot exclude me). As it is well known, it is unnecessary here to reproduce the debate about the final wording of Article 5 of the Constitution of 1787 in which one can appreciate this aspiration to synthesise the duality both in Hamilton's objections to the initial proposal and Madison's transactional solution that was ultimately accepted (Vile, 1985).

Besides the real difficulties produced by the formula used and the huge amount of literature that continues to be produced about it, this original constitutional solution would soon be repeated in other federations (Canada, Australia, India, …) to such an extent that on can say that a state's ability to block the reform of a federal constitution is one of the essential characteristics of federalism. In fact, in some cases this right to block has been raised, in its role as a guarantee, to the condition of an unamendable clause (vid. Art. 79.3 of the Federal Constitution of the Republic of Germany; Art. 60.4.1 of the Federal Constitution of Brazil).

This function of reform obliges us to reassess the complaint made by Ackerman (2007) in his extremely well-known lecture 'The living constitution'. For him, "after two centuries of development, America's political identity is at war with the system of constitutional revision left by the framers. We understand ourselves today as Americans first and Californians second. But the amendment system was written for a people who thought of themselves primarily as New Yorkers or Georgians. We have become a nation-centered people stuck with a state-centered system of formal amendment." His reflection – we could add others equally well known, such as Amar (1988, 1994) – is condensed in an equally expressive manner when, looking closely at the four combinations produced by Article 5 of the Constitution, he finishes by wondering "Why this plurality? Why can't the people learn to speak with a single voice?"

I propose a simple answer: because if the people had a single voice the constitution would be more republican, but it would no longer be federal. I do not intend to dispute that one of the great constructive functions of federal culture is encouraging the progressive move from a 'union' to 'unity'. But I do believe it is appropriate to warn of the risks that come with depriving the states of their right to block reform, leaving the final decision over amending powers exclusively in the hands of the federal state.

The unarguable unity of the federal people cannot be incompatible with political recognition of difference. I do not doubt that in the former case the constitution would be more easily amendable. However, it does not seem reasonable that to overcome the fear

of 'runaway conventions' it would be necessary to abandon the federal principle and thus open up a renewed possibility of secession, facilitating its recovery by the world of law. For federalism, the functional duality of the people is not an unnecessary legal artefact through which the construction of a nation began, but rather a necessary condition of democratic existence (Ishikawa, 1996), when, within the people, in addition to liberty and equality being important legally and politically, so are the recognition of difference and healthy competition between the different parts.

The implicit conversion of the right of secession to a constitutional right blocking reform coming from acceptance of the federal pact means providing more 'constitutionalism' and, as such, restraint of the eventual excesses of democratic demagoguery which could certainly tip the foundational balance in favour of the federal state. That might allow it to throw off old shackles, but also under the same banner, it would allow states' old secessionist grievances to stir. The democratic appeal to the people could move in either direction. Only the reform clause allows us to differentiate between a constitutional democracy, that which is expressed in law, and one which has decided to abandon its rules to think up new ones in service to the majority of the day.

The rule of the simple majority represents the smallest number that can democratically bind the greatest number of dissenters. Such a thin line does not offer enough consistency to ensure the critical mass needed to accept and consolidate a new constitutional order. When secessionist motives figure in dissenting arguments, as a consequence of the politically decentralised nature of a state, the parties' (states/federation) rights to block the exercise of the power of constitutional reform operates – using an economics simile – as an 'automatic stabiliser' which enables participation in decision making, encourages constitutional changes that do not question the unity of the state, and ultimately, ensures a chain of connection with the people.

The effects of the federal pact and amendment power are therefore particularly important in understanding the intrinsic relationship that must necessarily exist between constitutionalism and democracy. As Weingast (1997, p.260) concluded, after using game theory to analyze the connection between the political foundations of democracy and the state of law, "the study of democratic consolidation poses a paradox: although this consolidation requires a perspective beyond democratic procedures, that is only produced when a society adheres to these procedures."

From a historical perspective, the amendments made through Article 5 may well be insufficient to express the profound transformations of the USA constitution in its more than two centuries of existence. But Art. 5 in and of itself is not. The 'more perfect union' that the Philadelphia Convention aimed at, and that has been forged in the USA, is more a consequence of Article 5, founded on republican and federal ideals, than the ratification procedure outlined in Art. 7. This latter expresses subordination. However the consolidation of this will is due, in essence, to the stabilising effect produced by the regulation of the amending power.

