

A Pointless Legal Revolution? Constitutional Supremacy and EU Membership in Spain, 1978-2015

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This topic belongs to comparative legal history. After Franco's death (1975) Spain embarked on a 'legal revolution' that, if pressed to its extremes, could hardly be compatible with European integration. Understandably, the Spaniards strove to create not just a new constitution but also a whole new legal order, with the following traits:

First, legal monism, and pyramid-like shape.

Second, every legally relevant thing should be traceable back to the constitution, which would legitimate and pervade all laws, by-laws, decrees, orders, administrative acts and judicial rulings. Ideally, every law, act or verdict would be but a development of the constitution.

Third, the border separating constitutional law from the rest of the law according to the French tradition was brought down.

Fourth, the constitution must be supreme along the lines of the American supremacy clause—an interesting endeavor for a country soon to experience at the same time an inner decentralization and an outer integration.

My contention is that as of 2015, and especially as the financial Eurozone crisis continues, that 'revolution' seems to have been partly successful, and partly unsuccessful—should one say even pointless? As far as integration in the European Union is concerned, the Spanish constitution and the 'legal revolution' seem to have left Spain poorly prepared.

* © 2015 Antonio-Carlos Pereira-Menaut. Professor of Law; Jean Monnet Chairholder of EU Constitutional Law (1999), U. of Santiago de Compostela, Galicia. This Article reelaborates several previous works of mine, such as “A Constituição como Direito: A supremacia das normas constitucionais em Espanha e nos EUA,” 75 BOLETIM DA FACULDADE DE DIREITO (Coimbra) (1999), 219-77, “A Plea for a Compound Res Publica Europaea,” 18 TUL. EUR. & CIV. L.F. (2003), 75-98, and “A Constituição como Direito: A supremacia das normas constitucionais em Espanha e nos EUA. Sobre a relação entre o direito constitucional e o direito ordinário nas constituições americana e espanhola,” *in* JUSTIÇA CONSTITUCIONAL. PRESSUPOSTOS TEÓRICOS E ANÁLISES CONCRETAS, André Ramos Tavares (ed.), Belo Horizonte, Fórum (2008), 173-222. As for the main theories, I have also relied on my LECCIONES DE TEORÍA CONSTITUCIONAL (Madrid 2010 3d ed.), TEORÍA POLÍTICA (Santiago de Compostela, 2015; with C. Pereira-Saéz), RESETTING THE EU CONSTITUTIONAL ENGINE (with C. Cancela) (Regensburg, 2012), as well as on the mentioned “Plea for a Compound Res Publica Europaea”. I wish to acknowledge the help of many friends and colleagues, impossible to enumerate because we have been concerned with these problems for decades. Translations are my own except when stated otherwise. I beg the reader's pardon for coining cacophonous terms—‘normativism,’ ‘legalism,’ ‘judicialism’—often due to the fact that both the Spanish language and the Spanish Constitution distinguish ley and derecho whereas the English has only the word ‘law.’ Legalista does not mean ‘law-abiding’ nor ‘generally related to law’ but related to written norms, statute acts, regulations and so on. Normativista similarly means ‘committed to a vision of law as a fixed, written norm or set of norms.’ Therefore I prefer ‘normativistic’ instead of ‘normative’ to avoid the risk of understanding ‘prescriptive’ or ‘something that should be done.’

I. INTRODUCTION 82

II. MAIN TRAITS OF THE POST-1978 SPANISH CONSTITUTIONAL AND LEGAL VISION 87

 A. *Legal Positivism, Strong Influence of Hans Kelsen*..... 87

 B. *Supremacy of the 1978 Constitution*..... 88

 C. *Monism, Sovereignty, Statism* 89

 D. *The Normativa-Directa Condition of Our Constitution* 91

 E. *Constitutional Law, the New Derecho Común*..... 92

 F. *Principle of Constitutionality vs. Principle of Legality?*..... 93

 G. *Spain, on the American Track*..... 94

III. REALLY ON THE AMERICAN TRACK? THE TRANSATLANTIC DIVIDE AND THE MAIN DIFFERENCES BETWEEN THE U.S. AND SPAIN 99

 A. *The Case for Legal and Constitutional Americanization and the Transatlantic Divide*..... 99

 B. *Kinds of Polities and Varieties of Judicial Systems*..... 103

IV. LAW, LEGALITY AND CONSTITUTIONALITY 104

 A. *Supremacy*..... 104

 B. *Law, Norms and the Constitution*..... 111

 C. *The Principle of Legality Revisited*..... 114

V. CONCLUSION 119

I. INTRODUCTION

After the Spanish Constitution came into force in 1978 and the Constitutional Court delivered its first rulings in 1981, a new vision of the relations between the Constitution and ordinary, non-constitutional law, came into vogue in Spain so as to become the *de rigueur* doctrine that one could expect to find in most Spanish legal circles during the 1980s and 90s. An unprecedented flourishing of the science of constitutional law took place, producing quite a number of top quality research and textbooks for the first time in Spanish history.

The fairly successful Spanish political transition, rather than revolution, from dictatorship to democracy is only too well known in most Western countries. Yet it has obscured, to many an observer, another ‘revolution’—so to speak—that took place below the surface of the general transitional scheme. Being not too controversial and legal in nature, this revolution went rather unnoticed.

The topic we deal with in this piece of research belongs now to history—to Spanish legal and constitutional history. It tries to show that after General Franco's death (1975) Spain embarked on a 'legal revolution' that, if pressed to its extremes, could be hardly compatible with European integration.

Understandably after nearly forty years of Francoism, the Spaniards strove to create not just a new constitution but also a whole new legal order, roughly characterized by the following traits.

First, legal monism, sovereignty, and pyramid-like shape: all law enforceable in the Spanish territory should come from the Constitution. The constitution must be both the supreme statute and the supreme law (*tanto la suprema ley como el supremo derecho*).

Second, the Constitution should in some way 'contain' all possible legal development. Every legally relevant thing should be traceable back to the Constitution, which would legitimate and pervade all laws, by-laws, decrees, orders, administrative acts and judicial rulings. Ideally, every law, act or judicial ruling would be but a development of the Constitution, which acts as the top of a pyramid rather than as a limit or ceiling.

Third, the border separating constitutional law from the rest of the law according to the French tradition must be brought down, so that every branch of law would become 'constitutionalized' and the Civil Code would stop being the highest legal Spanish statute.

Fourth, the Constitution must be supreme along the lines of the American Supremacy Clause—an interesting endeavor for a country soon to experience an inner decentralization and an outer integration.

Constitutional law and non-constitutional law stopped being unconnected realms as they used to be in the old French tradition which Spain closely followed all along the 19th century.¹ The old *Tribunal Supremo* did not adjudicate constitutional matters but was otherwise supreme indeed. Political actions, unlike administrative ones not governed by law beforehand, were now subject to the Constitution and to the courts of law provided they had some justiciable dimension. The

1. In the last forty years the French Constitutional Council has grown to resemble a constitutional court, and its decisions became more relevant for every branch of law. The traditional French scheme appears to have given way even in its native stronghold. The opposite view—non-constitutional and constitutional matters are related—was originally the Common Law view (especially American). In Spain after 1978 we arrived at a relatively similar scheme, although not as a reception of Common Law doctrines. Yet, France still lacks so strong a declaration as that of the Spanish *Ley Orgánica del Poder Judicial* (LOPJ, the main law regulating the Judiciary), sect. 5.1.

Tribunal Constitucional through the *recurso de amparo*² had ready at hand a tool apt to have some control over every legal sphere, including private law.³ The Constitution would bind *all* public officers, civil servants, and judges and, for the first time in Spanish history, can be invoked immediately before any person bestowed with office and before any court of law even if no statute has yet been enacted in pursuance of constitutional provisions. So constitutional law became not merely a very important branch of law but potentially *the only substantial* branch of law, the one providing the bases for every other legal branch, public as well as private. Thus it is the branch of law that underpins all sorts of law (civil, penal, administrative, procedural), i.e., some sort of a basic, *nuevo Derecho común* of Spain—except that the old one was supplementary rather than over-riding. How the Spanish Constitutional Framers could reasonably expect to keep and foster constitutional supremacy while simultaneously preparing to join the European integration, with its ever expanding European law, remains to me a mystery.

Spain has never been a Common Law country in the Anglo-American sense of the term and I do not mean that it was to become such a thing. But Spain traditionally had a set of rules and legal principles that governed the interpretation and application of all laws, for the most part contained in the first articles of the Spanish Civil Code.⁴ Such provisions made for some kind of Spanish *Derecho Común*,⁵ which some now claim has been replaced by the Constitution.⁶ The traditional legal principles, both public and private, of the Civil Code fell from the high legal throne they undisputably held for one century and gave way to the activist, self-

2. The *recurso de amparo* is a remedy created by the 1978 Constitution to protect constitutional rights and liberties, along the lines of the German *Beschwerde*, the Colombian *acción de tutela* and the Chilean *recurso de protección*. It can be adjudicated only by the Constitutional Court, which has made rather expansive use of it, to the benefit of its position *vis à vis* that of the traditional *Tribunal Supremo*. The Chilean Constitutional Court does not monopolize the *recurso de protección*.

3. See generally Enrique Alonso-García, *La Interpretación de la Constitución* (Madrid 1984) and “El control por el Tribunal Constitucional del sistema español de fuentes del Derecho a través del art. 24 de la Constitución,” *Revista Española de Derecho Constitucional* 24 (1988).

4. Its survival in Puerto Rico for more than a century implies that not all law in force in U.S. territories comes from the U.S. Constitution, nor has to be traceable back to it.

5. Those claiming that a constitution consists mainly of a set of norms governing the production of further norms tend now to think of those articles of the Civil Code as the Spanish Constitution of the moment. We would prefer to consider such articles as the *Derecho Común* of Spain. It should be noted that before the Constitution came into force this problem was given little attention. That the main task of a constitution is regulating the production of further norms, instead of limiting power and guaranteeing rights, is open to discussion. But of this later.

6. See generally Rodrigo Fernández-Carvajal, “Nota sobre el Derecho Constitucional como nuevo ‘Derecho Común’,” *Anuario de Derecho Constitucional y Parlamentario* 1 (1989), 37-46.

expanding constitutional law that intended to reign uncontested—at least until EU law came to show its own expansionism, threatening the purported supremacy of our Constitution.⁷

Thus Spain ceased to be a French-like country for the first time since the Bourbon dynasty came to the throne, three centuries ago, and tried to become a German-like country,⁸ and, to a much lesser extent, a follower of certain particular aspects of American constitutional law. The 1978 constitution-makers took an important turn by looking for inspiration to the *Grundgesetz*. The Spanish Constitution is remarkably similar to the German in several ways, including the Constitutional Court, the territorial arrangements, the position of the executive *vis à vis* the legislative, the Social State, *Gleichheit vor dem Gesetz*, the *Wesensgehalt* of the *Grundrechten*, and other aspects. After 1978 the German approach gained even more currency so as to be *de rigueur* among prominent writers and judges too, although the BVG (*Bundesverfassungsgericht*) doctrines on the relations with the EU have not been followed in Spain (no *Solange*, *Maastricht* or *Lisbon* decisions can be found in Spanish constitutional jurisprudence). As for America, although it remains on the whole foreign to us, some important influences usually admitted can be mentioned: direct enforceability of the constitution (*carácter normativo-directo*), its supremacy, and the interpretation of some rights cases. During three centuries the uncontested French model had set the pace and framework: roughly speaking, the Spanish constitution-making tradition consisted of imitating French constitutionalism.

Another fact that should not pass without mention is that in previous Spanish constitutional experiences, not excluding periods of turmoil, nothing similar to this legal revolution had happened. Private law and, to some extent, administrative law lived its life more or less

7. The EU process of centralization is taking place at a pace faster than the American, and the current financial crisis has accelerated it to the point that as of 2015, in some (not many) fields the EU is already more centralized than the U.S. See Federico Fabbrini, “The Fiscal Compact, the ‘Golden Rule,’ and the Paradox of European Federalism,” 36 *Bos. Coll. of Int’l & Comp. L. Rev.* 1 (2013), 1-38. According to Fabbrini, while the U.S. federal government cannot interfere with member states budgetary processes, the EU’s present budgetary law is much less respectful of Member States’ sovereignty.

8. Most constitutional developments we are discussing took place along the German Basic Law model and the decisions of the *Bundesverfassungsgericht*. See generally Francisco Rubio-Llorente, “La Constitución como fuente del Derecho,” in *La Constitución Española y las Fuentes del Derecho* (Madrid, Instituto de Estudios Fiscales 1979), vol. I; Pedro Cruz-Villalón, “La recepción de la Ley Fundamental de la R.F.A.,” *Anuario de Derecho Constitucional y Parlamentario*, 1 (1989), 65-90, as well as “Formación y evolución de los derechos fundamentales,” *Revista Española de Derecho Constitucional* 25 (1989).

independent of the changing politics of the day, constitutions never being living documents from the legal point of view—and usually not much alive from the political point of view either. Defective as it may seem from a Kelsenian point of view, such inconsistency proved good for preserving some amount of liberty under dictatorships.

