

Yeshiva University, Cardozo School of Law

LARC @ Cardozo Law

Articles

Faculty

1998

Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example

Michel Rosenfeld

Benjamin N. Cardozo School of Law, mrosnfd@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Law Commons](#)

Recommended Citation

Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 *Cardozo Law Review* 1891 (1998).
Available at: <https://larc.cardozo.yu.edu/faculty-articles/145>

This Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

SYMPOSIUM

CONSTITUTION-MAKING, IDENTITY BUILDING, AND PEACEFUL TRANSITION TO DEMOCRACY: THEORETICAL REFLECTIONS INSPIRED BY THE SPANISH EXAMPLE

*Michel Rosenfeld**

I.

Transitions from authoritarian regimes to constitutional democracies have traditionally involved violent breaks with the past. The American and the French eighteenth century transitions, which gave birth to modern constitutionalism, occurred in the wake of bloody revolutions¹—though, strictly speaking, it would be more accurate to refer to the American Revolution as a war of liberation.² Similarly, the more recent transitions in Germany and Japan in the aftermath of World War II came after complete military defeat and surrender.³

The link between violence and the establishment of constitutional democracy seems perfectly logical when considering that despots have not been prone to relinquish their powers willingly.⁴ Accordingly, the making of a democratic constitution appears to require a clear break from the grip of an authoritarian past.⁵ As emphasized by a member of the constituent assembly during the French Revolution, “[a]narchy is a frightening but necessary transitional stage; the only moment in which a new order of things can

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University.

¹ See THE FEDERALIST NO. 45, at 325 (James Madison) (Benjamin Fletcher Wright ed., 1961); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 12 (1975).

² See DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 9-13 (1990). See generally JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION (1988).

³ See generally PETER YOUNG, WORLD WAR 1939-1945, at 393-416 (1980).

⁴ See *id.*

⁵ See Jon Elster, *Constitutional Bootstrapping in Philadelphia and Paris*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 57 (Michel Rosenfeld ed., 1994) [hereinafter CONSTITUTIONALISM].

be created.”⁶ Moreover, a period of anarchy may be necessary not only to rid the polity of its despot and of the latter’s closest collaborators, but also to generate a shift in collective identity.⁷ Indeed, the successful implantation of a constitutional democracy seemingly depends both on disempowering despots and on undermining prevailing submissive mentalities and self-images nurtured to suit the *ancien régime*.⁸

While breaking with the past looms as a necessary precondition to a successful implantation of constitutional democracy, such a break, particularly if violent, is problematic from the standpoint of the emergent constitutional order. For one thing, consistent and continuous adherence to the rule of law is an essential pillar of constitutional democracy,⁹ and violent breaks with the past sever the chain of legality, thus casting doubt on the legal legitimacy of the new constitutional order. Indeed, inasmuch as the constitutional framers must exceed the bounds of the pre-constitutional legal order to craft their new constitution, they cannot avoid what Jon Elster has termed “constitutional bootstrapping,”¹⁰ thus rooting allegiance to the rule of law in an act of legal transgression. Furthermore, to the extent that successful constitution-making depends on replacing an incompatible pre-constitutional identity with a more congenial collective self-image, the new constitutional framework could prove too destabilizing to allow the polity to rally sufficiently around the requisite common identity.¹¹ For example,

⁶ *Id.* at 65 (quoting 8 ARCHIVES PARLEMENTAIRES SÉRIE I: 1789-1799, at 461 (1875-88) (quoting Duke of Clermont-Tonnerre)).

⁷ For a discussion of the development of a collective constitutional identity distinct from pre-constitutional and extra-constitutional identities, see Michel Rosenfeld, *The Identity of the Constitutional Subject*, 16 CARDOZO L. REV. 1049 (1995).

⁸ A striking example of this phenomenon is provided by the post-World War II Constitution (known as the “Basic Law”) of the Federal Republic of Germany which embraces the right to life as a fundamental constitutional value. In the words of the German Constitutional Court, “the categorical inclusion of the inherently self-evident right to life in the Basic Law may be explained principally as a reaction to the ‘destruction of life unworthy to live’ the ‘final solution,’ and the ‘liquidations’ that the National Socialist regime carried out as governmental measures.” Various provisions of the Basic Law imply “an affirmation of the fundamental value of human life and of a state concept which emphatically opposes the views of a political regime for which the individual life had little significance and which therefore practiced unlimited abuse in the name of the arrogated right over life and death of the citizen.” *Abortion I Case*, (1975) BVerfGE 39, 1 (quoting GG art. 2(2)[I]), translated in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 336, 337 (2d ed. 1997).

⁹ See Michel Rosenfeld, *Modern Constitutionalism As Interplay Between Identity and Diversity*, in *CONSTITUTIONALISM*, *supra* note 5, at 3, 4.

¹⁰ Elster, *supra* note 5, at 57.

¹¹ *Cf. id.* at 63-64 (arguing that America’s eighteenth century Constitution was more

the radical break with the past launched in the course of the French Revolution led to the reign of terror, paving the way for the restoration of despotic rule in the Napoleonic Empire instead of consolidating the transition to constitutional democracy.¹² In contrast, the American Revolution's much more limited break with its colonial past, proved much more favorable to the successful implantation of constitutional democracy. In short, the success of a transition from authoritarianism to constitutional democracy seemingly depends, in part at least, on some kind of firm repudiation of the polity's pre-constitutional identity, though such repudiation is likely to lead to failure if it does away with too little or too much.

Inasmuch as history teaches that violence usually accompanies successful transition to constitutional democracy—though it remains unclear *which* violence and *how much* of it might be optional for these purposes—Spain's peaceful transition from the Franco dictatorship to constitutional democracy in the mid-1970s and its ability to develop a vibrant constitutional culture in the subsequent two decades is truly remarkable.¹³ Moreover, the Spanish case is all the more striking because it hardly qualifies as an anomaly. Instead, it marks a turning point towards peaceful transitions to constitutional democracy which has reached global proportions since the 1980s.¹⁴ In the last two decades, there has been a veritable global trend towards constitutional democracy and a majority of the transitions involved—in Eastern and Central Europe, Latin America, or South Africa—have been peaceful.¹⁵

This new trend towards peaceful transition is puzzling because

successful than its French counterpart as a consequence of America's political break with its colonial past as opposed to the French Revolution's much more radical break with the *ancien régime*).

¹² See R.C. VAN CAENEGEM, *AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW* 174-78 (1995).

¹³ For a succinct account of Spain's transition to constitutional democracy, see Francisco Rubio Llorente, *The Writing of the Constitution of Spain*, in *CONSTITUTION MAKERS ON CONSTITUTION-MAKING* 239 (Robert A. Goldwin & Art Kaufman eds., 1988).

¹⁴ "There is growing consensus that the Spanish transition is in many ways the paradigmatic case for the study of pacted democratic transition and rapid democratic consolidation . . ." JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION* 87 (1996).

¹⁵ See Videotape: Conference on Peaceful Transitions to Constitutional Democracy (Jacob Burns Institute for Advanced Legal Studies Apr. 8, 1997) (on file with author); see also Robert C. Johansen, *Toward a New Code of International Conduct: War, Peacekeeping, and Global Constitutionalism*, in *THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE* 39 (Richard A. Falk et al. eds., 1993); Samuel S. Kim, *In Search of Global Constitutionalism*, in *id.* at 55.

it raises serious questions about the accepted wisdom that genuine transitions to constitutional democracy require a violent tear in the political fabric and a radical shift in the polity's conception of its own identity. Perhaps the trend towards peaceful transition does not pose a challenge to the accepted wisdom because the bulk of the recent transitions did not involve constitutional revolutions, but rather constitutional restorations.¹⁶ If this latter view is warranted, then the Fascist and Socialist authoritarian regimes in Spain and Eastern Europe respectively did not erase the past, but merely suppressed it. Accordingly, upon the dissolution of their authoritarian experiences, these countries would be able to reclaim past identities and rebuild democracy upon once tried institutional foundations.