3 On the order of priority between constitution and state

This question, of markedly European origin, has returned with renewed vigour in the ever-inconclusive debate about the implicit limits of the amending power. Those who do not live in an 'over-constitutionalised democracy' (Rosenfeld, 2001) may have some problems understanding its true scope. Perhaps it would help to think of the constitution

not as a direct product of democracy, but rather as a rule governing the road that must be followed to finally achieve it. It means thinking of democracy as an externality, hard as that may be, as an independent proposition to the constitution and the state.

I do not intend to examine here such a complex and broad matter as implicit limits to reform power. As I stated in the beginning of this article, I am interested in one particular aspect: the invocation of the state as an implicit limit to the amending power, more specifically, I aim to examine whether in federal states it is consistent to infer implicit limits to constitutional reform based on the prior statehood of the territorial units that make up that federal state.

3.1 Creating a constitution by default. On congruent reform and implicit limits

I believe it is necessary to make some clarifications in order to frame my approach to this matter. Although there is significant jurisprudential heritage and considerable case-law support in favour of the recognition of implicit limits on constitutional reform, I must confess that they make me uneasy. I have never found it easy to accept the existence of amendments or constitutional reform laws that, while being formally constitutional, may be judged as unconstitutional by virtue of their contrast with a *theoretical construct* that is completely separate from the democratic will of the people. In fact, it surprises me that any attempt to change the constitution outside established reform procedures are deemed to be coups d'état, and that the possibility of blocking a reform that respects constitutionally established rules is justified in law, appealing to a claimed unwritten essence that must be presumed from the ignorant silence of the people.

In principle, attempting to change the constitution outside of the constitutionally available procedures is no more revolutionary than blocking and claiming the unconstitutionality of those changes carried out by constitutionally qualified subjects, in agreement with established procedures, and without contravening any rule expressly approved by the constituting power. If unamendable clauses are rules set by the framers when, with respect to certain values, principles and structures, they were unsure of what those with amendment powers would do with it, accepting implicit limits to reform mistrusts the good work of those who created and approved the constitution.

Accepting the existence of implicit limits to reform means accepting that a constituted power – usually the constitutional court – can amend constituent power. While it is paternalistic to think that the framers of the constitution knew what was best for the people, and therefore included that in the constitution, legally ensuring its unalterability (unamendable clauses), it is arrogant to say that constitutional judges know what suits the constitution better than the people who approved it.

I am aware that constituent power and reform power are not the same thing, and given that the power of amendment was created in order to preserve the constitution, I share the idea that it cannot be used to destroy it. I also believe that there is no constitution without a democratic basis, and that a constitution without rights and without separation of powers is not a constitution. Having said that, these convictions do not necessarily lead to the recognition of implicit limits on the power of reform. Instead, we should speak of a constitutional principle of congruence in the exercise of amending power.

In effect, although the amendment or reform law, once approved, becomes part of the constitution and enjoys its legal force, it is evident that the reform of the constitution can only produce 'constitution'. Therefore, it is perfectly possible, when there is no express constitutional impediment, that the process of reform could produce a 'total revision' or

substitution of the constitution, as long as the resulting final product can be deemed to be a constitution, that is, that it ensures the democratic origin of power, and the dual condition (fundamental rights and separation of powers) that makes up its genetic code.

Because the power of constitutional reform can only produce constitution (and nothing else), it is obvious that the amendment procedure cannot be used to drive legislative changes that nullify precisely those material clauses that make the constitution the singular law it is, which differentiate it from other laws that are also formally at the apex of a legal system but that, due to their democratic shortcomings, or content, are not a constitution. In other words, if a constitutional reform law results in the disappearance of the democratic basis, the respect of fundamental rights, or the separation of powers, the resulting legal product, regardless of its label (*nomen iuris*), will not legally be a constitution and will therefore have violated the constitutional principle of congruent reform.

This principle of congruence between the content of a reform and its result has some much more specific, and limited, legal consequences that are linked to the existence of implicit limits to the reform power, which is, in democratic terms, acquiring a more than questionable expansive force.

From the first debates about this question, the justification of implicit limits on the amending power have rested on the argument of the 'constitution within the constitution', which Hariou called 'supralégalité constitutionnelle', serving as cover for Carl Schmitt formulating his well-known differentiation between constitution (*verfassung*) and constitutional laws (*verfassungsgesezt*).