In its turn the Spanish Constitution then gained influence in Latin America, where Spanish post-1978 textbooks are widely known. Most influential Spanish books on these subjects, such as de Otto's⁹ or Balaguer's,¹⁰ were fairly Germanophile and not Anglo-American. Konrad Hesse and other prestigious German professors became widely known.¹¹ Our constitution never became substantially similar to the American (although many a Spanish professor emphasized otherwise on certain topics).¹² The old and once respected British constitution went rather unattended on the ground of the sovereignty of Parliament and the lack of a single, written constitutional document, as well as (then) a Supreme or Constitutional Court adjudicating an entrenched charter of rights.

An unintended side effect of our democratic monism is that while U.S. law is pluralistic and lives in a two-layered polity, and the Karlsruhe Court has developed important doctrines to this effect, Spain proved unable to cope with the typical pluralistic problems we faced after joining the EU. Hence arose the paradox that Spain's position turned to be less flexible than Germany's, our main model. Spanish constitutionalism has been clumsy when challenged by post-modern developments such as the demands for self-determination or for a reshaping of the State *ad intra*, as well as the consequences of joining a brand-new, continental, multi-layered polity of polities *ad extra*.

As stated, my contention is that as of early 2015, and especially as the financial Eurozone crisis continues, that 'revolution' seems to have

9. Ignacio de Otto, *Derecho Constitucional. Sistema de Fuentes* (Barcelona 1987).

10. Francisco Balaguer-Callejón, *Fuentes del Derecho* (Madrid 1991 and 1992) 2 vols.

11. A similar Germanophile trend could be seen during those same years in Portugal. See José Joaquim Gomes Canotilho, *Direito Constitucional* (Coimbra 1995), 6th revised ed.; *Direito Constitucional e Teoria da Constituição* (Coimbra 1998). As in Spain, this new Portuguese scholarship was also first class.

12. Quoting *Marbury v Madison* and comparing our Constitution to the American on some matters became commonplace. See, among the then well-established textbooks, Enrique Alvarez Conde's *Curso de Derecho Constitucional* (Madrid 1993-1996) 2 vols.; vol. I, 1996, 149 ff., and vol. II, 1993, 269 ff.; and Antonio Torres del Moral's *Principios de Derecho Constitucional Español* (Madrid 1992), 2 vols., 3d ed., see vol. I, 152. Although not textbooks, see Manuel Aragón-Reyes's "Sobre las nociones de supremacía y suprallegalidad," *Revista de Estudios Políticos* 50 (1986), 29-30, and Cruz-Villalón, "Formación y evolución . . ." *supra* note 8, at 48.

been partly unsuccessful—should one say even pointless in some aspects such as supremacy, sovereignty, pyramid-shape, monism, self-containment?—and partly successful: It put an end to the separation between constitutional law and the rest of the law and dethroned the Civil Code (taking for granted that it was a success). The constitution now pervaded all branches of law and a constitutional court was installed.

Activism of ordinary judges has been another, perhaps unintended result of the same revolution. The failed or less successful parts of that legal revolution in full bloom during the eighties and early nineties, belong now to history as a result of several causes, most notably (but not only) European integration.

II. MAIN TRAITS OF THE POST-1978 SPANISH CONSTITUTIONAL AND LEGAL VISION

On the whole, these developments resulted in the best scientific research on constitutional law ever produced in Spain. The main traits of this fashionable line of thought on the relations between the constitution and the law were the following.

A. *Legal Positivism, Strong Influence of Hans Kelsen*¹³

Ever since the start of these changes Kelsen seemed to hold the upper hand. Over time he had to share his dominant influence with ‘softer,’ more moderate positivists such as Bobbio and Hart.¹⁴ The evolution of European Law—the Maastricht Treaty and Treaties that came in its wake, opening the possibility of the EU having a real constitution, whether written or unwritten—together with Spain’s own constitutional experience, and the complexities of the Kelsenian doctrines, all contributed to soften the ‘hard’ Kelsenian contentions. Rawls and Dworkin made inroads into Spanish legal thinking and were quoted increasingly, yet their stances kept on sounding somewhat alien to the vast bulk of Spanish legal discourse. All in all, Kelsen kept the upper hand among both students and scholars, a fact that can be contrasted with the modest attention paid to him in most Anglo-American law schools, not to mention Germany, where many law students hardly know who Kelsen was.

13. Since his thought was complex, evolving and even self-defeating to some extent, it can be pointed out that I mean the Kelsen of the *Pure Theory* (first edition, 1934) rather than the author of the *General Theory of Norms*.

14. De Otto, for example, said that Hart’s work was central for him, yet his book had a strong Kelsenian flavor.

The positivist positions I can summarize were legalist, 'normativistic' and in principle not favorable to ordinary judges.¹⁵ One of the Kelsenian influences in this model was the assumption that when a constitutional change occurs the legal system tends, in the long run, to stand or fall as a whole, for the constitution holds the entire system together. As Finnis once wrote (although in a different context), "the system stands or falls as a whole [and it] is held together by the Constitution."¹⁶ This basic scheme—a new constitution brings about the question of legitimacy of all old norms, the system tending to stand or fall as a whole—echoes the problems faced by many new independent countries, or old countries changing *régime* such as Germany and Italy after 1945. Kelsen's well-known theory of revolutions as briefly stated by Finnis contends "that a revolution necessarily effects the total destruction of the pre-existing legal system and the creation *uno actu* of a new system."¹⁷

B. *Supremacy of the 1978 Constitution*

This is a relevant point because sovereignty and supremacy, if understood along U.S. lines, would hinder our European, "ever closer" supranational integration. U.S. constitutionalism is very flexible and not pyramid-like, but does not surrender its constitutional supremacy to any supranational organization.

This said, *prima facie* constitutional supremacy would seem to deserve little comment because all written constitutions are at least formally supreme. In Spain constitutional supremacy was much furthered, leading to enshrining the Constitution and the *Tribunal Constitucional*, which came to enjoy a position more predominant than the American Supreme Court, if only because Spanish *comunidades*

15. See Alonso-García, *supra* note 3. Emphasis should be placed upon the abuse of the *recurso de amparo*, which paved the way for intervening in every sphere of law, no matter how far it lay from the constitutional core. In several European Continental and Latin American countries, judges of Constitutional Courts were to become the masters of the law in a way broadly comparable to legislators in the 19th century.

16. John Finnis, "Rhodesia," *Annual Survey of Commonwealth Law* (1968), 109. He refers to *Madzimbamuto v. Lardner-Burke*, a case resolved along Kelsenian lines. The opinion of Lewis J. turned out to be "a mere exercise in, or application of, the 'pure theory of law,'" Finnis wrote. Curiously, in the 1950s and 1960s there had been a number of decisions following Kelsenian lines in several Commonwealth countries: Pakistan, Uganda, Rhodesia and Cyprus. In the *Matovu* case (1967) two judges expressly said: "[A]pplying the Kelsenian principles, . . . our deliberate and considered view is . . ." (quoted by Finnis, "Southern Rhodesia," *Annual Survey of Commonwealth Law* (1967), 82-83). See also Finnis's comments on *State v Dosso*, *id.*

17. Finnis, "Pakistan. Effects of Constitutional Change," *Annual Survey of Commonwealth Law* (1968), 73-75.

autónomas lack a judiciary of their own. It is the “supreme [and only] interpreter” of the Constitution¹⁸ and, in an indirect way, the lord over the main aspects of the whole legal system, constitutional and non-constitutional alike, especially through Articles 14 (equality) and 24 (due process) of the Constitution, and through the *recurso de amparo*. The distinction between constitutional and non-constitutional law became somewhat pointless because all law was supposed to flow from the Constitution, top downwards—otherwise it could perhaps be said not to be law, thus making the new Constitution bring about sooner or later the reconstruction of the entire legal system.

This was new in Spanish legal history. As stated, the tradition was that Civil Law lived for ages while short-lived constitutions came and went leaving untouched the essential fabric of non-constitutional law. Having to reconstruct the legal system, not to say the legal reasoning, for the sake of a new constitution was never heard of four decades ago. The most interventionist previous *régimes*—the dictatorships of Primo de Rivera (1923-1930), and Franco (1939-1975)—left nearly untouched the branches of law not directly constitutional in nature.¹⁹

As might be expected, abstract discussions on ‘sources of law’ along the lines of the *Rechtsquellen* became *de rigueur* in those days, in contrast to American and British neglect for this kind of topic.

C. Monism, Sovereignty, Statism

In the process of making Spanish law pyramid-like, the Constitution became the ultimate, only source of law, not merely the formally supreme statute—this would be anything but new—but also the touchstone, foundation, and apex of the pyramid of norms. In some way it became the compendium and key to all possible law: judicial rulings, legal principles, juristic rules, equity, and values. The legal system was forced to become ‘normativistic,’ the written norm being its basic, indisputable element, like the atom in old physics. Again, the comparison has a

18. See *Ley Orgánica del Tribunal Constitucional*—hereinafter *LOTC*—, art. 1. Some claim that the Constitutional Court is not the *only* interpreter because the Constitution binds *all* public powers, so that all other public powers would be secondary constitutional interpreters. This pluralistic landscape, although not forbidden by the Constitution, is rather alien to our practice.

19. If the Spanish legal system underwent several important changes under Franco’s dictatorship it was due more to the fact that it lasted many years than to deliberate attempts to change all the *Derecho español*. Since quite a few of those changes had little to do with the régime’s pseudo-constitutional *Leyes Fundamentales*, the legal system on the whole, and private law in particular, led a life relatively independent of politics. Luckily for Spanish law, Franco’s autocratic régime was somewhat pre-modern. It may pass without mentioning that the troubled and short lived II Republic (1931-1936) was originally intended to be notably interventionist because its constitution was left-leaning and fashioned after the Weimar model.

Kelsenian flavor, and not by chance. Completeness, logic, coherence, and self-containment were the features of such a legal system,²⁰ which embodied, actually or potentially, all imaginable Spanish law.

The Constitution mandated *political* pluralism as a superior value of the Spanish *legal* system.²¹ Yet, as regards law and its sources, the arrangement was not very pluralistic in spite of the regional historic remains known as *fueros* and of the new quasi-federal territorial arrangement.²² The dominant interpretation of the Constitution was perhaps more monistic than its literal wording, so that the salient features of Spanish law came to be monism, statism and sovereignty. De Otto aptly established the link between positivism and sovereignty: “The positiveness [of the legal system] means that there is no limit, chronological, social, or material, to things legally possible [in terms of] the capabilities of the legislator. To put it in another words: for the legal system, positiveness means what sovereignty means for political theory.”²³

This Hobbesian, Westphalian-sounding text seems alien to the American tradition: no person or body is expected to have monopolistic or unlimited powers, not even if given by the people. In this line of thought, the equation of statism, legalism, sovereignty, and monism can be discerned, a fact not entirely new, since as a rule modern states tended to be intrinsically monistic. Surprising as it may be and notwithstanding that we were knocking at Brussels’ doors, in Spain constitutionalism brought about a reawakening of statism—not that it was dormant before.

20. See Balaguer-Callejón, *supra* note 10, vol. I, for a clear statement.

21. See art. 1.1: “Spain is hereby established as a social and democratic State of Law advocating as the highest values of its legal system liberty, justice, equality, and political pluralism.” Note that *Estado Social y Democrático de Derecho*, if translated literally, makes strange English; a small issue that is more conceptual than linguistic.

22. The old body of law known as *fueros* and the new regional autonomy are different in kind. The *fueros* were pre-constitutional, previous even to the Spanish State, while the *Comunidades Autónomas* were created by the 1978 Constitution. *Fueros* are still much alive in the old Kingdom of Navarre and to a lesser extent also in other regions. *Fueros* are similar to the Scottish law that Scotland retains since 1707; regional autonomy would be more similar to the devolution of powers given to Scotland and others parts of the United Kingdom recently. The American federal model—pre-existing states that make a compact to form a federation—is absent from Spain, although Wilhelmsen pointed out some similarities between *foralismo* and federalism, mainly the pre-constitutional nature and the fact of retaining, instead of being given, competences by a central constitution. Frederik Wilhelmsen, “The Political Philosophy of Alvaro d’Ors,” *The Political Science Reviewer* XX (1991), 145-87.

23. De Otto, *supra* note 9, at 22:

La positividad significa que lo jurídicamente posible no tiene límite alguno, ni temporal, ni social, ni material. Dicho en otros términos: la positividad expresa para el ordenamiento jurídico lo que la teoría política conceptualiza como soberanía.