On the other hand, if recent peaceful transitions do not really involve restoration constitutions—and the cases of Spain, many East European countries, and South Africa strongly suggest that they cannot¹⁷—then reexamination of the conditions for successful constitution-making in the context of transitions to democracy is clearly called for. With this in mind, I will first briefly discuss some of the most salient features of traditional constitution-making and its relation to identity building in the context of transition to democracy, attempting to place the recent trend of peaceful transitions in context, on the basis of observations derived from the Spanish experience. It is well beyond the scope of the present undertaking to offer any systematic or comprehensive analysis. Rather, my aim is to focus on a limited number of theoretical issues and to use Spain as an example to suggest certain hypotheses which will have to await further analysis and testing before being properly verified.

II.

At a bare minimum, radical political transformation depends on two essential factors: leadership that will shepherd the transi-

¹⁶ See András Sajó, *Preferred Generations: A Paradox of Restoration Constitutions*, in CONSTITUTIONALISM, *supra* note 5, at 335, 335 (“The constitutional arrangements offered by the emerging new leaders [in East and Central Europe] promise a return to the golden glorious past and the ‘correct and normal European’ tradition.”).

¹⁷ Both Spain's nearly 40 years of authoritarian dictatorship, and East Europe's equally long experience with totalitarian regimes could not be seriously thought to have been susceptible of mere erasure. See generally LINZ & STEPAN, *supra* note 14, at 110-12. Moreover, South Africa's abandonment of apartheid opened an entirely new chapter in that nation's history. See 1 DEPARTMENT OF PUBLIC INFORMATION, UNITED NATIONS, THE UNITED NATIONS AND APARTHEID 1948-1994, at 3 (1994).

tion, and a move away from old habits and obsolete self-images for purposes of evolution towards a new collective self-identity suited to the emergent political and institutional order. For example, the transformation of the Jewish people from slavery in Egypt to free nationhood in Israel required, according to the *Bible*, divine legislation disseminated through the leadership of Moses and forty years in the desert to shed the vestiges of bondage.¹⁸ Moreover, modern constitution-making, as Ulrich K. Preuss emphasizes, represents a secularized version of divine creation, and legislation as the constituent power's constitution-making amounts to a creation *ex nihilo*.¹⁹ The *pouvoir constituant* of the constitution-makers must therefore be freed from any pre-constitutional constraints, or in other words, constituent power must be unbound but binding.²⁰ To be free from the bonds of the past, the constituent power cannot emerge except in the context of a revolution but to constrain the polity, and particularly subsequent generations, it must put an end to the revolution by instituting the constitution it crafts.²¹ Constitution-making in the course of transition to democracy seems inextricably linked to revolution though the relationship may be inherently ambivalent.²² Accordingly, for constitution-making to be genuinely a creation *ex nihilo* it would seem necessary that it go hand in hand with some form of violence.

While it may not require forty years to shed pre-constitutional self-images and to embrace a suitable constitutional identity, adaptation to the new order requires significant changes in mentality, and those changes are unlikely to occur overnight. For example, the changes brought about by the French Revolution and the constitutional movement it launched had their origins in the philosophy of the Enlightenment. This movement developed over the course of several decades preceding the revolution and did not become successfully implanted for a long time, possibly not until the advent of the Third Republic in the 1870s.²³ Similarly, constitutional identity in the United States was not consolidated until after the Civil War. Unlike the first French Constitution, the 1787

¹⁸ *Exodus* 3:1 to 4:17, 6:2 to 7:13.

¹⁹ See Ulrich K. Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, in CONSTITUTIONALISM, *supra* note 5, at 143, 143-44.

²⁰ See *id.* at 144.

²¹ See *id.* at 144-45.

²² See *id.* at 144.

²³ For a discussion of these historical events, see VAN CAENEGEM, *supra* note 12, at 209-17.

American Constitution has proved enduring,²⁴ yet the core of its constitutional identity—encapsulated in the phrase “all men are created equal” included in the 1776 Declaration of Independence—could not be fully deployed until the abolition of slavery.²⁵

Constitutional identity is distinct from both pre-constitutional and extra-constitutional identities, and it must depart from tradition, but it cannot completely sever its links with the other identities or with all traditions if it is to fulfill its critical role in cementing the new constitutional order.²⁶ For example, whereas the French Revolution brought about a radical shift from absolute monarchy to a constitutional parliamentary democracy, the French remained to an important extent united through their common nationhood. Or more precisely, the French nation endured through the tears and ruptures to the polity's social and political fabric caused by the Revolution, but its self-perception evolved. As conceived by Abbé Sieyès, the third estate not only became the legitimate representative of the nation, but it also emerged as its full embodiment.²⁷ In other words, what had been but a part—and the least powerful part—of what the old order came to stand for and to symbolize, became the whole emergent constitutional order launched by the Revolution.

Many factors undoubtedly contribute to the shift away from a pre-revolutionary identity towards a self-image better suited to constitutional democracy. One key factor, however, is critical in terms of shaping that part of the new collective self-perception that squarely qualifies as a constitutional identity.²⁸ That factor is

²⁴ France has had 15 constitutions since the Revolution, see JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 1 (1992), but that fact alone should not be taken to be indicative of a completely fragmentary constitutional identity. For example, France's current 1958 constitution incorporates part of its immediate predecessor, the 1946 constitution, and has been interpreted as incorporating the 1789 Declaration of the Rights of Man. See *id.* at 66-67.

²⁵ As David Richards points out, the implantation of American constitutionalism required not one but two revolutions, with the Civil War being viewed as the second American Revolution. See David A.J. Richards, *Revolution and Constitutionalism in America*, in *CONSTITUTIONALISM*, *supra* note 5, at 85.

²⁶ For an extended discussion of these issues, see generally Rosenfeld, *supra* note 7.

²⁷ See EMMANUEL JOSEPH SIEYÈS, *WHAT IS THE THIRD ESTATE?* 58 (S.E. Finer ed. & M. Blondel trans., Frederick A. Praeger 1963) (1789).

²⁸ The passage from a pre-revolutionary authoritarian polity to a post-revolutionary constitutional democracy may well require a profound transformation in collective identity, but not all changes would, strictly speaking, concern constitutional identity. For example, a rigid theocracy tightly run by an entrenched hierarchy of clerics would be clearly incompatible with the implantation of any workable version of contemporary constitutionalism. In that case, transition to constitutional democracy would require a loosening of the political grip of the clerics as well as a modification in the perceived bonds between

the particular constitutional model adopted by the constitution-makers. Indeed, at least prior to the Spanish transition, three distinct prototypical models had emerged, each leading to a different constitutional identity. These three models are the German, the French, and the American. Although all three posit the nation-state as the source and proper domain of the constitutional order; and although all three frame a conception of constitutional identity that singles out the nation-state as the essential and predominant constitutional unit; these constitutional models differ from one another in the ways in which they conceive the relationship between nation and state and between constitutional identity and other critical identities such as ethnic, cultural or national identity.

The principal difference between the German and French models can be traced back to their contrasting conceptions of the nation. As Ulrich Preuss notes: "Whereas in the French concept the nation is the entirety of the *demos*, in the German and East European concept the nation is a group defined in terms of ethnicity—the nation is the *ethnos*."²⁹ Accordingly, the French model envisions a nation founded on equal citizenship rooted in the social contract and operating through the principle of democratic sovereignty.³⁰ Within this model, each citizen enjoys universal rights and the polity's destiny is shaped by the general will as conceived in Jean-Jacques Rousseau's political philosophy.³¹ Within the French model, moreover, it is the task of the constitution-makers to give birth to a democratic nation united through equal citizenship, a political framework suited to give an effective voice to the people as a whole, and a constitutional regime designed to safeguard the rights of citizens. Consistent with Sieyès's conception of a nation as "a body of associates living under common laws and *represented* by the same *legislative assembly*,"³² the constitu-

religion and politics. Any change concerning the former would obviously inform constitutional identity, but the same would not necessarily be the case in connection with shifts in the latter. Indeed, a shift from an integrated vision of religion and politics to one that allows for reasonable daylight between the two would form an integral part of an emergent constitutional identity. In contrast, a more profound secularization among the people leading to a large scale weakening of the grip of religion in favor of a largely materialistic culture might play an important role in making room for a constitutional culture, but would clearly involve the polity's social, political, and cultural identity, as well as its constitutional identity.

