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# Forty Years from Fascism: Democratic Constitutionalism and the Spanish Model of National Transformation

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# ARTICLES

ERIC C. CHRISTIANSEN\*

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## INTRODUCTION

Forty years ago, modern Spain was born. On December 29, 1978, the Constitution of the Kingdom of Spain came into force, following ratification by the people of Spain earlier that month and sanction by King Juan Carlos on the prior day. Its publication in the *Boletín Oficial del Estado*, the official state gazette, was the final step in the constitutional process that had included nearly two years of drafting, debate, and passage by the Congress of Deputies and Senate in their role as the Spanish constituent assembly. Most notably, the coming into force of the Constitution marked the end of Spain's transition from the decades-long authoritarian dictatorship of Francisco Franco to constitutional democracy. As the last Western European country to adopt constitutional democracy, the Spanish transition brought a long delayed conclusion to the era of fascism that had rent Europe asunder since Spain (with Italy and Germany) fell to totalitarianism in the early twentieth-century.<sup>1</sup>

Since that time, the particular process by which Spain accomplished its democratic transition has attracted considerable attention from other nascent democracies. Spain's relatively peaceful transformation from Franco-era dictatorship to modern constitutional democracy can provide a notable and appealing model for other countries' democratic transitions. Spain achieved a "lawful revolution" without a sharp disruption to existing state institutions, despite a dramatic reformulation of its governing processes and significantly reformed national values. The transition's decision-making was typified by "moderation" with a stabilizing "commitment to democratic rules,"<sup>2</sup> and the results were accomplished through interparty consensus and intraparty discipline.<sup>3</sup> This type of transition is known as the Spanish Model.<sup>4</sup> It is a model of constitutional transition that has been examined—and to varying degrees, adopted—by countries in later

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<sup>1</sup> For a very helpful English-language overview of the 1978 Spanish Constitution, see VICTOR FERRERES COMELLA, *THE CONSTITUTION OF SPAIN: A CONTEXTUAL ANALYSIS* (2013).

<sup>2</sup> GREGORIO ALONSO & DIEGO MURO, *Introduction* to *THE POLITICS AND MEMORY OF DEMOCRATIC TRANSITION: THE SPANISH MODEL 1*, (Gregorio Alonso & Diego Muro eds., Routledge, 2011).

<sup>3</sup> See generally Bonnie Field, *Interparty Consensus and Intraparty Discipline in Spain's Transition to Democracy*, *THE POLITICS AND MEMORY OF DEMOCRATIC TRANSITION: THE SPANISH MODEL 71*, (Gregorio Alonso & Diego Muro eds., Routledge, 2011).

<sup>4</sup> Joseph M. Colomer, *Transitions by Agreement: Modeling the Spanish Way*, 85 *AMER. POL. SCI. REV.* 1283, 1283 (1991).

transitions. Indeed, its significance is seen in the influence the Spanish Model had on countries as varied as Poland, South Africa, and Ethiopia.<sup>5</sup>

Today, Spain is a nation of forty-seven million people and is the world's thirteenth-largest economy.<sup>6</sup> Spain's relatively recent return to democracy and, as a consequence, its membership in the European Union, the Council of Europe, and the North Atlantic Treaty Organization (NATO), are of significant contemporary geopolitical importance. And, its historic lesson that dictatorship is possible even in relatively modern and developed Western nations remains a necessary—if frightening—reminder in our era of rightward-leaning Western governments.

Nevertheless, Spain's constitutional transition is less well known to most English-language scholars than it deserves. It is overshadowed in American scholarship by the historically contemporaneous French Revolution, undertheorized relative to the dual waves of national constitutionalism following the end of World War II and the Cold War, and undervalued due to the United States' and British Commonwealth countries' far closer connection to English common law and the British constitutional tradition.

But, there is much fruitfully to study in Spanish constitutional history and in the nation's transition to democracy. First, the Spanish legal legacy lives on throughout North and South America, even in the laws of the United States. North Americans often seem to forget that the Spanish Empire was the Americas' largest colonial power. In addition to the obvious cultural, religious, and linguistic influences throughout Central and South America, Spanish territorial claims stretched from southern Alaska, across western Canada, and at their peak, claimed all the future United States west of the Mississippi River, in addition to Florida and much of the Caribbean.<sup>7</sup> The legacy of

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<sup>5</sup> See Luis López Guerra, *The Application of the Spanish Model in the Constitutional Transitions in Central and Eastern Europe*, 19 *CARDOZO L. REV.* 1937, 1942 (1998); see also Charles E. Ehrlich, *Ethnicity and Constitutional Reform: The Case of Ethiopia*, 6 *ILSA J. INT'L & COMP. L.* 51, 57 (1999).

<sup>6</sup> *Instituto Nacional de Estadística* [Spanish National Statistics Database] reports a January 1, 2018, population of 46.7 million persons, available at [http://www.ine.es/dyngs/INEbase/en/operacion.htm?c=Estadistica\\_C&cid=1254736176951&menu=ultiDatos&idp=1254735572981](http://www.ine.es/dyngs/INEbase/en/operacion.htm?c=Estadistica_C&cid=1254736176951&menu=ultiDatos&idp=1254735572981) (last visited Oct. 31, 2018); Spain's 2017 Gross Domestic Product was \$1,310 billion (in USD) according to the International Monetary Fund DataMapper, available at <http://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOORLD/ESP> (World Economic Outlook; Apr. 2018).

<sup>7</sup> See generally DAVID WEBER, *THE SPANISH FRONTIER IN NORTH AMERICA* (Yale 1994).

Spanish property law, water law, and family law is still evident in the laws of many states and provinces, especially in the western United States and the Caribbean.<sup>8</sup> Additionally, the modern Spanish Constitution shares the same historical antecedent as many of the countries in the Americas: the 1812 Constitution of Cádiz.<sup>9</sup> And finally, because of Spain's unique history of dictatorship and monarchy for nearly all its history, the convoluted nature of its regional interrelationships, and the relative modernity of its text, the Spanish Constitution includes several highly unique—and uniquely significant—characteristics, even while being solidly within the Western tradition of democratic constitutionalism.

This Article seeks to understand and evaluate core elements of the past promise and present reality of Spain's transformation from Francoist dictatorship to modern European democracy. It does this by investigating the role of the 1978 Constitution and the distinctive Spanish Model of relatively peaceful constitutional transformation in facilitating the key legal elements of Spain's transition to democracy. Following a review of important historical developments related to Spanish constitutionalism in Part I, this Article scrutinizes the process by which Spain transitioned to democracy in the 1970s. Part II focuses particularly on the dominant characteristics of the Spanish Model, which facilitated peaceful democratic transformation. Part III critically evaluates the use of the Spanish Model as a tool to decisively reject the core political elements of the Franco regime—autocratic rule, authoritarian governance, and fascism—and empower rights-based constitutional democracy. Finally, Part IV assesses the significance of the Spanish Model to the 1978 Constitution and the twenty-first century Kingdom of Spain and anticipates the Model's potential for future global influence.

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<sup>8</sup> See, e.g., Eric B. Kunkel, *The Spanish Law of Waters in the United States: From Alfonso the Wise to the Present Day*, 32 MCGEORGE L. REV. 341, 353–56 (2001) (discussing the legacy of Spanish water law and property law); Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 20–21 (1967) (discussing Spanish origins of community property regimes in the United States); *McCoy v. United States*, 247 F. 861, 867 (5th Cir. 1918) (Batts, J., concurring) (“[T]he territory acquired from Mexico had for the groundwork of its jurisprudence the civil law as developed in Spain and her colonies. When these lands were acquired, the mere act of acquisition did not give to them a United States system of laws.”).

<sup>9</sup> CONSTITUCIÓN DE CÁDIZ [Constitution of Cádiz] Mar. 19, 1812 (Spain), <http://www.cervantesvirtual.com/servlet/SirveObras/c1812/12159396448091522976624/index.htm>.

This Article argues that, despite recent, significant, and evolving challenges, constitutional democracy is strong in Spain and has been significantly aided by its constitutional text and the Spanish Model that inaugurated it. The Article concludes that, four decades later, there is much to study and learn from the way Spain successfully leveraged its constitutional process to overcome its authoritarian past and solidify its place as a stable modern democracy.

## I

### CONSTITUTIONAL AND ANTICONSTITUTIONAL DEVELOPMENTS IN SPANISH HISTORY

The story of modern Spain as a constitutional democracy is partially explicable as a divergent, sometimes painful attempt to maintain and define a Spanish national identity in the centuries of waning global influence following Spain's Golden Age. The *Siglo de Oro*, Spain's era of global empire, vast colonial wealth, and monarchic stability in the sixteenth and early seventeenth centuries, was established with the unification of Spain under the Catholic monarchs Isabella and Ferdinand.<sup>10</sup> During this period, long before the era of global constitutionalism, the Kingdom of Spain grew from a few nominally united monarchies on the Iberian Peninsula to a worldwide empire spread across Europe, East Asia, and North and South America.<sup>11</sup>

With the end of Habsburg rule in the late seventeenth century, Spanish global power waned significantly. Spain's fiscal and political health became more closely linked to France, through ties to the House of Bourbon, then alliance with Revolutionary France, and eventually defeat by Napoleon.<sup>12</sup> Reaction against Napoleonic reforms<sup>13</sup> (and placement of Napoleon's brother on the throne of Spain) eventually brought about the first modern Spanish constitution.

Relative to many countries, Spain has not had a significant number of national constitutions. Compared with its neighbor France (16 constitutions)<sup>14</sup> or its colonial successor states in Latin America, for

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<sup>10</sup> HENRY KAMEN, *GOLDEN AGE SPAIN* 5–22 (2nd ed., Palgrave Macmillan 2005).

<sup>11</sup> *Id.* at 23–39.

<sup>12</sup> HENRY KAMEN, *PHILIP V OF SPAIN: THE KING WHO REIGNED TWICE* 1–33 (2001).

<sup>13</sup> Edward J. Goodman, *Spanish Nationalism in the Struggle Against Napoleon*, 20 *THE REV. POL.* 337 (Cambridge Univ. Press 1958).

<sup>14</sup> Louis Henkin, *Revolutions and Constitutions*, 49 *LA. L. REV.* 1024 (1989).

example, the Dominican Republic (32)<sup>15</sup> or Venezuela (26),<sup>16</sup> Spain's history of only seven constitutions (and in practice, only three functional democratic constitutions) in the last 300 years is relatively modest.<sup>17</sup> However, each of the three constitutions examined below have an important role: the Constitution of Cádiz had global influence, the liberal Constitution of 1931 prompted the Spanish Civil War, and the modern Constitution of 1978 restored democracy to Spain.

### A. *The Constitution of Cádiz*

Arguably Spain's most significant historical constitution was the Constitution of 1812, typically called the Constitution of Cádiz, or more famously, *La Pepa*.<sup>18</sup> It was formulated in a relatively traditional process, with the elected, and ostensibly national, assembly (*Cortes*) acting as a representative constituent assembly.<sup>19</sup> Although much of the Spanish territory was occupied by Napoleon's forces as part of the 1807–14 Peninsular War, the Cádiz *Cortes* gathered representatives of the regions of Spain (or, where necessary, deputized others to represent occupied regions) to write a constitution in 1810.<sup>20</sup> Although it was a legislature in exile, the *Cortes* claimed national sovereign authority to draft and promulgate their constitution. The Constitution of Cádiz was nominally in force from 1812–14, again from 1820–23 following a period in which King Ferdinand VII re-asserted absolute sovereignty, and finally from 1836–37 as an interim document for a new constitution in 1837.<sup>21</sup>

The significance of the Constitution of Cádiz is based on three elements. First, it was a markedly liberal constitution for the era, hailed

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<sup>15</sup> José Luis Cordeiro, CONSTITUTIONS AROUND THE WORLD: A VIEW FROM LATIN AMERICA 164 IDE Discussion Paper (Inst. of Dev. Econ. July 1, 2008), <http://www.ide.go.jp/English/Publish/Download/Dp/164.html>.

<sup>16</sup> *Id.*

<sup>17</sup> *Aniversario Constitución Española* [Spanish Constitutional Anniversary] 1978–2003: *Otras Constituciones* [Other Constitutions], EUROPA PRESS (2007), [https://web.archive.org/web/20071012233918/http://www.constitucion.es/otras\\_constituciones/espana/index.html](https://web.archive.org/web/20071012233918/http://www.constitucion.es/otras_constituciones/espana/index.html).

<sup>18</sup> CESAR ARROYO LANDA, ROLE OF CONSTITUTION OF CÁDIZ IN THE GESTATION OF THE INDEPENDENCE OF PERU 330 (2012).

<sup>19</sup> Roger D. Congleton, *Early Spanish Liberalism and Constitutional Political Economy: The Cádiz Constitution of 1812*, CTR. FOR THE STUD. OF PUB. CHOICE 14–15 (2010), [http://www.rdc1.org/forthcoming/Early\\_Spanish\\_Political\\_Economy\\_4.pdf](http://www.rdc1.org/forthcoming/Early_Spanish_Political_Economy_4.pdf).

<sup>20</sup> J.H. ELLIOTT, EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA, 1492–1830, 378 (Yale 2006).

<sup>21</sup> MATTHEW C. MIROW, LATIN AMERICAN CONSTITUTIONS: THE CONSTITUTION OF CÁDIZ AND ITS LEGACY IN SPANISH AMERICA 41 (Cambridge Univ. Press 2015).

in the United States as “the most liberal, wise and durable . . . and even far superior to the boasted ones of many republican governments.”<sup>22</sup> Although it recognized the rule of King Ferdinand VII, it also gave significant authority to the *Cortes Generales* as a national legislature and included select freedoms and protections, that were broadly available to free male residents of Spain’s American and Asian colonies as well.<sup>23</sup> Indeed, the constituent body gathered in Cádiz included representatives of Spanish America as well as Spain itself.<sup>24</sup> The Constitution included land reform and private property rights, freedom of the press, and representational legislation under the monarch.<sup>25</sup>

Second, because of its timing, the Constitution of Cádiz had significant and direct impact upon the constitutions of the emerging, postcolonial nations of South America.<sup>26</sup> The Constitution of Cádiz has been called “America’s other First Constitution” for its substantial and enduring influence over the later constitutions of the Americas.<sup>27</sup> Indeed, while in force it was the constitution of the Spanish Empire, including her colonies in America and Asia.<sup>28</sup> The constitutions of Mexico, Peru, Cuba, and Ecuador still reflect this earliest source of constitutional principles.<sup>29</sup> The Constitution of Cádiz functioned as a direct influence on later constitutions across Europe as well.<sup>30</sup>

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<sup>22</sup> Scott Eastman & Natalia Sobrevilla Perea, *THE RISE OF CONSTITUTIONAL GOVERNMENT IN THE IBERIAN ATLANTIC WORLD: THE IMPACT OF THE CÁDIZ CONSTITUTION OF 1812* 2 (2015).

<sup>23</sup> CONSTITUCIÓN DE CÁDIZ [Constitution of Cádiz] Mar. 19, 1812 (Spain), <http://www.cervantesvirtual.com/servlet/SirveObras/c1812/12159396448091522976624/index.htm>; Lorenzo Peña, *Un puente jurídico entre Iberoamérica y Europa: La Constitución Española de 1812*, in *AMÉRICA Y EUROPA: IDENTIDADES, EXILIOS Y EXPECTATIVAS* 95–114 (J.M. González, ed., Madrid: Casa de América 2002).

<sup>24</sup> MIROW, *supra* note 21, at 7; *see generally* Marie Laure Rieu-Millan, *Los diputados Americanos en las Cortes de Cádiz: Igualdad o Independencia* (Madrid: Consejo Superior de Investigaciones Científicas 1990).

<sup>25</sup> CONSTITUCIÓN DE CÁDIZ [Constitution of Cádiz] Mar. 19, 1812 (Spain), <http://cervantesvirtual.com/servlet/SirveObras/c1812/12159396448091522976624/index.htm>.

<sup>26</sup> Scott Eastman & Natalia Sobrevilla Perea, eds., *THE RISE OF CONSTITUTIONAL GOVERNMENT IN THE IBERIAN ATLANTIC WORLD: THE IMPACT OF THE CÁDIZ CONSTITUTION OF 1812* 41–57 (Alabama 2015); *see generally* MIROW, *supra* note 21.

<sup>27</sup> *See generally* MIROW, *supra* note 21, at 31–73.

<sup>28</sup> CONSTITUCIÓN DE CÁDIZ [Constitution of Cádiz] Mar. 19, 1812 (Spain), tit. 1, ch. 2, art. 10, <http://www.cervantesvirtual.com/servlet/SirveObras/c1812/12159396448091522976624/index.htm>.

<sup>29</sup> MIROW, *supra* note 21, at 201–269.

<sup>30</sup> FERRERES, *supra* note 1, at 2.

Third, the Constitution of Cádiz represented the authoritative model of constitutional monarchy in Spanish history. Indeed, it structured a model of constitutionally and democratically limited monarchical authority that would, erratically and often painfully, animate significant controversies throughout Spanish history.

### ***B. The Constitution of 1931***

Another particularly noteworthy and influential historical constitution<sup>31</sup> was the Constitution of 1931. Although fated to a relatively short life, it was a notable liberal and progressive accomplishment. This Second Republic Constitution was a reformist document meant to modernize Spain and align it more closely with other European nations.<sup>32</sup> As such, it included no role for the monarchy, increased regional autonomy, provided expansive powers for nationalization of industries, and included equality guarantees, individual liberties, rights protections, and universal male suffrage<sup>33</sup>—and in 1933, the exercise of universal female suffrage as well.<sup>34</sup>

The potential economic changes were significant for Spain, “the Western European nation closest to feudalism” at the time.<sup>35</sup> Economic inequality was acute in early twentieth-century Spain, an agrarian country where sixty-five percent of the land was held by an extremely wealthy two percent of the population.<sup>36</sup> Initially, the transition was a welcome sign for liberal democracy in contrast to the rise of fascism elsewhere on the continent. It was a hopeful sign for a peaceful return to constitutional democracy and lawfulness after decades of political violence and weakened rule of law in Spain.<sup>37</sup>

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<sup>31</sup> After Constitution of Cádiz, Spain had four additional constitutions prior to the Second Republic’s Constitution of 1931. These Constitutions, each presenting models of constitutional monarchy, were enacted in 1837, 1845, 1869, and 1876. Spain produced written but unenacted constitutions in 1856 and 1873. See *Otras Constituciones*, *supra* note 17.

<sup>32</sup> FERRERES, *supra* note 1, at 3–5.

<sup>33</sup> CONSTITUCIÓN DE LA REPUBLICA ESPAÑOLA [CONSTITUTION OF THE SPANISH REPUBLIC] Dec. 9, 1931, tit. III, *Derechos y Deberes de los Españoles* [Rights and Duties of the Spanish People] (Spain).

<sup>34</sup> JUAN CARLOS OCANA AYBAR, THE 2ND REPUBLIC AND THE CIVIL WAR (1931–1936) (IES Parque de Lisboa), <http://www.historiasiglo20.org/4ESO/Spain%20-Second%20Republic%20and%20SCW.pdf>.

<sup>35</sup> ADAM HOCHSCHILD, SPAIN IN THEIR HEARTS 23 (2016).

<sup>36</sup> *Id.* at 24.

<sup>37</sup> *Id.* at 23.

The Constitution of 1931 also restructured the relationship between Spain and the Roman Catholic Church in starkly secularist terms, declaring that Spain's Second Republic had "no official state religion."<sup>38</sup> It disentangled the Church from certain state institutions, providing for civil marriage, divorce, and secular education.<sup>39</sup> The Constitution banned religious displays, traditional Catholic education, and even the Jesuits from Spain.<sup>40</sup>

In the end, the era of progressive constitutional democracy was disappointing; this secular and liberal democratic period was confused, occasionally lawless, and short-lived.<sup>41</sup> Traditionalists asserted that the Constitution of 1931 was socially destructive because of its progressive elements and its radical departure from existing Spanish social and political norms. Many described Franco's Nationalist cause as a rebellion to the social upheaval caused by the liberalizing and progressive elements of the 1931 Constitution.<sup>42</sup> Although the legacy of the Constitution of 1931 is evident in the text of the current Spanish Constitution, its most significant impact is the impetus it provided for the Spanish Civil War.<sup>43</sup>

### *C. Anticonstitutionalism: The Civil War and Francoist Spain*

The Spanish Civil War lasted nearly three horrific years beginning in July 1936. It ended with the surrender of the last Republican forces, those supportive of the Second Republic as established by the Constitution of 1931, in April 1939.<sup>44</sup> The leader of the Nationalist forces, General Francisco Franco, ruled Spain from then until his death in 1975.<sup>45</sup> The Nationalists abolished the Constitution of 1931 and, as a consequence, Spain held no democratic elections between 1936 and 1977.<sup>46</sup>

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<sup>38</sup> CONSTITUCIÓN DE LA REPUBLICA ESPAÑOLA [Constitution of the Spanish Republic] Dec. 9, 1931, prel. tit., art. 3 (Spain).

<sup>39</sup> Jose Antonio Souto Paz, *Perspectives on Religious Freedom in Spain*, 2001 B.Y.U. L. REV. 669, 680–85 (2001).

<sup>40</sup> *Id.*

<sup>41</sup> HOCHSCHILD, *supra* note 35, at 23.

<sup>42</sup> PAUL PRESTON, *THE SPANISH CIVIL WAR: REACTION, REVOLUTION, AND REVENGE* 87–88 (WW. Norton & Co. 2006).

<sup>43</sup> *Id.*

<sup>44</sup> ANTHONY BEEVOR, *THE WAR FOR SPAIN: THE SPANISH CIVIL WAR 1935–39* (Penguin 2006).

<sup>45</sup> See generally PAUL PRESTON, *FRANCO* (1995); STANLEY G. PAYNE & JESÚS PALACIOS, *FRANCO: A PERSONAL AND POLITICAL BIOGRAPHY* (2014).

