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Comment on Maria Isabel González Pascual's *Methods of Interpreting Competence Norms: Judicial Allocation of Powers in a Comparative Perspective*

By Allan F. Tatham[*]

A. Introduction

When considering the interpretative methodologies of tribunals charged with review powers, Raz's observations should be borne in mind: "constitutional interpretation always blends a conserving and an innovative function."[1] It is this interplay that provides a rich source of material for analysis and consideration: Interpretation is, in itself, "just another type of decision-making."[2] The many approaches to constitutional interpretation may be considered as maximizations that "attempt to produce as much as possible of some value the interpreter holds,"[3] whether that is—in the present context—a judge, judges, or the court itself.

The interpretation of a constitution involves, in many instances, the power exercised by a constitutional judiciary in determining "issues of profound moral and political importance, on the basis of very limited textual guidance, resulting in legal decisions that may last for decades and are practically almost impossible to change by regular democratic processes."[4] A constitution then, as the constituting document of the polity, "gestures towards timeless and enduring principles that can provide stability to society over time;" constant emendation to deal with changes in society would thus not amount to constituting a polity as much as "serving as a super-statute."[5] Accordingly, in its consideration of the value of pluralism in a democratic society, the interplay between judges, as well as that between the court and society, produces an enduring legacy of

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[1] Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 180 (Larry Alexander ed., 1998).

[2] Adrian Vermeule, *Three Strategies of Interpretation*, 42 SAN DIEGO L. REV. 607, 607 (2005).

[3] *Id.*

[4] Andrei Marmor, INTERPRETATION AND LEGAL THEORY 141 (2nd ed., 2005).

[5] Francis Joseph Mootz III, *Interpretation*, *in* LAW AND THE HUMANITIES: AN INTRODUCTION 339, 369 (Austin Sarat et al. eds., 2010).

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constitutional determination, subject to change only by a concerted effort of the political establishment.

Nevertheless, a constitution should not mean more than "an invitation for judges to rule as they deem best."[6] Choudhry emphasizes the pivotal nature of judicial decision-making and its justification when he observes: "[C]ourts, because of their central role in legitimizing and validating the exercise of public power, are under an obligation to engage in a process of justification for their *own* decisions. That obligation extends to courts' interpretive methodologies, because those methodologies define the institutional identity of courts."[7] As he subsequently maintains, a court's choice of interpretive methodology will affect more than the outcome of the particular case before it, as it will also likely affect the broader constitutional culture of its jurisdiction.[8]

While the determination of interpretive methodology and the balancing of value choices—both within the constitutional judiciary and between the court and, *e.g.*, the democratically-elected political establishment—may be most vividly apparent in the context of fundamental rights protection,[9] such phenomena can also be viewed from the perspective of the interplay of constitutional rules in other areas.[10] Particularly, in the article under consideration, this involves the principles of equality and of federalism.

González Pascual's article focuses her comparative analysis on a consideration of equality as a competence norm, and its critical use by three national constitutional courts as a tool either to recalibrate the original political bargain of the vertical competence allocation between the federal entity and its constituent parts, or to dynamically evolve a politically

[6] *Id.*

[7] Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 885–86 (1999).

[8] In Choudhry's view, *e.g.*, a Universalist interpretation of the constitution by courts will work that assumption into the domestic constitutional psyche so that it becomes part of the *culture* of constitutional argument. *See* Choudhry, *supra* note 7, at 888.

[9] For example, the Hungarian Constitutional Court in Decision 43/1995, June 30, 1995 (*available at* http://www.mkab.hu/decisions_stat/decisions), ruled against the so-called "Bokros package" of austerity measures of the mid-1990s, named after the then finance minister, when it determined as unconstitutional a series of statutes which contained serious reductions in social benefits on the grounds that the government's failure to maintain at least a nominal level of social support violated fundamental rights, and that the speed with which these programs had been amended violated the principle of legal certainty. The new 2011 Constitution, voted on by a two-thirds majority in the Hungarian Parliament, effectively protects governments from the Court's interference with economic and financial policy that had occurred under the pre-2012 rules.

