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(RE)INVENTING CONSTITUTIONAL CONCEPTS

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I. INTRODUCTION

The study and practice of constitutional law, as that of any area of law, often involves the invention of concepts. Scholars may identify similar constitutional phenomena present in different jurisdictions and capture them through an idea (e.g., constitutional dialogue, weak judicial review)¹ that can later be applied to other cases. Judges may develop sets of rules or legal tests that come to be identified with a particular notion (e.g., *sustitución de la constitución*, margin of appreciation).² This chapter focuses on instances where the relevant concept or closely related ideas have already been developed, sometimes decades or even centuries earlier, but remain inaccessible to scholars or judges, at least partly because of a language barrier. Often, those older concepts are connected to traditions of thought offering insights that escape their novel formulations. Accordingly, the risk is not simply that of developing a new concept when none was needed, but remaining unaware of debates that may point toward (alternative and forgotten) solutions to theoretical or practical problems common to constitutional states. In other words, we may miss out on the similarities (and differences) in the way different jurisdictions and traditions of thought conceived constitutional practices and institutions that are still with us. It is precisely in unearthing those connections where an important part of the work of comparative constitutional lawyers lies, and the problem of re-invention is a manifestation of the various obstacles pushing against the achievement of that task.

As an attempt to move things in the right direction, this chapter examines two main sets of examples of the re-invention of constitutional concepts. First, and after introducing (in Part II) the notion of a ‘constitutional concept’, Part III considers the concept of quasi-constitutional amendments and the small-c/large-c constitution distinction (and variations thereof). These are, it will be shown, re-inventions of the concept of constitutional mutation and of the distinction between the material and the formal constitution. A more complex example, considered in Part IV of the chapter, is the basic structure doctrine and its relationship with the less known 19th century concepts of the internal and the historical constitution. There are key differences between these ideas, even though they all point toward the existence of certain fundamental elements that are somehow close to the “essence” of a constitutional order and therefore fall outside of the scope of the power of constitutional reform. I nonetheless treat the basic structure

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¹ See Peter Hogg & Allison Bushell, ‘The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All)’ (1997) 35(1) *Osgoode Hall Law School* 75-124; Mark Tushnet, ‘Weak-Form Judicial Review and ‘Core’ Civil Liberties’ (2006) 41(1) *Harvard Civil Rights-Civil Liberties Law Review* 1.

² See Sentencia C-551/03, Corte Constitucional de Colombia (2003); *Handyside v. The United Kingdom*, European Court of Human Rights (Judgment of 7 December 1976).

as a case of re-invention, as contemporary discussions about it generally occur as if those earlier and closely connected notions (each of them having their own explanatory potential and offering insights about the limits of constitutional change) had not been developed.

II. OF NEW CONSTITUTIONAL CONCEPTS

By ‘constitutional concept’, I refer to a term or phrase that seeks to identify or describe a constitutional law related practice or doctrine.³ Some of these concepts may remain in an academic terrain (think, for example, about the notion of ‘constitutional rot’ or of ‘abusive constitutional review’)⁴, and others, like ‘constitutional conventions’ or the ‘separation of powers’, become so engrained in the constitutional discourse that they influence the way constitutions are designed and power is exercised in a given jurisdiction. The latter type of concept sometimes migrates from academic works to judicial or legislative discourse; sometimes, instead, it may originate in courts or legislatures and become the subject of wide academic commentary.⁵ That many constitutional concepts are not unique to a particular jurisdiction is not surprising. When looked from a sufficiently broad perspective and despite their many differences, states around the world usually share a series of basic features: a codified constitution, a tripartite separation of powers, a collective law-making body, branches of government that are subject to similar types of limits, and so on. The states that acquired these features gradually (for example, the states in continental Europe), also did so through broadly similar steps: a law-making power concentrated in a monarch and subject to moral limits and ever developing conventions, which eventually became subject to legal limitations contained in a written fundamental law.⁶

Of course, the specific institutional forms resulting from these features and developments vary in important ways and exist in very distinct cultural and linguistic contexts. But given the broad similarities mentioned above, it is to be expected for different societies to develop similar notions to describe their constitutional practices. And this can of course happen without any form of migration; that is, because the relevant practices are similar, similar constitutional concepts emerge. For example, the Aztecs, just as the English for an important part of their constitutional history, had individual rulers; the latter called them monarchs and the former

³ I am thus using the term “concept” in a broad sense, one that ranges from words used to name specific institutions (e.g., monarch) to terms used to describe a constitutional doctrine or set of principles (e.g., constitutional block).