D. The Normativa-Directa Condition of Our Constitution

A further trait of the Spanish Constitution is its being *normativa-directa* ('normative' and directly enforceable before a court of law). Here we meet again a departure from the French-Spanish tradition that conceived of constitutions as ideological, social or political programs rather than as legal norms, so that they usually could not be enforced by a court of law until secondary legislation *introduced* the constitution into the real, alive legal world by developing its particulars.

The change was both interesting and welcome, but it seems to have been a mixture of two different conditions: being a written, legal norm (which looks for abstract generality) and being directly enforceable in court (which looks for concretion). Since many legal norms have a programmatic dimension, being a legal norm *and* simultaneously a political program do not necessarily clash. Statutes are made by politicians and often embody their views, especially in fields such as social policy. (This is one of the reasons why positive rights are more difficult to enforce than classical liberties.)²⁴ Thus, the quality of direct enforceability by courts is not necessarily attached to the concept of 'norm'; as everyone who has sat on the bench knows, maximum enforceability belongs to the realm of judicial decisions rather than to the realm of statutes. The uneasiness of this combination—being a norm and therefore rather general, and being enforceable and therefore rather particular—went often unnoticed in Spain,²⁵ and contributed to the reinforcement of the idea, not new, that all law, constitutional or not, has to consist of norms or sets of norms which are by definition complete, self-sufficient and logically consistent. This had to do with the then dominant legal method, the *dogmática jurídica* coming from pre-1949 Germany, which relied upon the logical, systematic scrutiny of statutes. Those jurists not using the dogmatic, 'technical,' 'scientific' approach ran the risk of not being considered real scientists, something felt among Spanish legal scholars as undesirable. A very well-crafted piece of dogmatic, legal, scientific discourse was Balaguer's book.

24. See A.C. Pereira-Menaut, "Against Positive Rights," *Valparaiso Univ. L. Rev.* 22 (1988), 359-83, distinguishing policies, goals, values, and rights. See also the Dworkinian distinction between policies, principles, goals and rights. Ronald Dworkin, *Taking Rights Seriously* 22 (Oxford 1977), 90-91 ("principles are propositions that describe rights"). In the Western tradition legal principles used to be short formulae containing criteria for solving conflicts and *regulae*. Principles, *regulae* and rights are easy to enforce judicially; policies, goals, and values, are not. But of this later.

25. But see Alejandro Nieto, "Peculiaridades jurídicas de la norma constitucional," *Revista de Administración Pública* 100-102 (1983), 371-415.

E. Constitutional Law, the New Derecho Común

Constitutional law became the law common to all branches of Spanish law, in a way, the *real* law of the country. All other law qualifies as legal insofar as it derives from, or conforms to, the Constitution—and to the Constitutional Court's interpretation thereof. The Constitution became the foundation of the entire legal order and contains *in nuce* all subordinate legal branches. All realms of law must be traceable back to the source and key to all sources and kinds of law: one is reminded of the Hobbesian idea of no law existing before the social contract, with constitution substituted for social contract.²⁶ This explains why the rulings of the Constitutional Court come to be some sort of Spanish law of the land. The mentioned article 5.1 of the *Ley Orgánica del Poder Judicial* reads:

The Constitution is the supreme norm of the legal system, thus binding all judges and courts. These will interpret all laws and regulations according to the constitutional provisions and principles such as they are interpreted in judgments and decisions delivered by the Constitutional Court in every kind of litigation.

The position of the *Tribunal Constitucional* is thus more monopolistic than its American counterpart. Spain lacks the loose, relatively un-coordinated, federal-state scheme of courts that can be found in the United States, nor has it the *Landesverfassungsgerichten*.

A minor point but one that should not be omitted is that the protection of fundamental rights is entrusted by the Constitution not only to the Constitutional Court but also to ordinary courts (Art. 53.2 of the Constitution). After the reform of some articles of the *Ley Orgánica del Tribunal Constitucional* in 2007, this Court has the possibility of not reviewing the *recursos de amparo* in a way that reminds one of the American *certiorari*. All in all, this has resulted in a considerable reduction of the number of rulings issued annually by this Court and a greater role for ordinary courts (mostly administrative ones) in the adjudication of issues related to fundamental rights. Yet it cannot be said that the monistic scheme has really disappeared because it keeps on being top-to-bottom—no legal system or sub-system can be said to exist other than the Spanish—and the Constitutional Court keeps its top-of-pyramid position so that all other courts can have their decisions

26. Cf. Thomas Hobbes, *Leviathan*, ed. R. Tuck (Cambridge 1991), ch. XXVI. How Spanish statesmen and scholars expected their Constitution to contain *in nuce* the ECJ rulings, or the *acquis communautaire*, and to make them traceable back to the apex of the Spanish legal pyramid remains a mystery.

challenged before the Constitutional Court. Needless to say, this monopoly or quasi-monopoly of the Tribunal Constitucional stops short when European laws or judicial decisions come into the picture.

Another point worth noticing is that this centralized, monopolistic position provoked but a moderate stir among Spaniards, heartily committed as they were to democracy.²⁷ The explanation lies possibly in the cleft between Anglo-American and Continental states, commented on by Leibholz,²⁸ Dyson,²⁹ and Damaska.³⁰

F. Principle of Constitutionality vs. Principle of Legality?

Last but not least we should mention the principle of legality, ubiquitous in Continental legal culture. All judicial rulings and administrative actions can be traced back to a written norm, usually a by-law, decree or regulation, which in its turn is traceable back to a statute, and this to the Constitution. This principle has been somewhat submerged into the new, overall principle of constitutionality which governs not only administrative actions and rulings of inferior courts but even Parliamentary acts and the whole legal system, written as well as unwritten.

Although *prima facie* this constitutionality principle seems to be but the old principle of legality now moved into the next step up the ladder of written norms, some substantial changes are entailed. Due to the very nature of constitutions, moving into constitutionality and leaving legality in the rear-view mirror, or in a secondary position, implies moving into some sort of judicialism: because constitutions usually are single documents, full of extra-legal references, and always needing interpretation. This has to be done by interpreters, *i.e.*, judges, be they constitutional, as in Spain, Italy and Germany, or ordinary, as in the United States and Canada. Thus Spain, although fully belonging to the Continental, ‘normativist’ tradition, has become a ‘judicialistic’ country

27. De Otto’s mentioned work, widely diffused among both scholars and students, was a good example of considering legal monism as part and parcel of constitutional democracy.

28. Gerhard Leibholz ably shows the attitude of the puzzled Continental when delving into English law and Constitution. *See especially* “Estado y sociedad en Inglaterra,” *in Conceptos Fundamentales de la Política y de Teoría de la Constitución* (Madrid 1964), 165-202.

29. Robert Dyson, *The State Tradition in Western Europe* (Oxford 1980). The State seems to have originally been a European Continental invention and far from universal.

30. Mirjan Damaska, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* (New Haven and London 1986); “Reflections on American Constitutionalism,” *Am. J. of Comp. L.* 38, supplement (1990), 421-43.

sui generis.³¹ The position also changed for judges other than the constitutional judges, since they are now much more free concerning ordinary statutes, but they are under the new master court, the *Tribunal Constitucional*.

G. *Spain, on the American Track*

I have pointed out that in terms of foreign constitutional traditions we now rely heavily on Germany. Several provisions and features of our Constitution are easily to be found in the *Grundgesetz*, sometimes literally copied. But the full-blown legal supremacy of the Spanish Constitution is thought to follow the Supremacy Clause of Article VI.2 of the U.S. Constitution. The Spanish Article 9.1 reads: "Citizens as well as public authorities are bound by the Constitution and the rest of the legal system."

It should be noted that such all-embracing claims make sense only if the position of the constitutional document *vis à vis* the rest of the law is of such preeminence as to condition the validity of the entire legal system. Should this premise fail, should the legal system be more pluralistic, or the supremacy principle susceptible to a less expansive interpretation—say, as simply a tool for assuring the success of a new-born federation—the Spanish stance would be deprived of one of its alleged bases. Perhaps Spanish academics looked to the United States Supremacy Clause model³² because a provision so (relatively) similar to Article 9.1 of our Constitution could not be easily found in most main Western constitutions, such as the German, the Italian, the French, and, most obviously, the unwritten British Constitution. Besides the usual contents of constitutions—separation of powers, rights and liberties, and the like—the Spanish Constitution has provisions governing economics ('the Economic Constitution') and law ('the Legal Constitution') and, to a lesser degree, society and culture. Most major traditional constitutions lack such inner specialized constitutions, although they may contain some provisions here and there on those spheres. Even the Portuguese Constitution, despite its extensive economic constitution, lacks a 'legal' constitution comparable to the Spanish. The *Grundgesetz* went not much beyond clarifying a federal legal landscape. The literal wording of the American Supremacy Clause is sober, yet if pressed to its limits it would admit of an expansive interpretation. As for the Spanish "legal

31. Rubio-Llorente, "Sobre la relación entre Tribunal Constitucional y poder judicial en el ejercicio de la jurisdicción constitucional," *Revista Española de Derecho Constitucional* 2 (1982), 35-67; *see esp.* 54-55.

32. *See* U.S. CONST. art. VI.2.

constitution,” it is to be found in the Preamble and Articles 1.1, 9.1, 9.3, 10.2, 25.1, 53, 81-91, 96, 103, 105-106, 117-118, 123, 149, and 161, together with the First Additional Provision and the final Repealing Provisions, para. 3. The saliency of this point comes from the fact that claiming that the entire legal system is ‘created’ by the constitution is easier when the *magna carta* includes a ‘legal constitution.’

The American roots of this feature of the Spanish Constitution were commonly professed, but the most important contribution was García de Enterría’s *La Constitución como norma*,³³ which possibly opened a new era in Spanish legal discourse. Across its pages the reader came to think that the above-mentioned Spanish Article 9.1 potentially embraces all possible types of law, thus being literally “the supreme Law of the [Spanish] land.” García equated the Spanish Constitutional Court to the American Supreme Court. Similarly he seemed to take for granted that the American Constitution was a legalistic, normativistic constitution applied by logically minded officials and judges brought up to believe in legal systems which are hierarchical, consistent and closed.³⁴ He showed acquaintance with facts and documents of American constitutional history, yet the reader would say that he misunderstood the legal-cultural context and failed to pay due attention to the Ninth Amendment and to certain rulings like *Griswold v. Connecticut*.³⁵ His book, otherwise excellent, sounds continental, logical, and sees American materials through continental eyes. As nuances were shaded away, the average Spanish reader could have the impression that American Supreme Court justices held theories as if they were old German professors of the legal-dogmatic school before 1949.

There are as well quite a number of rulings of the *Tribunal Constitucional*, since its first decision in 1981, stating the same basic principle in different ways and moods, sometimes energetically.³⁶ The

33. Eduardo García de Enterría, *La Constitución como norma y el Tribunal Constitucional* (Madrid 1981), 1st ed. (originally in García de Enterría, Predieri, *et alii*, *La Constitución española de 1978* (Madrid 1980)).

34. García de Enterría, 54, 64, 178, and elsewhere.

35. *Griswold v. Connecticut*, 381 U.S. 479 (1965). According to the Ninth Amendment, people have more rights and liberties than those expressly stated in the Constitution. The ‘penumbra’ and ‘peripheral’ zones make this clear. Thus the Constitution is open-ended. This is important in understanding the ‘Silent’ or ‘Hidden’ Ninth Amendment.

36. STC (*Sentencia del Tribunal Constitucional*, Spain) 1/1981. The decision was important as being the first ruling by the *Tribunal*. Rulings of the Spanish courts are classified according to their number and year or by the date on which they are delivered. Usually there is no reference to the parties involved: STS (ruling of the *Tribunal Supremo*), STC (ruling of the *Tribunal Constitucional*). The reasoning of the court is divided into *fundamentos jurídicos*, hence—for example—STC 16/1982, f. j. 1.

argument that the Constitution is a legal norm, directly enforceable and supreme is ubiquitous in legal literature and in the cases of the *Tribunal Constitucional*, as if it tried to counterbalance the previous tradition. In the 9/1981 ruling the *Tribunal Constitucional* stated:

The Constitution is a *legal* norm . . . , but a norm different from the rest in quality because it embodies the essential value system that has to . . . pervade the entire legal fabric. So, the Constitution is the fundamental and founding norm (“*norma fundamental y fundamentadora*”) of the whole legal system. . . . The fact of the Constitution being a law superior in nature results in the need to interpret the entire legal system in conformity to the Constitution.³⁷

Balaguer-Callejón wrote something not very different. According to previous positivist thinking, law was equivalent to statute law; now, it is the Constitution that is equivalent to law:

All the law of the legal system must tend to constitutionality both concerning its formal and its material aspects as well The Constitution is the ultimate origin of all law in force in the legal system as far as law is law (beyond that point it does not exist as such).³⁸

In another decision delivered April 28, 1982 the *Tribunal Constitucional* warned that “it must never be forgotten that the Constitution . . . is a *legal* norm” (italics added), and the supreme one of the Spanish legal system. A further decision delivered on December 20, 1982 stated:

[T]he Constitution is just this, our supreme norm, not a programmatic declaration . . . , is something unequivocally and generally stated in its article 9.1 when it says that ‘citizens as well as public authorities are bound by the Constitution’ . . . Repeated decisions of this *Tribunal* in its capacity as supreme interpreter of the Constitution (art. 1 of the *LOTC*) have declared the undoubted value of the Constitution as a *legal* norm. (my italics)

Note that the *Tribunal* spoke of ‘normative’ as indistinguishable from ‘directly enforceable,’ and simultaneously emphasized the legal nature of the Constitution to make it clear that it is not a political program, unenforceable before a court of law.