<sup>46</sup> Stanley Meisler, *Spain's New Democracy*, in *FOREIGN AFFAIRS* 1 (Oct. 1977).

At the time of the Spanish Civil War, Americans were passionately interested in Spain and the outcome of the war. The Civil War was the single most reported-upon topic in *The New York Times* during the war years.<sup>47</sup> As Adam Hochschild notes in his much-lauded history of the 2,800 American civilians who fought in the Spanish Civil War, published reports on the Spanish conflict outnumbered “any other single topic, including President Roosevelt, the rise of Nazi Germany, or the calamitous toll of the Great Depression.”<sup>48</sup>

The stakes certainly seemed high for an ostensibly internal struggle. In part, this is because the responses of foreign nations seem so predictive of the early responses to World War II: lawless Nazi aggression, heedlessness among Spain’s democratic neighbors, and American isolation. It is difficult to imagine the eventual success of Franco’s Nationalist forces without the support of Hitler’s Germany and Mussolini’s Italy. Despite the pretense of a multilateral Non-Intervention Agreement, the Axis powers provided troops (in the form of thinly-veiled “volunteers”), fuel, weapons, and international propaganda support.<sup>49</sup>

Obviously, the Civil War itself is outside the scope of this Article; however, there are a few characteristics of the struggle and its consequences that affect Spanish constitutional history. The most obvious point is that a victory by the Republicans would have left the starkly democratic, secular, and progressive Constitution of 1931 in force. Instead, it governed Spain for only a few years and then languished during the Civil War, only in effect in the areas unconquered by Franco’s Nationalists.<sup>50</sup> Some elements of the progressive 1931 Constitution would return, but not for nearly fifty years.

Moreover, following Franco’s victory in the Spanish Civil War, political dominance at the national level was complemented by active political oppression at the regional level. Franco suppressed any independent ethno-cultural identity for the historic regions of Spain, with repression felt most acutely in the historically defined and independence minded regions like the Basque Country and Catalonia.<sup>51</sup>

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<sup>47</sup> HOCHSCHILD, *supra* note 35, at xvi.

<sup>48</sup> *Id.*

<sup>49</sup> BEEVOR, *supra* note 44, at ch. 13.

<sup>50</sup> Of course, Franco’s Nationalists created and enforced a wholly different constitutional system in the territories they controlled. PRESTON, *supra* note 42, at 316–17.

<sup>51</sup> *Id.*

Francoist policies suppressed local language, traditions, and culture, even the limited regional autonomy of the 1931 Constitution was rejected.<sup>52</sup> This policy, of course, exacerbated long-standing conflicts between the national government and the regions—the consequences of which are still dramatically evident today.<sup>53</sup>

Empowerment, rather than repression, typified the relationship between the Franco regime and Spain's more conservative institutions, such as the Roman Catholic Church, the military, and the monarchy. All three institutions benefited significantly from Franco's victory, not only because they had held diminished power under the Constitution of 1931 but because they enjoyed the state's favor throughout the Franco era.<sup>54</sup> The relationship was certainly not one-sided; the military had predominately sided with Franco to overthrow the Republic. The Roman Catholic Church and Franco were closely allied throughout the Civil War and the early years of Franco's rule: "The 'triumphant' church born in the Civil War was made possible by the Franco regime, but one could also say that the regime in large part was made possible, stable, and long lasting thanks to the religious legitimation."<sup>55</sup> Franco's Spain was a "political monolith . . . supported by two pillars": the military and the church.<sup>56</sup> Both institutions supported Franco as a lifeline to pre-1931 influence. However, the closeness of these relationships would affect the role of both institutions in the constitutional framework that followed Franco's death.

The Republican Constitution of 1931 terminated the formal power of the monarchy, just as it had with the church.<sup>57</sup> This is why the monarchists joined Franco's military coup. Their reward was the eventual return of the monarchy when Franco declared that Juan Carlos, grandson of the last ruling Spanish king Alfonso XIII, would be his heir as head of state. Franco made this possible with passage of

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<sup>52</sup> BEEVOR, *supra* note 44, at 340–42, 407–09.

<sup>53</sup> See, e.g., Michael Birnbaum, *For Some, Catalonia Crackdown Evokes Memories of the Dark Days of Spain's Dictatorship*, WASH. POST (Nov. 9, 2017), [https://www.washingtonpost.com/world/europe/spanish-crackdown-on-catalonia-independence-effort-prompts-bitter-memories-of-franco-ictatorship/2017/11/08/b0ae6eac-bf14-11e7-9294-705f80164f6e\\_story.html?utm\\_term=.1ef9f90abf0e](https://www.washingtonpost.com/world/europe/spanish-crackdown-on-catalonia-independence-effort-prompts-bitter-memories-of-franco-ictatorship/2017/11/08/b0ae6eac-bf14-11e7-9294-705f80164f6e_story.html?utm_term=.1ef9f90abf0e).

<sup>54</sup> Paz, *supra* note 39, at 685–87.

<sup>55</sup> Juan J. Linz, *Church and State in Spain from the Civil War to the Return of Democracy*, 120 *DEADALUS* 159, 163 (1991).

<sup>56</sup> FERRERES, *supra* note 1, at 11.

<sup>57</sup> *Id.*

a *ley fundamental* in 1947<sup>58</sup> and a 1969 declaration that Juan Carlos would be the future king of Spain—although Franco remained head of state for life.<sup>59</sup> The supportive role of Juan Carlos I in the transition to democracy removed the taint of association with Franco and secured a role for the monarchy, albeit a diminished one, in the post-Franco constitutional scheme.

With Franco's victory in the Civil War, Spain entered a long period without a constitution.<sup>60</sup> The Spain of Franco's four decades possessed no unitary governing document crafted through constituent power. The modest exception to this was the Fundamental Laws of the Kingdom (*Las Leyes Fundamentales del Reino*), seven quasi-constitutional laws that declared parameters for the running of Francoist Spain.<sup>61</sup> After 1945, there was the possibility of passage of fundamental laws with theoretically higher-order legal force if Franco approved.<sup>62</sup> The third of these laws, the national referendum law (*Ley del Referéndum Nacional*), allowed minimal head-of-household voting for such laws of quasi-constitutional significance, but this power was exercised only twice: to allow future restoration of the monarchy in 1947<sup>63</sup> and to reorganize government power in 1967.<sup>64</sup>

The *Fuero de los Españoles*, another *ley fundamental*, ostensibly identified the rights of Spaniards. But these "rights" were functionally unenforceable in the courts of the regime-dependent judiciary.<sup>65</sup> The primary purpose of the *Fuero de los Españoles* was "window dressing originally intended to hoodwink the victorious [A]llies into a belief that

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<sup>58</sup> LEY DE SUCESIÓN EN LA JEFATURA DEL ESTADO [Law of Succession of Head of State], (July 6, 1947), <http://www.boe.es/datos/pdfs/BOE/1947/160/A03272-03273.pdf>.

<sup>59</sup> Walther Bernecker, *Monarchy and Democracy: The Political Role of King Juan Carlos in the Spanish Transición*, 33 J. CONTEMP. HIST. 65 (1998).

<sup>60</sup> See generally *The Franco Years*, in SPAIN: A COUNTRY STUDY (Eric Solsten & Sandra W. Meditz, 1988), <http://countrystudies.us/spain/22.htm>.

<sup>61</sup> See *id.* at ch. 1.

<sup>62</sup> LEY DEL REFERENDUM NACIONAL [Law of National Referendum], (Oct. 24, 1945), <http://www.boe.es/datos/pdfs/BOE/1945/297/A02522-02522.pdf>.

<sup>63</sup> LEY DE SUCESIÓN EN LA JEFATURA DEL ESTADO [Law on the Succession of the Head of State], (1947), <http://www.boe.es/datos/pdfs/BOE/1947/160/A03272-03273.pdf>. In the July 6 referendum, support was claimed to be 95.1 percent of voters. See D. NOHLEN & P. STÖVER, *ELECTIONS IN EUROPE: A DATA HANDBOOK* 1823 (2010).

<sup>64</sup> LEY ORGÁNICA DEL ESTADO [Organic Law of State], (Jan. 10, 1967), <http://www.boe.es/boe/dias/1967/01/11/pdfs/A00466-00477.pdf>.

<sup>65</sup> José J. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, 9 LAW & SOC. REV. 475, 486–96 (1975); Carl Pinkele, *Plus ça Change: The Interaction Between the Legal System and Political Change in Francoist Spain*, 13 INT'L. POL. SCI. REV. 285 (1992).

Spain was a liberal state.”<sup>66</sup> Similarly, the right to vote was of little practical import because of the starkly circumscribed power of the legislature. Families and groups, rather than individuals, were given the very limited right to vote and the government was in no way regulated by the determinations of the *Cortes*.<sup>67</sup> The necessary rights to free speech, free press, and political association were unknown.<sup>68</sup> Unsurprisingly, the regime lacked an independent judiciary during this era as well. In the Franco era, courts had restricted authority and minimal independence.<sup>69</sup>

The nature of authoritarian governance is the substitution of the wishes of a single ruler for actual rule of law. In a 1962 report, the International Commission of Jurists concluded that Franco’s regime was based on “the intolerance and subjugation of all opposition which characterize a totalitarian system.”<sup>70</sup> Throughout this period, Franco was “Caudillo,” a strongman holding military and political power;<sup>71</sup> the Spanish version of Nazi Germany’s “Führer” or Fascist Italy’s “Duce.” This made him formally the head of state for Spain. He also functioned as prime minister, which made him the head of Spain’s legislature and one-party government as well.<sup>72</sup> Franco also retained his title of *Generalissimo*, supreme leader of the Spanish military.<sup>73</sup> Finally, after the 1947 quasi referendum to appease monarchists in Franco’s conservative coalition, Franco became regent for life for the to-be-restored monarchy.<sup>74</sup>

Similarly, rather than having a constitution, Spain had only what one historian called “the constitutional cosmetics of authoritarianism.”<sup>75</sup> This makes perfect sense for an authoritarian dictatorship. If the purpose of constitutionalism is to subject government power to reasoned limitations in order to advance shared values and protect

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<sup>66</sup> RAYMUND CARR & JUAN PABLO FUSI, *SPAIN: DICTATORSHIP TO DEMOCRACY* 45 (2nd ed. 1981).

<sup>67</sup> *Id.* at 43.

<sup>68</sup> *Id.* at 45–46.

<sup>69</sup> Toharia, *supra* note 65, at 486–96.

<sup>70</sup> INT’L COMM’N OF JURISTS, *SPAIN AND THE RULE OF LAW* 82–88 (1962), [https://archive.org/stream/spainruleoflaw00inte/spainruleoflaw00inte\\_djvu.txt](https://archive.org/stream/spainruleoflaw00inte/spainruleoflaw00inte_djvu.txt).

<sup>71</sup> PAUL PRESTON, *THE TRIUMPH OF DEMOCRACY IN SPAIN* 1–5 (1986).

<sup>72</sup> STANLEY G. PAYNE, *FASCISM IN SPAIN 1923–1977* 239–42 (1999). *See id.*

<sup>73</sup> LAURA DESFOR EDLES, *SYMBOL AND RITUAL IN THE NEW SPAIN: THE TRANSITION TO DEMOCRACY AFTER FRANCO* 36 (Jeffrey C. Alexander & Steven Seidman eds., 1998).

<sup>74</sup> PAYNE, *supra* note 72, at 401.

<sup>75</sup> CARR & FUSI, *supra* note 66, at 40.

rights under the rule of law, a constitution is antithetical to authoritarianism.

The overarching political model of the Franco era was one of significant but not classic authoritarianism organized along quasi-fascist models of citizen control. Commentators have noted that it is difficult to precisely place Franco's Spain in a typology of political science. As the Francoists insisted, "Spain is different."<sup>76</sup> This is unsurprising since the defining characteristics of a particular autocracy track the individual ruler with his own quirks and perspective. Necessarily, a long-enduring state organized around such an idiosyncratic cult will bear the unique characteristics of that individual. As one commentator said of Franco in the 1960s, "[H]e does not make politics, he is politics."<sup>77</sup>

Over the decades, Francoism evolved. The unchallenged autocratic rule of Franco in 1940 finally had to accommodate the looming question of the 1970s: "After Franco, what?"<sup>78</sup> This was in part accomplished through the pseudoconstitutional *ley fundamental* process, culminating in the Organic Law of 1967.<sup>79</sup> The final *ley fundamental* was part of a strategy to address the issue of post-Franco Spain; it attempted to institutionalize the characteristics of the Francoist state institutions. However, this "constitution" was crafted without democratic legitimacy and existed in the absence of the rule of law; it could claim little legitimacy and placed no real limits on the actions of Franco's government.

#### ***D. Transitioning to the Transformation***

Franco's poor succession choices and the democratic commitments of Franco's legally identified heir allowed Spain to transition to democracy. According to an earlier determination, Juan Carlos I assumed the throne as King of Spain upon the death of Franco on November 22, 1975, and became head of state.<sup>80</sup> Franco had chosen

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<sup>76</sup> *Id.* at 49.

<sup>77</sup> *Id.* at 1.

<sup>78</sup> *Id.* at 40–41.

<sup>79</sup> LEY ORGÁNICA DEL ESTADO [Organic Law of State], (Jan. 10, 1967), <http://www.boe.es/boe/dias/1967/01/11/pdfs/A00466-00477.pdf>.

<sup>80</sup> MICHAEL T. NEWTON WITH PETER J. DONAGHY, INSTITUTIONS OF MODERN SPAIN: A POLITICAL AND ECONOMIC GUIDE 31 (1997).

Juan Carlos over his potentially more liberal father to ensure the maintenance of a Spanish nation along the Francoist model.<sup>81</sup>

Initially, Carlos Arias Navarro, and then, within months, Adolfo Suárez held the position of prime minister for the still undemocratic *Cortes* under the authority of the King.<sup>82</sup> Both were recognized as committed supporters of Franco. However, where the exceedingly modest democratic reforms of Arias Navarro had failed, the more robust changes of Suárez were successful. They allowed for Spain's democratic elections in 1976, the first since 1931, and altered the political and legal framework to allow for such democratic developments.<sup>83</sup>

The election, although weighted in favor of the more conservative views, allowed participation by all political parties. This fulfilled a promise the King had made when he addressed the U.S. Congress in June 1976, where he promised to “ensure, under the principles of democracy . . . the orderly access to power of distinct political alternatives, in accordance with the freely expressed will of the people.”<sup>84</sup> The consequence of the election was a broadly representative *Cortes* poised to reshape the Spanish political landscape through a constitution that sharply rejected the political forms and values of the Franco era.

The promised elections were held in 1977. A contemporary reporter described the scenes that Franco would have abhorred:

Communists brazenly waving red banners, chanting slogans, and singing the Internationale; the young, dynamic leader of the Socialist Workers Party entering rallies with his left hand in a clenched fist salute, his right signaling V for victoria; politicians exhorting Basques in Euskera, Catalans in Catalan, Galicians in Gallego, all forbidden languages a few years before; and newspapers belittling their government and its leader.<sup>85</sup>

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<sup>81</sup> EDLES, *supra* note 73, at 37.

<sup>82</sup> *Id.*

<sup>83</sup> See LEY 1/1977, DE 4 DE ENERO, PARA LA REFORMA POLITICA [Law of Political Reform], (Jan. 5, 1977), <http://www.boe.es/boe/dias/1977/01/05/pdfs/A00170-00171.pdf>.

<sup>84</sup> Meisler, *supra* note 46, at 56; see generally *A King for Democracy*, N.Y. TIMES, June 4, 1976, at A24.

<sup>85</sup> Meisler, *supra* note 46.

## II A MODERN SPANISH CONSTITUTION IN THE EUROPEAN CONSTITUTIONAL MODEL

Spaniards commonly refer to the period between Franco's death and the inauguration of the new Constitution as *La Transición*.<sup>86</sup> But, from most perspectives, Spain's second twentieth-century transition is more accurately described as a transformation. With Franco's death, the nation lost its thirty-five-year commander in chief, prime minister, and head of state. In its short transition period, the nation would also discard its quasi-constitutional Fundamental Laws and draft and ratify a radically new constitution. From November 1975 to December 1978, Spain would transform from an internationally disfavored Francoist autocracy to a modern European constitutional democracy with an eye on membership in the Council of Europe, the European Communities,<sup>87</sup> and NATO.<sup>88</sup>

If "transformation" describes the quality of the change, the actual process by which the transition occurred has acquired a different moniker among scholars: the Spanish Model.<sup>89</sup> As discussed in more depth below, the Spanish Model is shorthand for a relatively peaceful constitutional transition typified by legal continuity with the prior regime, an elites-driven process of negotiation, and broad popular consensus that avoids extreme results. This model was eagerly studied

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<sup>86</sup> Some commentators extend this transitional period to the failed 1981 coup d'état or to the 1982 elections that peacefully transitioned to an elected socialist government. PILAR ORTUÑO ANAYA, *LOS SOCIALISTAS EUROPEOS Y LA TRANSICIÓN ESPAÑOLA (1959–1977)* [EUROPEAN SOCIALISTS AND THE SPANISH TRANSITION (1959–1977)] 22 (Marcial Pons, 2005) ("Con respecto al final del proceso de la transición española, existen diferencias de opinión entre los especialistas de este periodo." [With regard to the end of the Spanish transitional process, there are differences of opinion among specialists of this era.]).

<sup>87</sup> Étienne Deschamps, *The Accession of Spain and Portugal*, CENTRE VIRTUEL DE LA CONNAISSANCE DE L'EUROPE, [http://www.cvce.eu/en/obj/the\\_accession\\_of\\_spain\\_and\\_portugal-en-b1dd040b-7463-4e67-88f2-4890f5b8fac6.html](http://www.cvce.eu/en/obj/the_accession_of_spain_and_portugal-en-b1dd040b-7463-4e67-88f2-4890f5b8fac6.html) (last updated Aug. 7, 2016). In 1977 when Spain applied, and in 1986 when Spain acceded to the treaties, it was not yet referred to as the European Union. Spain acceded to the European Coal and Steel Community, the European Atomic Energy Community, and the European Economic Community, the E.U.'s predecessor entities with merged administration under the Treaty of Brussels (1965). *Timeline: History of the European Union*, THE TELEGRAPH [UK] (Sept. 14, 2009), <https://www.telegraph.co.uk/news/worldnews/europe/6181087/Timeline-history-of-the-European-Union.html>.

<sup>88</sup> Francisco José Rodrigo Luelmo, *The Accession of Spain to NATO*, CENTRE VIRTUEL DE LA CONNAISSANCE DE L'EUROPE, [http://www.cvce.eu/content/publication/2010/4/28/831ba342-0a7c-4ead-b35f-80fd52b01de9/publishable\\_en.pdf](http://www.cvce.eu/content/publication/2010/4/28/831ba342-0a7c-4ead-b35f-80fd52b01de9/publishable_en.pdf) (last updated Aug. 7, 2016).

<sup>89</sup> ALONSO & MURO, *supra* note 2.

and loosely followed by countries in later, analogous transitions. This Part examines the mechanisms, the model, and the meaning of Spain's post-authoritarianism transformation.

### *A. Drafting a Modern Spanish Constitution*

Upon the long anticipated death of Generalissimo Francisco Franco on November 20, 1975, Spain entered an uncertain era of transition. Franco had determined and enforced the form, tenor, and actual rulers of the prior thirty-five years. Even in the waning years of his dictatorship, Spain was Franco's. Moreover, while the rest of Western Europe<sup>90</sup> had inaugurated a post-War process of closer economic integration (through the European Communities), mutual defense (through NATO), and promotion of human rights (through the Council of Europe), Spain had been relegated to the sidelines during these international developments.

#### *1. Earliest Steps Toward Constitutional Democracy*

As arranged by Franco prior to his death, the *Cortes Generales*, the appointed Francoist pseudo-Parliament, proclaimed Juan Carlos I to be King of Spain.<sup>91</sup> This could have been a calamitous beginning for a constitutional transition because Juan Carlos was the grandson of Alfonso XIII, the king deposed by the Constitution of 1931.<sup>92</sup> Moreover, Juan Carlos was Franco's anointed and groomed successor, and Juan Carlos had even stepped in as acting head of state during the protracted illnesses near the end of Franco's life.<sup>93</sup> He had expressly affirmed his commitment to the Franco regime's laws prior to his coronation.<sup>94</sup>

However, the priorities of the newly restored king were not those of the prior regime. Although there was no abrupt rupture with the Francoist state or dismantling of Francoist state institutions, Juan Carlos I took steps to advance the transition away from authoritarianism. As king, Juan Carlos supported democracy in

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<sup>90</sup> The notable exception is Portugal, which also transitioned from autocratic rule on a similar, but slightly earlier, timeline. Following the Carnation Revolution, Portugal held democratic elections in 1974 and ratified its democratic constitution in 1976. DOUGLAS L. WHEELER & WALTER C. OPELLO JR., *HISTORICAL DICTIONARY OF PORTUGAL* xxviii (3d ed. 2010).

<sup>91</sup> Bernecker, *supra* note 59, at 70.

<sup>92</sup> EDLES, *supra* note 73, at 29.

<sup>93</sup> See generally Bernecker, *supra* note 59.

<sup>94</sup> CARR & FUSI, *supra* note 66, at 208.

unexpected ways. Importantly, he appointed Adolfo Suárez, a Francoist insider who soon revealed his commitment to reform, as prime minister.<sup>95</sup> Working within the existing Francoist institutions, the appointed prime minister proposed substantial political and democratic reforms. Suárez would go on to become the first democratically elected Prime Minister of Spain in the 1977 elections—the first genuine election since 1931.<sup>96</sup>

The transition to parliamentary democracy preceded the drafting and ratification of the Constitution of the Kingdom of Spain. The Law of Political Reform (*Ley para la Reforma Política*), proposed in 1976, signaled the commitment to a peaceful transition without a radical rupture of the existing legal framework.<sup>97</sup> Passed by the undemocratic *Cortes* and overwhelmingly affirmed in a popular referendum,<sup>98</sup> the law paved the way for the return and promotion of political and social groups persecuted by Franco.<sup>99</sup> The resulting elections gave a plurality to the United Democratic Centre Party (*Unión de Centro Democrático*) of Suárez (with 34.3 percent of the vote) but also showed significant political support for the center-left Spanish Socialist Workers' Party (*Partido Socialista Obrero Español*), which received 28.5 percent of the vote.<sup>100</sup> But the election was only the first step in a long process of transformation for Spain. The newly elected and newly representative *Cortes* was “a democratic institution in the middle of a sea of dictatorial power structures.”<sup>101</sup> A new constitution would be necessary to transform Spain.