⁴ See Jack Balkin, ‘Constitutional Crisis and Constitutional Rot’ (2017) 77 *Maryland Law Review* 147; Rosalind Dixon & David Landau, ‘Abusive Judicial Review: Abusive Borrowing by and of Constitutional Courts’ in Rosalind Dixon and David Landau (eds) *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, 2021).

⁵ Consider, for example, the concept of the constitution as a ‘living tree,’ usually seen as introduced in *Edwards v Canada (Attorney General)*, [1930] AC 124 at 124, 1929 UKPC 86 and now the subject of a large amount of literature and academic discussion.

⁶ See Bruno Aguilera-Barchet, *A History of Western Public Law: Between Nation and State* (Springer 2015).

tlatoani.⁷ There are endless differences between these two concepts and the institutions they named, and an extreme risk of misunderstanding in assuming that an Aztec ruler and political leader would have the same functions and kind of authority as an English king. But again, if one takes a sufficiently broad view, it should not be controversial to suggest that these concepts are in some way, *similar*. The similarities would, of course, not be as strong as say, those between 15th century French and English monarchs, but some would still be present. The exact origin of these and other constitutional concepts may be uncertain (I am, for example, not aware of any studies that identify the place in which the first concept broadly identifying a political ruler was originated) and this also makes claims about their ‘invention’ difficult to sustain.

In this chapter, I want to focus on cases where a newly ‘invented’ constitutional concept matches a previously existing one that has remained inaccessible to comparative constitutional lawyers, at least partly, as a result of a language barrier. I will show that this occurs more often than might be thought and that it comes accompanied by two related negative consequences. First, the academic and legal commentary associated with the relevant re-invented concept is inevitably left behind and potentially productive dialogues never take place. Second, the historical and current connections with other related notions, and the wealth of knowledge that would otherwise come with them, are lost (and may also need to be re-invented). The re-invention of constitutional concepts is a messy phenomenon. There may be slight differences between the original and the re-invention, and there may sometimes be value in understanding a constitutional practice afresh, even if as a result of being unaware of an existing body of literature somewhere else. The problem, as I just suggested, is not so much in the re-invention of the concept itself (that is, the use of a new term to refer to a practice that has already been identified and named), but in the resulting missed opportunities. Certain concepts are more often than not part of a network of constitutional ideas that may offer us a glimpse not only into other legal orders, but also into our own traditions of thought. And re-invention involves being oblivious to those insights.

III. QUASI-CONSTITUTIONAL AMENDMENTS AND THE SENSES OF A CONSTITUTION

The notion of quasi-constitutional amendments was introduced by Richard Albert in a 2017 article. A quasi-constitutional amendment is defined as:

[A] sub-constitutional alteration to the operation of a set of existing norms in the constitution. It is a change that does not possess the same legal status as a constitutional amendment, that is formally susceptible to statutory repeal or

⁷ See Lindsay C. Sidders Hodgins, ‘The Mexican Imperial Dream: The Role of the State, the Civilian and Institutions of Tenochtitlan’ (2009) 15 *Past Imperfect* 267.

revision, but that may achieve the function though not the formal status of constitutional law over time as a result of its subject-matter and importance - marking it just as durable as a constitutional amendment.⁸

For Albert, quasi-constitutional amendments are adopted by constitutional actors with the self-conscious purpose of circumventing the (more onerous) formal rules of change contained in the constitutional text.⁹ As an example, Albert mentions the Canadian Bill of Rights of 1960 and the Regional Veto Law (1996). These are ordinary statutes that altered in different ways the operation of Canada's constitution and did so outside of the constitutional amendment rule. He describes quasi-constitutional amendments as being a 'curious phenomenon' on the 'rise' in both 'master-text and partially codified constitutional democracies,' resulting 'from the marriage of constitutional law and politics.'¹⁰ Albert's analysis has undeniable explanatory value, even though the concept of quasi-constitutional amendments seems to be a re-invention of the notion of 'constitutional mutation' (*mutación constitucional*), present for a long time in Latin American constitutional discourse (of course, since I am myself not immune to the same barriers that may result in the re-invention of concepts, it is very well possible that, somewhere else in the world, a similar or identical concept emerged earlier). Consider the way constitutional mutation is defined in a standard Latin American constitutional law textbook. A constitutional mutation, we are told by Germán Bidart Campos in a 1994 book (which relies on his own discussion in a 1974 work) involves: 'real changes and transformations in the material constitution, which take place without any modification in the text of the formal constitution.'¹¹