²⁹ Preuss, *supra* note 19, at 150.

³⁰ *See id.* at 151.

³¹ *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 15-18 (Washington Square Press 1967) (1762).

³² SIEYÈS, *supra* note 27, at 58.

tion-makers of the Revolution created the French nation. Indeed, although the French Monarchy already claimed to embody the French nation, it did so only in contrast to the particularism of the powers of feudalism above which it rose.³³ In a political sense, however, the French nation was born during the Revolution when the constituent power wielded by the third estate gave the concept of universal equal citizenship throughout the land the force of law.³⁴ In short, the constitution-makers of the Revolution transformed the disparate population previously subjected to the French Monarchy into a democratic nation-state governed by the ideals of reason, equality, and universality.³⁵

In sharp contrast to its French counterpart, the German model places *ethnos* above *demos* and thus gives the prepolitical bonds, cemented through a common language culture, ethnicity, or religion, clear priority.³⁶ Unlike the French model where the nation must be constructed within the newly instituted constitutional order, the German model does not depend on a constitution because the nation as an indivisible ethnic, linguistic, cultural, etc., group is already fully formed. Accordingly, in the German model, constitution-making is important to enable an already existing nation to give expression to its will and to fulfill its own destiny through the instrumentalities of a full functioning state. In the German model therefore, the state is a mere vehicle at the disposal of an already well-defined nation rather than an indispensable instrument for nation-building purposes. Consistent with this, and as envisioned by the German model's foremost constitutional theorist, Carl Schmitt, democracy must be reinterpreted in ethnicist terms.³⁷ In other words, in Schmitt's ethnicist conception of democracy, the constitution-makers must produce an institutional framework capable of affording political expression to the nation's unique culture and character as distinguished from both the culture of the other ethnic groups and from the liberal-universalist aspirations inherent in the French model.³⁸ Within this perspective, as elaborated by Schmitt, true democracy provides authentic

³³ See Preuss, *supra* note 19, at 151.

³⁴ See *id.*

³⁵ Significantly, "a major administrative task" of the new nation-state was the "diffusion of the French language" so as to generate a common language for all citizens in a land where more than half the population either did not speak French or did so with great difficulty. *Id.* at 152.

³⁶ See *id.*

³⁷ See *id.* at 153 (citing CARL SCHMITT, VERFASSUNGSLEHRE (1928)).

³⁸ See *id.* at 153-55.

expression to the unified pre-political identity of the ethnically defined people.³⁹ Also, it follows from this—although it may at first glance seem paradoxical—that, as Ulrich Preuss states, “democracy and dictatorship are not essentially antagonistic; rather dictatorship is a kind of democracy if the dictator successfully claims to incarnate the identity of the people.”⁴⁰

In the French and German models, the nation is in place prior to the exercise of constituent power designed to lead to the institution of a constitutional democracy—albeit that in the French model, the identity of the pre-political nation may be radically different from that of its postrevolutionary counterpart. In contrast, in the making of the American Constitution, the state preceded the nation.⁴¹ Indeed, in the United States, the Constitution provided a framework for the deployment of a full-fledged state prior to the formation and consolidation of an American nation through an extended absorption and integration of large waves of immigration coming from a multitude of different nations and diverse cultures. Under the German model, the identity of the nation is not supposed to be changed through constitution-making, and under the French model an existing nation’s identity is supposed to be transformed, while under the American model, the constitution not only antedates the nation but it also predetermines to a significant extent the kind of nation that may emerge and grow within the institutional framework it circumscribes. In short, in the German model the constitution is supposed to give expression to a prevailing national identity; in the French, to transform and redirect an existing national identity; and in the American, to lay down the essential characteristics of the identity of a nation that is yet to be formed.

III.

Of the three models, the German apparently requires the least in terms of the transformation of pre-constitutional identity, while the American seemingly requires the most—or, more precisely, the American model is presumably generative rather than transformative of the polity’s distinctive identity. It would seem that the American model would be prone to producing the most violence and its German counterpart the least. Upon closer scru-

³⁹ *See id.* at 155.

⁴⁰ *Id.*

⁴¹ *See* GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* 107-09 (1993).

tiny, however, this does not necessarily follow, for the level of violence that might be required in the context of a successful transition to constitutional democracy may fluctuate significantly as a function of several distinct factors. For example, pre-constitutional identities may vary in intensity, or they may be kept in place through easier to dislodge external forces or through more deeply entrenched internal forces.⁴² Accordingly, in cases where transition to constitutional democracy is impeded by foreign rule and where there does not lurk any potential divisive internal strife, unproblematic assumption of a workable constitutional identity and smooth transition may be entirely within reach upon emancipation from colonial power.⁴³ Conversely, in cases where internal forces are deeply divided, such transition may remain elusive absent an interim period marked by considerable violence and account settling between proponents of a new order and defenders of traditional prerogatives.⁴⁴

The *amount* of violence surrounding a transition to constitutional democracy is likely to depend more on the degree of entrenchment of the forces that oppose change than on the prevalent constitutional model. On the other hand, the *need* for interim violence, between the fall of the old order and the emergence of the new, seems closely linked to the call for changes in self-perception conceived in the broadest terms. Specifically, the citizenry's perception of its polity's system of justice figures significantly in that citizenry's collective self-image. Moreover, transitions to constitutional democracy usually involve a switch in systems of justice that requires discrediting the old legal regime and the ways in which it purported to dispense justice. At the same time, such transitions must successfully institute and legitimize a new legal regime to foster adherence to newly adopted constitutional values and renewed respect for the rule of law. It is difficult to concurrently dismantle the old regime and build up the new one without violence. Especially when those oppressed by the

⁴² From the standpoint of the relevant identities, and regardless of the actual material assets at the disposal of various relevant players, external forces, such as colonialist or foreign occupiers, would seem less likely to have a firm or lasting grip on the collective self-image of those under their tutelage than would internal forces who share in a common heritage though they may wield excessive powers.

⁴³ Cf. discussion *supra* note 11 and accompanying text (comparing the United States' smoother transition to constitutional democracy to the more difficult and convoluted sequence of events in France).

⁴⁴ The paradigmatic example is, of course, that of the French Revolution and of its Reign of Terror. See generally VAN CAENEGEM, *supra* note 12.

old regime call for retribution, and those favored by it refuse to relinquish their privileges, an interim period for settling old accounts without sullyng the new legal regime would seem desirable, if not indispensable.⁴⁵ In short, an interim period marked by some violence and account settling may significantly facilitate passage from obsolete criteria of justice to a new conception of justice that is congruent with the emergent self-image launched by the constitution-makers.

Beyond these complex factors, it is necessary to take a close look at the nexus between the three constitutional models identified thus far and the respective changes in constitutional identity that they call for. As already mentioned, *prima facie*, the German model requires the least change from pre-political identity, and the American, the most. Once the essential features of contemporary constitutionalism are properly factored in, however, the picture is likely to differ quite substantially. Indeed, modern constitutionalism—viewed as a counterfactual ideal to be distinguished from any existing constitution—prescribes three general features: limited government, adherence to the rule of law, and protection of fundamental rights.⁴⁶ Moreover, consistent with these prescriptions, the German model—at least as envisioned by Carl Schmitt⁴⁷—does not necessarily conform with constitutionalism. Specifically, inasmuch as the German model may be satisfied in the context of a dictatorship bent on imposing the will fashioned by German nationalism without regard for limitations on the powers of government or for respect for strict legality or for fundamental rights, that model would stray beyond the permissible bounds of contemporary constitutionalism. Accordingly, for the German model to conform with the precepts of constitutionalism, the passage from pre-constitutional identity to a constitutional one would have to be mediated through a process of incorporation of the essential tenets of constitutionalism.⁴⁸

⁴⁵ For example, injustices under the old regime, such as torture or the killing of a loved one, may lead to claims for retribution or revenge. If the acts complained of were legal when committed, or illegal but not prosecuted in a timely manner for political reasons, then the new regime would face a dilemma: it can either prosecute, thus promoting political justice at the expense of respect for the rule of law; or it can strictly abide by the rule of law but allow glaring injustices to remain unpunished, thus undermining its claim to legitimacy. For a more extensive discussion of these issues, see Michel Rosenfeld, *Restitution, Retribution, Political Justice and the Rule of Law*, 2 CONSTELLATIONS 309 (1996).