[10] For a discussion in relation to courts beyond constitutional tribunals dealing with the concept of federalism, see generally Giuseppe Martinico, *The Importance of Consistent Interpretation in Subnational Constitutional Contexts: Old Wine in New Bottles?*, 4 PERSPECTIVES ON FEDERALISM 269 (2012), http://www.on-federalism.eu/attachments/143_download.pdf.

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revised, post-foundation bargain to the benefit of the authorities on either side of this bargain. In this sense, perceptions of the central or constituent regional authorities and courts of the (putative) effect of federal constitutional court decision-making are significant. The extent to which such a court promotes a balanced or unbalanced federalist agenda has a direct bearing on the legitimacy of its judgments as does the extent to which the central or constituent member political and legal establishments may accept (or even merely acquiesce in) that court's redrawing of the federal-regional boundary to their own apparent detriment.

The basic premise of this work (essentially the weighing of the principle of equality among citizens against the federal principle as a means to reconfigure the federal bargain) examines the supremacy of centripetal constitutional adjudication, and evaluates the practical application of such prioritization between these competence norms through examination of pertinent case law from various jurisdictions.

For me, this research has evident implications for the continuing evolution, even post Lisbon, of the vertical allocation of competences in the European Union by judicial fiat. The central tenets of González Pascual's work are challenging and provide future possible avenues for research: In employing the principle of equality among citizens as an interpretative device for a concentrated constitutional jurisdiction to (re-)assert control over the decentralizing elements of a federal or regionalized state and the pace and extent of change—or even perhaps, and provocatively so, an implicit reversal—in the center-periphery relationship, she has undertaken a focused piece of work which I hope she continues to pursue and expand.

The main part of this Comment is divided into three sections: The next section (Section B) will address in a little further detail the comparative context of constitutional interpretation. This will be followed by a brief look at how the principles of equality and federalism can play out (Section C), before turning to see to what extent González Pascual's approach may be useful in examining what impact EU law, as articulated through the case law of the Court of Justice of the European Union (CJEU), has had on balancing the principles of equality and federalism within the Union (Section D). A few concluding remarks (Section E) complete this Comment.

B. Comparative Constitutional Interpretation

In many ways, comparative law research work is fraught with its own pitfalls. Sagar has already noted "the extremely heterogeneous character of federalism jurisprudence in different federations,"[11] especially where such a large, complex body of case law has been

[11] Arun Sagar, *Constitutional Interpretation in Federations and its Impact on the Federal Balance*, 3 PERSPECTIVES ON FEDERALISM 1, 4 (2011), http://www.on-federalism.eu/attachments/088_download.pdf.

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built up over the years that any attempt at making sense of one legal system is in itself a difficult task.[12] His warning is that, in trying to reach comparative conclusions, the commentator is exposed, on the one hand, to being swamped by a flood of technical analysis while, on the other, to the danger of arriving at conclusions that are too broad and fail to actually explain why constitutional decision-making proceeds in the manner that it does in this field. González Pascual has clearly heeded such warning in her contribution.

Further she has also taken to heart Sagar's proposition that "the interpretative philosophies adopted by constitutional courts are not constant and may change as a function of the subject matter in question. Studies of constitutional interpretation must take this into account when comparing the interpretative approaches prevalent in different legal systems."[13] Evidence for this proposition comes from such diverse jurisdictions as the High Court of Australia and the Supreme Court of India, as well as from comparative studies conducted by academics.[14] González Pascual confirms the validity of such a nuanced approach by considering the methods of constitutional interpretation across Germany, Italy and Spain, and examining the impact of their interpretation of the competence norms with respect to the principle of equality of citizens and its impact on federalism.[15]

The constitutional determination of intra-federal disputes and the authoritative interpretation on federal-regional competences lies in the exclusive hands of each of the tribunals under consideration.[16] They are required, as González Pascual notes, to interpret the system of powers as a whole "in order to take into account the decentralization

[12]This is true even between systems, which, to the outside observer, appear to be culturally, linguistically and legally "close." András Jakab, *Two Opposing Paradigms of Continental European Constitutional Thinking: Austria and Germany*, 58 INT'L & COMP. L.Q. 933, 943–46, 951 (2009).