## 2. *Constitutional Drafting Process*

It was in this period of optimism, following the first democratic elections since the Civil War, that the constitutional drafting process

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<sup>95</sup> Suárez was briefly preceded by Arias Navarro, the King's initial appointment as prime minister. EDLES, *supra* note 73, at 37.

<sup>96</sup> Charles Powell, *Revisiting Spain's Transition to Democracy*, IEMED 39, 46–47 (2016).

<sup>97</sup> See generally LEY 1/1977, DE 4 DE ENERO, PARA LA REFORMA POLITICA [Law of Political Reform], (Jan. 5, 1977), <http://www.boe.es/boe/dias/1977/01/05/pdfs/A00170-00171.pdf>.

<sup>98</sup> Congress of the Deputies, Referéndum sobre el Proyecto de Ley para la Reforma Política [Referendum on the Project of the Law for Political Reform] (voting results), at [http://www.congreso.es/consti/elecciones/referendos/ref\\_r\\_p.htm](http://www.congreso.es/consti/elecciones/referendos/ref_r_p.htm); EDLES, *supra* note 73, at 11.

<sup>99</sup> CARR & FUSI, *supra* note 66, at 218.

<sup>100</sup> PRESTON, *supra* note 71, at 119.

<sup>101</sup> FERRERES, *supra* note 1, at 12.

began in earnest.<sup>102</sup> Although Spaniards had overwhelmingly supported more centrist political parties in the 1977 elections,<sup>103</sup> tensions remained. Suárez navigated tense relations with a military accustomed to significant governmental influence, elements of the independence minded Basque region that employed terrorist violence, and emboldened opposition political parties.<sup>104</sup> In an era of increased unemployment and economic stagnation, the possibility of further violence, unrecoverable political fracture, or the collapse of popular support for reforms was significant.<sup>105</sup>

Hence, the initial optimism, the savvy—if occasionally unprincipled—leadership by Suárez, and the general mood of consensus for nation building allowed the drafting of the constitution to begin.<sup>106</sup> De facto cooperation and the dominant spirit of consensus among the centrist political parties facilitated the process of constitutional drafting. Moreover, and vitally, the 1977 Moncloa Pact, a temporary truce regarding economic policies agreed on by political parties on the left and the right, minimized the threat of political disruption arising from economic protests—at least for the period of the constitutional transition.<sup>107</sup>

The elected deputies of the *Cortes* formed a Committee for Constitutional Affairs and Public Liberties to draft the new constitution. The Committee consisted of thirty-six Parliament members in proportion to their party's representation in *Congreso*, the larger house of the *Cortes*.<sup>108</sup> The primary driver of success, however, was achieved through the appointment of a seven-member drafting subcommittee of high-level representatives of the primary political parties.

Surprisingly, “the seven carried out their labours in a spirit of compromise and cooperation.”<sup>109</sup> They had such success that they offered a first constitutional draft after just three months, in November 1977. This success in finding agreeable compromises contributed to the

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<sup>102</sup> PRESTON, *supra* note 71, at 122–23.

<sup>103</sup> EDLES, *supra* note 73, at 65–67.

<sup>104</sup> See PRESTON, *supra* note 71, at ch. 5.

<sup>105</sup> Thomas D. Lancaster, *Economics, Democracy, and Spanish Elections*, in *ECONOMIC CONDITIONS AND ELECTORAL OUTCOMES: THE UNITED STATES AND WESTERN EUROPE* 110, 117 (Heinz Eulau & Michael S. Lewis-Beck eds., 1985).

<sup>106</sup> See PRESTON, *supra* note 71, at ch. 5.

<sup>107</sup> Lancaster, *supra* note 105, at 117.

<sup>108</sup> NEWTON, *supra* note 80, at 15.

<sup>109</sup> See PRESTON, *supra* note 71, at ch. 5.

sub-committee's nickname as the "Consensus Committee."<sup>110</sup> The ultimate success of the authors resulted in their more enduring nickname: "*los padres de la Constitución*."<sup>111</sup>

A more developed first draft was reviewed by the *Cortes* in January 1978, considered by constitutional committees of both houses (*Congreso* and *Senado*), and then returned to the seven-member subcommittee of the Constitutional Affairs Committee so it could consider more than 1300 possible amendments to the draft.<sup>112</sup> The next round of the drafting process evidenced sharper differences with tensions on a variety of topics, including education, the role of the Roman Catholic Church, and regional autonomy. Despite difficulties, the seven drafters returned a signed second draft to the Constitutional Affairs Committee in mid-April 1978.<sup>113</sup> After 1342 speeches over the course of 148 hours of debate, the Committee of Constitutional Affairs submitted the finalized draft to the *Congreso*.<sup>114</sup> After passage in the *Congreso*, a slightly altered version was passed by the *Senado*.<sup>115</sup> A reconciled version of the differing drafts resulted in a final amended proposal that was passed by an overwhelmingly positive vote of both bodies on October 31, 1978.<sup>116</sup> On a vote with 11 "no" votes and a commanding 551 "yes" votes (with just 22 abstentions), the constitutional draft was submitted to the people for ratification.<sup>117</sup> On December 6, 1978, in an expected but decisive victory, 87.8 percent of the 15.8 million voters supported the constitution.<sup>118</sup> More remarkably, only 7.8 percent of voters nationwide opposed the constitution.<sup>119</sup> In a final step, the constitution came into force on December 29, 1978, one day after it was signed by the King.<sup>120</sup>

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<sup>110</sup> EDLES, *supra* note 73, at 102.

<sup>111</sup> See, e.g., FERRERES, *supra* note 1, at 12.

<sup>112</sup> EDLES, *supra* note 73, at 102.

<sup>113</sup> *Id.* at 102–04.

<sup>114</sup> *Id.* at 103–04.

<sup>115</sup> PRESTON, *supra* note 71, at 139.

<sup>116</sup> The vote in *Congreso*: yes 326; no 6; abstain 14. The vote in the *Senado*: yes 226; no 5; abstain 8. NEWTON, *supra* note 80, at 17.

<sup>117</sup> *Id.*

<sup>118</sup> Although overall turnout was somewhat negatively affected by low turnout in the Basque region, nearly 68 percent of Spaniards voted in the ratification plebiscite. EDLES, *supra* note 73, at 104.

<sup>119</sup> *Id.* at 104–05. Significant abstentions in the independence-minded regions explain the differing numbers; 51.5 percent abstained in Galicia, 51.7 percent in the Basque region, and 31.7 percent in Catalonia. See also PRESTON, *supra* note 71, at 150.

<sup>120</sup> EDLES, *supra* note 73, at 104; George E. Glos, *The New Spanish Constitution Comments and Full Text*, 7 HASTINGS CONST. L.Q. 47 (1979).

### *3. Influences on the Drafting Process*

The particular outcomes of the consensus process were heavily molded by three influences: the external environment, especially the existence of relatively mature regional and international organizations; the timing of the constitutional process in the 1970s; and the overarching goal of post-Franco transformation. First, the appeal of membership in the post-War European institutions and Western alliances shaped certain elements of the new constitution.

Second, the relatively exceptional timing of the Spanish constitutional drafting process—in the period well after World War II and the establishment of the post-War human right consensus but before the end of the Cold War—influenced the content and protection of civil and political rights as well as the inclusion of weaker provisions related to workers and social welfare rights.

Third, popular reaction against the repressive, authoritarian, and anti-democratic characteristics of the Franco regime inclined the process toward significant structural and values-based changes. All three elements encouraged rights-based, democratic constitutionalism and significant socio-political transformation.

#### *a. Influence from the External Geopolitical Environment*

Franco's Spain was generally excluded from the European post-War movement towards cooperative international organizations, consolidation of democratic and rights-based norms, and closer economic integration. Integration with the global community was such an important goal of the transitional and early constitutional periods that it is impossible to fully comprehend the modern legal framework under which the Spanish people live without some discussion of the legal milieu within which the modern Spanish state functions: the European Union, the Council of Europe, NATO, and the United Nations, as well as other international bodies related to trade, political and social integration, and human rights.

Spain's lack of genuine democratic institutions and failure to protect human rights precluded it from membership in the European Communities (now the European Union) and the Council of Europe during the Franco era.<sup>121</sup> For the same reasons, Spain was not yet a member of the United Nations when the Universal Declaration of Human Rights (UDHR) was adopted by that body, and Spain did not become a signatory of the International Covenant on Civil and Political

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<sup>121</sup> PRESTON, *supra* note 71, at 60.

Rights or the International Covenant on Economic, Social, and Cultural Rights until after Franco's death.<sup>122</sup>

Spain's outsider status faded over the decades following the Spanish Civil War and World War II because of changes in global politics and evolution in the Franco regime's domestic policies. Indeed, the text of the 1978 Constitution demonstrates clear evidence of the desire for Spain to, in the words of another nation's transformative constitution, "take its rightful place as a sovereign state in the family of nations."<sup>123</sup>

Spain had not been kept out of all international organizations. It was permitted to join the United Nations in 1955.<sup>124</sup> This occurred in spite of suspicion toward Franco's multiple opportunistic shifts in alliances—more accurately, his swing in de facto support despite assurances of neutrality—during World War II.<sup>125</sup> Indeed, despite formal censure from the United Nations in 1946, within a decade Spain's strategic importance in the burgeoning Cold War led to full membership in the United Nations.<sup>126</sup> In a similarly pragmatic evolution of policy, the United States, which had excluded Spain from the Marshall Plan in the mid-1940s, normalized relations with Franco, expressly aligned with Spain for purposes of defense, and provided substantial financial support a decade later.<sup>127</sup>

The Constitution allowed for, and expected, international arrangements at the time it was written and ratified. The first article of the Bill of Rights (Chapter One, "Fundamental Rights and Duties") presumes Spain's membership in international human rights organizations.<sup>128</sup> Today, Spain is a signatory of a broad array of international agreements including the UDHR (1955), the International Covenant on Civil and Political Rights (ICCPR, 1977) and its

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<sup>122</sup> United Nations, "Status of Treaties," TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg\\_no=IV-4&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=en).

<sup>123</sup> THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Feb. 4, 1997, pmbl.

<sup>124</sup> EDLES, *supra* note 73, at 32.

<sup>125</sup> *Foreign Policy Under Franco*, in SPAIN: A COUNTRY STUDY (Eric Solsten & Sandra W. Meditz, eds., 1988), <http://countrystudies.us/spain/24.htm>.

<sup>126</sup> EDLES, *supra* note 73, at 32.

<sup>127</sup> Solsten & Meditz, *supra* note 125, at ch. 24.

<sup>128</sup> CONSTITUCIÓN ESPAÑOLA [CONSTITUTION] Dec. 27, 1978, pt. I, art. 10 ("The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain.")

individual complaints mechanism (1984),<sup>129</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1977) and its individual complaints protocol (2010), and many others.<sup>130</sup>

Spain's eagerness to join the framework of European human rights institutions is evident in the rapidity with which it signed human rights treaties and joined human rights bodies following Franco's death. Undoubtedly, this reflects a complementary interest by those bodies to welcome Spain into their existing networks as well. Spain joined the Council of Europe, became a signatory of the European Convention on Human Rights,<sup>131</sup> and became subject to the jurisdiction of the European Court of Human Rights more than a year before its new Constitution came into force.<sup>132</sup> It ratified the Council of Europe's European Social Charter in May 1980 and every amendment and additional protocol to the Charter.<sup>133</sup> In fact, Spain is a signatory of seventeen of the eighteen most prominent international human rights treaties administered by the United Nations.<sup>134</sup>

But Spain did not join only human rights bodies. It was a clear goal of the newly democratic Spain to become a member of the European Community, the historical predecessor of today's European Union. Membership had been denied in 1962 because Spain was not a

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<sup>129</sup> *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION (Jan. 7, 2018), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>.

<sup>130</sup> *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION (Jan. 2, 2017), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3-a.en.pdf>; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION (Dec. 10, 2008), [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3a&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3a&chapter=4&clang=_en).

<sup>131</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUROPE (Apr. 11, 1950), [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auth=ZlAcTejb](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=ZlAcTejb).

<sup>132</sup> Spain became a signatory on November 24, 1977. *Member States: Spain*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/portal/spain>.

<sup>133</sup> *Spain and the European Social Charter*, COUNCIL OF EUROPE, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680492969>.

<sup>134</sup> United Nations Office of the High Commissioner of Human Rights, Status of Ratification Interactive Dashboard, "Spain," <http://indicators.ohchr.org> (This interactive web tool allows the user to search based on any of the eighteen treaties and their optional protocols or based on country. Spain is currently not a signatory of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: 2003).

democracy.<sup>135</sup> Following its evolution into a constitutional democracy, Spain's challenge—similar to that of Greece and Portugal—was to comply with certain economic markers determined by the nine existing member states.<sup>136</sup> Spain (along with Portugal) acceded to the European Community treaties in 1986.<sup>137</sup>

Of course, the nature of the legal obligations and practical benefits derived from such membership has changed over time as the legal framework of the European Community has evolved into the European Union. The full legal impact of E.U. membership is outside the scope of this Article, but it does in fact extend back to the founding of the modern Spanish democratic state. Chapter II, Section 93 anticipated Spanish membership in the European Community (E.C.) and other international bodies in which it was denied membership during the Franco dictatorship:

By means of an organic law, authorisation may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organisation or institution. It is incumbent on the *Cortes Generales* or the Government, as the case may be, to guarantee compliance with these treaties and with the resolutions emanating from the international and supranational organisations in which the powers have been vested.<sup>138</sup>

Other provisions in the Constitution seem similarly designed to equip the state to qualify for membership in the E.C. and other bodies.<sup>139</sup>

There was far less popular or political support domestically for Spain's membership in NATO, which it joined in 1982.<sup>140</sup> Spain's position at the entrance to the Mediterranean Sea offered NATO a critical location for military bases and maneuvers.<sup>141</sup> Further, it was hoped that NATO membership (and reinforcement of links to the West) would encourage democratic developments in newly democratic Spain.

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<sup>135</sup> Ronald Janse, *The Evolution of the Political Criteria for Accession to the European Community, 1957–1973*, 24 EUR. L.J. 57, 64–70 (2018).

<sup>136</sup> Sebastian Royo & Paul Christopher Manuel, *Some Lessons from the Fifteenth Anniversary of the Accession of Portugal and Spain to the European Union*, 8 S. EURO. SOC & POL. 1, 11–15 (2003).

<sup>137</sup> *Id.* at 1.

<sup>138</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. III, ch. 2, art. 93.

<sup>139</sup> *Id.* at pt. VII, art. 135, § 3. “The volume of public debt for all the Public Administrations as a whole as a ratio of the State's Gross Domestic Product shall not surpass the benchmark figure set forth in the Treaty on the Functioning of the European Union.”

<sup>140</sup> FERRERES, *supra* note 1, at 11.

<sup>141</sup> Solsten & Meditz, *supra* note 125, at ch. 24.

But, the United States' long support for Franco rankled many parties and leaders on the left, and there was doubt about the claimed benefits for Spain.<sup>142</sup>

Spain rapidly overcame its geopolitical isolation and advanced European integration within a few years of Franco's death. These developments both preceded and were further facilitated by the Constitution's anticipation of these international connections. Additionally, Spain's popular desire for and constitutional accommodation of membership in established regional and international organizations was influenced by both the timing of Spain's transition and the desire for transformation in the constitutional process.

*b. The Timing of the Transition*

Many of the most notable characteristics of Spanish constitutional law derive from the timing of the drafting of the Constitution. The distinctiveness is evidenced in both structural and rights-oriented textual provisions. As a consequence, three timing-related factors significantly affected the Spanish Constitution: the capacity to study maturing (and respected) postwar constitutions, the prominence of international and regional human rights documents, and the relative success of two decades of European integration. These established elements of post-War European democracy exerted an irresistible gravitational pull on Spain's constitutional transition.

Spain drafted its Constitution in a relatively quiet era of constitutional development. Although the entirety of the second-half of the twentieth-century witnessed a significant number of new constitutions each year, the late 1970s had nothing like the post-World War II and postcolonialism abundance of constitution drafting.<sup>143</sup> Equally, Spain's transition preceded the wave of the late century constitution drafting at the end of the Cold War.

Greece and Portugal were crafting post-dictatorship constitutions on nearly the same timeline as Spain: Greece completed its post-junta constitution in June 1975, and Portugal's Carnation Revolution

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<sup>142</sup> *Id.* The important decision lacked the hallmark transition-era consensus when UCD initiated a successful majority vote in the Spanish Cortes in December 1981. Seth King, *Spain Enters NATO as First Country to Join Since 1955*, N.Y. TIMES, at A1 (May 31, 1982).

<sup>143</sup> ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (Cambridge Univ. Press 2009), <http://comparativeconstitutionsproject.org/chronology/> (last visited Oct. 31, 2018).

resulted in a new constitution in April 1976.<sup>144</sup> Otherwise, a major European country had not had a new constitution since France's de Gaulle-motivated 1958 constitution.<sup>145</sup> Indeed, in Western Europe today, only Switzerland and Finland have newer constitutions than Spain, both established in 1999.<sup>146</sup> The drafting of a Spanish constitution three decades after World War II meant that it was crafted after the post-War constitutions had been established and functioned in practice. The German Basic Law (*Grundgesetz für die Bundesrepublik Deutschland*) had come into force in 1949.<sup>147</sup> The Basic Law is routinely viewed as one of the most influential constitutions in the world and it is certainly the most influential modern constitution.<sup>148</sup> Like the German Basic Law, the Spanish Constitution created a strong constitutional court as a check on unlawful uses of state power.<sup>149</sup> The description of the German Constitutional Court as "a strict but benevolent guardian of an immature democracy that cannot quite trust itself"<sup>150</sup> could also be true of the Spanish Constitutional Court created nearly thirty years later. The Constitutional Courts share several characteristics: exclusive constitutional subject matter jurisdiction (neither is a supreme court of appeal for general legal claims like the

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<sup>144</sup> CONSTITUIÇÃO POLITICA DA REPÚBLICA PORTUGUESA [CONSTITUTION] 1976 (Port.); 1975 SYNTAGMA [SYN.] [CONSTITUTION] (Greece). Surprisingly, the Portugal Constitution seems to have had little influence upon the Spanish Constitution. This is surprising due to their historical and geographical connections, their common twentieth-century dictatorships, and the nearly contemporary transition to democracy. Portugal completed its democratic constitution in 1976, during the Spanish drafting process. The Spanish Constitution was more influenced by the German and Italian constitutions. ROBERT L. MADDOX, *CONSTITUTIONS OF THE WORLD* 405 (3rd ed. 2008).

<sup>145</sup> 1958 CONST. (Fr.). Cyprus (1960), Monaco (1962), and Malta (1965) also ratified new constitutions in this era. ELKINS ET AL., *supra* note 143.

<sup>146</sup> Andorra also ratified its first constitution in 1993. *Timeline of Constitutions*, COMPARATIVE CONSTITUTIONS PROJECT, <http://comparativeconstitutionsproject.org/chronology/>.

<sup>147</sup> GRUNDGESETZ [GG] [BASIC LAW], *translation at* [https://www.gesetze-om-internet.de/englisch\\_gg/](https://www.gesetze-om-internet.de/englisch_gg/).

<sup>148</sup> Michaela Hailbronner, *Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism*, 12 INT'L J. CONST. L. 626, 626–27 (2016) ("celebrations [of the 60th anniversary of the German Constitution] captured the contemporary consensus about the German Constitutional Court, often described as one of the most powerful and most admired courts in the world. The Basic Law and many of the Court's jurisprudential innovations have become export models in many foreign countries. For some liberal American scholars, the German Constitutional Court has even come to define the positive counter-model to the U.S. Supreme Court.").

<sup>149</sup> JUSTIN COLLINGS, *DEMOCRACY'S GUARDIAN: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT 1951–2001* xxvi (2015).

<sup>150</sup> *Id.* at xxxv.

United States Supreme Court); both were created as capstone courts over a mostly unreformed judiciary, i.e., there was no purge of the prior regime's judges;<sup>151</sup> and both are final and supreme on constitutional issues.

Additionally, as with many post-War constitutions, the rights and liberty protections of Chapter I of the Spanish Constitution are heavily influenced by the desire to advance and protect human dignity.<sup>152</sup> Although it is impossible to decisively trace the source of rights in the Spanish Constitution, there is significant crossover in the list of rights in the German Basic Law and those in Chapter II of the Spanish Constitution.

Similarities between the constitutional systems were perhaps inevitable. Germany and Spain (as well as Italy, another influential source for Spanish constitutionalism)<sup>153</sup> wrote their constitutions while transitioning out of authoritarian eras dominated by a single leader through divisive and repressive tactics.<sup>154</sup> The preceding totalitarian regimes were not successfully removed by domestic political forces or internal rebellion. Moreover, both nations transitioned to democracy under significant international scrutiny—allied occupation and supervision of the constitutional drafting process for Germany, and European Community and NATO attention for Spain.

The influence of the international and regional human rights treaties and, by 1978, international courts like the European Court of Human Rights, was a feature specifically welcomed by the 1978 Spanish Constitution. Article 10(2) of the Constitution states: “Principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and

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<sup>151</sup> Omar G. Encarnación, *Reconciliation after Democratization: Coping with the Past in Spain*, 123 POL. SCI. Q. 435, 437 (2008).