Constitutional mutations can be divided, Bidart Campos explains (while providing specific examples from Argentina's constitutional history), in four categories: (1) mutation by addition; (2) mutation by subtraction; (3) mutation by interpretation; and (4) deconstitutionalisation. The first type occurs when new content is added to the material constitution without it being incorporated into the constitutional text (this is the category to which Albert's examples mentioned above would fall); the second occurs when 'norms contained in the formal constitution maintain their presence in the text' (that is, they are legally valid), but 'lose sociological validity or fail to achieve it in the material constitution'; the third takes place when 'norms contained in the constitutional text acquire a sociological validity that goes beyond [*que no coincide exactamente con*] their express formulation in written form'; and the fourth type when 'the entire formal constitution, or a significant part of it, loses its sociological validity due to any source that causes its decline by introducing opposing content.' Some mutations,

⁸ Richard Albert, 'Quasi-Constitutional Amendments' (2017) 65(4) *Buffalo Law Review* 739, 740.

⁹ *ibid* 741-742.

¹⁰ *ibid* 740.

¹¹ Germán Bidart Campos, *Manual de la Constitución Reformada* (Buenos Aires: Ediar, 1996) 308. See also, Germán Bidart Campos, *Manual de Derecho Constitucional Argentino* (Buenos Aires: Ediar 1974) 45.

Bidart Campos adds, can violate the formal constitution while others are entirely permissible. The question is whether they represent ‘opposition or deformation’ in relation to the constitutional text, or whether they fall within a margin where, for example, the general understanding about the limits of constitutional interpretation allows the political community to consider them consistent with the formal constitution.¹²

Had Albert had access to this and similar discussions of the concept of constitutional mutation, he would probably have been able to make a more significant contribution to the literature. Instead of having to explain what a quasi-constitutional amendment is, he could have, for instance, embraced or critiqued the notion of constitutional mutation and explained to what extent it manifests in Canada and other jurisdictions. He could also have enriched his discussion of the possible unconstitutionality of quasi-constitutional amendments¹³ by examining Bidart Campos’ notion of constitutional mutation by deconstitutionalisation. The analysis would have also benefited from the comparative examples found in Bidart Campos’ work as well as in other discussions of the same phenomenon. At the same time, Albert would have had to engage with other concepts, used in typical explanations of the notion of constitutional mutation, that he also had no choice but to re-invent as well. This is the case of the previously mentioned formal/material distinction, which has also long been present in the Latin American tradition (as well as in the constitutional discourse of continental Europe). Note that, thanks to those pre-existing concepts, when Bidart Campos defines the notion of constitutional mutation, he can simply say that it involves a change in the material constitution without a modification of the formal one.¹⁴ Karl Loewenstein, in a 1968 paper translated shortly after into Spanish, explained the distinction between the material and formal constitutions as follows:

Every State, as any social organisation, possesses and is directed by certain basic norms for the direction of their political process. In their totality, they embody the Constitution in the material or substantive sense and primarily relate to the method through which the legitimate will of the State is formed, and which governors or state organs are legally capacitated to exercise social control. In the more specific sense of the constitutional-democratic State, these norms also relate to the position of individual citizens *vis à vis* the authorities or state organs. Despite their unwritten character, these norms are accepted by the community as valid and binding constitutional conventions.

¹² *ibid* 308-311.

¹³ Albert (n 8) 765-766.

¹⁴ For Bidart Campos’ definitions of the formal and material constitution, see *Manual de la Constitución Reformada* (n 11) 275.

On the contrary, a Constitution in the formal sense consists of a single written document (or in some cases various documents) that verbally articulates, in a logical series of themes, the most important norms, although not necessarily all of them, through which the political process of the community is directed. It is characteristic of the Constitution in the formal sense that it is elaborated in accordance with a specific constituent process; that is, usually by a special representative organ not by the ordinary legislative assembly...Equally characteristic is that the process of amending it is subject to specific demands that are more strict than the ones applying to ordinary legislation...¹⁵