⁴⁶ See Rosenfeld, *Modern Constitutionalism*, *supra* note 9, at 4.

⁴⁷ See *supra* text accompanying notes 37-40.

⁴⁸ Cf. Bernhard Schlink, *Why Carl Schmitt?*, 2 CONSTELLATIONS 429, 435 (1996) (noting that the legal culture of postwar West Germany was based on a disavowal, inter

In more general terms, pre-constitutional identity must be transformed, or at least mediated, in order to allow for the possible emergence of a constitutional identity. Moreover, the process involved is likely to be complex and on occasion even seemingly contradictory. Thus, although in terms of *content*, constitutional identity and its pre-constitutional counterpart may be closer to one another in the German model than in the other two, in terms of countering the grip of the past, adherents to the German model may well face the most daunting task.⁴⁹ Conversely, within the ambit of the American model, the emergent constitutional identity is likely to be the product of a creation *ex nihilo*, but its implantation may prove largely unproblematic inasmuch as there is no firmly grounded pre-constitutional identity with any significant hold on the members of the new polity.⁵⁰

In sum, regardless of which of the three models is involved, constitution-making cannot be successful without achieving a degree of coordination capable of dealing with the series of complex problems littered through its path. Moreover, to the extent that constitution-making under all three models requires a clear break with the past, some measure of violence—though its nature and intensity may vary depending on the relevant circumstances—seems inevitable. In short, transition from despotic rule to constitutional democracy depends on getting rid of the despot, forging a new identity for the polity, and furnishing an interim period for the settling of certain accounts without compromising the new system of justice about to be put in place.

IV.

To place Spain's peaceful transition to constitutional democracy in proper perspective, reference must be made not only to the three constitutional models discussed above, but also to the two

alia, of Schmitt's views for purposes of grounding the new legal system on the concept of right and just law).

⁴⁹ Cf. Cass R. Sunstein, *On Property and Constitutionalism*, in CONSTITUTIONALISM, *supra* note 5, at 383, 398 ("It is often said that constitutions, as a form of higher law, must be compatible with the culture and mores of those whom they regulate. In one sense, however, the opposite is true. . . . Constitutions should work against the particular nation's most threatening tendencies.").

⁵⁰ If the American model seems less problematic in the context of constitution-making, it by no means follows that it produces a constitutional identity that is substantial enough to satisfy the needs of subsequent generations. To the extent that the American model cannot rely on an existing set of commonly shared mores to build upon, it may have to invent "traditions" to cement a workable constitutional identity for the future. For a more extended discussion of this point, see Rosenfeld, *supra* note 7, at 1097-1105.

paradigmatic types of transition prevalent prior to the mid-1970s. These two types are, respectively, transition to constitutional democracy after a revolution, as in eighteenth century France and the United States; and transition imposed by the victors after total defeat and surrender of tyrannical belligerent regimes such as Nazi Germany and the Japanese Empire at the end of World War II.⁵¹ Moreover, in the latter case, the success of the transition hinges on reconstruction of the defeated polity and on an embracing of the new constitutional order by the citizenry as was clearly the case in postwar Germany.⁵² Furthermore, for constitutionalism and democracy to thrive in the last quarter of the twentieth century, there must be room for fruitful interaction among what Juan Linz and Alfred Stepan have termed the "five arenas of a consolidated democracy,"⁵³ to wit: 1) the existence of a "free and lively civil society"; 2) the functioning of a "relatively autonomous . . . political society";⁵⁴ 3) the implementation of the rule of law (which corresponds roughly to the last two features identified above as being essential to constitutionalism);⁵⁵ 4) the organization of a state bureaucracy usable by democratic government for the implementation of policy; and 5) the presence of an "institutionalized economic society."⁵⁶

Spain's transition to constitutional democracy is remarkable in several key respects. Above all, not only did the transition in question avoid violence, but it also managed to proceed from beginning to end without any break in legality. Furthermore, the constitutional order erected in Spain does not fit within any of three constitutional models described above, and the transition that led to the making of the Spanish Constitution does not belong

⁵¹ Although the United Kingdom does not have a written constitution, it is fair to say that it generally adheres to the fundamental tenets of constitutionalism and that it hence provides an example of gradual, largely peaceful, evolution towards constitutional democracy. A complete typology of models of transition might well have to account for the British experience, but given the time frame involved and the lack of a written constitution, the case of Britain does not seem directly relevant to that of Spain or to those of more recent transitions in Eastern Europe, Latin America, or South Africa.

⁵² See generally KOMMERS, *supra* note 8.

⁵³ LINZ & STEPAN, *supra* note 14, at 7.

⁵⁴ Political society is "that arena in which the polity specifically arranges itself to contest the legitimate right to exercise control over public power and the state apparatus." *Id.* at 8.

⁵⁵ See *supra* text accompanying note 46.

⁵⁶ An "economic society" mediates between state and market as "there has never been and there cannot be a non-wartime consolidated democracy in a command economy. Second, there has never been and almost certainly there never will be a modern consolidated democracy in a pure market economy." LINZ & STEPAN, *supra* note 14, at 11.

to either of the two types previously mentioned. Finally, the Spanish transition seems in many ways unique due to a confluence of historical circumstances unlikely to ever be reproduced,⁵⁷ including significant achievements in four of the five above listed areas of consolidated democracy.⁵⁸ Yet, as will be discussed below, in certain significant respects, the Spanish transition looms as the harbinger of a fourth constitutional model and of a third type of transition, namely peaceful transition. Keeping this in mind, I will now turn to some key aspects of the Spanish transition with a view towards better grasping its contribution to our understanding of constitution-making and towards building a workable constitutional identity.⁵⁹

Although Franco's thirty-six-year-authoritarian regime was preceded by democratic rule, the Spanish transition in no way amounted to a restoration.⁶⁰ This is because it was neither possible to return to pre-Francoist democratic institutions nor to use existing institutions to lend necessary support to democratic rule.⁶¹ Moreover, Franco's provision for the installation of a monarchy upon the end of his rule did not forge any workable links to the previously abolished Spanish Monarchy, notwithstanding any superficial indications to the contrary. While King Juan Carlos would play a key role in Spain's successful transition, at the moment he acceded to the throne he was neither the legitimate heir to the Spanish throne,⁶² nor did he enjoy legitimacy among the partisans of democracy who saw him as a pawn of Franco's heirs, or among hard line Francoists, who sensed that he was not committed to their cause.⁶³

Ironically, the Spanish transition might well not have been

⁵⁷ See *id.* at 87-115.

⁵⁸ See *id.* at 112.

⁵⁹ The following account is not intended to be in any way comprehensive or to provide a full sketch of the relevant historical events. For fuller accounts of the transition, reference is to be made to the other contributions to this symposium, see *Peaceful Transitions to Constitutional Democracy: Transcript of the Proceedings*, 19 CARDOZO L. REV. 1953, 1954-67 (1998) (comments of Jose Pedro Perez Llorca), as well as Luis López Guerra, *The Application of the Spanish Model in the Constitutional Transitions in Eastern and Central Europe*, 19 CARDOZO L. REV. 1937 (1998), as well as to the vast literature available on this subject. See generally LINZ & STEPAN, *supra* note 14, at 87-115 and works cited therein. For a thorough discussion of the making of the Spanish constitution, see ANDREA BONIME-BLANC, *SPAIN'S TRANSITION TO DEMOCRACY* (1987).

⁶⁰ See LINZ & STEPAN, *supra* note 14, at 89.

⁶¹ See *id.*

⁶² Juan Carlos's father Juan of Borbon, who was then living in exile, was the legitimate heir to the Spanish throne. See Rubio Llorente, *supra* note 13, at 248.

⁶³ See *id.* at 243.

peaceful were it not for the fact that both the political heirs of Franco and those who wished to institute a democracy proved too weak to take the country's destiny into their own hands. Indeed, the partisans of authoritarianism could not realistically expect to stay in office absent excessive repression due to external pressure from surrounding Western European polities.⁶⁴ For their part, those who wanted to bring about democracy lacked sufficient strength to violently overthrow those still in power, particularly since the latter had the benefit of the loyalty of the Armed Forces.⁶⁵ Thus, Spain's peaceful transition apparently grew out of the initial deadlock among the principal antagonists who stood on the political stage at Franco's death.