<sup>152</sup> MAR AGUILERA VAQUÉS & ROSARIO SERRA CRISTÓBAL, RIGHTS AND FREEDOMS IN THE SPANISH CONSTITUTION 15 (2015).

<sup>153</sup> *Comparative Constitutionalism in Practice*, 3 INT'L J. CONST. L. 543, 567 (2005); Enrique Guillén López, *Judicial Review in Spain: The Constitutional Court*, 41 LOY. L.A. L. REV. 529, 530–32 (2008).

<sup>154</sup> López, *supra* note 153, at 530. María José Martínez Jurico & Stephen G.H. Roberts, *How a Constitution is Made: An Interview with Alfonso Guerra*, in 1812 ECHOES: THE CÁDIZ CONSTITUTION IN HISPANIC HISTORY, CULTURE AND POLITICS 337, (Stephen G.H. Roberts & Adam Sharman, eds., 2013) (“No, no, teníamos los textos. Teníamos La Pepa, la del 31, la italiana, la alemana [No, no, we had the texts. We had La Pepa, the one from 1931, the Italian, the German]”).

agreements thereon ratified by Spain.”<sup>155</sup> Such an interpretive provision, especially a mandatory one such as this, is an effective transitional strategy when a transforming country acknowledges a lack of rights enforcement experience among existing courts and judges at the time a new constitution comes into force.

For Spain, this supported the development of a domestic rights jurisprudence despite the absence of a new or entirely reformed judiciary.<sup>156</sup> This permitted significant influence from human rights treaties, especially through the jurisprudence of the European Court of Human Rights.<sup>157</sup> The influence of international and regional norms is particularly strong in Spain, where the Constitutional Court has amplified their impact. In addition to using the Constitution’s article 10(2) command to interpret domestic constitutional rights in light of European Court of Human Rights’ case law, the tribunal applies European Convention rights with the force of domestic constitutional provisions, and has required lower Spanish courts to do the same.<sup>158</sup> For these reasons, one commentator noted of Spain, that “the capacity of the legal system to guarantee the effectiveness of the ECHR is virtually perfect.”<sup>159</sup> In a further reflection of the transformational role of such alignment with regional rights bodies, the same author declares, “Spain is one of the great success stories of post-authoritarian, rights-based democratization, and the ECHR is an important part of that story.”<sup>160</sup>

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<sup>155</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, art. 10, § 2. The complementarity of the jurisprudence is supported by significant textual similarities in the rights provisions themselves. The 1948 UDHR and the 1950 European Convention include a list of rights that are markedly similar to the final rights provisions of the 1978 Constitution. This is an obvious result of Spain’s incorporation of the existing global and European norms—both of which were well established and respected by the time Spain wrote its Constitution; see *Universal Declaration of Human Rights*, Dec. 10, 1948, UNITED NATIONS, <http://www.un.org/en/universal-declaration-human-rights/>; *Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 131.

<sup>156</sup> See Mercedes Candela Soriano, *The Reception Process in Spain and Italy*, in A EUROPE OF RIGHTS: THE INFLUENCE OF THE ECHR ON NATIONAL LEGAL SYSTEMS 393, 394 (Helen Keller & Alec Stone Sweet eds., 2008).

<sup>157</sup> Pedro Julio Tenorio Sánchez, *The Convergence of the Fundamental Rights Protection in Europe*, 52 IUS GENTIUM 14 (2016).

<sup>158</sup> Helen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, in A EUROPE OF RIGHTS: THE INFLUENCE OF THE ECHR ON NATIONAL LEGAL SYSTEMS 677, 684 (Helen Keller & Alec Stone Sweet eds., 2008).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

The final critical influence of timing on the Spanish Constitution relates to the relative maturation of the project of European integration. Indeed, Spain was drafting a constitution after twenty years of institutional organization and geographic growth for the European Community. The customs union was in place; the Treaty of Brussels had consolidated the three Communities (European Community for Steel and Coal, the European Economic Community, and EURATOM) and the Community had grown to nine member states with the addition of Denmark, Ireland, and the United Kingdom in 1973.<sup>161</sup>

Indeed, Spain's desire (and expectation) to join the European Community, i.e., that "powers derived from the Constitution shall be transferred to an international organization or institution," is evidenced in the final text of the Constitution. Together with the rest of the substantial references to international treaties,<sup>162</sup> Spain's intentions are evident. The prospect of membership in the E.U., NATO, and the Council of Europe acted as a support for the core elements of the 1978 Constitution: rule of law, political stability, market economy, and authentic democracy. For Spain, timely membership in the European Community provided support for its economic development goals and ratified its democratic transformation.

#### *4. Transformative Elements in the 1978 Constitution*

New constitutions are often built upon rejection of their polity's prior constitution or a former regime's perceived failings. This is one significantly helpful way to view the core features of the Spanish Constitution. Indeed, from its earliest declarations, the 1978 Constitution is a refutation of Francoism, authoritarianism, and the four decades of Spanish government after the Civil War. Furthermore, and helpfully, it also rejects the no-compromise, imposition-by-the-victors model that typified the 1931 Constitution. The Preamble announces the Constitution's purposes to

Guarantee democratic coexistence within the Constitution and the laws, in accordance with a fair economic and social order;

Consolidate a State of Law which ensures the rule of law as the expression of the popular will;

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<sup>161</sup> See generally ORIGINS AND EVOLUTION OF THE EUROPEAN UNION chs. 8–10 (Desmond Dinan, ed., 2006).

<sup>162</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. III, ch. 3, art. 93–96.

Protect all Spaniards and peoples of Spain in the exercise of human rights, of their culture and traditions, languages and institutions;

Promote the progress of culture and of the economy to ensure a dignified quality of life for all;

Establish an advanced democratic society and Cooperate in the strengthening of peaceful relations and effective cooperation among all the peoples of the earth.<sup>163</sup>

These declared purposes of the 1978 Constitution stand in contrast to the Spanish legal regime and the evident state values in the Franco era. The Preamble's core assertions of democracy, fairness, rule of law, rights protections, dignity, and quality of life for all Spanish persons and peoples of Spain define the values of the modern democratic country. This transformed state, a "social and democratic nation ruled by law," is starkly different from Franco's Spain.<sup>164</sup>

This notion of reactive constitutional drafting—the idea that the provisions of later constitutions are starkly influenced by reaction against the perceived failures of the prior government—seems self-evident in the constitutional history of many countries. Nevertheless, it is always difficult to attribute direct causation to the later regime's constitutional decisions. However, even without causal certainty, a cursory list of disfavored characteristics of Franco's regime is easily contrasted with the radically different textual promises of the 1978 Constitution. This requires us to contrast the Constitution's promises with the autocratic rule of Franco in a fundamentally authoritarian system of government animated by a fascistic philosophy.

The most obvious structural change provided by the 1978 Constitution is the return of meaningful, robust democracy. One of the core elements of autocratic governments is the consolidation of power in a single person. The restoration of adult suffrage and the division of elected representatives into multiple, genuinely empowered state organs is a flat rejection of autocracy. Moreover, the structural division of state competencies between national and regional authorities further refutes the radical unification of power typified by the earlier system.

Similarly, if we understand authoritarianism as a system of government where "individual freedom is held as completely subordinate to the power or authority of the state, centered . . . in one

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<sup>163</sup> *Id.* at pmb1.

<sup>164</sup> *Id.* at prelim pt., art. 1, § 1.

person . . . [who] is not constitutionally accountable to the people,”<sup>165</sup> the 1978 Constitution, with its numerous supports for the rule of law, is a stark transformation. At the highest level, the Constitution’s express application of constitutional norms to all state entities is the essence of the rule of law. The Constitution does this in the very first sentence: “Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system.”<sup>166</sup> Other elements in the Constitution’s preliminary title reaffirm the rule of law. Article 9(1) declares that “[c]itizens and public authorities are bound by the constitution and all other legal provisions,” and Section 9(3) affirms “the principle of legality, the hierarchy of legal provisions, . . . the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities.”<sup>167</sup>

These promises of legality and the promise of legality to all state actions are given a particularly anti-fascist formula in the extensive list of rights protected under Part I of the Constitution. The protection and enforcement of those rights are advanced by an independent judiciary and a specialized constitutional court (the *Tribunal Constitucional de España*), with additional state resources (such as the *Defensor del Pueblo* or Ombud) dedicated to securing the rule of law.<sup>168</sup> Additionally, provisions of the Constitution that circumscribe the role of the military and minimize the official role of the Roman Catholic Church also promote the rule of law as the foundation of the state.

Part III below further explores these core transformative goals of the transition toward constitutional democracy and away from autocracy, authoritarianism, and fascism.

### ***B. The Spanish Model of Constitutional Transition***

The final, and in some contexts most important, element to examine from the Spanish transformation to constitutional democracy is the process. The so-called Spanish Model of transition to democratic

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<sup>165</sup> *Authoritarianism*, DICTIONARY.COM, <https://www.dictionary.com/browse/authoritarianism?s=t> (last visited Oct. 31, 2018).

<sup>166</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978 prelim pt., art. 1, § 1.

<sup>167</sup> *Id.* at prelim. pt., art. 9, § 1, 3.

<sup>168</sup> FERRERES, *supra* note 1, at 152–54.

constitutionalism is of significant academic and political interest.<sup>169</sup> Spain's transformation, from authoritarian government to constitutional democracy, held significant appeal to a variety of countries in the late twentieth centuries and may continue to interest transitioning nations in the future.

### *1. Characteristics of the Spanish Model*

Although references to a Spanish Model of transformation extend back to at least 1991,<sup>170</sup> there is no unified definition of the precise characteristics of the model. In general, it describes a relatively peaceful transition from authoritarianism to democracy through negotiated, consensus-based reform without rupture of the existing legal framework through violence or revolution. Maintenance of legal continuity, the use of pacted negotiation, and the dominance of consensus-based decision-making are the hallmarks of the Spanish Model.

The Spanish transition has been termed a "legal revolution."<sup>171</sup> This refers to the fact that the radical transformation to constitutional democracy happened without a sociolegal rupture with the extant legal system: no revolution, no coup, no overthrow of the existing system as the first step toward change. Rather (and rather surprisingly), significant initial reform occurred through the formal mechanisms of the Francoist state. At a critical moment, a royally appointed prime minister with no democratic legitimacy secured the support of the former regime's pseudo-Parliament to hold genuine democratic

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<sup>169</sup> There are some inevitable and interesting comparisons between the relatively similar and simultaneous transition experiences of Greece, Portugal, and Spain. Collective examinations of this third wave of modern European democratization in Southern Europe is fascinating but not directly relevant to this Article's thesis. See, e.g., *TRANSITIONS FROM AUTHORITARIAN RULE: SOUTHERN EUROPE* (Guillermo O'Donnell et al. eds., 1986). The congruent timing is generally considered an "interesting fact" without a compelling "macro-level explanation." Robert M. Fishman, *Rethinking State and Regime: Southern Europe's Transition to Democracy*, 42 *WORLD POL.* 422, 425 (1990).

<sup>170</sup> Josep Colomer, *Transitions by Agreement: Modeling the Spanish Way*, 85 *AMER. POL. SCI. REV.* 1283, 1283 (1991) ("[F]requent and praiseworthy references to the *Spanish model* of transition to democracy have been made, generally identifying it with negotiations and pacts among political elites and consensus among the citizenry that avoid acts of revenge, violent confrontations, and civil war.").

<sup>171</sup> STANLEY G. PAYNE, *SPAIN'S FIRST DEMOCRACY: THE SECOND REPUBLIC, 1931–1936*, 49 (1993); see also Antonio-Carlos Pereira Menaut, *A Pointless Legal Revolution—Constitutional Supremacy and EU Membership in Spain, 1978–2015*, 30 *Tul. Eur. & Civ. L.F.* 81 (2015).

elections featuring previously banned political parties exercising rights repressed until that transformative moment.<sup>172</sup>

Such a gradualist transition avoided the shockwave of collapsing and re-creating all state institutions simultaneously. Major institutions of state authority remained in place until they were later lawfully replaced by new, also lawful, institutions under the new Constitution's democratic values and democratic structures. The avoidance of radical structural disruption also meant that there was no wholesale purge of the civil service or the judiciary.<sup>173</sup> Notably, the contemporaneous transitions in Portugal and Greece both included a sharper rupture with the predemocratic state, initiated by the military in both countries.<sup>174</sup>

The second commonly referenced characteristic of the Spanish Model is that it was a negotiated transition or "pacted transition" driven largely by political elites.<sup>175</sup> This was possible because of the nondisruptive nature of the transition, the openness of late-stage Francoists (especially Suárez) to fair elections, and the relatively weak electoral support for more extreme political parties and regional separatists. One author has described the elite nature as "[d]iscrete agreements and restaurant negotiations."<sup>176</sup> Additionally, the ultimate elite, King Juan Carlos, offered active support for the political change

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<sup>172</sup> The Spanish term *reforma pactada-rupture pactada* (pacted or negotiated reform, negotiated rupture) describes this process: internal, agreed-upon reforms from within the system and then an agreed-upon but formally legal break with the prior regime. JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 61 (1996).

<sup>173</sup> See Fishman, *supra* note 169, at 430.

<sup>174</sup> *Id.* at 430–31.

<sup>175</sup> There is an active academic debate about the relative influence and contributions of elites and civil society groups. For purposes of this Article, the debate offers little insight. Indeed, to the extent this Article focuses on the constitutional transition (through the Spanish Model) rather than the entirety of the post-Franco transition, the role of elites comes into sharper focus and is less controversial. Anyone who has participated in the drafting process of a collective statement for a large group of stakeholders knows that it cannot be done with all the stakeholders actually present. For legitimacy, there must be interplay between collective guidance and small group drafting. Guidance, redirection, and heavy influence can come from the larger collection of stakeholders, but a handful of authors will always achieve more than a mass of even like-minded folks. Of course, this drafting reality is starkly contrasted with the need for authentic public direction and engagement to secure genuine collective ownership. Constitutions, as broad collective statements of national values, political purposes, and governmental structuring, face exponentially larger challenges than day-to-day groups. Most constitutional processes address this, minimally, through express election of constituent assembly representatives at the start of the process and popular ratification at its end.

<sup>176</sup> ALONSO & MURO, *supra* note 2, at 4.

that was occurring.<sup>177</sup> The engagement of the King along with democratically elected centrists and moderate political parties permitted substantial change while encouraging moderate, nonpunitive results. Importantly, this kept the military at bay, watchful but passive, and diminished the risk of an abortive coup led by reactionary elements of the armed forces.<sup>178</sup>

The elite negotiated nature of the constitutional transition also promoted the use of consensus and avoided one of the oft-referenced pitfalls of the Second Republic under the Constitution of 1931. Decision-making through consensus allowed productive involvement of a larger array of political parties and, indirectly, increased investment from their collectively larger groups of constituents and stakeholders (*e.g.*, unions, the armed forces, monarchists, and other interest groups).<sup>179</sup> Of course, some groups excluded themselves from the process: Basque separatists, extreme groups on the left and right, and some others.<sup>180</sup> But the formal inclusion of groups supported the image of the transition and inevitably affected the results, giving compromise a far better chance than it might have otherwise had.

The result of the consensus model is evident when contrasted with Spain's other twentieth-century constitution. Most critics of the Constitution of 1931 saw it as a liberal winner-takes-all document that targeted institutions that still had significant support in Spanish society—especially the Catholic Church, the monarchy, and the armed forces.<sup>181</sup> This created allied opponents to the Second Republic and provided impetus for the Civil War.<sup>182</sup> The choice to structure consensus-based decision-making into the process rejected a no-compromise model that could easily have created numerous discontents.

Neither this, nor the discussion and evaluation of the Spanish Model that follows is intended to cast the actual Spanish process of transition in an ahistorical, sentimental, or overly idealistic light. No historian or political scientist would suggest purely altruistic motives to historical actors. Historical motives are as mixed as modern ones—perhaps even

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<sup>177</sup> See *A King for Democracy*, N.Y. TIMES, June 4, 1976, at A24.

<sup>178</sup> CARR & FUSI, *supra* note 66, at 220.

<sup>179</sup> Fishman, *supra* note 169, at 438.

<sup>180</sup> FERRERES, *supra* note 1, at 2.

<sup>181</sup> See *id.* at 4.

<sup>182</sup> *Id.*

more so when the stakes are as high as a short-term national transformation. As one commentator noted in 1989,

Spaniards feared a return to the anarchic bloodletting of the civil war; they were determined not to let it happen again. King Juan Carlos feared the anti-monarchist sentiments among the newly legalized Socialists. The military feared a purge, and the left feared the military. By turning its back on old scores, and on its own blood-stained history, Spain achieved the transition.<sup>183</sup>

But, regardless of underlying motives, the procedural design that resulted in the Spanish Model offered a generally successful, compelling, and possibly exportable model for constitutional transformation.

## 2. *Appeal of the Spanish Model*

There is little doubt that the Spanish Model has been attractive to later constitutional transitions. Since the time of Spain's transformation, the Iron Curtain has come down, Apartheid ended, and a variety of countries in South America, North Africa, and Asia transitioned away from one version of authoritarianism or another. As a consequence, the Spanish process was a potential model for nations from such diverse places as post-Communist Eastern Europe, post-Apartheid South Africa, and Northern Africa following the Arab Spring.<sup>184</sup>

For a host of nations, Spain provided a promising approach to stable, nonviolent transformation. As early as 1989, one news article specifically referenced Poland, Hungary, Tunisia, Argentina, and Mexico, saying:

[T]he Spanish model remains the most compelling one, and not only for Latin American nations like Argentina or Mexico that were once Spanish colonies. After the violent failure of heroic rebellions and upheavals in East Germany in 1953, Hungary in 1956 and Czechoslovakia in 1968, Eastern European innovators see Spain's

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<sup>183</sup> James Markham, *There's a Demand of Instruction in Democracy*, N.Y. TIMES (Apr. 16, 1989), <https://www.nytimes.com/1989/04/16/weekinreview/the-world-there-s-a-demand-for-instruction-in-democracy.html>.

<sup>184</sup> See, e.g., Paloma Aguilar & Clara Ramírez-Barat, *Past Injustices, Memory Politics and Transitional Justice in Spain*, in THE ARAB TRANSITIONS IN A CHANGING WORLD: BUILDING DEMOCRACIES IN LIGHT OF INTERNATIONAL EXPERIENCE 56 (Senén Florensa ed. 2016); see generally Charles Powell, *Revisiting Spain's Transition to Democracy*, in THE ARAB TRANSITIONS IN A CHANGING WORLD: BUILDING DEMOCRACIES IN LIGHT OF INTERNATIONAL EXPERIENCE 38 (Senén Florensa ed. 2016).

gradualist transition to full democracy as an alternative to bold but doomed leaps to freedom.<sup>185</sup>

Notably, this favorable view of Spain's transition is shared by Spaniards as well. In a 2001 poll, eighty-six percent of Spaniards were proud of their transition.<sup>186</sup>

These favorable opinions highlight the value of examining the potential value of the Spanish Model beyond the Iberian Peninsula in addition to evaluating the value of the transformation to Spain itself. The remainder of this Article assesses the Spanish Model's success in transitioning Spain away from Francoist authoritarianism and toward constitutional democracy—and evaluates the viability of foreign adoption of this model of democratic transformation.

### III

#### TRANSFORMATIVE AND REACTIVE ELEMENTS OF SPANISH CONSTITUTIONALISM

The Spanish constitutional transition was animated by entwined motivations: a desire to craft a new state in the model of modern constitutional democracies and a reaction against the disfavored elements of the Franco regime. Hence, Spain's affirmative transformation is inseparable from its denunciation of its recent past. At a high level of generality, it is relatively easy to identify the primary perceived failings of Franco's Spain from the perspective of the late twentieth century constitutional drafters. But closer examination of the process and the substantive choices of the authors show the interplay of the negative and positive motives. Moreover, it evinces how these particular transformative purposes were advanced by the Spanish Model of democratic transition.

This Part focuses on three of the worst characteristics of preconstitutional Spain in order to highlight the transformative changes introduced by the 1978 Constitution. Autocracy, authoritarianism, and fascism are overlapping and related characteristics of Francoist Spain. For purposes of the analysis below, they are treated distinctly to support a close examination of the modern Spanish response in the values and textual provisions of the 1978 Constitution.

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<sup>185</sup> Markham, *supra* note 183.

<sup>186</sup> ALONSO & MURO, *supra* note 2, at 3. Notably, this polling precedes the economic downturn of the early 2000s and the enlivened Catalanian independence crisis.

### *A. Democratic Constitutional Monarchy Replaces Autocratic Rule*

The nature of an autocracy is the effective collection of power in an individual without limitation from state institutions, other independent sources of authority, or the people themselves. Despite its moderately liberalizing evolution from the 1930s to the 1970s, Franco's Spain certainly meets these criteria. The primary response to this characteristic is the creation of genuinely democratic institutions, which diffuse the previously unified powers among the voting-age populace and their elected representatives. But in Spain, the retort to autocratic rule also required a delicate but decisive reframing of two historically important institutions: the monarchy and the quasi-independent regions.

#### *1. Democratic Structures and Rights*

Under the 1978 Constitution, the Kingdom of Spain became a modern parliamentary democracy. In fact, Spain held democratic elections in 1977, the year before the democratic Constitution came into force.<sup>187</sup> Spain's elections involve universal adult suffrage conducted through free, fair, and confidential processes.<sup>188</sup> At the national level, representatives are elected into one of the two chambers of the *Cortes Generales*, located in Madrid.<sup>189</sup> The 350 members<sup>190</sup> of the Congress of Deputies (*Congreso de los Diputados*) generally serve four-year terms selected through party-list proportional representation in their provinces.<sup>191</sup> Because it is a parliamentary system, a majority vote of the *Congreso* selects the prime minister as the head of the government.<sup>192</sup> The 266 members of the *Senado* (Senate) serve co-

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<sup>187</sup> See CARR & FUSI, *supra* note 66, at 227.