Whether called 'basic structure',[1] internal unity, hierarchy of values, constitutional identity (Bon, 2014), structural principles, or the 'doctrine of substitution',[2] all of these labels have a common element, the search for supraconstitutionality serving as support for declaring the unconstitutionality of an amendment that formally accommodates the constitution. Guardians of the constitution, in their protective zeal, break it down into fragments, differentiating between the essential and the non-essential, and in doing so, degrading what has been democratically created by the people in order to subject it to their 'own' interpretation of the constitution. While the destructive use of amending power is dangerous to the constitution, the hermeneutic substitution of what the constitution states is dangerous for democracy.

For this reason, defending a constitutional principle of congruence in reform is different from justifying the existence of implicit limits to the same (Reyes, 2005). The principle of congruence only requires that the resulting law could continue to be considered as a constitution. However, those who accept the existence of a 'constitution within the constitution' that can implicitly limit amending power need the resultant constitution produced by the reform to preserve the basic 'identity' or structure of the reformed constitution (principles, values, institutional or territorial organisation). The principle of congruence allows the power of reform, within limits expressly set by the framers, to partially or totally substitute one 'constitution' for another 'constitution', whereas the theory of implicit limits requires the essential core of the constitution being reformed to live on in the resulting constitution.

The principle of congruence does not require a 'tacit supraconstitutionality' that must be inferred by interpretation – and therefore by selection and delimitation – starting from the entire normative reality of a written constitution by a constituted power. For a reform to be congruent, and therefore legally valid, it is enough to confirm that, following the reform, the people still have a law that continues to be legally worthy of being deemed a

constitution, regardless of any other changes outside of the elements that determine this nature. The contrast is not between the constitution that was and that which is intended to be, but rather between a constitution and its legal concept.

In contrast, the theory of implicit limits rests on a necessary dialog between the supposed basis that cannot be found in a specific constitution, its 'spirit or *telos*' [the expression is from Loewenstein (1982)], which does not exist as a legal rule that can be applied, and the constitution itself as a basic legal foundation of a political community. This means that the constitution is no longer fundamental, because a part of it – related to the exercise of amendment power – is subordinate to a 'tacit basis' of the essential. The historic survival of constitutions as a political and cultural reality imposes on its legal expression, sacrificing scope of action provided by the framers to those charged with exercising the power of reform. Although the principle of congruence respects the democratic will of the people, protecting the constitution within the guidelines expressly laid down by the constituting authority, and in any case, in the face of the eventual use of amending power to change a constitution into a law lacking some of the attributes conceptually identified with constitutions, the theory of implicit limits substitutes the will of the constituent power, interpretively curtailing amending power and leaving it to a constituted power – the constitutional court – to intellectually configure a 'supranational' environment that may be very far from the will of the people and the task it was given.

It was Carl Schmitt who best argued this split between the political constitution (state) and constitutional law (formal constitution), laying out in this way a seemingly logical preference – first the state, then the constitution – through which the democratic component of the constitution, and therefore the law is excluded. Acclamation is the source of the legitimacy of the power of the state, and the constitution on its own are the norms that formally order it through the law. This is what Schmitt tells us. However, acclamation is not democracy, nor can it exist without a certain understanding of law.

3.2 First the state, then the constitution?

In Volume 1 of the well-known *Handbuch Der Verfassungsstaat der Bundesrepublik Deutschland* (published between 1987–1998) by Isensee and Kirchhof, it is argued that the state today is a constitutional state because it is not possible to understand the constitution without the state and, their supposition, in the sense that only in the state does the constitution gain reality and force.

It is worth mentioning a reciprocal exchange of functionality: the constitution shapes the state and is also shaped by it. The state provides the spatio-temporal reality and the ethical and cultural pre-suppositions, along with the legal system of this reality, such that the time of statehood precedes and is pre-existing to the constitution. Given that the state boasts the 'domain of reality' and exists before the constitution, statehood as such is not fully available to the constituting power.

The state is akin to the pre-existing substance that the constitution gives legal shape to. If the constitution hopes to legally format the state, the constituent power must respect the specific characteristics of the 'raw material' it wishes to mould, the essence of the preceding state. This unavailability of the pre-existing state leads Isensee to state that constitutional law is a 'code of regulation' and at the same time a 'code of articulation of pre-suppositions'.

Isensee (2003) stated more explicitly and forcefully that "the constitution and the state must be differentiated. The state is the prior condition and object of the constitution

(…) a change to the constitution does not put the continuity or the existence of the state into question. Its identity remains intact."

One must not hide the fact that this modified replay of Schmitt's thesis basically came about to offer some mooring points to enable certain backstops in the process of European integration. That said, its core – first the state, then the constitution – is perfectly applicable to the topic before us, as it also serves to protect the existence of implicit limits to the constitution (and as such, also to its reform) deriving from the unavoidable pre-existence of the state.