Another remarkable feature was that law became more and more ‘pure,’ technical, detached from politics, ethics or culture, and considered as rather a technicality belonging to the province of logic. Researches

37. Italics added.

38. Balaguer-Callejón, *supra* note 10, vol. I, at 54.

and books indulged in technicisms³⁹ while common sense reasoning was neglected or considered less serious. Using *una buena técnica jurídica* (‘a good legal technique’) deserved praise. Sir Paul Vinogradoff’s⁴⁰ opinion that legal problems, for all their technicalities, could in the end be translated into ordinary, common language is not fashionable in Spain to this day; nor is Judge Frankfurter’s opinion that “law is not a body of technicalities in the keeping of specialists.” That emphasis on logic, method, and technique fits with one of Damaska’s types (see *infra*), and makes for a neglect of unwritten laws and of the mentioned pluralistic and historicist aspects, which Spanish history had had plenty of.⁴¹

* * *

The foregoing brief statement of the then conventional wisdom is based mostly on the works by García de Enterría, Rubio-Llorente, de Otto, and Balaguer,⁴² the main premise of the whole being first supplied by García de Enterría’s alleged equation of Article 9.1 of the Spanish Constitution with the American Supremacy Clause. As usual in accounts of this kind, this report cannot include the full story: the train of thought sketched here with a rough brush would reveal on closer scrutiny many contours and exceptions. To begin with we do not have a Kelsenian

39. Needless to say, nuances and differences abounded. Alvarez-Conde’s and Torres del Moral’s widely used handbooks did not indulge in technicisms.

40. Sir Paul Vinogradoff, *Common Sense in Law* (Oxford 1913), 2d ed. 1946.

41. Although the *fueros* mentioned in footnote 22 started to decline in the 18th century, and the more so after 1812 (first Spanish Constitution), to this day there still exist minor regional codes (*compilaciones forales*) of civil law in seven regions. Intriguingly, Francoism was not adverse to the *fueros*.

42. On closer inspection, what it is termed here as ‘normativism’ was far from a simple, homogeneous block, but most of these otherwise excellent works had in common that they reinforced statism and could be read *etsi Europaea Communitas non daretur*. Prof. García de Enterría was a leading contemporary Spanish jurist. Before our Constitutional Court issued any judgment, he produced the mentioned “La Constitución como norma jurídica” (1980), which soon proved highly influential. His textbooks and works, widely known in Spain and Latin America, were translated into foreign languages (see, for example, “El valor normativo de la Constitución española,” *Revista de Derecho Político*, 44 (1998), 31-44) and his textbook was staple diet for many generations of law students. Prof. Rubio-Llorente was a prominent member of the *Tribunal Constitucional* and a highly respected constitutional lawyer. Remarkable attention was paid to his views. Prof. Ignacio de Otto, whose untimely death came in 1990 at 44, was connected to the *Consejo General del Poder Judicial* (the governing body of Spanish Judiciary) and to the Constitutional Court as well. He wrote *Derecho Constitucional. Sistema de Fuentes*, a brilliant, Kelsenian-like statement of the legal system resulting from the new Constitution and the rulings of the *Tribunal Constitucional*. Prof. Francisco Balaguer, the youngest of these authorities, wrote *Fuentes del Derecho*, a work on sources of law under the new constitutional scheme, ably crafted and with impressive documentation. To my mind he did not pay enough attention to the Anglo-American experience—a risky starting point when dealing with constitutional matters.

constitution; we have an ambiguous one, sometimes interpreted with a generally Kelsenian mentality. To say we followed Kelsen's thought, besides being both complex and evolving, was far from saying his throne was uncontested. Indeed, the thought of some of the writers quoted here could never be forced into Pure Theory premises.⁴³ Yet I hope this synthesis does not fail to reflect what most students, university teachers, lawyers, and judges thought (and what some still think).

Since I am but giving a general impression, it would not be of much use to emphasize that García de Enterría's position was very complex and not Kelsenian, and it would be even more pointless to report other voices holding different, even opposed contentions. Lucas-Verdú famously clashed with García de Enterría,⁴⁴ but one would say that Lucas's position passed down to posterity as vanquished rather than victor. The mentioned Alejandro Nieto crossed many t's and dotted many i's in an interesting article that went far less noticed than it should have been.⁴⁵

As things changed, some people moved towards more pluralistic and realistic positions. European law has direct effect and primacy over domestic laws, binding national judges and thus threatening the supremacy of both the constitutional document and its supreme interpreter. The Constitution, although fairly successful on the whole, has large parts that over time passed nearly into disuse, such as the social and economic provisions. De-codification of important parts of the Spanish legal system—say, commercial law—went on at a pace so quick that it became commonplace. The dogma of the self-sufficiency and completeness of the constitution and of the whole legal fabric became less and less clear as time passed. In 1988 Santamaría published *Fundamentos de Derecho Administrativo* casting both light and doubt on several points, such as the alleged absolute cutting-off of law from politics and the closed and complete nature of the legal system.⁴⁶ Linde-Paniagua published in 1991 *Constitución Abierta*, a shrewd booklet

43. See García de Enterría, "Reflexiones sobre la ley y los principios generales del Derecho en el Derecho Administrativo," *Revista de Administración Pública*, 40 (1963), 189-224, several times reprinted as a book (*Reflexiones sobre la ley y los principios generales del Derecho* (Madrid 1984)) and as a textbook chapter.

44. See Pablo Lucas-Verdú, "El Derecho Constitucional como Derecho Administrativo," *Revista de Derecho Político* 13 (Madrid 1982), 7-52; García de Enterría, "El Derecho Constitucional como Derecho," *Revista de Derecho Político* 15 (1982), 7-20.

45. See Nieto, *supra* note 25.

46. Juan Santamaría-Pastor, *Fundamentos de Derecho Administrativo* (Madrid 1988) 2 vols.

expounding why our Constitution is an open one.⁴⁷ On the whole, the vast bulk of Spanish legal thought of the time—whose average opinion is our present business—kept on following some kind of general, syncretic Kelsenianism, often coexisting with a strong influence of *La Constitución como norma* and, to a lessening degree, some other books.

III REALLY ON THE AMERICAN TRACK? THE TRANSATLANTIC DIVIDE AND THE MAIN DIFFERENCES BETWEEN THE U.S. AND SPAIN

A. *The Case for Legal and Constitutional Americanization and the Transatlantic Divide*

Opening Spanish constitutional and legal theory to American influence would have been a most interesting move. After all, was not the *Grundgesetz* the result of a certain degree of Americanization? Spain was marking a start in constitutional democracy and quasi-federalism, and simultaneously preparing to join European integration. The US, besides being a federation and having created constitutional supremacy and *Marbury v. Madison*,⁴⁸ were the result of a supra-state integration. The American experience could teach us a lot about territorial and legal pluralism, bi-layered legal orders, and integration “to make a more perfect union” without eliminating inferior constitutional and legal systems. This is why exploring what the U.S. had to inspire Spain with was worth the while. A fact that increased the interest was that the American vision of law would eventually be inconsistent with Spain’s monism and statism.

Since in the early eighties I came across García de Enterría’s *La Constitución como norma*, I was struck by its reading of the American Constitution and the Supreme Court rulings. Upon checking, I was unable to find in American constitutionalism such a degree of monism and supremacy, not to speak of legal normativism. The fabric of the Spanish theoretical vision relied mostly upon two aspects, the supremacy allegedly imported from America, and the nearly undisputed concept of law as a set of logical, hierarchical written norms. The features of the previous description of Spanish law were numerous—constitutional supremacy, law as norm, positivism, the constitution as ultimate source and compendium of all law, sovereignty, monism, the ‘pure’ and

47. Yet an unprejudiced reader may find it comes close to adopting a normativistic viewpoint, so that the openness could be but moderate (see Enrique Linde-Paniagua, *Constitución abierta* (Madrid 1991), *passim*).

48. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

technical character of law, self-consistency, and the principle of legality—but not all were equally important. Should supremacy and ‘normativeness’ fail, most other features would be affected.

In order to check the alleged, Spanish-like constitutional and legal supremacy in the US, I consulted every available relevant book and journal, but I was disappointed, because, to begin with, the Supremacy Clause seemed for Americans to be a federal arrangement, having little to do with philosophical questions about embracing all sources of law. It was more related to *Bundesrecht bricht Landesrecht* than to the Spanish Article 9.1 as expounded by García de Enterría and the Constitutional Court.

As for the *normativa-directa* nature of our Constitution,⁴⁹ it seemed for Americans nearly a platitude, since in the Anglo-American tradition statutes are born to be enforced before a court of law—not to emphasize that the more *normativa*, the more general and perhaps the less *directa* and enforceable; the more *directa*, the more specific and perhaps the less general. Even the three-centuries old English *Bill of Rights*, born mainly as a political program, gained over time legal currency and became a statute enforceable in Court in several countries.

The monistic view of a self-contained legal system with a single ultimate source seemed alien to American history. Even our ubiquitous principle of legality proved unlikely to be found in textbooks or in verdicts in spite of the phrase “a Government of Laws and not of men.”⁵⁰ The very consideration of law as a norm or set of norms was of little use because for common law mentalities, ‘norm’ is rather a legal principle or *regula iuris* or a rule deducible from a judicial decision or train of decisions—so ‘the rule in *García*’ or ‘the rule in *Miranda*’—, born to solve conflicts, likely to be open-ended, and better expressed as ‘rule’ than as ‘norm’.⁵¹ On the other hand ‘normative’ often means something that should be done for ethical reasons. Indexes of constitutional law

49. The *Tribunal Constitucional* repeatedly asserted from the beginning that the Constitution can be invoked directly in the courts of law. See STC 34/1981 (art. 14—equality—of the Constitution binds all public powers, including the legislator), STC 21/1981 (art. 24 binds all public powers in creating rights and duties enforceable in the courts of law; see *esp. f. j. 7*); STC 16/1982; *esp. f. j. 1*.

50. That was said when America was a Common Law country with only a moderate proportion of statutes.

51. When visiting U.S. universities it was for me very difficult to lecture to American students while using a mildly normativistic approach.

textbooks, normally unconcerned with such quasi-philosophical worries, proved of little use.⁵²

Consulting other American books and review articles of the same period produced similar results. Cover's⁵³ energetic attack on the monopoly of law sources by the Supreme Court was so pluralistic and, in a way, 'popular,' that it would be anathema for Spanish scholars such as de Otto. The excessive power in Cover's attacks fade when compared to the lordly position of our Constitutional Court. Finally *The Faces of Justice* and "Reflections on American Constitutionalism" by Damaska, himself a European aware of the legal Transatlantic Divide, proved very useful. In such a light García de Enterría's account of those American features and his attribution of them to our Constitution would be as misleading as reading Spanish law through American eyes.

This first linguistic and conceptual roadblock, instead of being a mere accident, was right at the heart of the problem. The real differences between American and Continental constitutional and legal schemes were not in the constitutional wording—just think that the American Constitution was crafted as a rational, enlightened document fashionable at the moment in Europe, as Spaniards underline. If we put aside the Declaration of Independence and the Ninth Amendment, there is little in the words of the U.S. Constitution preventing the Supremacy Clause and the 'Government of Laws' from being carried to their utmost possibilities over time. As Mark Tushnet once told me, theoretically speaking the American Constitution could also be forced into positivist interpretation schemes of legal monism; one needs just to abuse the Supremacy Clause, the Commerce Clause, Equal Protection, and Substantive Due Process. Simply put, Americans feel comfortable with heterogeneity and pluralism: French law in Louisiana, old Spanish law in New México, the Spanish Civil Code of 1888 in force in Puerto Rico till recently. Similarly, Roman jurists had felt at home with their casuistic, piecemeal scheme. It was not out of ignorance that they dismissed the 'enlightened,' 'modern' Ciceronian proposition, *ius in artem redigere*, to turn law from a prudential art into a systematic science.

If so, the deeper question lies in the minds of lawyers, civil servants, and judges. Why was the new Spanish Constitution, with or without

52. Being deeply rooted in the practical approach, little time is devoted to these questions in American law schools. See Richard Stith, "Can Practice Do Without Theory? Differing Answers in Western Legal Education," *Ind. Int'l & Comp. L. Rev.* 4 (1993), 1-14.