<sup>188</sup> Manuel Álvarez-Rivera, *Election Resources on the Internet: Elections to the Spanish Congress of Deputies* (July 24, 2016), [http://electionresources.org/es/index\\_en.html#ASPECTS](http://electionresources.org/es/index_en.html#ASPECTS).

<sup>189</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978. pt. III, ch. 1, art. 68.

<sup>190</sup> The precise number of Deputies and Senators is based on the General Electoral Regime Organic Law (5/1985; June 19, 1985), within a constitutional range of 300–400. CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978. pt. III, ch. 1, art. 68, § 1.

<sup>191</sup> Spain's parliamentary model follows the D'Hondt (or Jeffersonian) Method, which slightly favors larger parties.

<sup>192</sup> Although the elected leader of the *Congreso* is formally the President of the Government of Spain (*Presidente del Gobierno de España*), the role is functionally that of a prime minister of the parliamentary body.

terminus four-year terms. *Senado* seats favor rural constituencies because representation is not entirely apportioned by population.<sup>193</sup>

Although the *Cortes Generales* is bicameral, the chambers are not on an equal footing. The *Congreso* can overrule many *Senado* actions and the lower house has additional independent authority not shared by the upper house.<sup>194</sup> The *Senado*'s independent powers are much more limited. The most important and contentious of its powers is its capacity to suspend local governments, which it did in October 2017 in relation to the Catalonia independence crisis.<sup>195</sup>

The national legislature is joined by a host of other democratically elected institutions in the autonomous communities, provinces, and municipalities. Each level of government is guaranteed "self-government for the management of their respective interests."<sup>196</sup> Even trade unions, political parties, and professional associations must function democratically under the Constitution.<sup>197</sup>

Democracy, the antithesis of autocracy, is mentioned twice in the Preamble of the Constitution of 1978 (to "guarantee democratic existence" and "establish an advanced democratic society") and in the first sentence of Section 1.<sup>198</sup> These democratic values and the multilevel democratic institutions crafted by the Constitution are a direct and immediate response to Franco's autocratic rule. The Constitution created democratic state institutions that allow for representation of voter will and the political will of regional and local institutions. They replace the unelected rubber stamp *Cortes* and the pseudo-democratic municipal committees of the Franco era. Obviously, the creation and empowerment of democratic institutions directly advances the affirmative goal of becoming a modern

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<sup>193</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978 pt. III, ch. 1, art. 69, § 5. Typically, the four seats for each province are all won by the most popular party in that province. An additional fifty-eight senators are selected by the legislative assemblies of each autonomous community. Each region gets one additional senator for each one million citizens. Because senators are representatives of their regions, they may be recalled by their regional legislatures. NEWTON, *supra* note 80, at 47.

<sup>194</sup> NEWTON, *supra* note 80, at 46–48.

<sup>195</sup> Sam Jones et. al., *Spain Dissolves Catalan Parliament and Calls Fresh Elections*, THE GUARDIAN (U.K.) (Oct. 28, 2017), <http://www.theguardian.com/world/2017/oct/27/spanish-pm-mariano-rajoy-asks-senate-powers-dismiss-catalonia-president>.

<sup>196</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978 pt. VIII, ch. 1, art. 137.

<sup>197</sup> *Id.* at prelim. pt. art. 6, 7; ch. 2, § 2, art. 36; and ch. 3, art. 52.

<sup>198</sup> *Id.* at pmb.

constitutional democracy. It also rejects in principle and effect, the unification of power typified by Franco's autocratic state.

## 2. Regionalism, Ethnocultural Nationalism, and Autonomy

As discussed above, the Constitution of 1931 allowed significantly more autonomy for the historical regions with strong ethno-cultural identities than was permitted before or after that brief period. The most heavily historically identified regions—especially the Basque Country and Catalonia—were given significant autonomy under the Statutes of Autonomy.<sup>199</sup> These Statutes allowed regions to regulate a noteworthy number of local, domestic matters and to exhibit and promote their own language, culture, and history.

Conservative forces in Spain were violently opposed to the idea. The autocratic nature of Francoism required centralization. Subnational autonomy, or peripheral nationalism, was considered an existential threat as worrisome as communism or atheism.<sup>200</sup> Throughout the Franco era, the regions with strong national identities were targeted for special oppression.<sup>201</sup> Non-Castilian languages like Catalan and Euskadi were targeted with repressive laws and punishment. Any promotion of regional independence was violently addressed by the national government.<sup>202</sup>

The transition period following Franco's death offered great potential to the autonomy-minded regions. But there was significant doubt that the former Francoists who remained in power would allow genuine autonomy even once the transition to democracy began.<sup>203</sup> In fact, there appeared to be little consensus on the issue of centralized or decentralized power. The heirs of Franco on the right wanted a minimum amount of decentralization, while the parties on the left, including the regional parties of course, supported some version of federalism (in the absence of actual independence). An unlikely form of consensus resulted: both views found a home in the ratified text of the Constitution.

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<sup>199</sup> See CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 9, 1931 pt. I.

<sup>200</sup> PRESTON, *supra* note 42, at 53–54.

<sup>201</sup> Omar G. Encarnación, *The Ghost of Franco Still Haunts Catalonia*, FOR. POL'Y, (Oct. 5, 2017), <https://foreignpolicy.com/2017/10/05/the-ghost-of-franco-still-haunts-catalonia/>.

<sup>202</sup> Goldie Shabad & Richard Gunther, *Language, Nationalism, and Political Conflict in Spain*, 14 COMP. POL. 443, 443 (1982); see also PRESTON, *supra* note 42, at 53–54.

<sup>203</sup> The animosity was strong enough that the Basque country excluded itself from much of the constitutional drafting process and urged its voters to shun the ratification vote. CARR & FUSI, *supra* note 66, at 244–45; PRESTON, *supra* note 71, at 144–46, 150.

In the absence of precise agreement, the constitutional drafters tried to postpone the inevitable conflict with a constitution of multiple possible solutions. Hence, the Constitution of 1978 asserts the “indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards” while acknowledging the right to “self-government of the nationalities and regions.”<sup>204</sup> The drafters elected to delay confrontation on the contentious issue so that regional autonomy did not derail the entire transition:

“[I]n the exercise of the right to self-government recognized [in] the Constitution,”<sup>205</sup> the Constitution recognizes but does not identify examples of “Self-governing Communities that may be constituted.”<sup>206</sup> As a result, the Constitution of 1978 attempted to have both unity and regional autonomy. Rather than establishing fixed determinations about regional competence, the issue of decentralized authority and regional autonomy was primarily left to a nuanced democratic process of writing and soliciting approval of a Statute of Autonomy that defined areas of governmental competence. Thus, the Constitution allowed regions to “accede to self-government and form Self-governing Communities (*Comunidades Autónomas*)”<sup>207</sup> at their own initiation. Because each Autonomous Community negotiates the mechanisms and details of its own authority, each Community has a unique set of competencies and authority. The result is a form of “asymmetrical federalism,”<sup>208</sup> where the division of national and regional powers and responsibilities varies by Community. Indeed, the process of proposing areas of competence through a Statute of Autonomy may be regularly repeated (every five years) to alter or otherwise adjust competencies within the bounds laid out in the Constitution.<sup>209</sup>

In this way, the drafters of the Constitution included the limited areas of consensus in the text of the Constitution and insisted on a moderate

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<sup>204</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978 prelim. pt., art. 2.

<sup>205</sup> *Id.* at pt. VIII, ch. 3, art. 143.

<sup>206</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978 pt. VIII, ch. 1, art. 137.

<sup>207</sup> *Id.*

<sup>208</sup> See generally Luis Moreno, *Asymmetry in Spain: Federalism in the Making?*, in ACCOMMODATING DIVERSITY: ASYMMETRY IN FEDERAL STATES 149 (Nomos Verlagsgesellschaft Baden-Baden; Robert Agranoff, ed. 1999); see also Esther Seijas Villadangos, *Answers to Spanish Centrifugal Federalism: Asymmetrical Federalism Versus Coercive Federalism*, 2 PERSP. ON FEDERALISM 164 (2014), [http://www.on-federalism.eu/attachments/185\\_download.pdf](http://www.on-federalism.eu/attachments/185_download.pdf).

<sup>209</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978 pt. VIII, ch. 1, art. 148–49.

result, i.e., a negotiated framework for future definition of relative autonomy. The Spanish Model's focus on consensus and moderation is evident in the decision not to decide beyond the limited areas of agreement. Any other approach could have produced winners and losers who may have threatened the larger transformational project. This shows another value of the Spanish Model. By deciding less, the drafters accomplished more. Moreover, the process that would ultimately apportion power between particular Autonomous Communities and the national government was structured to resemble the constitutional transition model: a binding agreement requires negotiated consensus between state and Community leadership, heightened majority requirements to ensure broad agreement, and the avoidance of extreme results (because of the extant constitutional limits). These constitutionally hard-wired requirements ensure the successful procedural characteristics of the drafting era are extended beyond the special, constitutional moment.

### 3. *The Role of the Constitutional Monarch*

It would be disingenuous to discuss the constitutional reaction against autocracy without addressing the (perhaps surprising) constitutional role of the Spanish monarch. From the peninsular unification in the Golden Age of Spain under Queen Isabella and King Ferdinand to the present King Felipe VI,<sup>210</sup> the Spanish monarchy has always played a decisive role in Spanish history. Most of Spain's constitutions have been monarchical.<sup>211</sup> Even following declaration of the Second Republic and renunciation of the royal line in the Constitution of 1931, the exiled King Alfonso XIII acted as a rallying cry for important elements supporting Franco in the Civil War.<sup>212</sup>

Of course, Franco failed to restore the monarchy following his victory in the Civil War, instead consolidating power in himself. Nevertheless, the monarchy was central to Franco's plan for governing Spain after his own death. Alfonso's grandson, whom Franco considered more reliably aligned to Franco's vision of Spain than

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<sup>210</sup> The current King is Felipe VI. Felipe became the Spanish King on June 19, 2014, when his father King Juan Carlos I abdicated in his favor. Rafael Minder, *Spain's Incoming King Takes Over a Throne Heavy With Political Tension*, N.Y. TIMES, June 18, 2014, at A7.

<sup>211</sup> Adam Przewarski et al., *The Origins of Parliamentary Responsibility*, COMPARATIVE CONSTITUTIONAL DESIGN 116–17 (Tom Ginsburg, ed. 2011).

<sup>212</sup> PRESTON, *supra* note 42, at 37, 209–10, 224; PAYNE, *supra* note 72, at 41–42; CARR & FUSI, *supra* note 66, at 33–35.

Alfonso's son, would become King Juan Carlos I upon Franco's death.<sup>213</sup> Juan Carlos had been guided, counseled, and supported by Franco in the last decade of his regime.<sup>214</sup> However, Juan Carlos's commitment to democracy was greater than his loyalty to the deceased dictator. The restored monarch announced public support for democratization soon after his return to power in 1975,<sup>215</sup> and in 1976, appointed the reform-minded Adolfo Suárez as Prime Minister of Spain, who helped lead Spain to constitutional democracy.<sup>216</sup>

King Juan Carlos's support for democratic reforms was certainly one reason that the new Constitution included a role for the king and the royal family. But the Constitution of 1978 is nothing like early Spain's constitutional monarchies, none of which effectively limited royal control over the government.<sup>217</sup> Part II of the Constitution details a visible but carefully circumscribed role for the monarch. The monarch is given a variety of formal but largely symbolic powers by the Constitution: promulgating laws, summoning the *Cortes Generales*, appointment of government officials on the prime minister's proposal, and others as one would expect in a "Parliamentary Monarchy," as the Constitution identifies Spain.<sup>218</sup> But, the king must make an oath "to obey the Constitution and the laws and ensure that they are obeyed, and to respect the rights of citizens and the Self-governing Communities"<sup>219</sup> And, his acts are invalid unless countersigned by the prime minister or other ministers, denying him any actual legislative role.<sup>220</sup>

Including a public role for the monarchy provides "a symbol of [Spain's] unity and permanence." And, subsuming the monarch's role into the Constitution, as is done by Section 56 and other provisions, both accentuates the new state's legitimacy and allows historical continuity within the transformative framework of the new Constitution. The compromise of retaining a figurative role for the

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<sup>213</sup> See FERRERES, *supra* note 1, at 72.

<sup>214</sup> *Portent for a King*, N.Y. TIMES, Oct. 25, 1975, at 28 ("From the outset, Juan Carlos heavily mortgaged his future to Franco at his designation when he swore on his knees in front of the Generalissimo to uphold Spain's laws and institutions.").

<sup>215</sup> *Id.*

<sup>216</sup> PRESTON, *supra* note 71, at 92–93.

<sup>217</sup> Przewarski et al., *supra* note 211.

<sup>218</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978 prelim. pt., art. 1, § 3.

<sup>219</sup> *Id.* at pt. II, art. 61, § 1.

<sup>220</sup> *Id.* at pt. II, art. 64, § 1; *id.* at art. 56, § 3. The only exception to this rule is that the King may "appoint and dismiss the civil and military members of his Household." *Id.* at art. 65, § 2.

monarchy also fits perfectly within the Spanish Model of transition. A monarchic role satisfied traditionalists and placated the military without threatening the core democratic transformation. It reflected a consensus of the centrist elites on the left and right of the political spectrum and avoided an inflammatory result like the one made in the Constitution of 1931. In some ways, the inclusion of a democratically restrained monarch was a constitutional decision emblematic of the Spanish Model.

### ***B. The Rule of Law Replaces Authoritarianism***

The importance of establishing the newly democratic Spain as a nation under the rule of law is evident in the earliest words of the new Constitution. The second clause of the Preamble declares the intent to “consolidate a State of Law (*Estado de Derecho*) which ensures the rule of law as the expression of the popular will.”<sup>221</sup> This idea of a state that enshrines and advances the rule of law is utterly contrary to Franco-era authoritarianism. An *Estado de Derecho* is a sharp rebuke to the classic authoritarian focus on a single leader’s power and current desires over fixed, enforceable rules that apply to everyone.<sup>222</sup> It rejects such a regime’s insistence on unity of party and ruler, malleability of legal rules, and oppression of dissent at the ruler’s caprice.

The significance of this idea is immediately embodied in Part I of the Constitution, where the drafters presented the overarching tenets of the new Spanish state. Section 1 of the Constitution declares, “Spain is hereby established as a social and democratic state, subject to the rule of law, which advocates freedom, justice, equality, and political pluralism as the highest values in its legal system.”<sup>223</sup> The meaning and effect of being an *Estado de Derecho* is made expressly and abundantly clear in the same Preliminary Part of the Constitution:

Citizens and public authorities are bound by the Constitution and all other legal provisions. . . . The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions . . . , the certainty that the rule of law shall prevail, the accountability of public

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<sup>221</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978 pmb1.

<sup>222</sup> Merriam Webster Dictionary defines “authoritarian” as “of, relating to, or favoring a concentration of power in a leader or an elite not constitutionally responsible to the people.” [http://www.merriamwebster.com/dictionary/authoritarianism?utm\\_campaign=sd&utm\\_medium=serp&utm\\_source=jsonld](http://www.merriamwebster.com/dictionary/authoritarianism?utm_campaign=sd&utm_medium=serp&utm_source=jsonld).

<sup>223</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978 prelim. pt.

authorities, and the prohibition of arbitrary action of public authorities.<sup>224</sup>

Such a comprehensive and emphatic assertion of the importance of the rule of law in the newly democratic Spain is an unmitigated rebuke to the malleability of law as a tool to serve authoritarian ends in the prior era. This section will focus on this fundamental role for the rule of law in the textual provisions of the Constitution, the enforceability of constitutional (and other) norms through adjudication, and the constitutional reply to the nongovernmental authoritarian institutions, Spain's "de facto powers": the Spanish military and the Catholic Church.

### *1. A Rule of Law Constitution*

First on the list of critiques of any authoritarian state must be the absence of rule of law. Using the raw power of governmental authority, rather than the force of established law, is the hallmark of authoritarianism. The ruler, or the ruling elite, is the law. Authoritarianism is a particular form of lawlessness that allows the current desires of the leader or ruling class to dominate over established procedures, community values, or any fixed national principles. A lawfully established, enduring, and enforceable constitution is the most common foundation for the rule of law in the modern era. To the extent it fixes and enforces rules of governance, a constitution is a direct refutation of lawlessness or authoritarianism.

At the conclusion of the Spanish Civil War, Franco took on his various dictatorial titles (most prominently head of state for life), banned opposition political parties, repudiated the Constitution of 1931, and established his own government supported by a puppet legislature.<sup>225</sup> As a consequence, Franco's Spain functioned without a democratic constitution, without express or enforceable rights guarantees, and without an independent judiciary. Although there are many other vital elements of a government under law, the absence of a legally enforceable, rights-based democratic constitution is a glaring absence. The lack in Franco's Spain is even more exceptional, because the middle decades of Francoism were a period of triumphant constitutionalism and rights ascendancy globally. The post-War period

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<sup>224</sup> *Id.* at prelim. pt., art. 9, § 1, 3.

<sup>225</sup> See generally PAUL PRESTON, *FRANCO* (Fontana, 1995); STANLEY G. PAYNE & JESÚS PALACIOS, *FRANCO: A PERSONAL AND POLITICAL BIOGRAPHY* (2014).

witnessed dozens of new constitutions<sup>226</sup> and passage of the United Nation's International Bill of Rights and the Council of Europe's European Convention of Human Rights and Fundamental Freedoms.<sup>227</sup>

The direct response to the absence of rule of law in the Franco era is, of course, the 1978 Constitution itself. From a legal perspective, this is most evident in the thoughtful provisions to enact and enforce statutes, the structuring of multilevel state power, and the fixed distribution of power among state institutions. Additionally, an enforceable bill of rights is a specific, purposeful bulwark to the harm authoritarian governments can effect on individuals. The provisions of the Constitution of 1978 satisfy all these elements. For rule of law, the constitutional provisions are "law"; "rule" comes from the enforceability of these constitutional limits and compliance of governmental institutions with these legal norms.

In Spain, the constitutional support for the rule of law takes on additional forms. Not only does the Constitution enumerate general civil and political rights—for example, free expression, political participation, and criminal procedural protections—but other provisions respond directly to the sins of the prior regime. For example, the Constitution's prohibition on the death penalty was in response to the deadly, repressive early history of the Franco regime.<sup>228</sup> Similarly, the Constitution's extensive protections for those accused of crimes and detained by the state are easily explicable as a response to the dictatorship's prolific detention of political enemies.<sup>229</sup> Even the elements of sex equality in the Constitution can be viewed as a reaction to the oppressive sexism of the Civil War and Franco eras.<sup>230</sup>

Overall, entrenchment of principles of the rule of law is a core value woven throughout the Constitution, and this is reflected in the consensus of the drafting period. The rule of law elements were novel for Spain, but not controversial. The provisions advancing the rule of law in the Constitution of 1978 were not subject to significant negotiation or compromise in the constitutional process when it became clear to the Francoist old guard that the era of authoritarianism was over. This was clear with the 1977 election results, if not sooner. There

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<sup>226</sup> *Timeline of Constitutions*, COMPARATIVE CONSTITUTIONS PROJECT, <http://comparativeconstitutionsproject.org/chronology/> (last visited Nov. 1, 2018).

<sup>227</sup> *Universal Declaration of Human Rights*, *supra* note 155; *Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 131.

<sup>228</sup> See CARR & FUSI, *supra* note 66, at 19.

<sup>229</sup> PRESTON, *supra* note 42, at 319–21.

<sup>230</sup> Eric Solsten & Sandra W. Meditz, *Social Values and Attitudes*, SPAIN: A COUNTRY STUDY (1988), <http://countrystudies.us/spain/43.htm>.

was little evident popular support for continuation of the prior regime, and any moves toward constitutionalism and democracy were implicitly moves toward a state subject to the rule of law.

## 2. *The Role of the Spanish Judiciary*

The judiciary is a central tool of an *Estado de Derecho* because it embodies much of the fixity and enforceability of legal rules. In organizing the judicial power in a constitutional democracy, the core focus is upon separating judicial determinations from democratic lawmaking, consolidating the power of adjudication in the courts, and protecting the independence of the judiciary. Legal determinations can then be based on established laws through fair and open processes separated from the prejudice and preferences of rulers, and from the short-term interests of those in power. This is an essential element of effective governance by rule of law. Part VI of the Constitution establishes a judicial branch of government with judges “accountable for their acts and subject only to the rule of law.”<sup>231</sup> This Part secures the other characteristics of a fair and independent judiciary in its organization of court and judges: “The exercise of judicial authority in any kind of action, both in ruling and having judgments executed, is vested exclusively in the courts and tribunals laid down by the law, in accordance with the rules of jurisdiction and procedure which may be established therein.”<sup>232</sup>

Because Spain’s Constitution was drafted a generation after most Western European constitutions, Spain could rely heavily on the models of other countries, particularly Italy, for the structuring and functioning of its courts.<sup>233</sup> This also served the purpose of affirming Spain’s modern democratic bona fides for the European Communities and the Council of Europe, which it sought to join in its new era. As a consequence, although it was an essential component of the transformation from Francoist authoritarianism to modern constitutionalism, the provisions on the Spanish judiciary were not controversial and thus not subject to heavy negotiation or compromise.

However, not all Franco-era power bases drew lawful power from state institutions or were unquestionably willing to constrict their own

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<sup>231</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. VI, art. 117, § 1.

<sup>232</sup> *Id.* at pt. VI, art. 117, § 3.