[13]Sagar, *supra* note 11, at 18.

[14]*See* Jamal Greene, *On the Origins of Originalism*, 88 TEX.L. REV. 1, 43–9 (2009); James Allan and Nicholas Aroney, *An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism*, 30 SYDNEY L. REV. 245, 292–3 (2008); MAHABIR PRASHAD JAIN, INDIAN CONSTITUTIONAL LAW 833 (6th ed. 2008). *See generally* CHRISTOPHER DAVID GILBERT, AUSTRALIAN AND CANADIAN FEDERALISM 1867-1984: A STUDY OF JUDICIAL TECHNIQUES (1986); INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY (Jeffrey Goldsworthy ed., 2006); GREGORY TAYLOR, CHARACTERIZATION IN FEDERATIONS: SIX COUNTRIES COMPARED (2006).

[15]*See generally* Markus Rau, *Subsidiarity and Judicial Review in German Federalism: The Decision of the Federal Constitutional Court in the Geriatric Nursing Act Case*, 4 GERMAN L.J. 223 (2003); Giacomo Delledonne, *Subnational Constitutionalism: A Matter of Review*, 4 PERSPECTIVES ON FEDERALISM 294 (2012), *available at* http://www.on-federalism.eu/attachments/134_download.pdf; Antonio Moreira Maués, *Constitutional Justice and Subnational Constitutional Space: The Cases of Brazil and Spain* (2007), *available at* http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Moreira.pdf.

[16]*See generally* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. I, Art. 93 (Ger.); Art. 134 COSTITUZIONE [COST.] (It.); C.E., B.O.E. Art. 161 (Spain).

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enshrined in the Constitution."[17] In her consideration, the competence of all the actors involved must equally be evaluated so that the constitutional court preserves the respective constitutional spaces of the central state and the component entities.[18]

While this holds true for the maintenance of neutrality of the constitutional court's work in delimiting the federal-regional boundaries,[19] nevertheless, in this judicial evaluative process, the actual nature of the emergence of the federal polity has a bearing on the constitutional court's interpretive discourse. Two broad tracks of federalization are represented by the notions of a "coming-together" or a "holding-together": The former track, as represented in this study by Germany, is exemplified by enhancement of the commonality of an external threat, growing trade relations, or the sharing of a common language or constitutional heritage; the latter track, with Spain and Italy as examples, occurs where states devolve powers from the central to newly-established regional levels of government with the purpose of accommodating, *e.g.*, ethno-linguistic or possibly financial concerns.[20]

How then do these differences have a bearing on constitutional interpretation of federal-regional competences?[21] In Germany, the Constitution determines which competences should be assigned to the newly created federal level, leaving the residue (or residual power) to the component entities.[22] The Spanish Constitution assigns the residual power to the center and lists the competences of the national and regional governments; statutes of

[17] Maria Isabel González Pascual, *Methods of Interpreting Competence Norms. Judicial Allocation of Powers in a Comparative Perspective*, 14 GERMAN L.J. 1501 (2013).

[18] *See* Hans D. Jarass, *Allgemeine Probleme der Gesetzgebungskompetenz des Bundes*, *in* NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1089, 1092 (2000).

[19] *See* Udo Steiner, Retired Judge of the Fed. Constitutional Court, Speech on the Role of the Federal Constitutional Court within Germany's Federal Structure 7–8 (Mar. 26–27, 2008), *available at* http://www.forumfed.org/libdocs/Misc/Arg6_Present_Udo_Steiner_En.pdf.