53. See Robert Cover, "Nomos and Narrative" (a 'Foreword' to 'The Supreme Court 1982 Term'), *Harv. L. Rev.* 97 (1983), 4-68; an energetic attack on the alleged monopoly of the 'jurisgenerative process' by the American Supreme Court.

Article 9.1, not interpreted as had been usual before 1978? Could the reason be that the new constitutional judges had a new mentality? Or perhaps because mentalities were now ripe and prepared for change, although mentalities were also ready for European integration, and yet no relevant constitutional or legal theory was developed to that effect. To put an example to the contrary: what if a codifier makes a Code and then leaves it in the hands of Common Law-minded interpreters, like the Californian Field Code of 1872?⁵⁴ Had the Spanish statesmen and scholars of 1978 borne this risk in mind? The Spanish *Tribunal Supremo* still had some notion of dealing with the Constitution after the old fashion, as a general norm in want of further specification through statutes, which would thus become the *real, enforceable*, law. See for example the *Tribunal Supremo* ruling of April 8, 1982: the *Tribunal Supremo* said that Article 14 of the Constitution (equality of opportunities), being merely programmatic in nature, was not directly enforceable in Court until its further development by statutes, so that old ordinary laws contrary to the then-new Constitution were kept in force—a statement of the traditional position of the Spanish judiciary on the relations between non-constitutional laws and Constitutions or Fundamental Laws.⁵⁵

In the end this cleavage goes back to the notion of what law is. In practical sciences such as law and politics, some *prima facie* negligible facts like, say, that among the drafters of the American Constitution there was not a single theoretician,⁵⁶ casts considerable light. So, the ‘Government of Laws and not of men’ idea must be understood in its context—a pragmatic, Common Law notion that did not become statutory until recently—not as a precedent of the European *Rechtsstaat*.

54. For the Field Code example see Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge (Mass.) 1982), 83-85. A contrary example is supplied by Bernardino Bravo-Lira, who explains how the success of 19th century codes in Civil Law countries was due not just to the solemn enactment of the Codes but rather to a new attitude on the part of the Courts and generally to a different, more normativistic vision of law (see Bravo-Lira, “Arbitrio judicial y legalismo. Juez y Derecho en Europa continental y en Iberoamérica antes y después de la Codificación,” *Revista de Ciencias Sociales* (Valparaíso) 32-33 (1988), 65-82). What both examples have in common is the saliency of attitudes, be they in favor of codes as in Bravo-Lira’s example, or not as in Calabresi’s.

55. This verdict was soon to be quashed by the Constitutional Court in its 80/1982 ruling, holding that the Constitution has *valor normativo inmediato* (“direct enforceability”) and does not need to be implemented through ordinary legislation. Yet some of its provisions, not by chance those related to Social and Economic Rights, need a ‘mediation’ by the legislature (see ff. jj. 1 and 2). As for the position of the Supreme Court, it went against the tide and was not entirely reasonable.

56. As Prof. William Fox, then of the Catholic University of America, first emphasized to me many years ago. This is a fact seldom commented on in Spain.

Let us now consider shortly the topics where the main differences between American and Spanish legal and constitutional systems might be seen: politics and judicial systems, visions of law and constitution, relations between judges and norms, views of the principle of legality, and supremacy. Going a bit ahead of schedule we may say that in spite of those Americanizing trends of the Spanish legal revolution, as of 2015 Spain remains deeply un-American (unlike the influence coming from Germany, no one looked for Americanization beyond the Supremacy Clause, some aspects of rights, and the *Marbury* decision).

B. Kinds of Politics and Varieties of Judicial Systems

This is the kind of question everyone knows but few draw the consequences. Damaska stresses the deep-seated differences between Anglo-Americans and Europeans, concentrating on the distinct judicial structures which result from different conceptions of political communities. Borrowing from Damaska and adding some elaboration, two types of politics and legal systems can be distinguished.

First, statist politics, mainly European Continental, have the following traits: a) organization and relationship between norms are hierarchical; b) the task of judges is policy-implementing; c) emphasis is placed on legalism; d) state interventionism; e) administrations are bureaucratic officialdoms; f) legal decision-making is professional and impersonal, rather abstract and technical; g) in a formal sense, judges enjoy little discretionary power; h) law is a set of written norms, ideally open only to further application and to be studied from a ‘scientific’ point of view; i) the legal system is often compared to a pyramid.

Second, Common Law, non-statist, mostly Anglo-American countries, have the following traits: a) organization is based on coordination; b) the task of judges is solving conflicts; c) substantive justice is the main goal; d) governments tend to keep ‘at arm’s length’; e) judicial administration is entrusted to a non-bureaucratic officialdom; f) legal decision-making tends to be lay or intermingled; legal arguments are commonsensical; judges do not specialize very much; the judge’s personal reasons are not hidden; g) judges enjoy considerable discretion; h) law is a “network of interlocking principles and rules,” open-ended, somewhat proteiform, historical rather than logical; law is (or was) dealt with no particularly ‘scientific’ approach; creation of law through judicial interpretation is admitted; i) the legal system does not easily fit into the pyramid model since not all sources of law come from a single and distinct source at the top; plurality of sources of law is similarly accepted. Till 2005—not to go before the 1873 reform—the House of Lords,

roughly the British equivalent to a Supreme Court, was not the ultimate Court for certain litigation stemming from Scotland, the Isle of Man, and the Channel Islands, as well as former colonies and Commonwealth countries. So the machinery of Justice is “amorphous,” not fully hierarchical, “a web without a spider sitting at its heart.”⁵⁷

IV. LAW, LEGALITY AND CONSTITUTIONALITY

A *Supremacy*

In the context of the Spanish predicament of the 1970s, constitutional supremacy deserves scrutiny because *prima facie* there seems to be some resemblance between the American and the Spanish constitutions (no article of the Spanish Constitution reads literally like the American VI.2, but the supremacy of our Constitution and of central law is absolute). In the year 1978 the primacy of European law was already well known and undisputed. Once again, leading Spanish politicians and theorists kept on building as if *Van Gend, Costa* and *Simmenthal* could never pose problems to their brand-new conception of supremacy. Interestingly, while they enshrined supremacy, they prepared to join the then EEC without taking measures to preserve the same constitutional supremacy against possible overreach by Brussels. The *Grundgesetz* had on the one hand Article 23.1 nearly *mandating* EU membership, counterbalanced by Article 79.3 (and by Karlsruhe’s repeated jurisprudence) exempting some areas of statehood from integration, no matter how close the Union comes to be. There exists no Spanish equivalent; only the generic, unconditional authorization of Article 93, which hardly guarantees the integrity of constitutionally proclaimed supremacy.

It cannot be denied that Article VI.2 of the American Constitution has, *prima facie*, as strong a proclamation of constitutional legal supremacy as any statist, monistic person could wish for. It is phrased in strong language.⁵⁸ Small wonder, therefore, that Spaniards turned their

57. Damaska, *The Faces of Justice*, *supra* note 30, at 22, 23, 25.

58.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

If read today by an entirely objective, candid person, it would seem to fit EU law rather than national law since it fits perfectly to *Van Gend, Costa*, the failed 2005 Constitutional Treaty,

attention to it. But when looking for the topic in American textbooks, one realizes how little attention American authors paid to the entry ‘Supremacy Clause,’⁵⁹ and when they did it was in the context of the federal-state relations. Besides, there is no excessive amount of Supreme Court rulings dealing directly with the supremacy problem. Of these, none makes too much fuss about the theoretical problem of the relationship between the Supreme Law of the Land and other sources or kinds of law. The opposite happens in Spain, where the question is not expected to arise in the context of the rather limited powers of our *Comunidades Autónomas*. So, supremacy in the U.S. seems to be a federal problem; in Spain, where regions are no rivals to the Spanish State, it looks like a *Rechtsquellen* (source of law) problem.

Had the American Supremacy Clause been understood literally by someone with a Continental mentality, any federal statute made in pursuance of the Constitution—and all are expected to be so—even those dealing with, say, dog vaccines, would override state constitutions, laws and judicial decisions, and even, perhaps, Common Law and Equity. This was not the intention of the Framers. They rather designed a federal government with very limited powers, although supreme within those limits—not very different from the original European design. This explains why, in spite of the Supremacy Clause, the United States have been and remains a Common Law country with plenty of legal pluralism. When the Framers wrote that the Constitution and the laws and treaties of the United States “shall be the Supreme Law of the Land” they were not siding with any specific legal theory. Simply, they were ensuring that the new Union was to be stronger than the old Confederation and therefore they used stronger language. But one might dare say that, had they had the opportunity of coming across some modern Spanish interpretations of the Clause they wrote, they would have felt surprised.

To begin with, ‘Law of the Land’ was the vulgar tongue rendering of an old medieval clause that was *Lex Terrae* in the several *Magna Cartae* of the 13th century. It never meant a Code of statutes. Rather on the contrary, it meant a non-systematic compound of Common Law, statutes—the more ancient the better—local customs, privileges, judicial

Declaration 17 on Primacy, and document 11197/07 (JUR 260). One wonders where Spaniards thought supremacy would be finally allocated, in Spain or in the EU?

59. To mention but a few widely known works in those decades, see Barrett-Cohen-Varat, *Constitutional Law. Cases and Materials* (Westbury, N.Y.) (1989), 8th ed.; Nowak & Rotunda, *Constitutional Law* (St. Paul, Minn. 1991), 4th ed.; Ronald Rotunda, *Modern Constitutional Law. Cases and Notes* (St. Paul, Minn., this ed. 1989) 3d ed.; Stone-Seidman-Tushnet, *Constitutional Law* (Boston, this ed. 1991), 2d ed.

rulings, compacts, equitable principles, and rules of natural justice.⁶⁰ Therefore to say that the ‘Supreme Law of the Land’ could mean broadly the same thing in a non-statutory country in 1787 as in Spain in 1978 seems rather bold. The idea that all legality flows from an all-embracing constitutional document was and still is alien to Anglo-Americans. The American framers lacked the conception that all other branches of law—civil, penal and commercial—should be considered legal in nature only if they flowed from top downwards in pursuance of the Constitution.

Some people in Spain in the late seventies and eighties tended to see constitutional law in America as the real Common Law, pervading all branches of law which in some way lacked any substantial legal meaning by themselves—as if all law would have to become in some way constitutional, lest it could not be reputed real law. It is an example of the deep contrast between the Anglo-American notion of constitutions as limits (on government) and the European notion of constitutions as foundations (of the whole polity, or the social fabric, or of the legal system).

Reality was and still is different. America kept on being a Common Law country and many issues were not solved along specific constitutional provisions—which is not to say they were solved *against* the Constitution. It was only in the 20th century that constitutional law began to expand so as to become some Common Constitutional Law. One cannot deny that it sometimes has expanded too much, for example, to the extent of making hairstyle a case of constitutional litigation.⁶¹ But this was not the American tradition,⁶² and would in the end produce an overload on both constitutional law and the Supreme Court. Common Law was and still is enforced in ordinary American courts of law (federal courts not being Common Law courts). Over time federal jurisprudence developed into some kind of Common Federal Law, so that the new Common Constitutional Law would be a part of that Federal Common Law.⁶³ This would not mean that America is about to cease to be a Common Law nation. Certainly the governmental developments that

60. ‘Law of the Land’ means, among other renderings, ‘custom of the country’ in the OED (entry ‘Law’).

61. The case is real. I borrow it from Tribe, pp. 1835-88. Lawrence Tribe, *American Constitutional Law* (Mineola, N.Y., this ed. 1988) 2d ed.

62. As Prof. R. Stith pointed out in a letter to the author, “basically, we see the Constitution simply as a fairly negative limit on government, analogous to the criminal law with regard to individuals. It does not affect most of the rest of the law any more than individuals construct their life-plans by studying the penal statutes. In short, we do not have a constitutional ‘jurisprudence of values.’” The contrast could hardly be put in clearer terms.

63. See Henry Monaghan, “The Supreme Court 1974 Term. Foreword: Constitutional Common Law,” 89 *Harv. L. Rev.* (1975), 1-45, *in fine*.

took place after the New Deal did not fit squarely in a traditional Common Law scheme, but Calabresi said that judges are dealing with the problem of obsolescence of proliferating statutes after a Common Law fashion (see Calabresi, *passim*). As for Britain, let us point out that the new role of judges in administrative law was born of extending Common Law principles to administrative litigation.⁶⁴

Even if constitutional law replaced Common Law it would not cease to pose further problems, because it would stretch the scope of the Supreme Court's monopolistic powers to a degree that many Americans deem undesirable.⁶⁵ Curiously enough, such fears are less frequent in Spain, where many people are content to have a rather monistic concentration of power in the hands of the *Tribunal Constitucional* with its mastery over all other courts and branches of law. In the United States the situation was to some extent the opposite because they began with the states. Things were so different in the beginning, and the Constitution so modest, that the Bill of Rights was originally not intended to stop the powers of the states but only those of the Federal Government.⁶⁶

Among the Supreme Court decisions expounding on the meaning of supremacy, two deserve further comment. The first is *Marbury v. Madison*, which faced the problem of breaking the old English tradition in the newborn United States that had given themselves a written, rigid, and federal constitution. A 20th century judgment holding to this principle was *Cooper v. Aaron*,⁶⁷ in which the supremacy of the Constitution was energetically reasserted and the Supreme Court rulings were said to be a part of the supreme law of the land. *Cooper's* energy arose from the circumstances: Arkansas state authorities were stubbornly resisting federally ordered school desegregation. *Cooper* also represented a highly conflictive situation because of its relation to the

64. Among the cases, see *Ridge* (1964); *Padfield* (1968); *Anisminic* (1969); *Congreve* (1976); *Laker* (1977); *Tameside* (1977).