<sup>233</sup> *Comparative Constitutionalism in Practice*, *supra* note 153. López, *supra* note 153, at 530–32.

accustomed authority to the new *Estado de Derecho*. The next two sections discuss the “de facto powers”: the Spanish armed forces and the Roman Catholic Church.<sup>234</sup>

### 3. *The Military’s Role in the New Democracy*

Historically, the military was a critically important support for dictatorial and authoritarian rule in Spain. The armed forces in Spain have always played an expansive role in support of the monarchy, and in twentieth-century Spain that role took on quasi-political dimensions. Most notably, Franco entered the attack on the Second Republic from his position as a general in the armed forces.<sup>235</sup> After the Civil War, the military remained a core pillar of Franco’s power, perceiving itself as the last defense of Spain.<sup>236</sup> Moreover, the fact that the military was the means of destruction of Spain’s earlier attempt at democracy in the Second Republic was often present in the minds of Spaniards working on the transition.<sup>237</sup>

By the end of Franco’s reign, the military was definitively aligned with conservative political elements, the monarchy, and other traditionalist Spanish institutions.<sup>238</sup> Many in the military perceived its role to be that of protector of a notion of a true Spain. This resulted in an abiding military connection to the status quo and the traditionalist elements glorified by Franco. A common (and realistic) concern during Spain’s transition to democracy was whether the military would overcome its authoritarian impulses and support the democratic Constitution.<sup>239</sup>

In the transition, the *Cortes*, the drafters, and the political parties had to keep an eye on the military as they feared interference.<sup>240</sup> Because of the fears of democratically inclined elites, the military was accommodated by multiple elements of the Spanish Model. The much-discussed “moderation” of constitutional decision-making and “consensus” in the process were significantly the result of attempts to ensure that the military did not halt the transition through force.<sup>241</sup> The

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<sup>234</sup> NEWTON, *supra* note 80, at 18–19.

<sup>235</sup> PRESTON, *supra* note 42, at 131.

<sup>236</sup> *Id.* at 3–4.

<sup>237</sup> PAUL PRESTON, *THE POLITICS OF REVENGE: FASCISM AND THE MILITARY IN TWENTIETH-CENTURY SPAIN*, 127 (1995).

<sup>238</sup> CARR & FUSI, *supra* note 66, at 21–24.

<sup>239</sup> *See generally* PRESTON, *supra* note 42, at 171.

<sup>240</sup> PRESTON, *supra* note 71, at 98–100, 129–31, 146–50, 195–204, and 206–07.

<sup>241</sup> *Id.*

support of the king, changes in military leadership arranged by Suárez prior to the formal transition, and the gradualist nature of the transition kept the threat of a military coup low.<sup>242</sup> Additionally, the continuity of the existing legal framework diminished the excuse for military intervention.

The actual constitutional text is somewhat more expansive than one would expect in light of the acute concerns during the drafting period about military interference. Article 8 of the Constitution declares the role of the military is “to safeguard the sovereignty and independence of Spain, defend its territorial integrity and the constitutional order.”<sup>243</sup> Notably, this role addresses the habitual resistance to decentralization by giving the military a role in keeping the regions from unconstitutional splits with Madrid.<sup>244</sup> But most of the details of the constitutional duties and democratic accountability of the military were postponed. The Constitution allowed for a later organic law to work out the details,<sup>245</sup> a strategy that naturally minimized objections. As with issues of regional autonomy, the Spanish Model of transition facilitated consensus on moderate principles and postponed contentious details for a later date. This allowed the constitutional transition to advance without forcible objection from the armed forces.

Indeed, these concerns were legitimate; the military did carry out a nearly successful coup d'état very soon after the transition. On February 23, 1981, armed members of Spain's Civil Guard led by Lieutenant-Colonel Tejero took control of a meeting of the Congress of Deputies that was selecting a new prime minister.<sup>246</sup> The coup was motivated, in part, by the issues that the armed forces had long opposed: devolution of power to the regions, renewed violence caused by Basque separatists, and the uncertainties of democracy.<sup>247</sup> However, the coup eventually failed. King Juan Carlos I appeared on television during the early morning of February 24 while the Deputies were still

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<sup>242</sup> See generally *id.*

<sup>243</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978 prelim. pt., art. 8.

<sup>244</sup> NEWTON, *supra* note 80, at 18–19. This is also true of the primary governing legislation, the Organic Law on National Defense and Military Organization, 1980.

<sup>245</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978 prelim. pt., art. 8, § 2.

<sup>246</sup> PRESTON, *supra* note 71, at 195–202.

<sup>247</sup> See generally JAVIER CERCAS, ANATOMY OF A MOMENT: THIRTY-FIVE MINUTES IN HISTORY AND IMAGINATION (Anne McLean trans., Bloomsbury 2011). The “thirty-five minutes” refers to a live recording of the first moments of the coup later widely shown on television after the coup failed; see generally PRESTON, *supra* note 237, at ch. 8.

being held hostage.<sup>248</sup> Appearing in his uniform as Captain General of the Armed Forces, the king rebuked the coup participants, and stated that “[t]he Crown, the symbol of permanence and unity of the nation, cannot tolerate, in any form, the actions or behavior of anyone attempting by force to interrupt the democratic process of the Constitution, which the Spanish people approved at the time of the referendum.”<sup>249</sup> The statement damaged the asserted purpose to restore the monarchy and challenged the claims that the military was acting on behalf of the Spanish people. Along with other factors, the king’s actions facilitated the ultimate failure of the coup eighteen hours after the deputies had been seized by the members of the Civil Guard.

The failed coup weakened the influence of the military leadership but left untouched its constitutional and organic law authority. The later convictions of the coup leaders and others associated with the coup<sup>250</sup> had the result of strengthening the rule of law by demonstrating that even one of the “de facto powers” with a long history of influence was subject to the Constitution and the rule of law.<sup>251</sup> Of course, one additional result of the coup was that it strongly reinforced support for Juan Carlos I and the Spanish monarchy, and reaffirmed the viability of Spain’s fledgling democracy.

#### 4. *Catholicism and the State*

Religion, especially Roman Catholicism, has always been a significant factor in Spanish self-definition and Spanish politics. From the rule of Isabella and Ferdinand, the “Reyes Catolicos” of Spain’s Golden Era, to the significant constitutional debate about the role of the typically pro-Francoist Church in the constitutional democracy launched in 1978, the Roman Catholic Church has long been concerned with its relation to Spain and vice versa.<sup>252</sup> Catholicism was a core characteristic by which fifteenth-century Spain defined itself as a

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<sup>248</sup> PRESTON, *supra* note 237, at ch. 8.

<sup>249</sup> *Spanish King Juan Carlos I’s Speech Defeated a Coup* [Notable and Quotable], WALL ST. JOURNAL, (June 3, 2014) <https://www.wsj.com/articles/notable-quotable-1401827637>; for a contemporary account, see James Markham, *Spain’s Rightist Civil Guards Seize Parliament Amid Vote on Premier*, N.Y. TIMES, Feb. 24, 1981, at A1.

<sup>250</sup> LAUREN MCLAREN, CONSTRUCTING DEMOCRACY IN SOUTHERN EUROPE: A COMPARATIVE ANALYSIS OF ITALY, SPAIN, AND TURKEY 210 (2008).

<sup>251</sup> See generally NARCIS SERRA, THE MILITARY TRANSITION: DEMOCRATIC REFORM OF THE ARMED FORCES ch. 5–6 (2010).

<sup>252</sup> See generally STANLEY G. PAYNE, SPANISH CATHOLICISM: AN HISTORICAL OVERVIEW (1984).

nation.<sup>253</sup> Iberian Spain was intended to be united as a Catholic country reclaimed from centuries of Muslim occupation.<sup>254</sup> Religion often dictated international relations, most obviously as one of the motives for Spain's global expansion through empire.<sup>255</sup> Spreading the Catholic faith justified conquest and colonialism and defending it was a defining duty of the monarchs over the centuries.

Contrarily, the denial of special prerogatives to the Church defined the modern, liberal state created in the Constitution of 1931. The Second Republic's secularist vision of Spain stood in sharp contrast to the preceding centuries of Catholic or divided Catholic and Muslim rule. It was also a prime motive and rallying cry for traditionalists and nationalists in the Spanish Civil War.<sup>256</sup>

The "antireligious" restrictions on Catholicism in the Constitution of 1931 yielded to a triumphant association (and robust support) of the Catholic Church with Franco's rebellion and regime.<sup>257</sup> One of the defining characteristics of Spain under Franco was its close and complementary relationship with the Roman Catholic Church. Each affirmed the authority of the other to augment its own power.<sup>258</sup> Indeed, one historian described Catholicism as "the most potent weapon in the right-wing armoury" during the Spanish Civil War—although noting that the tool was, "to a certain extent, placed there by Republican and Socialist impudence" in 1931.<sup>259</sup> These historical swings between significant authority and minimal influence for the Spanish Church—more commonly, significant influence—defined Spain until 1978.

It was inevitable that the role of religion, and more specifically Catholicism, would be a contentious issue in the Constitution of 1978. Indeed, constitutional decision-making in this area seems to be more particularly good evidence of the compromise and moderation of the Spanish Model. Consistent with the Model, the Constitution did not return to the secularism of the Constitution of 1931 nor did it continue

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<sup>253</sup> *Id.*

<sup>254</sup> HENRY KAMEN, *EMPIRE: HOW SPAIN BECAME A WORLD POWER 1492–1763* 16–17 (2002); J.H. ELLIOT, *supra* note 20, at 17.

<sup>255</sup> J.H. ELLIOT, *supra* note 20, at 68, 86; KAMEN, *supra* note 254, at 375–76.

<sup>256</sup> PRESTON, *supra* note 237, at 59–60.

<sup>257</sup> *Id.*

<sup>258</sup> See Ministry of Foreign Affairs (Spain), *Concordat with the Holy See, August 27th, 1953*, CONCORDAT WATCH, [http://www.concordatwatch.eu/showtopic.php?org\\_id=845&kb\\_header\\_id=34561](http://www.concordatwatch.eu/showtopic.php?org_id=845&kb_header_id=34561) (last visited Nov. 1, 2018); see generally SPAIN: A COUNTRY STUDY 110 (Eric Solsten & Sandra W. Meditz, eds.1988), <http://countrystudies.us/spain/44.htm>.

<sup>259</sup> PRESTON, *supra* note 42, at 59.

the symbiotic relationship of Franco's Spain. Instead, it exhibits rights-based liberalism in the form of modern constitutional religious liberty protections and it also embraces the special historical and cultural significance of Roman Catholicism. These related constitutional elements certainly exhibit some tension, but at the very least they have mitigated the claims of anticlericalism from the Constitution of 1931 and the excessive entanglement of church and state in the Franco era.<sup>260</sup> Hence, the Constitution includes traditional religious liberty rights, robust freedom of belief, and freedom to practice one's religion: "Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law."<sup>261</sup> Additionally, one's religion may not be subject to forced disclosure, a provision clearly responsive to elements of enforced confessionality during the Franco regime.<sup>262</sup> And, of course, religion is a prohibited ground of discrimination in the equality clause of the Constitution.<sup>263</sup>

However, the Spanish treatment of religion is not secularist nor purely focused on individuals' religious liberty. Instead, the Constitution requires neutrality with a notable exception. Although it states that "[n]o religion shall have a state character," it nevertheless requires some special accommodation of Catholicism by state entities: "The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperative relations with the Catholic Church and other confessions."<sup>264</sup> This latter element is justified as an acknowledgement of the important historical role of the Spanish Catholic Church,

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<sup>260</sup> It should be noted that the Roman Catholic Church's own views about engagement with official state institutions generally and with Franco particularly evolved importantly during the twentieth century, particularly following the Second Vatican Council when the Church embraced the reality of plural faiths in traditionally Catholic states. Javier Martínez-Torrón, *Religious Freedom and Democratic Change in Spain*, 2006 B.Y.U. L. Rev. 777, 790 (2006).

<sup>261</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. I, ch. 2, § 1, art. 16, § 1.

<sup>262</sup> "No one may be compelled to make statements regarding his or her ideology, religion or beliefs." CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. I, ch. 2, § 1, art. 16, § 2.

<sup>263</sup> *Id.* at pt. I, ch. 2, art. 14; and "The public authorities guarantee the right of parents to ensure that their children receive religious and moral instruction in accordance with their own convictions." *Id.* at pt. I, ch. 2, § 21, art. 27, § 2.

<sup>264</sup> *Id.* at pt. I, ch. 2, § 1, art. 16, § 3.

inseparable from Spain's historical self-understanding and the substantial majority of Spaniards who identify as Catholic.<sup>265</sup>

This special relationship arguably creates tension with the equality clause's nondiscrimination language and the general neutrality model of the religious liberty provisions. Some elements of Spanish church-state relations are fairly common, while others carry accommodation close to favoritism.<sup>266</sup> As with regional autonomy and military issues, the Constitution leaves many of the details to special legislation to decide. This occurred with passage of the Organic Law of Religious Freedom in July 1980, the first such organic law completed after ratification.<sup>267</sup> Although the Constitution does not require an organic law to clarify the state's accommodation of the Catholic Church (as it did with other contentious issues), the number and sensitivity of issues argued for such clarification. The use of the absolute majority legislative process also has the effect of continuing the drafting period's consensus model.

The Spanish example of moderation and compromise, where present provisions are improved through examination of past mistakes, reflects a fascinating alternative approach to Spain's previous models. Prior constitutional missteps—winner-take-all provisions with insufficient popular support, radical changes to the status quo, or too many changes at once—were mostly avoided. Even in the area of church-state relations, where the Spanish position of compromise favors religion far more than most Western nations would permit, the Spanish Model serves the goal of successful transition with sensitivity to uniquely Spanish factors. In a contentious sociolegal area, the carefully

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<sup>265</sup> Seventy-five percent of Spaniards identify as Roman Catholic but only a small minority are actively religious and participate regularly in Catholic rituals. Giles Tremlett, *Spain is Still a Very Roman Catholic Country, but Times are Changing*, THE GUARDIAN, (Mar. 31, 2011) <https://www.theguardian.com/world/2011/mar/31/neweurope-spain-catholics-church-influence>. In fact, Spain signed a series of four agreements about church-state relations with the Vatican just one week after the Constitution was ratified. Javier Martínez-Torrón, *supra* note 260, at 794 (2006).

<sup>266</sup> For example, religious bodies receive organizational tax breaks, their direct donors also receive tax incentives for supporting their religions, and there are some forms of direct financial assistance available to registered religious groups. Currently, this third benefit is only received by the Catholic Church. Additionally, religious instruction occurs in public schools as well. *See, e.g., id.* at 725–36.

<sup>267</sup> LEY ORGÁNICA 7/1980, DE 5 DE JULIO, DE LIBERTAD RELIGIOSA [Organic Law of Religious Liberty] (July 1980), <http://www.boe.es/boe/dias/1980/07/24/pdfs/A16804-16805.pdf>.

negotiated compromise served an important “pacifying function.”<sup>268</sup> This was possible because the 1978 Constitution avoided creating either another Catholic confessional state or a purposively secularist state.

### *C. Entrenched Constitutional Rights Replace Fascism*

Spain in the Franco era can be understood as fascist, especially in the earliest years, because it was a regime that valued the state over individual or regional interests, with a centralized autocratic government headed by an authoritarian leader that exhibited rigid economic and social regimentation through forcible suppression of any political opposition or contrary social movements.<sup>269</sup> While many of the elements of the 1978 Constitution are directly contrary to Spain’s past fascist characteristics, the focus of this section is on the adoption of the twentieth-century model of human rights protections. Human rights regimes were the international legal response to the global calamity caused by fascism in the Second World War. Spain was a tardy member to U.N. and European human rights institutions because its authoritarian government lasted decades longer than those of the Axis powers. The result was that democratic Spain established a belated domestic rights framework in an already existing international human rights environment.

#### *1. The Role of Spain’s Tribunal Constitucional*

For purposes of this Article, I have separated the discussion of the Spanish Constitutional Court (*Tribunal Constitucional de España*) from the Spanish judiciary. This is justified by their distinct functions and by differing roles in the transition to constitutional democracy. Where the role of the regular Spanish judiciary was a traditional judicial role, serving the rule of law generally, the Constitutional Court has a more specialized role as guarantor of the promises in the Constitution. To the extent a constitution makes binding promises, there must be an institution to enforce them. In Spain, as in most countries, that institution is a constitutional court.<sup>270</sup> The Court polices

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<sup>268</sup> FERRERES, *supra* note 1, at 22–23.

<sup>269</sup> Merriam Webster Dictionary defines fascism as “a political philosophy, movement, or regime . . . that exalts nation and often race above the individual and that stands for a centralized autocratic government headed by a dictatorial leader, severe economic and social regimentation, and forcible suppression of opposition.” *Fascism*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/fascism>.

<sup>270</sup> Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INTL J. CONST. L. 44, 44 (2007).

the constitutional promises related to the organization of the state, division of legislative competence and authority, and—in the focus below—protection of individual and collective constitutional rights.

Notably, this schema—treating as distinct the general legal and specialized constitutional roles of state judicial institutions—is an unusual perspective for most readers from North America and other regions more closely tied to the British legal traditions. In those countries, the highest appellate (judicial) court often performs a double duty as the national constitutional court: the Supreme Court of the United States and the Supreme Court of Canada are the prominent examples of this different model. The Spanish institutional organization is typical of European states and, indeed, far more common globally.<sup>271</sup>

In the typical European model, the constitution assigns the special task of constitutional interpretation, including rights adjudication, to a specialized court or tribunal—often exclusively. The constitutional court model highlights the special role, tasks, and authority of a tribunal with such powers, especially the weighty power of constitutional judicial review. This model, formulated by Hans Kelsen for the Second Austrian Republic in 1920,<sup>272</sup> is commonly contrasted with the American model.<sup>273</sup> Although commonly labeled a “court,” a constitutional court in Kelsen’s model is not merely another judicial institution; it is an adjudicatory body outside the judiciary.<sup>274</sup> A constitutional court is typically given authority to review only constitutional issues, not disputes without a constitutional character.<sup>275</sup> Moreover, such a court typically has exclusive authority to review constitutional claims, requiring lower courts to refer such issues to the specialized court.<sup>276</sup>

Spain follows the Kelsenian model closely. The Spanish Constitutional Court is created and empowered in Part IX of the Constitution, rather than in Part VI, which describes the role of the

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<sup>271</sup> Louis Favoreau, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 46 (Louis Henkin & Albert J. Resenthal eds., 1990)

<sup>272</sup> *Id.*

<sup>273</sup> See Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25 W. EUR. POL. 77, 79 (2002); Garlicki, *supra* note 270.

<sup>274</sup> Sweet, *supra* note 273, at 79–80.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

judiciary as a whole.<sup>277</sup> The Spanish Constitutional Court has authority to consider constitutional issues only and is the primary and supreme state institution empowered to rule on the constitutionality of laws. As is common of constitutional courts, members of the Spanish Constitutional Court must be selected through special processes. In Spain, the appointment of *magistrados* (justices) of the Constitutional Court requires super majority support from *Congreso* and the *Senado* for all nominees originating from those institutions.<sup>278</sup> Each Spanish justice must have special, relevant qualifications, and each serves a nine-year term, with three members leaving the court every three years.<sup>279</sup>

One objective of the Kelsen model is to highlight the extrajudicial nature of constitutional court power.<sup>280</sup> This characteristic may be why constitutional courts are more globally popular than the American model: they acknowledge the exceptional authority of judicial review, highlight the elevated stature of constitutional norms, and reiterate the distinct nature of the value-rich and purposive interpretation that a constitution (unlike a statute or contract) requires. Such attitudes toward constitutional courts reaffirm the legal and transformative power of constitutional rights enforcement, a refutation of fascist disregard for the dignity and worth of all human beings.

In fact, prominent scholars have shown that robust constitutional judicial review has often arisen in the aftermath of authoritarian regimes.<sup>281</sup> In such stark transitions, the constitutional courts take on a distinct, protective role to facilitate the transformation. On its twenty-fifth anniversary, King Juan Carlos I asserted that Spaniards “owe a great deal” to the Spanish Constitutional Court as the “guarantor of the rules, values and principles” of the Constitution and as “an interpretive guiding light and protecting bastion of the letter and spirit of our Constitution.”<sup>282</sup> This special role is also reflected in the distinct relationship between the Constitutional Court and the Spanish Model

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<sup>277</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. IX and pt. VI.

<sup>278</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. IX, art. 159, § 1.

<sup>279</sup> *Id.* at pt. IX art. 159, § 3.

<sup>280</sup> TOM GINSBERG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 9 (2003).

<sup>281</sup> John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEXAS L. REV. 1671 (2004).

<sup>282</sup> *Words from His Majesty the King in the Commemorative Act of the XXV Anniversary of the Constitutional Court* (Madrid, July 12, 2005), <http://www.tribunalconstitucional.es/ActividadesDocumentos/2005-07-12-00-00/King%27s%20Speech.pdf>.

of democratic transition. Unlike many state institutions created through the Spanish drafting process, the Constitutional Court is less a result of the process than a guarantor of it. The Constitutional Court protects the negotiated terms of the transition. It is the primary institution designed to ensure, within its capabilities, that the consensus-based promises of the drafting era are upheld.

## 2. *Rights Protections in the Constitutional Text*

Enforceable rights protections, one of the hallmarks of modern constitutionalism, are a response against all three elements of the Franco regime: autocracy, authoritarianism, and fascism. Individual liberties, including political freedoms, collective rights to language and culture, and the promotion of social welfare for all Spaniards, are forcefully antithetical to authoritarianism. The protection of such rights runs counter to the fascist use of authority to suppress dissent, oppress regional nationalism, and prioritize the desires of the state over the needs of individual citizens. This section focuses on the substantive content of constitutional rights in Spain because it is a direct refutation of the prior regime.

### a. *Hierarchical Structure of Rights*

The Spanish Constitution includes an expansive list of rights drawn from postwar international human rights documents and extant democratic European constitutions—a broad array of civil and political, social and economic, and collective and cultural rights. The rights in the Spanish Constitution, though expansive in number, are not equal in value. Spain’s constitutional text establishes a hierarchy of rights: “A different scale of legal protection has been established among rights, such that some of them seem to be substantively more important than others, depending on the group they belong to.”<sup>283</sup> At the top of the hierarchy sits the animating idea of human dignity—a common characteristic of postwar constitutions. As the Constitution says, “[H]uman dignity, the inviolable and inherent rights, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace.”<sup>284</sup>

Beyond dignity, the Spanish Bill of Rights (Part I of the Constitution) identifies different categories of rights. The differences

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<sup>283</sup> AGUILERA & SERRA, *supra* note 152, at 28.