In short, in the face of dangers arising from the process of European construction (blending the outlines of the states), economic globalisation, and the mixing of traditional values of the community, it was an attempt to recover a pre-formative political unity which, although still unconstitutionalised, would operate as a tacit limit to the democratic freedom of the people to democratically shape their constitution.

The return to this predominance of state over constitution is also present in Spain, where the Catalan question has reopened the academic debate about implicit limits to constitutional reform and brought it up to date. The insecurities and fears, the mere idea that a constitution and democracy can be the route to dissolving the pre-existing state has stimulated the appearance of new 'implicit impediments' whose purpose is to provisionally ensure the unfeasibility of any hypothetical constitutional reform that may lead to changes that could weaken the jurisdiction of the state over Catalonia. Although the constitution and democracy may allow it, the state will not permit it given the essential political reality shaping the legal order – democratic constitution – that the people have decided, at a specific time. The state is like a target unit, able to impose itself on the constitution and on democracy, invoking an elitist right of origin lacking positive reality, but which – for fear of what may happen – feels itself to have sufficient powers of persuasion to restrain the people's freedom of legal creation and expression.

We are intellectual victims of our own contradictions. As part of the European process there has been an enthusiastic embrace of the concept of 'the open state', formulated in its day by Voguen (1964) and the subject of much literature (vid. Huber, 2013), in the domestic arena this same statehood is closed "with the two keys of El Cid's tomb" (Costa, 1901) in order to pre-emptively put a brake on any eventual modification of the territorial constitution.

It is worth discussing, as Canotilho (2006) does with a broad perspective, 'statist patriotism', which rather than seeking answers to emergent problems of fluid sovereignty and the loss of the state's protagonism, abandons the path of reflexive constitutionalism to take refuge in another absolutely closed off territory in which the constitution-state symbiosis is erected on a universal parameter of interpretation, with the aim of containing the democratic principle and thus compensating for the insecurities of the modern day.

In this recurring and perhaps insoluble conflict, reform of the federal constitution may provide us with some additional approaches. Indeed, those who believe that, on principle, the people cannot be restrained by implicit limits or unamendable clauses, and the fear of the siren call, about which Elster (1984) spoke so graphically, seem on the surface to be justified. We prefer to continue thinking along with Häberle (2005) that "hic et nunc, in the constitutional state there is only as much state as the constitution determines."

If we can learn anything from the process of creating the first normative constitution in history, it is that there is no competitive confrontation between constitution and state. The constitution is not conceived of as the legal form of the state, but rather as the legal expression of democracy.

In this context we cannot reject the constitutional importance of the states, as the prior reality to the constitution and subject to constituting power. Consequently one might think that despite the silence of the 1787 Constitution, this prior statehood may produce some implicit limits to the power of reform.

This was the position brilliantly defended by Calhoun and other 'federalists' against the 'nationalists' in favour of consolidation and a strong federal government. Nonetheless, and despite his efforts, the supposed prior statehood of the member states of the federation is a quality that was confined in this case to the areas of self-governance and ended up without any protection against amendment power, except for what the constitution expressly provides.

In a federal state, the state does not come before the constitution: one cannot talk of prior statehood, either for the federation or its member states. It is the constitution that breathes life into a new democratic statehood.

Well then, if, in a federal state, statehood does not predetermine the constitution, why must it do so in a non-federal state? Between democratic populism and over-constitutionalisation there is a broad space to construct a democratic constitutionalism based on balance. However for that we need less 'hive democracy' (Han, 2017) and more deliberation.

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Notes

1 A formulation embraced by the Indian Supreme Court, vid. *Singh v. Rajasthan*, 1965 (AIR 1965 SC 845), *Golaknath v. Estado de Punjab* (AIR 1967 SC 1643), *Indira Nehru Gandhi v. Raj Narain* (AIR 1975 SC 2299) o *Minerva Mills v. Union of India* (AIR 1980 SC 1789) owing to the influence of German jurisprudence and certain cases in the German Supreme Court, such as the early judgment in the case 'Southeastern State' of 1951 (BVerfGE 1, 14). The idea of 'basic structure' quickly moved to legal systems in other countries in the area and the African continent. An excellent comparative analysis may be found in Roznai (2019).

2 This is the label for the doctrine used by the Colombian Constitutional Court to declare the unconstitutionality of certain reform laws contrary to implicit constitutional limits. Vid. las sentencias C-551 (2003), C-1200 (2003), C-558 (2009) o C-579 (2013).