What Loewenstein and many others have long called the constitution in the formal sense is what, more recently, has been identified in the English literature as the ‘large-c constitution,’ and what has long been called the material constitution is what is more recently being identified as the ‘small c-constitution’ by scholars writing in English.¹⁶ I used Loewenstein’s paper as an example because it also shows the value of translations: many concepts developed in continental Europe made their way (and kept developing) in Latin American constitutional discourse due to the availability of many works (particularly from the German and French) in Spanish. Now, in his paper, Albert defines quasi-constitutional amendments in relation to what he calls the ‘master-text’¹⁷ constitution (i.e., the constitution in the formal sense) but, as Oran Doyle has explained, the analysis of informal constitutional change requires also attention to what he calls ‘the informal constitution’ (i.e., the constitution in the material sense). Doyle thus writes: ‘We should recognize the two overlapping but competing senses of the word ‘constitution’: (1) the set of laws and practices that constitute the governance structure of the state; versus (2) the written master-text *constitution*.’¹⁸ Moreover, he explains that ‘[a]ll states have an informal constitution; nearly all states have a master-text constitution.’¹⁹ It is difficult to find anything wrong in this discussion and there is much to learn from Doyle’s (and Albert’s) analysis but, perhaps, more progress would have been made had they been able to rely on existing concepts (or criticise them, show their limits, etc.) than having to engage in the activity of re-invention.

¹⁵ Karl Loewenstein, ‘Constituciones y Derecho Constitucional en Oriente y Occidente’ (1969) 164 *Revista de Estudios Políticos* 5, 10.

¹⁶ See for example the following distinction (and re-invention of the notion of the formal and the material constitution): “A large-c constitution is a legal document, or set of legal documents, that (1) proclaims its own status as supreme or fundamental law, (2) purports to dictate the structure, contours, and powers of the state, and (3) may also be formally entrenched, in the sense of being harder to amend or repeal than other laws. A small- c constitution, by contrast, consists of the body of rules, practices, and understandings, written or unwritten, that actually determines who holds what kind of power, under what conditions, and subject to what limits.” David S. Laws, “Constitutions” in Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 377. See also Ernest A. Young, ‘The Constitution Outside the Constitution’ (2007) 117 *Yale Law Journal* 408, 415.

¹⁷ Albert (n 8) 740.

¹⁸ Oran Doyle, ‘Informal Constitutional Change’ (2017) 65(5) *Buffalo Law Review* 1021, 1022-1023.

¹⁹ *ibid* 1024.

It could nonetheless be argued that, beyond perhaps some waste of time and energy, there is not much we are losing by developing these new iterations. After all, they are simply different terms that refer to the same or similar phenomena. This is unfortunately not necessarily the case. In remaining unaware of the relevant earlier concepts, one loses access to debates taking place in different jurisdictions and epochs, to the manner in which some concepts were presented or justified in the past and, more generally, to the ways in which the relevant ideas fit in different traditions of constitutional thought (which may be also our traditions). These problems will be further exemplified in the next section, which will examine the extent to which the basic structure doctrine can be understood as a re-invention (or, given the key differences identified below, at least as a partial re-invention) of the older notions of the internal and the historical constitution. The relationship between those concepts to -a slightly different understanding of- the constitution in the material sense, will also be considered. The purpose is to show how the relative invisibility of the basic structure doctrine's precursors in different traditions prevents us from seeing it as more than a judicial innovation (as opposed, for example, of potentially being a continuation of the natural law tradition or one more mean of protecting the existing relations of power in a given jurisdiction).

IV. BASIC STRUCTURES AND HISTORIAL CONSTITUTIONS

The basic structure doctrine posits that the power of constitutional reform cannot be used to alter or destroy the identity (i.e., the basic structure) of a constitution. An amendment contrary to a constitution's basic structure, which could involve the alteration of only a few provisions (e.g., an amendment increasing the presidential term from 4 to 40 years, or an amendment repealing the constitutional recognition of the right to freedom of expression), would be, according to the doctrine, subject to judicial invalidation. The doctrine was embraced by the Indian Supreme Court in a series of cases in the 1960s and 1970s²⁰ and it is now present in some form in countries in Asia, Africa, and South America. In India, its direct intellectual origins are usually located in the writings of Dietrich Conrad, a German jurist who in 1965 gave a lecture on implied limitations to constitutional change at Banaras Hindu University, which shortly after was presented to the Supreme Court during the *Golaknath v. State of Punjab* proceedings.²¹ But the idea that each constitution has an essential content (i.e., a basic structure) that lies outside of the amendment rule had been advanced long before. It was present, for

²⁰ See e.g., *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 14.