<sup>284</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. I, art. 10.

are evident in the textual division of Part I into Chapter 2 (“Rights and Liberties”) and Chapter 3 (“Governing Principles of Economic and Social Policy”).<sup>285</sup> The relative importance of the rights is evident in the difference in categorization, their textual description, and their differing enforcement options. Generally speaking, traditional civil and political rights are enumerated in Chapter 2. They are described with classical fundamental rights language, are labeled “rights,” and have the broadest range of judicial protection options. Other categories of rights—economic rights, social welfare rights, labor rights, among others—are more likely to be relegated to Chapter 3. The Chapter’s title identifies them as “governing principles” instead of as rights, and they have no direct avenues of judicial enforcement or protection.<sup>286</sup>

This division and hierarchy is not a Spanish invention. A similar hierarchy exists in the “International Bill of Rights,” the core human rights treaties of the United Nations: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Social, Economic, and Cultural Rights.<sup>287</sup> Hence, it is unsurprising that this division is evident in hierarchies of kind and of enforcement in the Spanish Constitution. The text secures the hierarchy of rights in Section 53.<sup>288</sup> Section 53 begins with the assertion that the civil and political “rights and liberties recognized in Chapter Two . . . are binding for all public authorities [and] may be regulated only by law which shall, in any case, respect their essential content.”<sup>289</sup> This “essential content” requirement

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<sup>285</sup> *Id.* at pt. I, ch. 2 and 3.

<sup>286</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. I, ch. 3.

<sup>287</sup> Initially, a single covenant was planned to expand on the principles agreed upon in the UDHR but the U.N. General Assembly agreed to split the draft covenant into two distinct documents in 1952. G.A. Res. 543 (VI) (Feb. 5, 1952). Indeed, the United Nation’s original differentiation in 1952 is the most obvious source of the ongoing division of civil/political and socioeconomic rights in most of the world’s constitutions. These documents, the ICCPR and the ICESCR, contained different lists of rights and subjected states to different levels of obligations related to remedies and enforcement.

<sup>288</sup> To understand this hierarchy, recall that the bill of rights includes Chapter 2 (“Rights and Liberties” consisting of Equality [Article 14] and two distinct Divisions. Division 1 is “Fundamental Rights and Public Liberties” (including many traditional civil and political rights, certain labor rights, and the right to education) and Division 2 is “Rights and Duties of Citizens” (including certain duties of citizens and additional economic rights and the rights of marriage and private property). CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. I.

<sup>289</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. I, ch. 4, art. 53, § 1. The Chapter 2 fundamental rights are judicially enforceable rules, with direct and immediate legal effect. This point is made multiple times in the Constitution.

prohibits Parliament's use of law-making authority to strip away the inherent, intended protection provided by the textual right.

The second part of Article 53 identifies the first two judicial remedies related to rights protection:

Any citizen may assert his or her claim to protect the liberties and rights recognised in Article 14 [Equality] and in Section 1 of Chapter Two, by means of a preferential and summary procedure in the ordinary courts and, when appropriate, by submitting an individual appeal for protection (*recurso de amparo*) to the Constitutional Court.<sup>290</sup>

These two special judicial procedures, the “preferential and summary procedure” in ordinary courts and the *amparo* appeal to the Constitutional Court, are available only for the core civil and political rights.<sup>291</sup> So, Chapter 2 rights bind all government entities, and legislation that limits those rights is substantively constrained by the essential content requirement. But only traditional civil and political rights are identified for special judicial and constitutional protection.

Depending on one's definition of a Bill of Rights, Chapter 3 of the Constitution may also be included. Chapter 3, “Governing Principles of Social and Economic Policy,” includes an array of social welfare rights, some additional economic rights, cultural rights, and environmental rights, among others.<sup>292</sup> However, the limitations on and guidance to state institutions in their tasks related to Chapter 3 rights are less stringent: “substantive legislation, judicial practice and actions of the public authorities shall be based on the recognition, respect and protection of the principles recognised in Chapter Three.”<sup>293</sup> Additionally, judicial protection is far less robust: Chapter 3 rights “may only be invoked in the ordinary courts in the context of the legal

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<sup>290</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. I, ch. 4, art. 53, § 2.

<sup>291</sup> *Id.*

<sup>292</sup> In Chapter 3, some of the individual provisions refer to the “governing principles” with the language of “rights” (“right to health protection,” “right to decent and affordable housing,” and “right to an environment suitable for personal development”) and others are merely instructions to public authorities, in significantly varied language: “public authorities shall promote” or that the “State shall be especially concerned with. . .”, or it “shall promote conditions directed towards. . . .” Article 53, which robustly constrains substantive government limitations on Chapter 2 rights, are less protective of Chapter 3 rights. CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. I, ch. 3.

<sup>293</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978 pt. I, ch. 4, art. 53, § 3.

provisions by which they are developed.”<sup>294</sup> There are no claims absent statutory grant of rights or remedies.

Finally, the hierarchical nature of such rights is additionally evident in the procedural requirements for related legislation. For “fundamental rights and public liberties,”<sup>295</sup> related legislation must be passed through an “organic act” (*ley orgánica*). Procedural requirements for organic acts are more rigorous: any initial passage or subsequent amendment or full repeal must demonstrate an absolute majority of the *Congreso* on a final vote on the entirety of the bill.<sup>296</sup> The purpose of heightened requirements is to ensure greater support and more complete consideration. The hope is that greater consensus will be evidenced in the passage of such laws.<sup>297</sup> No such requirement exists for other rights.

Although the Spanish mechanism of implementing organic act legislation for the core of its protected rights is uncommon, the values behind it are often present in the thoughts of constitutional drafters. This allows Spain to ensure that the spirit of compromise and the high valuation of rights (the Spanish *consenso*) are present when future amendments or far-reaching rights-related legislation is passed. In Spain, the heightened requirements of organic laws are an attempt to ensure this additional level of protection. This may be a particular or heightened concern for negotiated constitutional transitions. In Spain, it reflects an extension of the Spanish Model into the regular governing era (far beyond the constituting drafting moment). It encourages, and potentially forces, cooperation and moderation among political parties in certain contentious or important legislative areas of constitutional

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<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at pt. III, ch. 8, art. 81.

<sup>296</sup> *Id.*

<sup>297</sup> The Constitutional Court has narrowly interpreted the organic law protection from Article 81. First, the court has held that the list of rights that are subject to the organic law requirement is restricted; it is only Articles 15 to 29, i.e., Chapter 2, Article 1 of the Constitution. AGUILERA & SERRA, *supra* note 152, at 30. This excludes a host of rights, most notable the right to equality in Article 14, but also the rights in Section 2 of Chapter 2 (such as the right to private property in Article 33) that would seem likely to be highly protected as well. CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. I, ch. 2. Additionally, the Constitutional Court has a restrictive view of when the organic law requirement applies to rights-related legislation—even when it relates to the short list of protected rights. The court will require organic law procedures only when the legislation applies directly to the Article 1 right. Laws that have an indirect effect on the protected rights do not trigger the special procedures. The Congress of Deputies has not struggled to achieve the requisite majorities to pass, amend, or revoke rights-related organic laws. A simple legislative majority is sufficient for all rights other than those in Chapter 2, Article 1 and for the non-essential elements of all rights. AGUILERA & SERRA, *supra* note 152, at 30–31.

significance. Furthermore, it supports the drafters' purposes by reassuring stakeholders that rights are entrenched: it secures the values and protections of the constitutional founding for future generations.

*b. Other Constitutional Provisions for the Protection of Rights*

Additional rights-related elements of the 1978 Constitution are responses to the fascist past and facilitate transformation toward, and maintenance of, the nation's transformed values. Although this is not the place for a close reading of every Spanish constitutional provision that advances "liberty, justice, equality and political pluralism,"<sup>298</sup> this Section examines three noteworthy elements that combat fascism by advancing transformed values and protecting substantive rights: (1) a transformative substantive right (equality), (2) a protective interpretive principle (the essential content requirement), and (3) a supplemental state institution for the protection of rights (the Ombud).

*(i) Equality*

Like dignity, equality is a core constitutional value in a constitution responding to a fascist past. Where fascism prioritizes particular members of the state polity—based on ethnicity, race, language, culture, or nationality—equality provisions reject state preferences and prejudices. Even the most cursory reading of the Spanish Constitution demonstrates the importance of equality. The very first Section of the Constitution tells the reader that "Spain . . . advocates as the highest values of its legal order, liberty, justice, equality, and political pluralism."<sup>299</sup> The importance of equality is reflected in the expansive language of the formal equality clause and its placement as the first substantive right in Article 14 of the Spanish bill of rights. It states, "Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance."<sup>300</sup>

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<sup>298</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution], Dec. 27, 1978, prelim. pt., art. 1, § 1.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at pt. I, ch. 2, art. 14. There are several notable characteristics of the text that are reflected in the court's jurisprudence. First, it includes both a list of impermissible grounds of discrimination and a more general prohibition on discrimination for unlisted conditions or circumstances, combining the two different methods most countries choose. This is an effective way to maximize equality protection.

However, the Constitution has more to say about equality. Where fascism uses the power of the state to advance certain groups, Article 9 requires affirmative government duties to advance substantive equality.

It is incumbent upon the public authorities to promote conditions which ensure that freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural, and social life.<sup>301</sup>

These obligations, to “promote conditions,” “remove obstacles,” and “facilitate . . . participation,” require the government to actively advance equality in Spain. The affirmative duties in Article 9 and the prohibition on discrimination in Article 14 combine to place a significant obligation on Spanish state entities to promote equality.

Of course, equality rights are unique among civil and political rights. They are not single circumstance rights but rather require equal treatment and equal regard in all government actions. Equality secures a personal right, but it also changes the character of all state action. It generally forbids state preferences, prejudices, or disfavor. This potential and intent to change the nature of state treatment of individuals highlights the antifascist values of the Constitution of 1978.

*(ii) Essential Content Principle*

Referring to all Chapter 2 rights, Article 53 declares that the “exercise of such rights and liberties . . . may be regulated only by law which shall, in any case, respect their essential content.” Certain inherent, vital elements of each right are meant to be protected, and the fact that significant authority is given to the legislature to manage the protection of rights does not mean that there are no substantive limits on their actions in this area. This protective principle ensures powerful protection of the core meaning of the constitutional rights, even when details of the rights realization are delegated to the legislature. The essential content principle protects the substance of each right as secured in the transition while allowing the legislature to ensure the protection retains vitality and remains effective in contemporary society.

The essential content requirement is a substantive requirement, and therefore, it has been subject to interpretation by the Constitutional Court. Although the content must be examined “right by right and case

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<sup>301</sup> *Id.* at prelim. pt., art. 9, § 2.

by case,”<sup>302</sup> the court has identified general descriptions of these two complementary elements of the essential content requirement: “To identify what is the essential content the right will have to be linked to human dignity, [to] the recognisability [i.e., the core understanding of the right], and the legally protected interests. . . . Each right has its own [essential content].”<sup>303</sup>

The “human dignity” element, a hallmark of postwar constitutionalism, is discussed above because it is the first of the core principles listed in the Constitution.<sup>304</sup> There seems to be a special relationship between dignity and transformative constitutionalism. Additionally, understanding “recognisability” requires acknowledgement of the abstract meaning of the right: the meaning prior to its appearance in the challenged legislation. Because there is a meaning that “conceptually pre-dates the legislative moment,” courts can use that meaning to ensure the related legislation respects the right in such a way that preserves the constitutional intent for the right.<sup>305</sup>

The third element, the maintenance of the “legally protected interests,” focuses on the desired action or liberty or decision that is legally protected for the individual right-holder. For example, the legally protected interest in the right of free expression is the lawfully protected capacity to express one’s own formulated thoughts or opinions. For the court, this identifies a substantive core of protection that “gives rise to the right” and makes it “real, concrete and effectively protected.”<sup>306</sup>

These three elements will be examined by the court in a case alleging the denial of the essential content of a right. This is another area where the influence of a similarly anti-authoritarian and transformative constitution is evident.<sup>307</sup> Article 19 of the German Basic Law says that “[i]nsofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law. . . . In no case may the essence of a basic right be

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<sup>302</sup> S.T.C., Nov. 18, 1993 (B.O.E. No. 341) (Spain).

<sup>303</sup> AGUILERA & SERRA, *supra* note 152, at 23. [drawn from CCT 11/1981].

<sup>304</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution], Dec. 27, 1978, pt. I, art. 10. This is a common place for this right and this value; many postwar, transformative constitutions put dignity in a primary place in their new constitutions. Germany is the most well-known example, GRUNDGESETZ [Constitution], May 23, 1949, pt. I, art. 1 (Germany); *but also* South Africa, Constitution, Feb. 4, 1997, ch. 1, § 1.a (South Africa).

<sup>305</sup> S.T.C., Apr. 8, 1993 (B.O.E. No. 11) (Spain).

<sup>306</sup> *Id.*

<sup>307</sup> AGUILERA & SERRA, *supra* note 152, at 31.

affected.”<sup>308</sup> In Spain, the Constitutional Court’s protection of essential content exemplifies the ongoing role of the court to protect the core negotiated agreement and facilitate the transformation that the Constitution represents.

(iii) *The Role of the Ombud*

The absence of reliable substantive rights protections in a fascist state reflects the priorities of the regime. Radically different values are evident in the role of the Ombud in the Constitution of 1978. Section 54, the second of only two provisions in Chapter 4 of the Spanish bill of rights (titled “Guarantee of Fundamental Rights and Freedoms”), creates the position of Ombud (*Defensor del Pueblo*).<sup>309</sup> The Ombud, “who shall be a high commissioner of the *Cortes Generales*, appointed by them to defend the rights contained in” the Spanish bill of rights, plays a significant role in the protection of rights and the promotion of rights-based constitutional values.<sup>310</sup>

Elected by a super majority of the *Congreso* and *Senado*, the Ombud is a public advocate “responsible for defending the fundamental rights and civil liberties of the citizens by monitoring the activity” of national, regional and local authorities.<sup>311</sup> The duties of the Ombud are predominately defined by organic law, but the Ombud functions independently on its own initiative or upon request from the public.<sup>312</sup> The work of the Ombud is focused on the acts of the public administration; the Ombud does not initiate or participate in claims between private individuals. Cooperation with the Ombud is required by law for public entities.<sup>313</sup>

The Ombud’s capacity to bring constitutional claims against governmental entities is discussed below, but its pointed refutation of fascist or authoritarian government’s denial of rights is significant. The Constitution of 1978 creates the Ombud as a supplemental rights institution to advance rights protections for individuals. Moreover, the

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<sup>308</sup> GRUNDGESETZ [Constitution], May 23, 1949, pt. I, art. 19, § 1 and 2 (Germany).

<sup>309</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. I, ch. 4 art. 54. “*Defensor del Pueblo*” translates as “Defender of the People” but is more commonly translated as its functional equivalent, Ombudsperson. I have used the gender-neutral version Ombud.

<sup>310</sup> *See id.*

<sup>311</sup> *What is the Defensor del Pueblo?*, DEFENSOR DEL PUEBLO, <https://www.defensor.delpueblo.es/en/who-we-are/what-is-the-defensor/>.

<sup>312</sup> LEY ORGÁNICA 31/1981, DE 8 DE ABRIL, DEL DEFENSOR DEL PUEBLO [Organic Law of the Ombud], <http://www.boe.es/boe/dias/1981/05/07/pdfs/A09764-09768.pdf> (Spain).

<sup>313</sup> NEWTON, *supra* note 80, at 28–29.

authorization and support of a governmental institution to ensure the government complies with its own rules is a starkly transformative constitutional element. The Ombud is an actor within the government that is empowered to use the independent powers to ensure governmental compliance with the rule of law and the Constitution: this is the antithesis of authoritarian government.

### 3. *Rights Claims at the Constitutional Court*

The authority of the Spanish Constitutional Court is national, relatively expansive, and final. It was also the exclusive tribunal with direct authority over parliamentary laws, although other state actions can be reviewed by the regular courts in certain circumstances.<sup>314</sup> As a consequence, the Constitutional Court has the principal power to enforce the Constitution through judicial review. The court can, subject to jurisdictional requirements,<sup>315</sup> invalidate parliamentary acts, regional statutes, and regulations with the force of law issued by the national or Autonomous Communities' legislatures.<sup>316</sup> While the Spanish Supreme Court (*Tribunal Supremo de España*) has ultimate nationwide appellate authority over all non-constitutional issues, the Constitutional Court is supreme for interpretation and enforcement of the Constitution.<sup>317</sup>

Although the Spanish Constitutional Court is a court of limited and special jurisdiction, the constitutional text and norms are binding and applicable upon the entirety of the judiciary and all governmental entities.<sup>318</sup> The court's authority to police the promises of the Constitution counters the fascist elements of Spain's past by dispersing governmental power and reaffirming the supremacy of the rule of law, especially constitutional rules.

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<sup>314</sup> Organic Law 6/2007 amended the Organic Law of the Constitutional Court to allow the Constitutional Court increased discretion to choose whether to hear *amparo* appeals. The same organic law also expanded the constitutional review authority of regular courts in relation to *amparo* claims. LEY ORGÁNICA 6/2007, DE 24 DE MAYO, POR LA QUE SE MODIFICA LA LEY ORGÁNICA 2/1979, DE 3 DE OCTUBRE, DEL TRIBUNAL CONSTITUCIONAL [Organic Law amending the Organic Law of the Constitutional Court], <http://www.boe.es/boe/dias/2007/05/25/pdfs/A22541-22547.pdf> (Spain).

<sup>315</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution], Dec. 27, 1978, pt. IX, art. 161–63.

<sup>316</sup> *Id.* at art. 161.

<sup>317</sup> “The Supreme Court, with jurisdiction over the whole of Spain, is the highest judicial body in all branches of justice, except with regard to provisions concerning constitutional guarantees.” *Id.* at pt. V, art. 123, § 1.

<sup>318</sup> *Id.* at pt. I, ch. 4, art. 53, § 1.

In general, there are two categories of constitutional claims that can be brought before the Constitutional Court: claims initiated by state institutions and claims from individuals or nongovernmental legal entities.

*a. State Institutional Claims*

The most common route for institutional claims to be brought before the Constitutional Court is through references from the regular judiciary regarding unavoidable constitutional issues in lower court proceedings. “If a judicial body considers, when hearing a case, that . . . an act which is applicable thereto and upon the validity of which the judgment depends, might be contrary to the Constitution, it may bring the matter before the Constitutional Court.”<sup>319</sup> In general, this process of reference ensures a unified interpretation of the Constitution from a single body designed to interpret the qualitatively different terms of the Constitution.

Additionally, the Constitution allows the Constitutional Court access to claims from minority parties in the national legislature or Autonomous Communities. The former types of claims, which are commonly allowed by European constitutions,<sup>320</sup> permit a minority of either legislative house to sponsor a claim of unconstitutionality.<sup>321</sup> These members usually belong to parties that opposed the challenged law in the legislature. In Spain, a group of fifty members of the *Congreso* or the *Senado* are sufficient to bring a challenge.

Autonomous Community claims allow an Autonomous Community to protect its constitutional interests when the Community’s executive body disputes the validity of an action by the national government. Conversely, the national government “may appeal to the Constitutional Court against provisions and resolutions adopted by the bodies of the Self-governing Communities, which shall bring about the [temporary] suspension of the contested provisions or resolutions.”<sup>322</sup>

Finally, the national Ombud (*Defensor del Pueblo*) can bring claims to the Constitutional Court. The Ombud role was created by Article 54

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<sup>319</sup> *Id.* at pt. IX, art. 163.

<sup>320</sup> Wojciech Sadurski, *Constitutional Review in Europe and in the United States: Influences, Paradoxes, and Convergence*, in *THE AMERICAN EXCEPTIONALISM REVISITED* (Marcello Fantoni & Leonardo Morlino, eds., 2016).

<sup>321</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution], Dec. 27, 1978, pt. IX, art. 162, § 1.

<sup>322</sup> *Id.* at pt. IX, art. 161, § 2.

of the Constitution (with many details settled by a 1981 organic law<sup>323</sup>) for the specific purpose of protecting the individual rights set forth in the Spanish bill of rights.<sup>324</sup> Although the role of the Ombud is primarily investigative, the remedies that are available to the Ombud include: referral to the Public Prosecutor, independent initiation of claims of unconstitutionality before the Constitutional Court, commencing of fundamental rights-based *amparo* actions on behalf of individuals, recommendations to public authorities, and reports to Parliament on rights-related matters.<sup>325</sup>

Spain's reaction to fascism and consequential promotion of its new constitutional values directly contributed to the significant number of state actors who can bring a constitutional challenge. This has at least three benefits consistent with the reaction against fascism and promotion of the new constitutional values. First, the plethora of permitted parties allows ample opportunities for the court to review potentially unconstitutional state action. This affirms the Constitution's values by allowing the court to assess, and, where appropriate, to affirm the superior legal value of rights and other constitutional rules. Additionally, internal avenues of seeking redress for unconstitutional government actions promote the rule of law. Finally, the availability of legal remedies discourages extralegal means of seeking redress. It provides a de-escalating and lawful (and hopefully trusted) means of addressing political conflict. In a transition that valued moderation and peaceful, negotiated resolution of potential conflicts—and for a nation that experienced a shattering civil war—such a process has enormous value.