[20] *See* Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10 J. OF DEMOCRACY 19, 21-22 (1999). *See generally* JUAN JOSÉ LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE (1996); THE POLITICS OF CONSTITUTIONAL CHANGE IN INDUSTRIAL NATIONS: REDESIGNING THE STATE (Keith Banting & Richard Simeon eds., 1986). A further distinction between the administrative federalism of Germany and the legislative one of Spain and, increasingly, of Italy should also be acknowledged. *See generally* Gian Franco Cartei & Vincenzo Ferraro, *Reform of the Fifth Title of the Italian Constitution: A First Step Towards a Federal System?*, 8 EUR. PUB. L. 445 (2007); Arthur B. Gunlicks, *German Federalism and Recent Reform Efforts*, 6 GERMAN L.J. 1283 (2005); Jörn Ipsen, *Die Kompetenzverteilung zwischen Bund und Ländern nach der Föderalismusnovelle*, *in* NEUE JURISTISCHE WOCHENSCHRIFT 2801 (2006); Luis Ortega, *The Decentralization Alternatives on the Spanish Constitutional System*, 10 EUR. PUB. L. 469 (2009).

[21] *See generally* EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, FEDERAL AND REGIONAL STATES (1997) [hereinafter Federal and Regional States].

[22] *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, Art. 70 (Ger.).

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autonomy for each of the Autonomous Communities detail further the regional competences.[23] Consequently, in this plurilegislative space,[24] these bilateral central-regional agreements have rendered Spain a leading exponent of an "asymmetric" quasi-federal state.[25] In recent times, Italy has itself embarked on a process of decentralization but, despite increasing the administrative, financial and legislative competences of its regions,[26] it can still be maintained that, at least constitutionally, residual power still rests with the center.[27]

Consequently, constitutional review of the residual power clause generates different consequences for the process of (de)centralization when it occurs in a "coming-together" or in a "holding-together" federation: in Germany, a wide reading of the residual powers expands the powers of the regions (decentralization), while the opposite is true in Spain and Italy (centralization).[28] Thus, despite the evident neutrality of the respective constitutional court, its interpretations can have differing effects on the federal bargain: judges exercising constitutional review are thus evidently alert to the putative impacts of their rulings on that bargain, whether they be constitutional, social and/or financial.

C. An Interplay of Equality and Federalism in Constitutional Adjudication

The principle of equality among citizens exhibits a certain tension with that of federalism. Unlike a unitary state,[29] federal structures allow the entities that are integrated within the federation to formulate their own rules and policies in their jurisdiction, leaving other matters in the hands of the central government; this causes a diversity of legal systems that are in conflict with the strict legal equality among the citizens. In other words, "federalism and rights are necessarily at odds, for federalism countenances particularism and diversity, while the protection of rights seems to require universal standards and

[23] *See* C.E., B.O.E. Art. 148–49 (Spain).

[24] *See* Pilar Domínguez Lozano, *Internal Conflicts and "Interregional Law" in the Spanish Legal System*, 5 SPANISH YEARBOOK OF INT'L L. 43, 44–48 (1997).

[25] *See generally* Robert Agranoff & Juan Antonio Ramos Gallarin, *Toward Federal Democracy in Spain: An Examination of Intergovernmental Relations*, 27 PUBLIUS 1 (1997); Michael Keating, *What's Wrong with Asymmetrical Government?*, 8 REG'L & FED. STUDIES 195 (1998).

[26] *See generally* Gian Franco Cartei, *Devolution and the Constitution: The Italian Perspective*, 10 EUR. PUB. L. 33 (2004).

[27] *See generally* Art. 15 COSTITUZIONE [COST.] (It.).

[28] *See* Wilfried Swenden, *Is the European Union in Need of a Competence Catalogue? Insights from Comparative Federalism*, 42 J. OF COMMON MKT. STUD. 371, 377 (2004).

[29] *See* José Woehrling, *Le príncipe d'égalité, la système fédéral canadien et le caractère distinct du Québec*, *in* QUÉBEC-COMMUNAUTÉ FRANÇAISE DE BELGIQUE: AUTONOMIE ET SPÉCIFICITÉ DANS LE CADRE D'UN SYSTÈME FÉDÉRAL 119, 122 (Pierre Patenaude ed., 1991).