This initial deadlock may account for the lack of violence at the outset of Spain's transition, but it does not explain why the entire process remained peaceful. Although in retrospect, the Spanish transition may be portrayed as smooth and relatively straightforward, in reality it was fraught with difficulties and uncertainties and its success was by no means a foregone conclusion.⁶⁶ Actually, it seems fair to conclude that the success of Spain's peaceful transition was due, at least in part, to a fortunate confluence of a series of events, to the outstanding leadership of certain individuals, and to certain other factors unlikely to be reproduced in other historical contexts.⁶⁷

Before further exploring the most salient factors that shaped the Spanish transition, a brief look at the time frame of that transition is warranted to help shed light on the essentials of the process involved. Indeed, depending on one's conception of what a successful transition requires, one may select among a series of significant dates as being best suited to mark the successful completion of the process of transition. Whereas there is consensus that the transition began with the death of Franco in November 1975, several different dates have been mentioned as marking the successful completion of the process⁶⁸ and the consolidation of Spain's constitutional democracy.⁶⁹ Arguably, the success of the Spanish transition was assured as early as the fall of 1977, when, after the first democratic elections to Parliament, the process of government

⁶⁴ See LINZ & STEPAN, *supra* note 14, at 88.

⁶⁵ *See id.*

⁶⁶ *See id.* at 89.

⁶⁷ *See id.*

⁶⁸ *See id.* at 106-07.

⁶⁹ *See id.* at 108-09.

accountability to Parliament was formally established.⁷⁰ At the other end of the spectrum, plausibly, success was not assured until Spain actually entered into the European Community in 1986.⁷¹ In between these two dates, moreover, there are several others that loom as critical in relation to the success of the transition. These include: December 1978, when the new constitution was ratified in a nationwide referendum;⁷² October 1979, when the Basque and Catalan referenda on regional autonomy consistent with the constitution were held; February 1981, when a military coup failed, due in large measure to the King's courageous intervention in order to save democracy;⁷³ and October 1982, when power peacefully transferred to the Socialist Party upon the latter's victory in Parliamentary elections.⁷⁴

Although the relative importance of each of the above listed dates may vary depending on one's conception of the transition, they all serve to demarcate key moments in the shaping of Spain's emerging new democracy and in the construction of its constitutional identity. The first of these dates, that of the death of Franco, has special significance not only because it clearly marks the beginning of the transition, but it also serves to set the Spanish transition, apart from both the two types of violent transition that preceded it and from the peaceful transitions that followed it. Whereas the earlier transitions in France, Germany, or the United States involved putting a violent end to despotic rule; and whereas later peaceful transitions in Eastern and Central European countries like Poland and Hungary resulted from pacted arrangements worked out among weakened incumbent socialist regimes and their democratic opponents;⁷⁵ Franco's regime ultimately never ascended beyond one-man rule;⁷⁶ and hence his death truly marked the end of a political era. Ironically, Franco was not indifferent when it came to his succession, and he did take measures to insure an orderly transition—such as providing for a king upon his

⁷⁰ See *id.* at 106.

⁷¹ See *id.* at 113.

⁷² See *id.* at 106.

⁷³ See *id.* at 109.

⁷⁴ See *id.* at 108.

⁷⁵ In Poland, the pacted transition resulted from 1989 roundtable agreements between the communist regime of General Jaruzelski and the Solidarity Movement headed by Lech Walesa. See *id.* at 265-69. In Hungary, the transition resulted from the roundtable negotiations held between the Communist Party "increasingly led by reformists" and "organized democratic party opposition." *Id.* at 295.

⁷⁶ See Rubio Llorente, *supra* note 13, at 239.

death⁷⁷—but those measures did not allow his would-be heirs to remain in power, and would prove eventually to be a key link in the successful transition to democracy due to the King's use of his considerable powers to that end.

Franco's regime has been characterized as a "kingdom without a king."⁷⁸ Drawing from fascism as well as from tradition, Franco shaped the state according to three fundamental principles. First, "subordination of the individual to the communal interests of the nation";⁷⁹ second, rejection of capitalism and Marxism in favor of a corporatist economy designed to harmonize the interests of business and labor;⁸⁰ and third, "concentration of political power in a charismatic leader" only answerable to "God and History."⁸¹ Moreover the collective identity designed to blend together with Franco's state was highlighted by an embrace of Catholicism as the state's religion, a rejection of liberalism and all else that smacked of relativism—including political parties—and unbending commitment to the unity of Spain, resulting in complete intolerance of any aspiration towards regional autonomy—especially among the Basques or Catalans.⁸²

The above mentioned identity stands in sharp contrast to that forged in the wake of the Spanish transition to constitutional democracy. Not only has Spain become a typical Western constitutional parliamentary democracy, but it has also abandoned corporatism, collectivism and the close nexus between church and state, in favor of a pluralistic and secular political society that has institutionalized a large degree of regional autonomy within its new constitutional framework.⁸³ This raises the question of what accounts for these dramatic changes in identity between Francoist and post-Francoist Spain. Specifically, have these considerable changes really come about within the short period between Franco's death and the consolidation of the Spanish transition to constitutional democracy?⁸⁴ Furthermore, to what extent are these changes in Spain's social and political self-image attributable to the formation

⁷⁷ See *id.* at 242.

⁷⁸ *Id.*

⁷⁹ *Id.* at 241.

⁸⁰ See *id.*

⁸¹ *Id.*

⁸² See *id.* at 240.

⁸³ See C.E. [Constitution] arts. 1, 2, 6, 143 (Spain).

⁸⁴ The period in question spans at most 11 years, 1975-1986, if one accepts that Spain's entry into the European Community (now European Union) signals the enduring success of its transition, see *supra* text accompanying note 71.

of a new constitutional identity in the course of that transition?

Upon closer examination, Spain's changes in identity were more gradual than they may first appear because they were prompted by a series of internal and external factors at work well before Franco's death. Although Franco's death marks the starting point of Spain's *political* transition to constitutional democracy, the conditions that lent support to the national identity forged by Franco began unraveling during the latter part of his regime due to a confluence of internal and external causes.

Franco never gave up authoritarian one-man rule, but his grip on power did not prevent Spain from embarking during the last twenty years of his regime on the path that would ultimately culminate in democracy. As already mentioned, at the time of Franco's death, Spain had already managed considerable achievements in four of the five arenas of consolidated democracy,⁸⁵ and was only seriously lacking in the development of a political society.⁸⁶ In particular, by the mid-1970s Spain was a well-institutionalized economic society ranking tenth among all capitalist economies and having experienced the greatest growth rate throughout the world during the period 1961-1970.⁸⁷ Finally, Spain's working state bureaucracy, though run in an authoritarian way, was usable by a democratic government,⁸⁸ and the country had, "a reasonably strong recent tradition of rule of law."⁸⁹

Whereas one might disagree on whether the cause of Spain's economic and cultural development in the years preceding Franco's death were primarily internal or external,⁹⁰ it seems clear that one key factor that played a major role in leading to a peaceful transition was squarely internal. That factor was the cultural reconstruction—over the course of the last two decades of Franco's regime—of the historical memory of the civil war in a way that transformed what had been a deep tear within the very fabric of the Spanish polity into a building block on the path to democracy.⁹¹ In other words, the severe wounds that Spain's

⁸⁵ See *supra* text accompanying note 59.

⁸⁶ See LINZ & STEPAN, *supra* note 14, at 113.

⁸⁷ See *id.* at 112.

⁸⁸ See *id.* at 113.

⁸⁹ *Id.* During World War II Franco issued "fundamental laws" that provided a legal framework to his regime. See Rubio Llorente, *supra* note 13, at 241-42.

⁹⁰ Rubio Llorente, for example, argues that the tensions that arose at the end of Franco's regime were largely due to "a continuous process of economic development into which Spain was dragged rather than led by European prosperity." Rubio Llorente, *supra* note 13, at 242.