²¹ A.G. Noorani, 'Sanctity of the Constitution: Dietrich Conrad – The Man Behind the 'Basic Structure Doctrine' in *Constitutional Questions and Citizens' Rights: An Omnibus Comprising Constitutional Questions in India and Citizens' Rights, Judges and State Accountability* (Delhi, 2006); *Golaknath v. State of Punjab*, AIR 1967 S.C. 1643; See also Dietrich Conrad, 'Limitations of Amendment Procedures and the Constituent Power' (1970) *The Indian Yearbook of International Affairs* 375; Monika Polzin, 'The Basic Structure Doctrine and its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting' (2021) 5(1) *Indian Law Review* 45 (2021).

example, in Emilio Rabasa's *La Constitución y la Dictadura* (1912),²² Maurice Hauriou, *Précis de Droit Constitutionnel* (1923) (which Conrad briefly discusses),²³ Carl Schmitt's *Verfassungslehre* (1928) (which Conrad explicitly relies on),²⁴ Costantino Mortati's *La Costituzione in Senso Materiale* (1940),²⁵ Georges Liet Veaux's classic paper on constitutional fraud (1943)²⁶ and Carl Friedrich's *Constitutional Government and Democracy* (1950)²⁷ works that, with the exception of Friedrich's, have been generally unavailable in English (Schmitt's book was not translated into English until 2007, and the previously cited works by Mortati, Rabasa, Hauriou, and Liet Veaux still lack an English translation).

Since, as noted in the introduction, modern constitutions typically share a number of features, it is not surprising that, on the one hand, notions similar to the basic structure doctrine have developed in different constitutional orders and epochs and, on the other, that the principles and rules said to be part of the basic structure are also similar (e.g., the form of government, the protection of fundamental rights, the secular or religious character of the state, etc.). What I want to argue in this section, however, is not that the Indian Supreme Court, Conrad, or any of the scholars cited above, re-invented the basic structure doctrine as a result of a language barrier. In fact, the very notion of the unamendability of certain aspects of a written constitution was already present centuries ago in the English tradition: 'In every government there must be somewhat fundamental, somewhat like a Magna Charta, that should be standing and be unalterable,' Oliver Cromwell maintained shortly after the adoption of the Instrument of Government in 1653 (identifying 'the government by a single person and a parliament' as the unalterable content in England).²⁸ A similar notion was later expressed in some of the first 18th century North American constitutions, some of which contained eternity clauses protecting from the amendment rule provisions related, for example, to fundamental rights and the form

²² Emilio Rabasa, *La Constitución y la Dictadura: Estudio sobre la Organización Política de México* (Mexico City, 1912).

²³ Maurice Hauriou, *Précis de Droit Constitutionnel*, 2nd ed. (Paris: Recueil Sirey, 1929). See Dietrich Conrad, "Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration" (1978) 7 *Delhi Law Review* 1, 16.

²⁴ Carl Schmitt, *Constitutional Theory* (Duke University Press, 2007). See Dietrich Conrad, 'Limitation of Amendment Procedures and the Constituent Power' (1970) *The Indian Yearbook of International Affairs* 47, 56, where Conrad maintains that Schmitt, "one of the leading constitutional writers of the Weimar era" maintained that "an amendment could not change the basic structure of the Constitution."

²⁵ Costantino Mortati, *La Constitución en el Sentido Material* (Almudena Bergareche Gros trans.) (Madrid: Centro de Estudios Políticos y Constitucionales, 2000).

²⁶ Georges Liet Veaux, 'La "Fraude à la Constitution" Essay d'une Analyse Juridique des Révolutions Communautaires Récentes: Italie, Allemagne, France' (1943) 59 *Revue du Droit Public et de la Science Politique* 116. Albert cites Liet Veaux's work early in his book on constitutional amendments, but the concept of constitutional fraud does not form part of his analysis of the limits of the power of constitutional reform. Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019) 1. The notion of constitutional fraud as presented by Liet Veaux has also long been present in Latin America. See for example, Segundo V Linares Quintana, *Derecho Constitucional e Instituciones Políticas*, vol 2 (Abeledo-Perrot, 1970) 484; Jorge Reinaldo A. Vanossi, *Teoría Constitucional*, vol 1 (2000) 224, fn 58.

²⁷ Carl Friedrich, *Constitutional Government and Democracy* (Blaisdell, 1950).