65. The idea of constitutional law replacing Common Law is unfamiliar to most Americans. It "sounds impossible, even unthinkable [to Americans]. It would be like saying that GATT could replace the Civil Code." (Stith, letter to the author). The example is a felicitous one, first, because in Spain it has become commonplace to say that constitutional law has replaced some parts of the Civil Code, and, second, because the European Union looms potentially as an ever expanding lawgiver, able to menace sooner or later the integrity of any branch of domestic law that may stand in its way. Although the EU is much more of a body politic than the GATT or WTO, it still is less of one than the US.

66. In the *Griswold* decision the IXth Amendment was invoked against the State of Connecticut. Although the general proposition that the Bill of Rights binds the states had come earlier, the dissenting opinions in *Griswold* show the strength of the opposite notion.

67. *Cooper v. Aaron*, 358 U.S. 1 (1958). An energetic ruling on desegregating Alabama schools in Alabama. According to article VI.2, the Constitution is the Supreme Law of the Land, and rulings of the Supreme Court are granted the same status.

events of 1958 in Little Rock, Arkansas. The Governor and other Arkansas authorities opposed a desegregation plan approved by the courts on the ground that they were not bound by the Supreme Court holding in the *Brown* case.⁶⁸ This fact—the Arkansas authorities bluntly disobeyed a desegregation plan approved by Federal authorities and Courts—explains why the Supreme Court reacted with such strong language. The Court emphasized the supremacy of the Constitution—“Supreme Law of the Land” again—and the supremacy of *its own judicial decisions as part of the very Constitution and therefore of that Supreme Law of the Land*.⁶⁹ The concept of ‘state action’ was equally stressed, *i.e.*, that the School Board was at the moment acting as if they were a state agency rather than as private individuals:⁷⁰ “From the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State” the Court said. In the words of Justice Black:

Article VI of the Constitution makes the Constitution the ‘supreme Law of the Land.’ In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as ‘the fundamental and paramount law of the nation,’ declared in the notable case of *Marbury v Madison* . . . that ‘It is emphatically the province and duty of the judicial department to say what the law is.’ This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI.3 ‘to support this Constitution.’ Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers’ anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State.

68. *Brown v. Board of Education of Topeka* (Kansas), 349 U.S. 294 (1955).

69. This was possibly the most important point, though to my mind the Court was a bit too activist. See Cover & Meese, “The Law of the Constitution,” 61 *Tul. L. Rev.* (1987), 979-90, who oppose the idea of the Supreme Court being a kind of permanent constituent legislator. As for the Spanish *Tribunal Constitucional* it had to deal soon with the enforcement of the Constitution and of its own rulings (STC 66/83).

70. They were local officials. The quality of ‘State agency’ (‘State’ meaning here the member State) would be roughly equivalent to being *un poder público* (one who holds a public office and is bestowed with public authority) that for Europeans would be so self-evident that no local official would ever think otherwise. The fact that the Court had to state it highlights American non-statism.

This wording confirms that this strong assertion of Supremacy is related to problems arising from the federal structure of the Nation rather than from problems of *Rechtsquellen* or philosophy of law. In other words the Supremacy Clause was intended to strengthen the Federation, not to make the Constitution the sole and ultimate source of all forms of law in America, neither at that moment nor in the future. Yet one has to admit that such strong holdings, if pressed to their utmost extreme, could over time lead to strengthening the position of the Supreme Court into that of a highly monopolistic power, which in turn would perhaps depart from the American vision;⁷¹ or, to put it the other way round, it would end up clashing with the Ninth Amendment and the rights of the states.

The solution lies possibly in not studying American constitutional law with overly systematic, theoretical eyes. The United States, and Britain to a higher degree, are not the kind of countries to infer theories and then carry them to their extreme consequences. To see how Supremacy has been understood in a way rather restricted to federation-state conflicts, and in any case milder than a Spanish mind would expect, suffice it to point out that the conflictive situation in Arkansas could hardly have been imaginable among us because the central powers would have imposed their plans, rightly or wrongly, long before reaching such stage.

One has just to recall that the Bill of Rights, until relatively recently, was a check against the federal government's actions, not against States activities. For some 150 years the Ninth Amendment, for good or for ill, was "enacted to protect state powers against federal invasion" and was never thought of 'as a weapon of federal power' against state legislatures.⁷² What is more, when the Bill of Rights was adopted (1791) many people feared that, once your rights and liberties are enumerated, you are likely to be denied all other possible birthrights. This is why the mentioned Ninth Amendment was born, reflecting the Anglo-American view of the social compact both between individuals and their government and between the states and the union: "The enumeration in the Constitution of certain rights shall not be construed to deny or

71. See again Cover, *supra* note 53; Cover & Meese, *supra* note 69; Monaghan, *supra* note 63 *in fine*; Richard Stith, "The Extraordinary Counter-Majoritarian Power of the New Supreme Court of Nepal," 4 *Asia L. Rev.* (1995), 38-70. Over time the trend against judicial monopolization would grow; see Louis Fisher & Neal Devins, *Political Dynamics of Constitutional Law* (St Paul (Minn.) 1996) 2d ed.; Stith, "Securing the Rule of Law Through Interpretive Pluralism: An Argument From Comparative Law," 35:3 *Hastings Const. L.Q.* (2008), 401-47; Mark Tushnet, *Taking the Constitutions Away from the Courts* (Princeton 2000).

72. See Justice Black's dissenting opinion in *Griswold v. State of Connecticut*.

disparage others retained by the people.” (Ninth Amendment)⁷³ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” (Tenth Amendment)

Furthermore, to properly understand the Supremacy Clause and the energetic holdings in *Marbury* and *Cooper*, one has also to take into account the *Griswold* decision, which accepts that “unenumerated fundamental rights” do exist and that those rights of the First, Third, Fourth, Fifth and Ninth Amendments have “penumbras,” as Justice Douglas said, i.e., rights implied or peripheral to the great rights of the Bill. Justice Goldberg, joined by Brennan and Warren JJ, went further in saying “that the ‘liberty’ protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.” *Griswold* made several other statements enabling us to understand the Supremacy Clause: “Rather, the Ninth Amendment shows a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.”⁷⁴

It may be interesting to note that the 1869 Constitution of Spain, one of our short-lived Constitutions of the 19th century, imitated the Ninth Amendment: “The enumeration of rights made in this [chapter of the Constitution] does not imply the prohibition of any other right not expressly mentioned” (Art. 9). Unfortunately this was but an isolated provision lost among our general French-like provisions, not to mention that the 1869 Constitution can hardly be said to have been really in force. The present Constitution, although often interpreted with a positivist mindset, has Article 10.1 which reads as follows: “Human dignity, man’s inviolable and inherent rights, . . . respect for law and for the rights of others, are the foundation of political order and social peace.” In practice, this Article has not shown much expansive force, nor has it been

73. “The Amendment is entirely the work of James Madison. It was introduced in Congress by him and it passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.” (Justice Goldberg’s dissenting opinion in *Griswold*; he recalled also that Hamilton was opposed to bills of rights on the ground of they being unnecessary and dangerous; some people in Britain now fear that the Human Rights Act of 1998 has had that effect.) It has been the matter of little litigation, although it is a criterion for interpreting all other clauses of the Constitution dealing with rights. García de Enterría in *La Constitución como norma*, as well as the Spanish legal literature in general, pays little attention to Amendment IX.

74. Justice Goldberg, *id.*

often used as an interpretative criterion, and has not been the source of much litigation.⁷⁵

B. Law, Norms and the Constitution

As pointed out before, the supremacy of the constitution over all other forms of law, the hierarchical, pyramid model, and other traits of the Spanish doctrine presuppose as a *conditio sine qua non* that law consists of norms. Referring to law as norm in our schools of law became run of the mill. But on closer scrutiny, considering law as a norm, like other undisputed assumptions, e.g., that every polity is a State, means adhering to a specific vision that is far from universal. In fact, this view had a discernible date of birth and the date of its demise may have already passed or may occur be in the near future. The normativistic vision received little development before Bacon, Hobbes, Montesquieu, the Enlightenment, and the French Revolution, thus covering a relatively short period of legal history, although, one has to acknowledge, it arose in *our* period and in *our* countries. Thus normativism is more at home in some countries and political cultures than in others, according to Damaska's scheme. To begin with, law for the Romans was neither a norm nor set of norms. Private Roman law was something like a complex of justiciable personal actions.

"A complex of justiciable personal actions, protected by those who have public *potestas*, intended to solve patrimonial conflicts between private people according to a scheme of civil liberty, upon the advice of the *auctoritas* of private jurists, and observed by the *auctoritas* of also private judges."⁷⁶

On the contrary, present-day private law is "[a] system of norms imposed by the authority of the legislative power to declare a number of

75. See STS 11-VII-1980, as well as SSTC 5/1981, 8/1981, 11/1981, 21/1981, 24/1981, 25/1981, 181/1981, 2/82, 6/1982, 28/1982, 52/1982, 67/1982, 91/1983, 52/1985, 64/1986, 82/1986, 158/1986, 37/1989, 113/1989, 129/1989, and 178/1991. On Constitutional jurisprudence concerning dignity at that time, see Pedro Serna, "Dignidad de la persona: un estudio jurisprudencial," 41 *Persona y Derecho* (1999), 139-96; more recently, Antonio García Cuadrado, "Problemas constitucionales de la dignidad de la persona," 67 *Persona y Derecho* (2012), 449-14. If the *Luftsicherheitsgesetz* (1 BvR 357/05; judgment of 15-II-2006)) and *Brüstle v Greenpeace* (18-X-2011; C-34/10) decisions can be considered as taking dignity seriously, then the Spanish Constitutional Court falls well below the mark (the first dealt with aerial security and the second with patenting and commercializing embryos).

76. As seen by Alvaro d'Ors, *Elementos de Derecho Privado Romano* (Pamplona 1992), 21.

subjective rights which must be defended by the power of the judicial authority of civil courts, in their general task of administering justice.⁷⁷

The modern, normativistic view was an offspring of the alliance between the needs of emergent modern states, a trend which we term here ‘statism,’ and rationalistic philosophies such as Hobbes’s and, later on, Kant’s. State-builders, anxious for controlling the patchwork of local laws, customs and privileges, were plainly in need of a uniform, ready-at-hand tool for the sovereign.

Unsurprisingly, Thomas Hobbes had a modern, rationalistic, statist vision that he expounded in chapter XXVI of *Leviathan*. Law consists of general commandments of the sovereign in the form of fixed, known norms. The sovereign has the monopoly over law making—“the Sovereign is the sole Legislator”—so that it can only be due to the sovereign’s consent that customs come to acquire the force of law. Hobbes denied that judges could make law (he spoke of “some foolish opinions of Lawyers concerning the making of Lawes”) and he rejected the idea that the *Juris Prudentia*, as he wrote, was a source of law because there could be no source other than the sovereign’s commandment. Even interpretation of laws belonged exclusively to the sovereign or to the persons he appointed.

Later on, the French Revolutionaries would basically replicate Hobbes’s position—a fact usually unnoticed in Spanish books, which indulge in Montesquieu, Robespierre and the *référé législatif* as if *Leviathan* had never been written. Hobbes went on to say that “the interpretation of the Law of Nature [for him the same as the Civil Law] consisteth *in the application of the Law to the present case*,”⁷⁸ a view of interpretation also to be repeated during the French Revolution. As for commentators, they are not true interpreters, since they are only the judges appointed by the sovereign.⁷⁹ In dubious cases judges should refrain from adjudicating and refer the matter to the sovereign.⁸⁰

In these pages Hobbes appears as the great theoretician he was, defending propositions much ahead of his times. He was possibly the best representative of the combination of a rationalistic philosophy, and

77. As seen by d’Ors, *Elementos*, *supra* note 76, at 22. Among Spanish legal scholars it was d’Ors who most emphasized the cleavage between the two notions of law (see his “Ordenancistas y judicialistas,” 75-76 *Nuestro Tiempo* (1960), 273-83, and “Sobre la palabra ‘norma’ en Derecho Canónico,” *Nuevos Papeles del oficio universitario* (Madrid 1980), 369-76). Yet, although widely respected, his views were far from predominant in Spain. On d’Ors’s thought in English, see Wilhelmsen, *supra* note 22.