*b. Individual Claims to the Court*

The second category of rights-based claims to the Constitutional Court are individual claims: claims brought by real persons or legal entities for a vindication of their rights. The most common individual claim, and the source of the significant majority of all claims before the Constitutional Court, is the *recurso de amparo constitucional* (hereinafter referred to as the “*amparo*”). The *amparo* is the first of two

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<sup>323</sup> LEY ORGÁNICA 31/1981, DE 8 DE ABRIL, DEL DEFENSOR DEL PUEBLO [Organic Law of the Ombud], <http://www.boe.es/boe/dias/1981/05/07/pdfs/A09764-09768.pdf> (Spain).

<sup>324</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution], Dec. 27, 1978, pt. I, ch. 4, art. 54.

<sup>325</sup> NEWTON, *supra* note 80, at 28–29; AGUILERA & SERRA, *supra* note 152, at 36–38; LEY ORGÁNICA 31/1981, DE 8 DE ABRIL, DEL DEFENSOR DEL PUEBLO [Organic Law of the Ombud], <http://www.boe.es/boe/dias/1981/05/07/pdfs/A09764-09768.pdf> (Spain).

specialized domestic options for the vindication of a fundamental right under the Constitution. An amparo claim may only assert denial of a fundamental right; i.e., a right enumerated in Chapter 2, Section 1, or in Article 14 of the Constitution.<sup>326</sup>

The Organic Law for the Constitutional Court lays out the amparo procedure.<sup>327</sup> The law makes such claims available “against violations of the rights and freedoms. . . resulting from provisions, legal enactments, omissions or flagrantly illegal actions by the public authorities of the State, the Autonomous Communities and other territorial, corporate or institutional public bodies, as well as by officials or agents.”<sup>328</sup> Challenges to traditional parliamentary laws are not directly subject to challenge through amparo.<sup>329</sup> However, the amparo procedure and the work of the Constitutional Court has changed significantly since 2007. To deal with the high number of backlogged amparo claims, Parliament granted the court additional discretion over the claims submitted to the court.<sup>330</sup> The bulk of these claims are now heard only by the regular judiciary; “it was time to trust Spanish ordinary judges and tribunals as the main fundamental rights guarantors.”<sup>331</sup> As a result of the 2007 changes, individuals who wish to have their amparo claim heard by judges of the Constitutional Court

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<sup>326</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution], Dec. 27, 1978, pt. I, ch. 4, art. 53, § 2 (“Any citizen may assert his or her claim to the protection of the liberties and rights recognized in Article 14 and in Section 1, of Chapter Two . . . by submitting an individual appeal for protection to the Constitutional Court. This latter procedure shall be applicable to conscientious objection as recognized in Section 30”).

<sup>327</sup> LEY ORGÁNICA 2/1979, DE 3 DE OCTUBRE, DEL TRIBUNAL CONSTITUCIONAL [Organic Law of the Constitutional Court], <http://www.boe.es/boe/dias/1979/10/05/pdfs/A23186-23195.pdf> (Spain).

<sup>328</sup> *Id.* at art. 41.

<sup>329</sup> Even though a direct constitutional challenge of legislation cannot be the basis for the amparo, such a procedure can indirectly result in a declaration of unconstitutionality of the law if the challenged judicial ruling (that is found to be a violation of the claimant’s rights) is based on correct application of an apparently unconstitutional law. Then the chamber or section of the Constitutional Court that is hearing the appeal can permissibly refer it to the plenary Court for review of constitutionality. This is allowed because it is a referral of the question of unconstitutionality from a judge, which is permitted by the Constitution and CCOA, rather than a direct challenge to the law through an amparo. AGUILERA & SERRA, *supra* note 152, at 47–8.

<sup>330</sup> LEY ORGÁNICA 6/2007, DE 24 DE MAYO, POR LA QUE SE MODIFICA LA LEY ORGÁNICA 2/1979, DE 3 DE OCTUBRE, DEL TRIBUNAL CONSTITUCIONAL [Organic Law amending the Organic Law of the Constitutional Court], <http://www.boe.es/boe/dias/2007/05/25/pdfs/A22541-22547.pdf> (Spain).

<sup>331</sup> AGUILERA & SERRA, *supra* note 152, at 46.

must now demonstrate that their particular controversy has a “special constitutional significance” (*especial trascendencia constitucional*).<sup>332</sup>

Consequently, the Constitutional Court is no longer the exclusive arbiter of amparo claims. Instead, the court plays a capstone or backstop role and, as described above, adjudicates cases of “special constitutional significance” at its own discretion. Rather than directly adjudicating constitutional issues, the court’s altered function is to indirectly ensure proper interpretation and application of constitutional rules through supervision of the lower courts.

Even before the 2007 reforms, other (non-amparo) rights claims could be adjudicated through a “preferential and summary procedure” in an ordinary court.<sup>333</sup>

The primary idea is that ordinary courts, which are plentiful and accessible (especially when compared with the Constitutional Court) should be the ones to guarantee fundamental rights in the very first place . . . an individual . . . should be able to go to the nearby court through a preferential and summary process to get immediate protection.<sup>334</sup>

These claims are “preferential and summary” due to their simplified processes, shorter deadlines, and the limitation on subject matter to only fundamental rights.<sup>335</sup>

The decision regarding whether the summary procedure in any particular case is appropriate is made by the judge.<sup>336</sup> Hence, since 2007, the vast majority of constitutional claims are brought and decided in the ordinary courts. Only institutional claims or individual claims of “special constitutional significance” will be decided by the Constitutional Court. In order to protect those fundamental Spanish

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<sup>332</sup> LEY ORGÁNICA 6/2007, DE 24 DE MAYO, POR LA QUE SE MODIFICA LA LEY ORGÁNICA 2/1979, DE 3 DE OCTUBRE, DEL TRIBUNAL CONSTITUCIONAL [Organic Law amending the Organic Law of the Constitutional Court], <http://www.boe.es/boe/dias/2007/05/25/pdfs/A22541-22547.pdf> (Spain).

<sup>333</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pt. I, ch. 4, art. 53, § 2.

<sup>334</sup> AGUILERA & SERRA, *supra* note 152, at 40.

<sup>335</sup> There is no uniformity of process for these procedures. Various special subject matter laws outline different processes; claims brought in labor law area will differ for claims brought under military jurisdiction, as an example. Additionally, there are even more specialized processes for claims that are inherently time sensitive; habeas corpus claims, election rights claims, etc. *Id.* at 42.

<sup>336</sup> *Id.* at 43. Parliamentary laws cannot themselves be directly challenged through the summary process. Rather, claims are brought against a public authority implementing the suspect law (even if the public authority is a lower court upholding or applying that law to the challenging party).

rights, courts have shortened the timeframe for such challenges, thereby increasing the likelihood of a powerful resolution.

Overall, the process and availability of judicial and constitutional court review now addresses a significant perceived failing of the Spanish judicial system: the inability to deal with amparo claims in a timely and effective manner. This development, achieved through the absolute majority process of an organic law, serves the larger purposes of constitutional review and affirms the rule of law. Moreover, the more diffused responsibility for the protection of fundamental rights, shared now with ordinary judges, furthers the Spanish interest in affirming constitutional rights in reaction to the general failure to protect individual rights in the years of fascism, authoritarianism, and autocracy.

#### IV

#### TRANSFORMATIVE CONSTITUTIONALISM FORTY YEARS AFTER FRANCO

Assessing a constitutional transition and evaluating a constitution are perilous and potentially hubristic tasks. On the other hand, refusing to examine the results of such a transition or to appraise alternative methods of transition—especially for a radical transformation on the scale of Spain's—hinders future constitutional progress. But such comparisons can never exhibit scientific precision; there are no control groups in comparative constitutional history or comparative constitutional design. Moreover, any evaluative conclusions will always be preliminary because of the unknowable number of years of future development for the constitution. There is no assured way to know if the current version of an extant constitution is in its early years or its late stage. Nevertheless, close examination and contextual appraisal are both possible and valuable.

In addition to the inevitable subjectivity of such an analysis, there are unavoidable challenges to analyzing constitutional problems and solutions across geographical, cultural, linguistic, and even temporal differences. However, not all of such an evaluation must fall to claims of relativism. Most nations in the process of drafting a new constitution are rejecting a specific former system of government and set of values while pursuing an improved system with perceived better values. This accurately describes the Spanish transition. Thus, the transformative and reactive goals of the new Constitution provide a fair basis for assessment.

### *A. Spain's Constitutional Answer to Authoritarianism*

Perhaps the first test of a constitution's success is how well it responds to the perceived failings of the prior regime and mode of governance. Does the constitution's response to the preceding system of government address the faults of the past in an effective and sustainable way? For modern Spain, the question is whether the rule of law, democracy, the organization of the state, the distribution of national and regional authority, and the protection of individual rights viably counter the errors of autocracy, authoritarianism, and fascism. As shown in Part III, forty years after the death of Franco there is ample evidence that the current Spanish Constitution addresses each of the overarching faults of the past regime.

A second, more affirmative standard also belongs in this evaluation: a new constitution must look forward and not merely back. Does the new constitution encapsulate the transformative, aspirational values of the polity it serves in an effective and enduring way? For reviewers who support the values of modern constitutionalism—rule of law, restrained governmental power, democratic governance, and the protection of individual rights—these are values against which the resulting political and legal system can be measured. It is particularly appropriate to evaluate the Spanish transition against these four common goals of modern constitutionalism because each is identified and lauded in the Spanish Constitution's Preamble.

Moreover, Spain's pursuit of constitutional democracy occurred in the unique context of post-War, 1970s Europe, against the backdrop of Spain's history of monarchy, Catholicism, failed constitutionalism, civil war, and Francoism. As a result, the Spanish iteration of modern constitutionalism included correlated goals: European integration, international community acceptance, national unity, ethnocultural regional autonomy, socioeconomic development, and the general improvement of the quality of life for all Spaniards.<sup>337</sup>

Thus, the question becomes: Does multilevel representative democracy, adoption of international standards of human rights protections, a dynamic system of regional autonomy, and European integration advance the Spanish vision of modern democratic constitutionalism? The predominant (if incomplete) answer is yes.

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<sup>337</sup> CONSTITUCIÓN ESPAÑOLA [Spanish Constitution] Dec. 27, 1978, pmb. (“Guarantee democratic coexistence within the Constitution and the laws . . . ; Consolidate a State of Law which ensures the rule of law . . . ; Protect all Spaniards and peoples of Spain in the exercise of human rights...; [and] Establish an advanced democratic society”).

Much of this evaluation is based on the relative stability, peacefulness, and socioeconomic maturity of Spain as of its fortieth anniversary. Today, despite its imperfections, Spain is a mature, functioning constitutional democracy. The Constitution of 1978 secured a new state capable of protecting human rights that also existed in alignment with European and international expectations. It secured this peace and significant economic investment through membership in the European Union. It modernized and de-politicized the role of its military through civilian control and NATO alignment.<sup>338</sup> Finally, it entrenched expansive individual and collective rights within an independent judicial and legal system with all the significant indicators of the rule of law. These are undoubtedly hallmarks of a successful transformation.<sup>339</sup>

As was shown in Part III, the expanded list of goals for Spain's own form of modern constitutional democracy—derived from its history and expressed in the Preamble—was inseparable from the core, unstated goal of a decisive break from the authoritarian past. This is the entwined nature of the desire for constitutional democracy and the rejection of Francoism. The successful rejection of authoritarian values and reformulation of the Francoist state institutions were inextricably coupled with establishment of a modern constitutional democracy in Spain.

However, this Article has focused on more than the substantive achievements of Spanish constitutionalism. It has also explored a procedural axis in addition to the 1978 Constitution's substantive content axis. As a result, the Spanish Model of transition also needs to be evaluated for its contribution to Spain's transformation and potential contribution to constitutional transition elsewhere.

### ***B. The Evolving Significance of the Spanish Model***

The term "Spanish Model" refers to a relatively peaceful transition from authoritarianism to constitutionalism through negotiated, consensus-based reforms without disruption of the existing legal

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<sup>338</sup> JAVIER CERCAS, *supra* note 247, at 370–71.

<sup>339</sup> It is important to note that any such assessment can only address the most general terms. Whether the Constitution meets the needs of each individual or of specific communities of common interest—for example, of Spanish women or gay and lesbian persons or workers—is a valuable question worthy of research, but beyond the scope of this Article. More acutely, the current Catalonia independence crisis highlights a similarly important question. The assertion that the Spanish Constitution is successful on its own terms does not dismiss the question of whether it does (or should) meet the twenty-first century nationalist aspirations of Catalonians.

framework through violence or revolution. Maintenance of legal continuity, prioritization of pact-led negotiation, and the dominance of moderation in final terms are the hallmarks of the Spanish Model. For Spain, the model provided significant value in the potentially violent, radically uncertain transition period following the death of Franco. The model promoted judicious results reflective of significant consensus; rejected the punitive, winner-take-all model of prior eras; reflected the centrist wishes of most Spaniards; kept political parties and other interest groups engaged; and diffused potential violent reaction from the military or extremist elements of civil society.<sup>340</sup>

### *1. A Viable Model for Spanish Transformation*

Ultimately, the Spanish Model of constitutional transition is important and valuable only if it facilitates a peaceful transformation from authoritarianism to constitutional democracy. Does it facilitate a relatively effective process of constitutional change resulting in a rights-based democracy with enduring value for the nation and its people? To the extent that the characteristics of the process—legal continuity, negotiation, consensus, elite engagement, and moderation—supported the content of the Constitution and the expectations of Spaniards, the Spanish Model served the transition extraordinarily well. The Constitution’s fortieth anniversary itself is valid initial evidence of success of the Spanish Model. In the context of Spain’s constitutional history, a forty-year period of stable democracy is without domestic precedent. The longest prior democratic government, under the Constitution of 1931, lasted only

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<sup>340</sup> Although this Article demonstrates the effectiveness of the model’s characteristics in securing a transition to constitutional democracy, it is worth noting that moderation, elite empowerment, and formal legal continuity are not self-evidently or universally praiseworthy in a democratic transformation. Moderation in the process may strike a balance between conflicting, coequal values and keep political opponents engaged in the transition, but it is less of a virtue when the outgoing regime is deeply racist or misogynist or holds some other value antithetical to constitutional democracy. It is not appropriate to only moderately condemn genocide, apartheid, or other distasteful government programs. Similarly, negotiations among elites may diminish violence but it might also empower the legacy actors of a violent, oppressive regime. The maintenance of formal legal stability, while it minimizes sociopolitical shocks, could be perceived as affirmation of a distasteful prior government and could support future political power for constitutionally misaligned parties. Although there is limited evidence of this in the Spanish transition, the concerns remain.

five to eight years (depending on how one measures the years of shrinking territory during the Spanish Civil War from 1936 to 1939).<sup>341</sup>

The forty years (and counting) of the Spanish Constitution are even more remarkable in the global context, where short-lived constitutions are the norm, not the exception. A recent study identified the average “lifespan” of a constitution as only nineteen years,<sup>342</sup> and an even lower average, twelve years, for constitutions drafted since the end of World War II.<sup>343</sup> Of course, years of duration could be an invalid mark of success if an allegedly democratic, human rights constitution were maintained by force or other means counter to the constitution’s rules or values. There is no such claim, as a general matter, in modern Spain. Even the most forceful claims of a denial of self-determination by independence-minded regions, whatever the objective validity, are claims from outside the existing constitutional framework. The least we can say at this stage is that the Spanish Model provided a successful process to transition from the still-entrenched post-Franco authoritarian state to a modern constitutional democracy. When viewed more generally, Spain’s transformation achieved the general goals of modern constitutionalism and the context specific goals identified by Spaniards in their Constitution.

Moreover, the model’s influence did not end on the day the 1978 Constitution came into force; it left a legacy within Spanish constitutional law and practice. The entrenchment of enduring processes that promote moderate, consensus-driven results supports the ongoing vitality of the transformation. The use of heightened voting requirements for the higher-stakes organic laws, the tailored autonomy statutes defining competence for the regions, and the Parliamentary nominations to the Constitutional Court are all examples of constitutional provisions that encourage viable governing relationships among people and parties with competing interests.<sup>344</sup>

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<sup>341</sup> This was the Second Spanish Republic. The First Spanish Republic lasted less than two years from February 1873 to December 1874. Raymond Carr, *Liberalism and Reaction 1831–1934*, in *SPAIN: A HISTORY* (Raymond Carr ed., Oxford 2000).

<sup>342</sup> ELKINS ET AL., *supra* note 143, at 2.

<sup>343</sup> Thomas Ginsburg, Zachary Elkins, & James Melton, *The Lifespan of Written Constitutions*, <https://www.law.uchicago.edu/news/lifespan-written-constitutions> (a summary of findings published in ZACHARY ELKINS, THOMAS GINSBURG, & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009)).

<sup>344</sup> Of note, such entrenchment is not unique to the Spanish transition. Constitutions often protect certain decisions, like amendments, from easy alteration by bare majorities. (That is also true of many of the individual elements of the model; they were not individually inventive, just collectively effective.)

Arguably, the legacy of the Spanish Model helped with some of the acute challenges experienced by Spain after the Constitution came into force. One prominent example, the failed coup of February 23, 1981, could have been much worse if the transition had taken a harder line on the monarchy because the king exerted significant influence in denouncing the coup and brought it to a peaceful conclusion. The coup crisis also benefited from the moderating influence on the military exerted by Suárez during the transitional years, something made possible by the lack of a sharp disruption with the prior regime during the move toward democracy. Hopefully future research will ask about the legacy of the model on other important constitutional-level challenges such as the early Basque separatist violence, the austerity measures in response to the financial crisis of 2008,<sup>345</sup> recurring problems with government corruption, or the current Catalonia independence crisis.

## 2. *The Spanish Model Outside Spain*

Another marker of the value of the Spanish Model is its popularity with other nations. As discussed in Part II, Spain's transition model was noted and studied by countries in Eastern Europe as they began their transitions to democracy a decade later. And other versions of pacted, negotiated "legal revolutions" followed. Other than the more obvious, analogous processes in postcommunist Eastern Europe, another prominent example in comparative constitutional study is South Africa as it transformed itself from apartheid authoritarianism to full constitutional democracy. Like Spain, South Africa's transition was aided by party-led negotiations using the existing legal framework to craft a new rights-based constitution and legitimize a radical transformation. Of course, it is even more challenging to assess whether these model exports were successful. On the one hand, these countries left behind communist and apartheid authoritarianism for genuine democratic governance. But many of these nations have struggled to maintain their commitments to democratic constitutionalism.<sup>346</sup>

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<sup>345</sup> See Laurence Knight, *Spanish Economy: What Is to Blame for Its Problems?*, BBC NEWS (May 18, 2012), <http://www.bbc.co.uk/news/business-17753891>; Vanessa Drucker, *A New Sunrise for Spain?*, GLOBAL FIN. (June 6, 2014), <http://www.gfmag.com/magazine/june-2014/new-sunrise-spain>.

<sup>346</sup> See ALEX BORRAINE, WHAT'S GONE WRONG? SOUTH AFRICA ON THE BRINK OF FAILED STATEHOOD (2014); PAUL BLOKKER, NEW DEMOCRACIES IN CRISIS? A



## CONCLUSION

Just over four decades ago, Spain was a quasi-fascist state with an authoritarian government led by Generalissimo Francisco Franco. It was a rare holdout to the wave of democracy and constitutionalism that swept Europe and then much of the globe in the aftermath of World War II and the founding of the United Nations. In fact, due to Spain's sideline role in the war and its usefulness to Western governments, Spain was one of the few fascist regimes to survive after the defeat of Hitler's Germany and Mussolini's Italy.

With the death of Franco, Spain's future was uncertain. But within a few years, the newly reigning king and remnants of Franco's power structure had facilitated an unlikely democratic transformation—the final democratic transition in Western Europe.<sup>349</sup> This Article examined and evaluated core elements of the past promise and present reality of Spain's transformation from Francoist dictatorship to modern European democracy. It accomplished this by investigating the role of the Constitution of 1978 and of the distinctive Spanish Model of constitutional transformation in facilitating Spain's transition to democracy.

The Spanish Model refers to a relatively peaceful transition from authoritarianism to constitutionalism through negotiated, consensus-based reforms without disruption of the existing legal framework through violence or revolution. The model allowed Spain to minimize internal threats to the transition, solidify popular constitutional elements, and postpone contentious issues. The result was a broadly democratic but uniquely Spanish Constitution in the modern European model.

The endurance and vitality of the Constitution at forty years can be explained differently by historians, political scientists, and economists, but its success from the perspective of comparative constitutional law seems to rest in its successful capacity to address the issues that had been the source of destabilizing stress in Spain's prior governing documents. The 1978 Constitution provided viable solutions to Spain's pressing and recurring challenges: centrifugal tension between national and regional levels of government, the power of the military, the quasi-

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<sup>349</sup> Notably, the modern Portuguese transition to democracy occurred on a very similar timeline to the Spanish transition: a 1974 end to dictatorship in the Carnation Revolution; democratic elections in 1975; constitution drafted 1975–76; and the new constitution came into force in 1976. António Costa Pinto, *Constitution-Making and the Democratization of Portugal: An Enduring Legacy*, 34 PORTUGUESE STUD. 35 (2018).

governmental power and role of the Catholic Church, and the structure of the economy. The model helped Spain identify and codify settled processes for dynamic resolution of conflicts. The uniquely Spanish challenges were addressed in a modern state that exhibits all the hallmarks of democratic constitutionalism—rule of law, democracy, and entrenched rights protections.

For modern Spain, the question was whether the rule of law, democracy, the organization of the state, the distribution of authority, and the protection of individual rights could viably counter the errors of autocracy, authoritarianism, and fascism. Forty years after the death of Franco, there is ample evidence that the Spanish Constitution addresses each of those overarching faults. This Article demonstrated that, despite recent, significant, and evolving challenges, constitutional democracy is strong in Spain and has been significantly aided by its constitutional text and the Spanish Model that inaugurated it. Forty years later, there is much to study and learn from the manner in which Spain successfully leveraged its constitutional process and textual promises to overcome its authoritarian past and solidify Spain's place as a modern European democracy.