²⁸ See Charles McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press, 1947) Chapter 1.

of government.²⁹ There were also several 19th and 20th century commentators in the United States (some of which, like John Calhoun, are discussed by Conrad),³⁰ who defended the notion of implicit limits to the power of constitutional reform, insisting, e.g., that ‘amendments cannot depart from the scheme and purpose of the original constitution,’³¹ and that a ‘wholly new constitution can be adopted only by the same authority that adopted the present constitution.’³²

The view that some parts of a constitution are not susceptible (or should not be susceptible) of change has thus long been present in the history of constitutional thought. But, unlike the notion of constitutional mutation or the distinction between the formal and the material constitution, the basic structure doctrine was not simply reinvented by Indian judges. Rather, the doctrine judicializes those older notions, giving judges the power to invalidate changes that, in earlier contexts, would have probably appeared as politically unacceptable, but legally binding. There are nonetheless other notions, developed through long periods of time in non-English speaking jurisdictions, that not only come close to that of the basic structure, but offer valuable insights about the limits of constitutional change and seem to have been forgotten. Consider, for example, the 19th century notion of the internal constitution, which I will introduce here through the work of Fernando Mellado. Mellado, a 19th century conservative Spanish legal scholar, thought that the *raison d’être* of the power to create a constitution is that of making possible the establishment of the rules and structures necessary for a political community to exist and thrive. He thought that the best way of achieving that end was to authorise the Crown-in-Parliament, to engage in constituent activity.³³ Mellado thus defended the sovereignty of parliament, a parliament able to amend the constitution at will.

But even the constitution-making power of a sovereign parliament, he maintained, would be subject to certain limits, some of which were part of what he referred to as the internal constitution.³⁴ Their violation could result in the very dissolution of the political community. Firstly, there are ‘physical laws’ related to things such as climate, topography, and culture that, as Montesquieu famously noted, influence the constitution of every country. These elements posed ‘physical’ limits on the type of constitution (and constitutional changes) a constituent

²⁹ See Article 30 of the Constitution of Delaware of 1776: “No article of the declaration of rights and fundamental rules of this State, agreed to by this convention, nor the first, second, fifth, (except that part thereof that relates to the right of suffrage) twenty-sixth, and twenty-ninth articles of this constitution, ought ever to be violated on any presence whatever. No other part of this constitution shall be altered, changed, or diminished without the consent of five parts in seven of the assembly, and seven members of the legislative council.”

³⁰ Conrad (n 24) 57. See also Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017) 39-40.

³¹ George Skinner, ‘Intrinsic Limitations on the Power of Constitutional Amendment’ (1920) 18 *Michigan Law Review* 213, 223.

³² Arthur W. Machen, Jr, ‘Is the Fifteenth Amendment Void?’ (1910) 23 *Harvard Law Review* 169, 170.

³³ Fernando Mellado, *Tratado Elemental de Derecho Político* (Madrid, 1891) 329, 325, 331, 368, 354.

³⁴ *ibid* 352.

authority would ever adopt.³⁵ Secondly, there are a series of norms of natural law which apply in every state, which include the idea that ‘the constituent power must direct and organise social forces towards the common good,’ that it ‘must respect religion as a bonding knot and as a means to achieve the end of each people,’ that it ‘must respect justice as the norm and basis of any social organisation of Nations’; that it ‘must aim at the harmony of social and political order’; and that it must ‘coordinate the individual with the collective, the state with the social forces or entities.’³⁶ When the constituent subject respects those norms, the internal constitution of the people (i.e. its character, its social mode of being) and the external one (the rules that govern the relationship between citizens and the State and that establish the structure of the latter) would likely coincide with each other. If an external constitution inconsistent with the internal one is adopted, ‘a struggle between the ideal and the real, between theory and practice’³⁷ would be produced, and the destruction of the state could follow.

In the 1950s, Luis Sánchez Agesta noted the similarities between the concepts of the internal and the material constitution, maintaining that ‘the internal constitution is a fact that is prior to any formal juridical declaration; it is what we would today call the material constitution, using the unhappy term with which we have replaced the suggestive one invented by the Spaniards of the 19th century.’³⁸ The material constitution, like the internal constitution (and like the basic structure doctrine), is all about a particular type of content: a content that is substantively constitutional (i.e., norms that establish the structure of the state and that regulate the legal relations between state and citizens). But in some formulations (which involve a difference between the notion of the small-c constitution and the material one -a difference which, needless to say, has not been discussed in the literature), the material constitution specifically refers to content which is fundamental and legally unchangeable.³⁹ Consider the conception of the constitution in the material sense presented by Mortati’s, the great Italian jurist.⁴⁰ For Mortati, while the provisions of a formal constitution could be altered through the constitution’s amendment rule, the ‘ideological positions of the dominant political forces’ (reflected in the material constitution) pose an absolute limit to constitutional change.⁴¹

³⁵ *ibid* 352.