78. *Leviathan*, 191, italics provided.

79. *Leviathan*, 193.

80. *Leviathan*, 194.

the need for an overall, monistic power, as felt by the rulers of the newborn states of modernity.

So the law-as-norm view is a feature of modernity in danger of passing down to posterity as supranational integrations proceed on, or being radically altered insofar as postmodernity keeps on creating a crisis for general theories.

But the norm approach never triumphed completely. Stein recalls that the Romans understood law as a mildly chaotic set of open-ended *regulae iuris* intermingled with some statutes.⁸¹ Normativism rode again under Justinian, and then again with the Bologna commentators, yet it never reached a real triumph until modern, Continental states came into being. Normativism did not make important inroads into the Anglo-American legal culture for centuries. Even in our days, one wonders, what is a ‘norm’ for the average American lawyer or law student?

The illusion of all law being embodied in fixed, abstract, self-contained propositions has never been quite true to reality, even in European Continental countries. ‘Law’ is wider than ‘norm’ and includes Equity, natural justice and/or natural law, general legal principles, *regulae iuris*, precedents, and opinions of jurists. Part of this varied set of elements—in variable proportions, according to times and countries—originates in litigation and in criteria for judicial adjudication, rather than in norms. In practice, norms do not always ensure a high degree of Justice, not even of generality, because they need interpreters—“words do not interpret themselves,” said Calabresi.⁸² A train of judicial decisions may over time turn into a more general and fixed norm, while in their turn a certain kind of norm is apt to give birth to new legal principles.⁸³

If normativism reached little development before modernity, law has to be more than written legal norms and cannot be contained in a single norm, however high or perfect. To answer that modern

81. Peter Stein, *Regulae Iuris. From Juristic Rules to Legal Maxims* (Edinburgh 1966). Interestingly, he points out the transformation from *Regulae Iuris* to codified, systematic statutes; from *iuris prudentes* laws to statute laws.

82. Calabresi, *supra* note 54, at 31. One of the best opportunities to realize the insufficiency of norms is to see things from the Bench. Spanish Courts are formally subject to statutory law but closer scrutiny reveals many nuances neglected or absent from our textbooks.

83. For instance, art. 103.1 of the Spanish Constitution, often invoked in litigation: “The Public Administration [shall act] . . . in full subordination to statutes and the Law” (cf. art. 20.3 of the German Basic Law: “[. . .] Die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden”). Creation of legal principles out of relevant statutes is an experience of all countries that have had long-standing written laws, be they the Magna Carta, the American Constitution, or the Spanish Civil Code. But such creation is often the work of judges and commentators.

constitutions contain the ‘chapter headings’ of all other branches of Law is merely formal and poses as many problems as it solves. The U.S. Constitution and the European Treaties (so far) do not do so.

As a partial conclusion on law and norms one is tempted to say that the Spanish legal revolution, while allegedly modernizing and referring to American law on some points, seemed rather to be an untimely striving for a scheme that would fit a Westphalian landscape of states unconnected and cut off from each other.

C The Principle of Legality Revisited

Concerning the relation between judges and norms, one is tempted to say that the ‘Spanish legal revolution,’ if we are to take literally its most representative writings, was not in touch with reality. ‘Normativistic revolutionaries’ claimed to be approaching judicialistic America, and at the same time making every effort since the sixties to join the judicialistic European Communities. Maybe this made for an unintended, second rank revolution: over time Spanish ordinary judges were to become fairly activist.⁸⁴ Yet, the conventional wisdom of the age proclaimed to the contrary: Article 117.1 of our Constitution states “Justice emanates from the people. It is administered in the name of the King by judges . . . who shall be . . . subject only to the rule of statutory law.”⁸⁵ The same Spanish conventional wisdom, as stated for instance by Garrorena, ran as follows:

Full subordination of judges to statute-law is probably the oldest conquest of the principle of legality. Concerning this topic the constitutional state has done little but receive the inherited lot of a whole, centuries-long process of struggle directed to establish the legality of judicial proceedings That process began with the English Carta Magna . . . and came to be expressed—relying upon the new, rationalistic basis of the principle of

84. The causes of this transformation are varied: the new principle of constitutionality, the trend to universal judicial scrutiny, the ‘Statutory Orgy’ (a term I borrow from Calabresi, *supra* note 54), the abundance of laws containing *conceptos jurídicos indeterminados*, judges abusing the *interpretatio abrogans*, new laws giving judges more freedom, the ‘Social Reality’ Clause as a criteria for judicial interpretation (art. 3.1 of the Civil Code as amended in 1974), the ‘hot potatoes’ sent by politicians to judges, and the coming onto the scene of younger judges with new mentalities. The last two trends are common of late in many countries. As for the ‘Statutory Orgy,’ positivist Spanish legislators and scholars failed to see that an excessive amount of statutes in the end would be self-defeating and prone to judicial activism. To mention but a book, see Miguel-Ángel Pérez-Álvarez, *Realidad Social y Jurisprudencia* (Madrid 2005).

85. “Sometidos únicamente al imperio de la ley.”

separation of powers—by Montesquieu and Beccaria as a conviction that judges are above all the mouth that has to utter the words of the law.⁸⁶

For all such professions of normativistic faith, Spanish ordinary judges have never been less subject to statutory law than they are now. Certainly, we keep on being legalist, and, if we include the EU, the amount of written norms increases every year by the thousands, but if law is a prediction of what judges will say, in Spain over time it has become less predictable than ever before.

Looking retrospectively from 2015 one may say that in the late 70s and early 80s the principle of legality was already doomed to give way to the principle of constitutionality, and to resent the impact of the European integration—not to mention the current financial crisis that ignores laws (and sometimes constitutions) out of efficiency. For statesmen and scholars in that era, foreseeing this was not easy because the trees did not let them to see the forest.⁸⁷ What was reasonably foreseeable was that laying the bricks in order to build the principle of constitutionality was not the better way to keep the principle of legality in good health, and that over time the latter would be dethroned by the former. But this Spanish story was far from exceptional in Europe.

The classical Continental principle of legality is solemnly proclaimed by the Spanish Constitution in Article 9.3: “The Constitution guarantees the principle of legality, the hierarchy of norms, . . . the accountability of public authorities, and the prohibition of arbitrariness on the part of the latter.” This principle, dear to modern Spanish authors even after enshrining constitutionality, was understood by the mentioned Garrorena as a “principle of being bound by law, i.e., the branches of government other than Parliament—the Courts and the Executive—submitting to the work of the legislative branch.”⁸⁸ Ignacio de Otto’s opinion was more neatly positivist:

In its widest sense the principle of legality implies that the activity of the organs of the State [the Civil Service and the Judiciary] is carried on upon subjection to the legal system [*ordenamiento jurídico*]. The word legality [*legalidad*] does not describe here the sole statute law but all norms

86. This author also said that this “[is] an old, undisputed tradition.” Note the continuity he saw between medieval English pre-constitutionalism and Enlightened Continental rationalism. The reality was that judges were far from ill-used in the Magna Carta of 1215, as in many other English documents of that age, while codes were fairly unknown, and generally written norms were but embryonic, so that modern normativism could hardly be said to exist (see Ángel Garrorena-Morales, *El lugar de la ley en la Constitución española* (Madrid 1980), 73-74).

87. Personally I was not enthusiastic about the principle of legality but more out of my Roman and Anglo-American leanings than out of any particular foresight.

88. Garrorena-Morales, *supra* note 86, at 73.

including regulations made by the Executive—what is called ‘the legality block’—. Hence the principle of legality, when understood after this fashion, is also named *principio de juridicidad*.⁸⁹ Positiveness as a feature of modern law describes the fact that in legal culture and conscience and in the very structure of the legal system all those [old] limitations [to the legislator’s power] have disappeared. Thus understood, the concept of positiveness implies not only that law is law because it is imposed. It also means that for our legal culture law is valid just because it is imposed, not because of any other reason, such as being just or old. Law can be changed at any moment and the legislator does not bind himself for the future. . . .⁹⁰

Later on he also wrote:

Ex definitione every legal system forbids illegal acts [*actuación antijurídica*]. If the legal system gives a governing body the power to act freely, for example to fix punishments when and how it thinks fit and regardless the norms regulating the power to punish, the acts carried on exercising such a power are fully legal acts [*conformes a Derecho*].⁹¹

These views, rather than similar to Anglo-American constitutionalism, fell into the statist vision of Damaska’s classification. Again, a candid reader coming from another planet would conclude that Spain was a Westphalian State, never to pool its sovereignty in common.

What, then, of the principle of legality, so dear to us Europeans? In Britain textbooks usually lacked a chapter on it—and it is not this lack of treatment which has lately increased arbitrariness in that country. Instead of it one may find a variety of assertions and definitions, most of them coming, in the end, to the old, not quite scientific notion of the Rule of Law. See, for example, the classical statement of Dicey:

When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions.

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. . . .

89. See De Otto, *supra* note 9, at 157. Note that *juridicidad* for modern Spanish positivists was not the open-ended Anglo-American ‘legality,’ but the set of written and general norms in force, comprising those made by the executive. Yet this is a deliberate positivist stance; in Spanish nothing in the term excludes other, broader interpretations. See, for one, Eduardo Soto Kloss, *Derecho Administrativo. Bases Fundamentales* (Santiago de Chile 1996), vol. 2, 24 ff. A *juridicidad*, that could even comprise natural law, was often opposed to *legalidad*.

90. De Otto, *supra* note 9, at 21.

91. *Id.* at 157.

We mean in the second place, when we speak of the ‘rule of law’ as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. . . .

There remains yet a third and a different sense in which the ‘rule of law’ or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.⁹²

See also the opinion of a contemporary British writer, Yardley:

Providing the aim is the preservation of the liberty and rights of all members of the community, and that only such exceptions from this aim are allowed as are essential to the administration of the nation in an orderly fashion (such as judicial and parliamentary privilege, with proper safeguards), the purpose of the rule of law will have been fulfilled. In short, the rule of law is not a rule or a law, but a persuasive guide for the legislature, the executive and the judiciary, linked in practice, in the United Kingdom, with the working of many of the conventions which mitigate the theoretical deficiencies⁹³

So the technical existence of a principle of legality in Britain is unclear. Things seem to change when the American Constitution comes onto the scene, given the famous statement “A Government of Laws, not of Men,” and the direct enforceability of the Constitution.⁹⁴ Some people in Spain claimed therefore that America has a legality principle substantially equivalent to ours in all but name. Yet, if understood *sensu stricto*, I am unable to find such a thing. The nearest to it was possibly expressed in Justice Felix Frankfurter’s view of the ‘Government of Laws’:

92. Albert V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London 1915) 8th ed. (American edition: Indianapolis, 1982), 110-15.

93. David C.M. Yardley, *Introduction to British Constitutional Law* (London 1990), 7th ed., 78. Personally I equally enjoy Sir Ivor Jennings’s lively definition in *The Queen’s Government* (London 1965). For a contrast between the Rule of Law and the *Rechtsstaat* and its recent developments, see A.C. Pereira-Menaut, *Rule of Law o Estado de Derecho* (Madrid 2003), a little book conceived in 1999 in a Regensburg *Biergarten* after a discussion with professors Arnold and Pielow.

94. As pointed out before, it seems to be more directly enforceable than normativistic.

The historic phrase ‘a government of laws and not of men’ epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights, pt. 1, art. 30, he was . . . expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. ‘A government of Laws and not of men’ was *the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court.* Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. . . .

But from their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception *that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be ‘as free, impartial, and independent as the lot of humanity will admit.’*⁹⁵

These long quotations seem worth their length. Felix Frankfurter’s idea of the ‘Government of Laws’ is far from equivalent to the European, normativistic principle of legality. Instead of a highly impersonal rule of abstract norms, it means the possibility of having the government made liable before a court of law, and, in the end, before the Supreme Court. Yet not even this Court will have the absolute last say because Congress could overrule its decisions. So the real American ‘Government of Laws and not of men’ makes for a combination of ‘*control* of men’ sitting as courts of law, balanced by the legislative capacities of Congress to overrule their decisions by enacting new statutes, being all of them bound by an open-ended Constitution. As if abridging his vision, Frankfurter also said that, in the end, America is governed by an old legal principle: “No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for.” (*United States v. United Mine Workers*). On occasion, he also said: “There can be no free society without law administered through an independent judiciary As the Nation’s ultimate judicial tribunal, this Court, beyond any other organ of society, is the trustee of law”

95. Concurring opinion *U.S. v. United Mine Workers of America*, 330 U.S. 258 (1947), italics added.

V CONCLUSION

We come now to a close. I will not try to cheat the reader by hiding my generally Anglo-American leanings: I wish the American influence in Spain had been real, and—what is more—that European integration in general was being conducted after a more American fashion.⁹⁶

As stated, part of what has been described belongs now to history. Spain is a full-fledged member of the European Union and of the Eurozone. Much of what in 1978 could be supposed to happen has already happened. As of 2015 (a retrospective our Spanish ‘legal revolutionaries’ could not have in mind thirty seven years ago), Spanish constitutional supremacy is not of much use in the EU context and has shown its effectiveness mostly in relation to regional laws. Regulations, directives and judicial decisions coming from the EU find little if any opposition in our Article 9.1 (to put but an example) or in our Constitutional Court either. When new, powerful *dramatis personae*—‘the Troika’ and ‘the Markets’—recently came onto the scene of the financial crisis, the Constitution, its supremacy, the Constitutional Court, and the principles of constitutionality and legality proved to be of not much use for protecting those constitutional features at risk: the social state, social rights, or the autonomy of regions and universities.