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uniform treatment."[30] From a historical perspective, the social and political evolution in the nineteenth century gave rise to the predominance of a political culture of universalization of rights that has tended towards a homogenization of citizen status within the state as a whole, in spite of its having a federal or quasi-federal structure.[31]

Such a tendency has been rendered explicit through the adoption of rights charters that are applicable to all citizens, independent of territory, and that are generally interpreted, ultimately, by a single judicial body in the form of a constitutional court.[32] It is evident then, that this has led to the progressive reduction of the disparity that existed in the original federal systems and has produced, at the same time, a tendency towards uniformity— though not always towards centralization.[33] Nevertheless, "federal systems have shown themselves more tolerant of legal diversity than unitary states have and have thereby made it possible to balance their citizens' wishes to be simultaneously different and equal."[34]

Federal constitutional courts are required to define "a shared conception of federal citizenship and multilevel self-government."[35] But is the court's understanding of the principle of equality immutable in the federal context? The response appears to be in the negative, because "[t]his conception can accommodate persistent asymmetries of national identities, but it requires a fairly symmetric baseline for federal representation and the allocation of powers."[36] It consequently appears to be the case that the constitutional court is required to reconstruct its notion of "equality between citizens" on a case-by-case basis when balancing this principle against the more precise notion of "federalism" as detailed in the constitution, special laws and ordinary statutes.

In her study, González Pascual's case examples and related arguments aid an understanding of the actual work of the constitutional courts in maintaining the legitimacy

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[30] Ellis Katz & George Alan Tarr, *Does Federalism Promote or Undermine Rights?*, *in* FEDERALISM AND RIGHTS ix, x (Ellis Katz & George Alan Tarr eds., 1996).

[31] *See* Enric Fossas, *National Plurality and Equality*, *in* DEMOCRACY AND NATIONAL PLURALISM 63, 76 (Ferran Requejo ed., 2001).

[32] *See id.*

[33] *Cf*. the common interpretation of the German Basic Law rights chapter by the Federal Constitutional Court and the constitutional courts of the Länder. *See* Steiner, *supra* note 19, at 15–19.

[34] Fossas, *supra* note 31, at 80.

[35] Rainer Bauböck, *United in Misunderstanding? Asymmetry in Multinational Federations 2* (Austrian Acad. of Sciences, Working Paper No.26, 2002), *available at* http://eif.univie.ac.at/downloads/workingpapers/IWE-Papers/WP26.pdf.

[36] *Id.*

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of their decision-making authority against a fluctuating federal landscape. Nevertheless, from her work, it might be possible to observe that the use of a teleological interpretation of competence norms—as exemplified by the leverage created by the equality principle—necessarily implies a degree of caution as to the possible implications of an extension or reduction of federal power in a particular field. This is due to the dynamic nature of teleological interpretation according to which, in case of doubt, "a legal provision must be interpreted in a way that is coherent with the goals and purposes explicitly or implicitly established by a rule or set of rules of the legal order."[37] In such situations, the judge(s) or court must therefore justify the interpretation from the perspective of its instrumental function in relation to those goals and purposes: removing that means of interpretation from the confines of domestic constitutional judicial decision-making to the plane of the CJEU will now be addressed.

D. The Transposition of González Pascual's Arguments to the EU Context

I find that the arguments presented by González Pascual on competence norm interpretation also resonate within the context of the European Union. Indeed, it has already been remarked that the interpretative techniques of EU law are significantly nearer to constitutional interpretation than to treaty interpretation,[38] with the Treaty provisions being interpreted as "the constitutional charter" of the Union.[39] Nevertheless, constitutions determine the division of competences rather more clearly than the Treaties which formulate a project, *viz*., "an ever closer union of the peoples of Europe," the main objective of which is integration and with it an implicit change in the constitutional and legal relationship of the Member States *inter se*.[40]

Under the founding Treaties of the Communities, there was in fact no distinction made between the categories of national and of European competences. Instead, specific Treaty Articles provided the necessary legal bases for particular Community policies.[41] In the absence of the categorization of competence attribution, two competing theories were

[37]Giulio Itzcovich, *The Interpretation of Community Law by the European Court of Justice*, 10 GERMAN L.J. 537, 555 (2009).

[38]*See id.* at 557.