⁹¹ See LINZ & STEPAN, *supra* note 14, at 88 n.3.

bloody civil war inflicted on the nation's self-image had to be healed before it could forge ahead towards democracy. And this was accomplished through cultural reconstruction of the country's historical identity so as to emphasize the commonalities among all Spaniards rather than the irreconcilable differences that led to fratricidal strife. Moreover, the importance of this shift in identity can hardly be overemphasized. Indeed, the contrast between the Spanish shift in identity and the complete lack of meaningful change in the forty years that followed the 1940s civil wars between Serbs and Croats could not be more dramatic.⁹²

Several other factors, both internal and external, which became significant during Franco's lifetime, also helped pave the way towards democracy. First, the alliance between the Catholic Church and the regime, which, as we have seen above,⁹³ was an important ingredient in the collective self-image promoted by Franco, began to change as the Spanish Church belatedly started to adapt to the program of modernization launched by Vatican II in 1965.⁹⁴ In addition, as already mentioned,⁹⁵ Franco undertook to transform his personal rule into a lasting institutional framework for government during the last years of his life. He appointed Carrero Blanco as prime minister, thus separating for the first time the function of head of government from that of head of state.⁹⁶ Soon afterwards, however, in December 1973, Carrero Blanco was assassinated by Basque terrorists.⁹⁷

Basque terrorism in general, and Carrero Blanco's assassination in particular, had an important impact on the end of the Franco regime and on the onset of the transition. Basque terrorism destabilized the regime and the repressive measures adopted to combat against it led to further discrediting of Franco's rule abroad.⁹⁸ Moreover, while the full implications of Carrero Blanco's assassination are still a matter of debate, it seems reasonable to assume that had Carrero Blanco been in office at Franco's

⁹² See *id.*

⁹³ See *supra* text accompanying note 82.

⁹⁴ See Rubio Llorente, *supra* note 13, at 240. Because its hierarchy was conservative and because of its collaboration with Franco's regime, the Spanish Catholic Church did not play a significant role in the Spanish transition to democracy in stark contrast to the major roles played by the Polish Church and the Brazilian Church in their respective polity's transition. See JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 85-89 (1994).

⁹⁵ See *supra* text accompanying note 77.

⁹⁶ See Rubio Llorente, *supra* note 13, at 242.

⁹⁷ See LINZ & STEPAN, *supra* note 14, at 107.

⁹⁸ See *id.*

death, the heirs of the regime would have been in a much better position to delay or greatly complicate the transition.⁹⁹

Although the Spanish transition was not itself violent, the preceding brief review reveals that it was surrounded by violence. At the time the transition was about to begin, violence, the threat of violence, and the memory of violence were all very much present. It seems quite plausible that the memory of the extreme violence of the civil war as culturally reconstructed in the years preceding the transition provided a great incentive to all parties involved in the transition to preserve the peace. Moreover, Basque terrorism would continue throughout the transition and thereafter, but would also become increasingly politically isolated.¹⁰⁰ By all indications, Basque terrorism did not shape the transition but it remained ever present within the political landscape.

In the immediate aftermath of Franco's death, Arias Navarro, Carrero Blanco's successor, was confirmed as head of government by the King, and began weak attempts at reform.¹⁰¹ Because of great suspicion and mistrust among Francoists and their opponents—none of whom really trusted the King¹⁰²—these attempts met with little success. Decisive action was needed, and the King apparently provided it as it is believed that he forced the resignation of Arias Navarro and had him replaced on July 1, 1976 by Adolfo Suarez, the man who would lead Spain to democratic elections and to the making of its new constitution.¹⁰³

The situation was precarious, but remarkably Suarez managed to launch the path towards a working democracy without ever exceeding the bounds of legality. The task was formidable as, to remain within the realm of legality, Suarez could only count on Francoist law and had to work together with the Cortes—the corporatist legislature created by Franco and whose membership comprised a significant number of his appointees.¹⁰⁴ Insisting on the importance of adhering to the rule of law, and adroitly navigating in treacherous political waters, through appeals to the Cortes and through television addresses to the nation as a whole, Suarez managed to have the Cortes enact two crucial pieces of legislation in 1976. The first of these legalized political associa-

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See Rubio Llorente, *supra* note 13, at 242.

¹⁰² See *supra* text accompanying note 63.

¹⁰³ See Rubio Llorente, *supra* note 13, at 243-44.

¹⁰⁴ See LINZ & STEPAN, *supra* note 14, at 92.

tions and paved the way for the establishment of full-fledged non-Francoist political parties. The second—which was even more remarkable, because in enacting it the Cortes were in effect voting themselves out of office—provided for political reform and called for free elections.¹⁰⁵

For his part, the King made full use of the powers awarded him by the dictatorship, but did so not in furtherance of authoritarianism but with a view toward breaking away from it. Aside from his role in the installation of Suarez as premier, the King took care to legitimize his position as rightful heir to the Spanish Monarchy by having his father renounce his succession rights.¹⁰⁶ That important step had the symbolic effect of casting the Monarchy (which had been abolished in 1931) in the light of a restored government, thus bolstering the King's support among the military and a sizeable proportion of the political right.¹⁰⁷ Furthermore, after the first elections which took place in June 1977, the King declared at the opening of the new Parliament in July 1977 that it was the Spanish people who were sovereign and that as a constitutional monarch he would take no role in fashioning a political program for Spain.¹⁰⁸ From that moment on, the King rose above politics and became a symbol of national unity as the vexing and delicate process of constitution-making was about to commence.

In the meantime, Suarez proved a deft master of politics during the potentially explosive period that preceded the election. In particular, against very high odds, Suarez managed to legalize the Communist Party, thereby enabling the entire political spectrum to participate in the parliamentary elections.¹⁰⁹ This in turn maximized the chances for the newly elected Parliament to become a genuine constituent assembly.

The June 1977 elections were carried out without significant problems and gave Suarez's centrist party the largest number of seats in the Parliament.¹¹⁰ The next largest number of seats went to the Socialists, while the Communists, Basques, and Catalans all managed to achieve significant representation.¹¹¹ Accordingly, the Parliament had broad enough representation for most concerned

¹⁰⁵ See *id.* at 95.

¹⁰⁶ See Rubio Llorente, *supra* note 13, at 248.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See LINZ & STEPAN, *supra* note 14, at 96-98.

¹¹⁰ See Rubio Llorente, *supra* note 13, at 247.

¹¹¹ See *id.*

to regard it as a legitimate constituent assembly.¹¹²

Prior to launching in a full-fledged process of constitution-making, several key actions essential for purposes of facilitating the task ahead were undertaken by the Suarez government and by the Parliament. For our purposes, two such actions are worthy of mention. The first is the Amnesty Act of 1977 which was the culmination of a series of amnesties dating to the King's accession to the throne.¹¹³ These amnesties were designed to lift all sanctions going as far back as 1936—the beginning of the civil war—imposed for politically motivated acts, including some of those perpetrated by ETA, the Basque organization responsible for many terrorist incidents.¹¹⁴ The purpose of the Amnesty Act was to eliminate restrictions on political activity imposed by Franco's dictatorship,¹¹⁵ and its broad scope was well suited to promote a break away from the past without emphasis on account settling.

The second action undertaken by the Suarez government was as bold as it was crucial to the success of the constitution-making process. Pressured by Basque and Catalan nationalists as well as by the Socialists and Communists who had become partisans of federalism, Suarez provisionally granted autonomous rule to Catalonia and the Basque region and to all other regions of Spain even though the latter were not particularly interested in such rule.¹¹⁶ Suarez's strategy was to accommodate the Basque and Catalan quest for autonomy while underplaying their uniqueness. Moreover, by redrawing the map of Spain into a number of autonomous regions through a series of decrees, Suarez hoped that the changes involved would be endorsed by the constituent Parliament which was in the process of crafting the new constitution.¹¹⁷

The constitution-making process took place between September 1977 and October 1978,¹¹⁸ and the constitution that emerged from it was approved by a nationwide referendum on December 6, 1978.¹¹⁹ The story of this constitution-making has been amply told¹²⁰ and it need not be repeated here. Suffice it, therefore, to very briefly summarize its outcome and mention some of the most

¹¹² See *id.*

¹¹³ See *id.* at 249.

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 250.

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.* at 256.