³⁶ *ibid* 353.

³⁷ *ibid* 360.

³⁸ Luis Sánchez Agesta, ‘Los Principios del Constitucionalismo Español: Soberanía Nacional y Constitución Interna’ in *Archivo de Derecho Público* (Universidad de Granada, 1953-1953) 29.

³⁹ For difference conceptions of the material constitution, see Hans Kelsen, ‘The Function of a Constitution’ in Richard Tur et al (eds) *Essays on Kelsen* (Clarendon Press: Oxford, 1986) 115; Hermann Heller, *Teoría del Estado* (Mexico: Fondo de Cultura Económica, 2012) 349;; Marco Goldoni and Michael Wilkinson (eds), *The Cambridge Handbook of the Material Constitution* (Cambridge University Press, 2023); Chapter 8 of Joel Colón-Ríos, *Constituent Power and the Law* (Oxford University Press, 2020).

⁴⁰ Costantino Mortati, *La Constitución en el Sentido Material* (Madrid: Centro de Estudios Políticos y Constitucionales, 2000).

⁴¹ *ibid* 76, 213.

Not surprisingly, Mortati rejected both major approaches to constitutional change (parliamentary sovereignty and a rigid constitution with a legally unlimited amendment power) since they would allow the legal replacement of the material constitution.⁴² To the extent that the material constitution reflects the fundamental aims of the state, Mortati saw it as posing ‘an absolute limit to constitutional change.’ ‘Its fall,’ he wrote, ‘means the fall of the state itself.’⁴³ The concept of internal constitution (and by implication the material constitution and the basic structure) are also connected to the doctrine of historical constitution. The latter doctrine was highly influential during the 19th century, particularly in Spain.⁴⁴ The idea is that each society is governed by a set of fundamental norms that develop through its history and that, like the internal constitution, reflect the way of being of the community in question. In Spain, its main proponent was Gaspar Melchor de Jovellanos. Jovellanos, who wrote within the tradition of unwritten constitutions, argued that ‘a nation could attempt to improve its constitution’ but could never ‘alter it and destroy it to create a new one.’⁴⁵ This view followed from Jovellanos’ conception of what a constitution is. ‘What is a constitution,’ he asked, but the ‘fundamental laws that fix the rights of the sovereign and the subjects, and the healthy means of preserving both?’⁴⁶

These fundamental laws, which he called the ‘effective or historical’ constitution, were to be found in ‘our old codes, in our ancient chronicles, in our depreciated manuscripts and dusty archives.’⁴⁷ As the historical constitution was formed slowly through the ages, Jovellanos maintained that ‘[t]o think that a constitution can be made just in the same way that someone creates a play or a novel is a great insanity.’⁴⁸ Accordingly, he insisted that not even the nation had the right to ‘alter the form and the essence’ of the historical constitution.⁴⁹ A constitution would lack stability if the very people who are supposed to defend and respect it today can destroy it tomorrow. Not surprisingly, Jovellanos’ view resonated with conservative critics of the 1812 constitution-making process. That was the case of Pedro Inganzo Rivero, who claimed that ‘there are laws that because of their nature are unalterable in any event, and others that on the contrary, can and should be changed at different times and circumstances.’⁵⁰ ‘To

⁴² *ibid* 202-203.

⁴³ *ibid* 214.

⁴⁴ It also continues to be part of the constitutional discourse of some jurisdictions. See for example the references to the “historical constitution of Peru” in Constitutional Tribunal of Peru, Judgment 014-2002-AI/TC, para 122, 74. See also similar references, but by the Constitutional Court of Hungary, in Judgment of 5 December 2016, 22/2016 AB, para 65.

⁴⁵ Gaspar Melchor de Jovellanos, *Memoria en Defensa de la Junta Central*, vol. 5 584.

⁴⁶ *ibid*, vol 2, 39.

⁴⁷ Jovellanos, ‘Carta a Antonio Fernández de Prado’ (Gijón, 7 December 1795) in *Obras Completas* (Oviedo: Centro de Estudios del Siglo CVIII, 1986) vol 3, 179-180.

⁴⁸ “Diarios Inéditos de Jovellanos”, cited in Julio Somoza, *Las Amarguras de Jovellanos* (Gijón: Auseva, 1989) 178.

⁴⁹ Jovellanos, *Memoria* (n 46) vol 5, 585.