[39]*See* Parti écologiste Les Verts v. European Parliament, CJEU Case 294/83, 1986 E.C.R. 1339, para. 23; Re Draft Treaty on a European Econ. Area, CJEU Opinion 1/91, 1991 E.C.R. I-6079, para 20; Kadi v. Council and Comm'n, CJEU Joined Cases C-402/05 P and C-415/05 P, 2008 E.C.R. I-6351, para. 81.

[40] *See* Itzcovich, *supra* note 37, at 558.

[41] *See* Jean Victor Louis, *Quelques réflexions sur la répartition des compétences entre la Communauté européenne et ses Etats membres*, 2 J. EUR. INTEGRATION, 355, 357 (1979).

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proffered,[42] *viz*., that all the competences mentioned in the Treaties were exclusive, as the Member States had fully transferred their powers to the Communities or that all the Communities' powers were shared competences, and the Member States had merely renounced their exclusive right to act in such designated fields. Between these two poles, the constitutional development of the Communities occurred, with different categories of Community competence being discovered in the 1970s.[43]

The Treaty on the Functioning of the European Union (TFEU) now contains express rules on vertical competence allocation with the Member States (as "masters of the Treaty"[44]) conferring on the European Union its power to act with competences of varying degrees.[45] Outside its exclusive competence under Art. 3 TFEU, the Union is bound by the principle of subsidiarity as defined under Art. 5(3) of the Treaty on European Union (TEU):

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[46]

Via the terms of this provision, it has accordingly been argued that subsidiarity is either a political or a judicial safeguard of federalism in the European Union.[47]

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[42]*See* Antonio Tizzano, *The Powers of the Community*, *in* THIRTY YEARS OF COMMUNITY LAW 43, 63–7 (European Commission ed., 1981).

[43]*See* ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW 157 *et seq*. (2009).

[44]*German Federal Constitutional Court in the Maastricht Treaty decision, 12 October 1993*, 1 COMMON MKT. L. REPORTS 57, 91 (1994).

[45] In such situations, the EU's competence to act may be either exclusive (Art. 3 TFEU), shared (Art. 4 TFEU), co-ordinating (Arts. 2 and 5 TFEU) or "complementary" (Art. 6 TFEU). *See* Consolidated Version of the Treaty on the Functioning of the European Union, Sep. 5, 2008. For a pre-Lisbon discussion of this field, *see generally* Thomas Von Dannwitz, *Vertikale Kompetenzkontrolle in föderalen Systemen–Rechtsvergleichende und rechtsdogmatische Überlegungen zur vertikalen Abgrenzung von Legislativkompetenzen in der Europäischen Union*, 131 ARCHIV DES ÖFFENTLICHEN RECHTS 510 (2006).

[46] For various criticisms of the principle, *see, e.g.*, George Berman, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994); CHRISTIAN CALLIESS, SUBSIDIARITÄTS- UND SOLIDARITÄTSPRINZIP IN DER EUROPÄISCHEN UNION (1999); ANTONIO ESTELLA, THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE (2002); ALLAN FRANCIS TATHAM, EC LAW IN PRACTICE: A CASE-STUDY APPROACH 36–41 (2006). Its application is the subject of further Treaty definition under Protocol (No. 2) "On the Application of the Principles of Subsidiarity and Proportionality" to the TEU and TFEU.

[47]*See* ROBERT SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW 177–86 (2012).

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Still, in whichever way the competences and the exercise of them are conceived, the European Union has long experienced a federalizing effect vis-à-vis its relations with the Member States, as in any federal or quasi-federal system.[48] This is due not to the evolution of competence categories determined in Treaty provisions but, rather in large measure, to the case law of the CJEU which has extensively used a teleological interpretative approach to expand and deepen the legal competence basis in the process of European integration.[49] Confirmation of the CJEU's teleological approach to interpretation of EU primary and secondary law was expressed in *Srl CILFIT v. Ministero della Sanità* when it observed: "[E]very provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."[50] Such method of interpretation thus provides the CJEU with the perfect way of evolving the original rubric of the Treaties founding the Communities, with their purely economic objectives, into a broader system of new values and aims in the Union that affect, *inter alia*, social issues and the protection of human rights.[51]