¹²⁰ See generally BONIME-BLANC, *supra* note 59.

important features that appear to have had a determinative impact on its success. The Spanish Constitution of 1978 opts, in stark contrast to the preceding dictatorship, for a federal or quasi-federal system headed by a constitutional monarch and comprised of a national bicameral parliament, as well as broadly and vaguely spelled out autonomous communities with certain enumerated powers.¹²¹ Moreover, the constitution provides for a political life dominated by political parties and guarantees rights and liberties that are standard throughout Western Europe.¹²²

The determinative features that loom as crucial to the success of the Spanish constitution-making experience can, in turn, be encapsulated in the following three words: delegation, ambiguity, and consensus. Delegation of the initial drafting of the constitution to a group of lawyers and legal academics, who worked largely in secret, made it possible to deal with divisive issues such as the aspirations to autonomy of Basques and Catalans without alienating a large segment of the population. Furthermore, the seven drafters of the constitution were representatives of the major parties, and each of them was responsible to his own party.¹²³ The parties represented were Suarez's UDC; the Socialists and Communists; Popular Alliance, the principal rightist party; and the Catalan party, whose representative also took into account the Basque point of view.¹²⁴

These various parties did not see eye-to-eye on many important subjects. This would have made reaching the requisite agreement to craft a workable constitution highly unlikely had it not been for the successful strategic use of ambiguity. As a matter of fact, ambiguity not only played an important role in constitution-making proper but also in many of the steps that led to it. Thus, Suarez's 1976 political reform legislation that, as already mentioned, led to democratic elections which were a precondition to constitution-making,¹²⁵ was so ambiguous that it created great confusion among both Francoists and their opponents.¹²⁶ Under the guise of being merely one more law added to an existing corpus of law regulating political activity, the political reform legislation in substance repealed prior law by endorsing the principle of popular

¹²¹ See Rubio Llorente, *supra* note 13, at 250, 262.

¹²² See *id.* at 250.

¹²³ See *id.* at 251-52.

¹²⁴ See *id.*

¹²⁵ See *supra* text accompanying notes 104-07.

¹²⁶ See Rubio Llorente, *supra* note 13, at 244.

sovereignty.¹²⁷ Similarly, constitution-making and the constitutional text it produced were also rife with ambiguity. The most striking example of this is the constitution's simultaneous commitment to national unity and regional autonomy without clearly or sufficiently spelling out how these potentially contradictory objectives ought to be reconciled.¹²⁸

Both delegation and, more importantly, ambiguity made it possible for the constitution-making process to proceed by means of consensus rather than majority rule. Indeed, delegation to the seven drafters made it possible to reach agreements on many contentious issues which would have been most unlikely in the context of an open debate in Parliament.¹²⁹ Furthermore, ambiguity allowed for compromise where consensus, strictly speaking—that is agreement for the same reason by all concerned—was impossible as in the case of distribution of powers among the central government and that of autonomous communities.¹³⁰

After the initial drafting by the group of seven, the constitution was debated and its text amended in Parliament.¹³¹ The drafters had managed by and large to lay down the essential framework. The constitution was overwhelmingly approved by Parliament. Only a handful of extreme right and extreme left parliamentarians voted against it, while the Basques abstained.¹³² As already mentioned, the constitution was approved by an overwhelming majority of the Spanish voters. Finally, this constitution, described by its drafters as “a pact reached through consensus,”¹³³ was promulgated by the King at a joint session of the two houses of Parliament on December 27, 1978.

V.

As already indicated, Spain's transition to constitutional democracy is properly characterized as a new type of transition—peaceful transition—and its principal features include: lack of violence concerning the process of transition in itself; lack of any convulsive break in legality; and presence of a common interest among those identified with the old regime and those committed to the institution of constitutional democracy to reach a negotiated

¹²⁷ *See id.*

¹²⁸ *See id.* at 263-64.

¹²⁹ *See id.* at 251.

¹³⁰ *See id.*

¹³¹ *See id.* at 254-57.

¹³² *See id.* at 256.

¹³³ *Id.* at 257.

agreement rather than resort to confrontation—a common interest undoubtedly buttressed by the inability of either side to impose its will by force. Moreover, this type of transition is undoubtedly greatly boosted by the presence of a rallying point capable of providing a significant measure of unity commonly shared by all relevant actors regardless of what otherwise divides them. In Spain, the unifying factor in question was provided by the King once it became broadly accepted that he had risen above politics.¹³⁴

Emergence of the King as a symbol of national unity was due to a series of intricate shifts in collective identity. These various shifts came from many different directions and were often initiated for inconsistent reasons, but they fortunately resulted in a convergence of views among proponents of otherwise antagonistic perspectives. As stressed above, upon his ascent to the throne, the King was not the legitimate heir to the Spanish Monarchy;¹³⁵ and although given his throne by Franco, he was regarded as an unreliable heir by Francoists and as a mere pawn by proponents of democracy.¹³⁶ Paradoxically, precisely because of his lack of identification with traditionalists¹³⁷ as well as with those who wished to shed tradition to pursue constitutional democracy, the new King had room to grow into a source of national unity and identity. In other words, the King could become a symbol of Spain's unity provided he acted in ways that gave him legitimacy in the eyes of both traditionalist and advocates of constitutional democracy.

The King succeeded remarkably in becoming different things to different people through his straightening of the Monarchy's legitimate line of succession by having his father renounce any aspirations to the throne¹³⁸ and his rising above politics once the democratically elected Parliament was in place in July 1977.¹³⁹ For Francoists, legitimation of the King's position on the throne afforded an opportunity to both fully reinstate Franco within tradition—for the King whom he had made his successor was now the legitimate heir to the Spanish throne—and to extend the horizon of Francoism beyond that of the man who embodied it during his

¹³⁴ See *supra* text accompanying notes 106-08.

¹³⁵ See *supra* text accompanying notes 106-07.

¹³⁶ See *supra* text accompanying note 102.

¹³⁷ This lack was presumably as much of a problem for traditionalists who considered legitimate tradition to require reinstatement of the Monarchy abolished in 1931—for whom Juan Carlos was not the legitimate heir to the throne—as for Francoist traditionalists who sensed that Juan Carlos was not a true believer in their cause.

¹³⁸ See *supra* text accompanying note 106.

¹³⁹ See *supra* text accompanying note 108.

lifetime. For non-Francoist conservatives, on the other hand, formal legitimation of the King's position could be construed as a symbol of restoration of Spain's historical traditions and used as a telling sign of hope that Spain's uncertain future would eventually be guided by the sound values that had held the nation together in the past.

For their part, the proponents of democracy could accept the King after becoming convinced that he would uphold democracy and lend support to its institutions, even if they were not particularly in favor of the Monarchy. Moreover, proponents of democracy had an incentive to share in the vision of the King as a symbol of national unity inasmuch as this allowed virtually all Spaniards to remain within the fold of the new democracy notwithstanding preferences to the contrary. Also, for those who associated democracy with a significant level of regional autonomy, casting the King as a symbol of an indissoluble national unity had the virtue of countering the fear that devolutions of power from the nation to regions would imperil the very survival of the Spanish nation.

The position of the King as guarantor of national unity and as the rallying point for groups with otherwise antagonistic visions of the polity was greatly bolstered in the aftermath of the attempted military coup that led to the seizure of Parliament on February 23, 1981. Without a doubt, the King played a pivotal role in the quick resolution of the crisis as he spoke out for democracy and, donning his military uniform, issued an order to desist to the rebels.¹⁴⁰ On the other hand, all partisans of democracy, even if foes of the Monarchy, had to admire the King's personal courage in intervening so decisively in the crisis. Indeed, as a consequence of the extremely negative reaction to the attempted coup led by the King, the self-image of Spain as a democracy became firmly consolidated to the exclusion of all rival visions.¹⁴¹ Thus for some, it may be the Monarchy as an institution and the King as its present embodiment that is the guarantor of national unity, while for others it is the King as a man rather than as a monarch who has earned that position. In any event, albeit for overlapping, rather than commonly shared reasons, the King became a focal point of the new constitutional identity that played an important part in the consolidation of Spain's new democracy.

¹⁴⁰ See LINZ & STEPAN, *supra* note 14, at 101.