A secondary aspect of the then-dominant Spanish stance was that constitutionalism seemed to become a doctrine about making norms, and the Constitution something of a main norm dealing with the production of further norms, as was seen in several Kelsen-inspired books, most clearly in de Otto’s. Other constitutional dimensions such as separation of powers, liberties of the citizen, accountability of rulers, and stopping government’s interferences, could run the risk of being neglected. In the troubled Eurozone of 2015 national constitutions should not be seen as laws-making procedures but rather as limit-setting compacts, drawing red lines to integration and guaranteeing a minimum of self-government along the lines of Article 79(3) of the *Grundgesetz*.

The Spanish reformers succeeded in some aspects although failing in others. It sounds somewhat paradoxical to develop the doctrine of normativistic supremacy and completeness of the *ordenamiento jurídico* to the exclusion or subordination of other sources of law, while giving up our law-making monopoly. The fiction that the *entire* fabric of our *ordenamiento jurídico* was self-contained, consistent, and derived directly or indirectly from our Constitution could never have been safely held. Few people claim as of 2015 that Spain is really a sovereign country—in

96. See A.C. Pereira-Menaut & C. Cancela-Outeda, *Resetting...* (Regensburg 2012).

2011 a Constitutional reform was covertly induced from outside to introduce a debt brake—but to claim it in 1986 was not realistic either because primacy and direct effect were already the conventional wisdom.

As of 1978 there was not much future in Kelsenian-like, self-contained, monistic, sovereign legal pyramids. While knocking on the door of the then EEC, our reformers, holding on to ideas that had passed their ‘sell by’ date, emphasized the supreme monopoly of production and adjudication of all possible law. They were not the only ones to have their watches running slowly: the economic parts of the 1976 Portuguese constitution were utterly incompatible with the EEC because of overtly favored State-owned industries and similar socialist arrangements. In the nineties, other European, mostly eastern countries emphasized national independence and sovereignty *etsi Europaeae Communitates non darentur* while simultaneously applying for membership. The Spanish framers dealt with these subjects nearly as if the then European Economic Community did not exist, but at the same time was enthusiastically preparing to join the EEC.⁹⁷ Statesmen, constitutional judges and professors failed to see that in the 1980s traditional statism had long ceased to suit reality, since the famous ECJ rulings *Van Gend* (1963) and *Costa* (1964) were already conventional wisdom in Europe. European Union Treaties and regulations have primacy and direct effect, and our *Tribunal Constitucional* is no longer the ultimate court when European law is at stake. Spanish national courts must apply European laws and disregard domestic ones, no matter their level in the Spanish hierarchy—*Constitución, Estatutos de Autonomía* of the *Comunidades Autónomas, leyes orgánicas, leyes ordinarias, reglamentos*. Therefore to keep on holding to the absolute supremacy of the Constitution was then doubtful. To argue that we joined the EEC with all due respect to our Constitution seems to be a *pro forma* consolation, especially after the reform of our Constitution in 2011. Our real situation as of 2015 is that Spanish law is no longer self-contained nor strictly normativistic because European law cares little for Spanish legal completeness or constitutional supremacy, a fact that introduces some further degree of inconsistency in a legal system originally designed to be as solid and consistent as a rock.

97. Article 93, introduced in our Constitution precisely that effect—allowing a partial surrender of Spanish sovereignty to the then EEC. The provision reads as follows: “Authorization for concluding treaties by which powers derived from the Constitution can be transferred to an international organization or institution may be granted by an organic act [. . .].” Unlike the *Grundgesetz*, it contains no explicit hard core or brake upon ‘excessive’ European integration.

The illusion of a constitution—or, for that matter, a normative system—closed and self-contained was the illusion of the Enlightenment, the French Revolution and the Codes, but in the 21st century it would be naïve to expect law to have more logical and monistic unity than mathematics—just remember Gödel’s theorem: it is difficult even to conceive of a single pyramid with a single, identifiable top. For the sake of democracy it would be good to disperse power and jurisdiction; monopolies are dangerous even if backed by a majority. For the sake of realism it could be wise in a post-modern landscape to acknowledge that no constitution and no set of written norms may encompass all law—and this applies also to European integration.

Misreading the American Supremacy clause for a statist, European Continental supremacy, Spaniards failed to distinguish the *suprema ley* (the highest statute) from the *supremo derecho* (the supreme law); not to mention that once in the European Union, the chances any national constitution has of keeping on being supreme—be it *suprema ley* or *supremo derecho*—are but meager. The study they made of American supremacy should probably have been redirected towards European law supremacy. We have paid particular attention to the inspiration some writers claimed to draw from the U.S. Constitution because, although not embarked in any process of supranational integration *ad extra*, it has shown much flexibility and open-endedness *ad intra*. Regrettably, Spain did not import these American qualities.

Over time, the monistic claim of 1978 has been ruled out of the question by the European legal and constitutional developments. The Constitution and the Constitutional Court may claim to be officially in control of every written norm, administrative act and judicial ruling produced inside Spain but not of the law coming from beyond the Pyrenees, which in practice is little controlled by our *Tribunal Constitucional*. So the end of monism has not been due to some domestic development of any pluralistic part of the Constitution, although they are not quite absent from the text. Our constitutional framers wanted a single pyramid, but then allowed a hole in the wall of the constitutional pyramid (the mentioned Art. 93), which is quite incoherent, to my mind, with the rest of the structure. Indeed, this left Spain unprepared for integration, a fact that helps explain why it is so defenseless in the face of European overreaching. On the whole we may safely say that European integration has produced a multiconstitutional landscape but not without local nuances. Inside Spain there is little, if any, multiconstitutionalism because inferior levels are mere copies with no constitutional identity, ‘soul’ or ‘spirit’ of their own. To the extent that

the pyramid and the top-to-bottom schemes hold the upper hand, no other result is possible. True multilevel constitutionalism, if it really deserves to be considered ‘constitutionalism’ and not monism in disguise, would imply that every inferior level cannot be merely a smaller repetition of the superior ones. That would really be similar to a massive administrative decentralization. If these levels are really constitutional in nature they have to have something qualitatively different, be it values, principles, legal theories, constitutional identity or political culture. In 1953 the Edinburgh Court of Session (the highest Scottish court) ruled against sovereignty of the Westminster Parliament.⁹⁸ This does not amount to bottom-to-top constitutionalism but implies a different constitutional identity, notwithstanding the fact that at that moment Scotland enjoyed no self-government and Britain was apparently a unitary, fully centralized state.

The Spanish monistic *forma mentis* was successful in the domestic realm but by the same token left the Spanish constitution unprotected before Europe: the monistic (Spanish) scheme simply gave way to a subsequent monistic (European) scheme uncritically accepted by politicians, professors, and judges. If “the system stands or falls as a whole,” if it can exist only as a single substantial polity with a single substantial constitutional and legal system, processes of supranational integration will give birth to a macro-state in which old member states will not be much more than massively decentralized entities. To put it shortly: if monism, just one; if just one, it has to be in Europe now rather than in Spain. Another kind of supranational integration, more accommodating than uniformizing, and apt to give birth to national rulings such as *MacCormick* and the *Maastricht Urteil*, seems for Spaniards difficult to conceive of. Formal multilevel constitutionalism meets material monism. At the moment of putting the last touches to this work the media inform us that the Spanish Foreign Minister, José-Manuel García-Margallo, has asked for a “true European economic Government above national governments, and able to impose its decisions and control the latter,”⁹⁹ a proposition that, if taken literally,

98. *MacCormick v Lord Advocate*, see Scots Law Times (1954). The Court admitted that Queen Elisabeth could be denominated ‘Elisabeth II’ in Scotland although no ‘Elisabeth I’ ever reigned there, but said that sovereignty of Parliament—precisely the only dogma of the British Constitution—is not a principle of Scottish constitutional law. It was not the only example of pluralism: in 1958 the same Court dealt with a commercial contract between an Englishman and a Scotsman as if it were a case of international private law (*English v Donnelly & Anor*, Scots Law Times (1959)).

99. Lecture given at a University Forum in Valencia, 26th of February, 2014 (<http://www.europapress.es/nacional/noticia-margallo-aboga-creacion-gobierno-economico->

would bring about a degree of centralization higher than in the U.S. Thus Spain seems now to be less prepared to defend its constitutional integrity and identity than, say, Denmark, Ireland, the Czech Republic, Poland, the UK, perhaps Portugal, and, most obviously, Germany. The soulless condition of our Constitution—or rather, for that matter, of its dominant interpretation—adds to the same results.

Yet, the Spanish legal revolution succeeded in other endeavors. To start with, our Constitution is now more than thirty-six years old—not bad by Spanish standards¹⁰⁰—and it is a living document—or has been so until the present crisis. Furthermore, the Constitutional Court is here to stay, although less prestigious than its German or Chilean counterparts. Civil law and the Civil Code have been dethroned by the Constitution. The old, French-style frontiers isolating the Constitution from the rest of the law no longer exist, and the Constitution pervades every branch of law—although EU law, in its turn, is proving a serious competitor when it comes to pervading the law. The old *Tribunal Supremo* stopped being the lord of Spanish law to the benefit of the activism of the *Tribunal Constitucional*, insofar as the activism of the ECJ leaves room for maneuver. For now a great deal of room remains, but it is diminishing. Yet, it should be noted that some of those successful changes would possibly have occurred with or without European integration, as the constitutional evolution of other democracies shows.

Another question worth our attention is whether the evolution of the EU will bring about a pluralistic legal landscape or will favor, in the long run, a new monism, similar to the previous one but in a bigger, continental scale. For the time being, the European Union's constitution is a compound, multi-level, asymmetric one, but the present crisis has given birth to a number of monistic, top-to-bottom trends, not excluding a real constitutional mutation that can hardly be said to be democratic.¹⁰¹

europo-control-ejecutivos-estados-miembros). It is worth noticing that when Margallo makes this proposition Spain already had the opportunity to realize how ruthlessly those who rule Europe may behave. Prime Minister Mariano Rajoy had more than once said that Spain follows Germany as closely as possible.

100. If measured by its real enforceability before a court of law, as years pass by and the financial crisis continues, the Constitution is afforded less and less respect in Spain. Quite a number of aspects of Spanish political life are not governed by the Constitution, e.g., relations with the European Union, social rights, economic provisions, party discipline, separation of powers, daily administrative and tax measures, and the territorial arrangement.

101. See Agustín J. Menéndez, “La Mutación Constitucional de la Unión Europea,” *Revista Española de Derecho Constitucional* 96 (2012), 41-98; Pereira-Menaut & Cancela-Outeda, *Resetting the EU...*; Pereira-Menaut, “European Constitutionalism in 2012. Times Are Tough Again,” in Silveira, Canotilho, & Madeira (eds.), *Citizenship and Solidarity in the European Union. From the Charter of Fundamental Rights to the Crisis. The State of the Art* (Brussels, Peter Lang, 2013), 457-79.

Under the one and same roof—the European Union Treaties—Member States react in very different ways, so the European constitution in force in each country is in a way ‘customized’ in each Member State. The Spanish customization seems to consist of accepting nearly everything that comes from Europe—a stance that has little in common with Virginia in 19th century US, or Germany in the EU. Monism, ruthlessly imposed by Madrid on regions, universities or cities and towns, is now readily accepted by Madrid when it comes from Brussels.

Thus, as stated, formal multiconstitutionalism does not mean for Spain the abandonment of monism in practice. It rather changes the scale. Once proud Spain, now willingly abandons what is left of its sovereignty and bows to the ESM (European Stability Mechanism) Treaty. although it undisguisedly enshrines a degree of concentration of power, privileges, unaccountability, and exemption from the rule of law, perhaps no less minor than under old, mild autocracies (see Articles 9.3, 32, 35 and 36), and apt to send shivers down the spine of any democratic-minded person.

Whichever the formal constitutional arrangement—federalism, confederation, supranational integration—if monism, pyramidal shape and top-to-bottom decisions are taken for granted, or accepted, accommodation will give way to uniformization, rule by consent to rule by fiat, horizontality to verticality, and cooperation to hierarchy.

But all these problems would take us far beyond the boundaries of this Article.