In this sense, transposing González Pascual's arguments into the Union legal order requires recognition, in the first place, of this expansive nature of CJEU reasoning in securing, *e.g.*, the rights of persons (basically individuals and companies) through the economic freedom rights guaranteed under the Treaties at the European level, without discrimination on the grounds of nationality set out generally under Art. 18 TFEU as against, in the second place, a restrictive interpretation on their possible limitations at national level on the grounds of public policy, public security, public health and public sector employment.[52] Underlying this calibration between federal-regional rules is the central and fundamental theme of protection of the guaranteed rights on the grounds of the principle of non-discrimination or equal treatment, based on the nationality of the person seeking to secure the right directly before domestic courts.[53]

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[48] *See generally* Manfred Zuleeg, *Die föderativen Grundsätze der Europäischen Union*, *in* NEUE JURISTISCHE WOCHENSCHRIFT 2846 (2000).

[49] For a detailed analysis, see Gerard Conway, *Conflicts of Competence Norms in EU law and the Reasoning of the ECJ*, 11 GERMAN L.J. 966 (2010). *See generally* PAUL CRAIG, EU ADMINISTRATIVE LAW 367–397 (2nd ed. 2012); Armin von Bogdandy & Jürgen Bast, *The Union's Powers: A Question of Competence: The Vertical Order of Competences and Proposals for its Reform*, 38 COMMON MKT. L. REV. 227 (2002).

[50] Srl CILFIT v. Ministero della Sanità, CJEU Case 283/81, 1982 E.C.R. I-3415, 3430.

[51] *See* Oreste Pollicino, *Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-Restraint*, 5 GERMAN L.J. 283, 289 (2004).

[52] The public policy, public security and public health exceptions are to be found in Arts. 45(3), 52(1) and 62 TFEU; and the public service exception in Arts. 45(4), 51 and 62 TFEU.

[53] *See* TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 118–32 (2nd ed. 2006).

In its initial centralization of constitutional review, the CJEU was able to expand the competence of the Community at the expense of the Member States through strategic use of the Art. 267 TFEU preliminary reference procedure. Combining the creation of the principle of direct effect, and extending its potential use throughout the Treaties and secondary EU legislation, it secured an instrument under its sole purview that allowed it to determine the contours of the federal-state bargain in the Community, while simultaneously engaging the active commitment of lower national courts and later rendering them *de facto* constitutional courts in an EC-wide and diffuse constellation of review tribunals bound to serve the interests of European law priority application.[54]

Enforcement of the principle of non-discrimination or equal treatment between nationals of the Member States allowed the CJEU to use this principle as a lever in order to intervene, indirectly, at the domestic court level to protect EU-derived rights, such intervention being overwhelmingly in favor of the priority of "federal" law over conflicting "state" law. Under the rubric of ensuring the proper functioning of the common market, the CJEU was able to secure protection of non-discrimination in the treatment of workers and their families, as well as of companies, across the market. The introduction of the concept of EU citizenship proved an irresistible draw for the CJEU and, in a series of cases starting with *Martínez Sala*,[55] it recognized that this citizenship was "destined to be the fundamental status of nationals of the Member States,"[56] thereby weakening the link between free movement rights and economic status.[57] For Tridimas, the ruling in *Martínez Sala* signaled the importance of EU citizenship "as a new legal status from which autonomous rights could be derived beyond the rights flowing from free movement."[58]

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[54]*See generally*, Amministrazione delle Finanze dello Stato v. Simmenthal SpA (Simmenthal No. 2), CJEU Case 106/77 1978 E.C.R. I-629, and the loyalty clause present in the Treaties since the beginning and, since the Lisbon Treaty amendments, numbered as Art. 4(3) TEU, by means of which the CJEU emphasizes the duty of co-operation, *inter alia*, with national authorities including the courts, in the enforcement of EU law. *See also* Luxembourg v. Parliament, CJEU Case 230/81, 1983 E.C.R. I-255, paras. 35 *et seq*.