¹⁴¹ See *id.* at 109 ("[T]he overwhelmingly negative reaction to the coup . . . helped to establish very clearly that the only game in town after February 1981 was a democratic game.").

Spanish constitution-making and the constitutional order it produced cannot reasonably be said to fit within any of the three constitutional models thus far encountered.¹⁴² It does not fit within the German model since one of its chief characteristics is the move away from ethnocentrism—or, more precisely, from the linguistic and cultural hegemony pursued throughout the Franco dictatorship. Likewise, the Spanish experience cannot be satisfactorily incorporated within the French model to the extent that the latter is predicated on the indivisibility of the *demos* and the general will,¹⁴³ and that it gives recognition to the individual as the embodiment of the ideal of universal equal citizenship to the exclusion of any consideration of group affiliation or allegiance.¹⁴⁴ Finally, the Spanish transition to constitutional democracy cannot be subsumed under the American model, for Spain's constitution clearly did not establish the framework for a new nation, but rather carved out a new identity and a new set of institutions designed to mediate among various, often antagonistic, visions of the nation, and to preserve the polity's unity while affording sufficient space for meaningful expression of its diversity.

The Spanish experience suggests the emergence of a fourth constitutional model, the Spanish model. The chief characteristics of this new model revolve around a twofold transformation of the relationship between the nation and the state that is motivated, in part by external factors, and, in part, by internal ones. Moreover, the transformation in question consists of the reframing of the relationship between the nation and the state in terms of the broader perspective projected by political actors engaged in a common supra-national project, such as the European Community ("EC") and of a movement toward a more supple, nuanced, and complex relationship between nation and state, designed to include and accommodate national diversity without thereby threatening the integrity or viability of the nation as a whole. Furthermore, the internal and external factors that promote this transformation loom as more interdependent than independent, and although they may at times pull in opposite directions, they nonetheless combine to prompt the creation of a constitutional order designed to accommodate their respective demands in the best manner possible.

As already indicated, it is not always obvious which of the factors that had an influential role in the Spanish transition are prop-

¹⁴² See *supra* text accompanying notes 56-58.

¹⁴³ See *supra* text accompanying note 29.

¹⁴⁴ See *supra* text accompanying notes 29-32.

erly characterized as external, and which as internal.¹⁴⁵ What is important, however, is to recognize that the Spanish constitutional model is configured by an interplay of internal and external factors in ways that differ considerably from the way in which these factors figure in the other three models. To cite but one example, consider the importance of the nexus between Spain and the EC for purposes of the constitutional order crafted in the course of the transition.¹⁴⁶ On the one hand, Spain arguably internalized the democratic values embodied by the EC member states as part of the process of preparing for admission into the EC, which was a natural step given Spain's cultural and economic position in the mid-1970s. On the other hand, it is arguable that Spain's evolution toward constitutional democracy was primarily internally generated, but it also called for forging external links in order to achieve consolidation, thus looking to the EC as a means of reinforcing the emergent order rather than as a magnet for change.

Furthermore, it is also plausible that links to the EC were essential (through a concurrent process of internalization and externalization) for purposes of mediating successfully between preservation of national unity and recognition of regional autonomy. Indeed, recourse to the supra-national space occupied by the EC allows for a variety of possible three-way relationships capable of defusing the tensions created by power conflicts which can only be resolved in favor of either the nation as an indivisible entity or of the autonomous region as a separate entity.

In contrast, adherence to either of the three other models does not require any comparable process of internalization and externalization. In its original incarnation, the German model requires only internalization (or merely expression assuming internalization as a given) of the nation's ethnos to the exclusion of all alien or external factors.¹⁴⁷ For its part, the French model requires internalization of the universal values that promote the demos, but

¹⁴⁵ See *supra* text accompanying notes 84-89.

¹⁴⁶ Aldofo Suarez requested Spain's admission to the EC in 1977 and although the degree of influence of the EC example on the Spanish transition may be a matter of disagreement, there is little question that the EC became an important symbol in the quest to overcome Francoism, and that it was "helpful" if not "decisive" to the success of the transition. See LINZ & STEPAN, *supra* note 14, at 113.

¹⁴⁷ It bears emphasizing that the current German Constitution does not fully conform to the original model inasmuch as it requires a filtering of the expression of ethnic identity through certain fundamental constraints, such as the preservation of "militant democracy," see GRUNDGESETZ [Constitution] [GG] arts. 18, 20 (F.R.G.); KOMMERS, *supra* note 8, at 37-38, and respect for human dignity. See GRUNDGESETZ [Constitution] [GG] art. 1, § 1 (F.R.G.).

the process of adaptation that it requires remains clearly confined to the space encompassed by a single nation. In other words, the French model requires adapting universal norms to the scale of the nation rather than assimilating transnational objectives or projecting domestic concerns onto a supra-national arena. Finally, the American model also commands adaptation to fundamental norms infused with a constitutional dimension, but such adaptation is for purposes of creating a nation rather than refashioning an existing one. In any event, the American model is also purely national rather than transnational in scope, as it prescribes that its immigrants who covet citizenship shed or downplay their ties to their country of origin in order to become integrated into their new emergent nation.

To recapitulate: The Spanish constitutional model is shaped by the convergence of internal and external trends and it emerges out of negotiations among various political actors who pursue divergent objectives but are (or perceive themselves to be) too weak to impose their will on their antagonists. Within this model, the constitution is much more likely to be the product of consensus than majority politics.¹⁴⁸ Moreover, such a consensus-based constitution is likely to remain ambiguous in significant respects, and adherence to it notwithstanding strong disagreements concerning its ambiguous provisions—in the case of Spain, the provisions regarding regional autonomy¹⁴⁹—is likely to be buttressed both by fear of violence and by transnational aspirations. In short, the success of the Spanish model hinges on finding a viable equilibrium between internal compromises and external influence allowing for the spread of a distinct constitutional identity which provides a focal point of national unity while remaining open to transnational trends and solutions.

CONCLUSION

The peaceful type of transition that occurred in Spain and the kind of constitutional model to which it gave rise seem above all the products of an internal erosion of authoritarianism, concurrent with a gradual strengthening of democratically inspired opposition, coupled with increased influence or pressure coming from abroad. As noted in the outset, a large number of the transitions to consti-

¹⁴⁸ The 1978 Spanish Constitution was itself the product of a consensus among the various political parties that participated in its elaboration. See Rubio Llorente, *supra* note 13, at 257.

¹⁴⁹ See *supra* text accompanying notes 116-17.

tutional democracy that took place after Spain's have been peaceful in kind. To what extent these transitions ought to be considered to be of the same kind as Spain's, and to what extent the constitutional orders which they have spawned ought to be deemed to fit within the Spanish constitutional models, are open questions that require further examination. Nevertheless, it appears that many of the more recent transitions bear significant similarities to Spain's. In particular, pacted transitions such as those in Hungary and in Poland, which arose as a consequence of roundtable negotiations between weakened communist governments and rapidly emerging movements committed to democracy,¹⁵⁰ bear close affinities with Spanish transition.

To be sure, important differences exist. Spain, for example, had a working economic society before the onset of its transition and did not confront an economic crisis like the countries of Eastern Europe.¹⁵¹ In contrast, none of the communist Eastern and Central European countries had a working economic society when they embarked on their transition.¹⁵² Beyond this lack regarding the five arenas of democracy, there were other important differences between Spain and these countries. For example, none of these countries could rely on a unifying figure such as the King of Spain—though, as noted by Professor Geremek, the Catholic Church played in the Polish transition a role similar to that of the King in the Spanish one.¹⁵³

In any event, if these transitions and the constitutional orders to which they gave rise will ultimately prove to fall within the scope of the Spanish model, it will undoubtedly be because they found a workable equilibrium between internal compromise and successful adaptation to external influences, as well as reasonable accommodation of transnational aspirations without undermining their recently minted constitutional identities.

¹⁵⁰ See *supra* text accompany note 75.

¹⁵¹ See LINZ & STEPAN, *supra* note 14, at 88.

¹⁵² See *id.* at 252.

¹⁵³ See *Transcript*, *supra* note 59, at 1973 (comments of Bronislaw Geremek).