⁵⁰ Cited in Joaquín Varela Suanzes-Carpegna, *Doctrina de la Constitución Histórica de España* (Alicante, 2013) 54.

the first type,' Inguanzo added, 'belong those laws that are called, and are truly, fundamental, which constitute the bases of the State, and if destroyed, the entire social edifice would fall. All the others belong to the second type.'⁵¹ Fundamental laws, if there is a need to write them down, should be formalized in a way that prevents them 'from ever being revoked.'⁵²

Around these ideas about constitutions having a fundamental content or basic structure, lie innumerable and unexplored theoretical debates about the relationship between history, the limits of constitutional change, and the very nature of constitutions. They bring to the surface -the rather obvious but seldom explicitly acknowledged fact- that the basic structure doctrine (as well as its Latin American or Colombian counterpart, *la sustitución de la constitución*) reflect ideas and concerns long present in the Western constitutional tradition, ideas about the relationship between constitutional change and natural law, and about the role of a constitution's rule of change in keeping in place existing power relations. While in many cases the inaccessibility of those discussions may be the result of a language barrier, it may also be a reflection of a certain ideological bias affecting the entire discipline: while non-English speaking scholars are expected to show familiarity with concepts developed in English speaking jurisdictions when writing for a global audience, the opposite is not necessarily the case.⁵³ In fact, the notions of the internal and historical constitutions hardly appear, if ever, in contemporary works of Latin American or Spanish speaking authors writing about the basic structure doctrine. And this, at least indirectly, also contributes to the invisibility of certain ideas and the inability of comparative constitutional law analyses to benefit from their insights.

V. CONCLUSION

Concepts are often re-invented in comparative constitutional law scholarship. Similar ideas have been developed by scholars and judges in different jurisdictions and historical periods, sometimes with apparent full unawareness of each other. As suggested above, this is, on the one hand not surprising. Despite their many differences, our constitutional systems are sufficiently alike to result in similar concerns and debates, necessitating the development of similar concepts. On the other hand, the very occurrence of a re-invention is not necessarily negative: valuable insights may in fact result from attempts to describe a constitutional practice

⁵¹ *ibid.*

⁵² *ibid* 57. As the reader may note, Jovellanos' approach has some important similarities with that of Edmund Burke. For a discussion of Burke's influence in Jovellanos, see Lioba Simon Schuhmache, "Burke's Political and Aesthetic Ideas in Spain: A View from the Right" in *The Reception of Edmund Burke in Europe* (Martin Fitzpatrick & Peter Jones eds.) (Bloomsbury, 2017). Burke also rejected the very idea of someone having the authority of giving society a new constitution or of transforming the existing one in fundamental ways. 'The very idea of the fabrication of a new government,' Burke wrote, 'is enough to fill us with disgust and horror.' Edmund Burke, *Reflections on the Revolution in France* (Penguin Classics, 1986) 117. It is thus not surprising that Burke is frequently cited in discussions about the basic structure doctrine. Roznai (n 30) 15; Gary J. Jacobsohn, 'An Unconstitutional Constitution: A Comparative Perspective' (2006) 4(3) *International Journal of Constitutional Law* 460, which relies on Burke's work to defend the possibility of invalidating constitutional amendments.

⁵³ I am grateful to the editors of this volume for raising this point.

as if it was the first time it was detected. In the examples discussed in this chapter, however, it seems that having been able to engage with the relevant concept's earlier iterations would have been productive in at least two senses. First, it would have contributed to the progress of the field: instead of having to develop notions that already exist and then apply them to the matters at hand, the relevant scholars could have simply relied on the concept's earlier iteration (or show its limits and present a superior notion) and proceed to the comparative analysis. Second, engagement with earlier formulations of the concept would have made accessible different insights from earlier bodies of literature and unearth interest connections -and disconnections- between distinct traditions of constitutional thought. Such engagements are not only beneficial from a methodological perspective but would also contribute to challenging existing linguistic hegemonies. Comparative constitutional lawyers, in short, should do their best to avoid reinvention even if the problem is to some extent inevitable; the constitutional universe is just too large, and the number of concepts needed to describe it perhaps even larger.⁵⁴

⁵⁴ This is partly what has prevented, perhaps for good reasons, the development of a canon in comparative constitutional law. However, to the extent that certain concepts facilitate dialogue among scholars and allow the field to move forward, it may be not so bad for them to be "canonised". For a recent discussion, see David S. Law, 'Canon and Comparative Constitutional Law' in Vicki Jackson and Madhav Khosla (eds.), *Redefining Comparative Constitutional Law* (Oxford University Press, 2024).