[55]*See generally* Martínez Sala v. Freistaat Bayern, CJEU Case C-85/96, 1998 E.C.R. I-2691; Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, CJEU Case C-184/99, 2001 E.C.R. I-6193 [hereinafter Grzelczyk]; Baumbast and R. v. Sec'y of State for the Home Dep't, CJEU Case C-413/99, 2002 E.C.R. I-7091 [hereinafter Baumbast]; D'Hoop v. Office national de l'emploi, CJEU Case C-224/98, 2002 E.C.R. I-6191; Pusa v. Osuuspankkien Keskinäinen Vakuutusyhtiö, CJEU Case C-224/02, 2004 E.C.R. I-5763; Zhu and Chen v. Sec'y of State for the Home Dep't, CJEU Case C-200/02, 2004 E.C.R. I-9925; Garcia Avello v. Belgian State, CJEU Case C-148/02, 2003 E.C.R. I-11613; Schempp v. Finanzamt München V, CJEU Case C-403/03, 2005 E.C.R. I-6421; Regina, on the application of Bidar v. London Borough of Ealing, CJEU Case C-209/03, 2005 E.C.R. I-2119; Carpenter v. Sec'y of State for the Home Dep't, CJEU Case C-60/00, 2002 E.C.R. I-6279. But the CJEU recognizes that there are limits to its interpretative reach. *See generally* Sinclair Collis Ltd. v. Comm'rs of Customs & Excise, CJEU Case C-275/01, 2003 E.C.R. I-5965; Office national de l'emploi v. Ioannidis, CJEU Case C-258/04, 2005 E.C.R. I-8275.

[56] Grzelczyk*, supra* note 55, at para. 31; Baumbast, *supra* note 55, at para. 82.

[57] Now accentuated by the introduction of the EC Directive 2004/38, 2004 O.J. L158/77, as corrected.

[58]TRIDIMAS, *supra* note 53, at 133.

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The CJEU had accordingly performed "a quantum leap" in making the transition from Art. 18 TFEU as a tool of integration, to Art. 18 TFEU as an instrument of citizen empowerment and solidarity: a potent idea then of a putative commonality of citizens in a European Union, arguably on a par with the citizens of a federal or quasi-federal state, even with the express Treaty recognition of Union citizenship as a subsidiary concept.[59]

Nevertheless, while the CJEU pursued its expansive competence-building policy in the Community through teleological interpretation, it was still able to recognize—in certain instances—that national (constitutional) requirements could trump or pre-empt European law. Thus the fluidity between exclusive and shared competences did allow for justifiable national limits beyond those identified under the relevant Treaty provisions where national constitutional conditions demanded. Consequently, in *Commission v. Luxembourg*,[60] the CJEU was able to acknowledge that the protection of national identities of Member States was a legitimate objective that the EU legal order had to respect; and in other cases, the CJEU also took into consideration concerns of national identity.[61]

Against the backdrop of Arts. 4(2) and 6 TEU, and recognizing the need to respect the equality between and the national identities of the Member States together with CJEU case-law underlining the importance of co-operation with national courts,[62] it would appear that a series of CJEU rulings has indicated an evolving respect for the specific constitutional identity of the Member States.[63] Within the federalizing structure of the Union, the CJEU is open to balancing the economic freedoms and the equal treatment of those claiming them throughout the Union with its recognition of the need to protect such rights against the individuality of Member State constitutions. For example, in the *Omega* case,[64] the CJEU balanced the right to

[59] As set out in TFEU Art. 20(1). The intertwining of non-discrimination (equality) and citizenship is confirmed by their appearance together in Part Two of the TFEU.

[60] *See* Commission v. Luxembourg, CJEU Case C-473/93, 1996 E.C.R. I-3207, para. 35.

[61] *See generally* Commission v. Greece, CJEU Case 147/86,1988 E.C.R. 1637; Groener v. Minister for Educ., CJEU Case 379/87, 1989 E.C.R. 3967 [hereinafter Groener]; Soc'y for the Protection of the Unborn Child v. Grogan, CJEU Case C-159/90, 1991 E.C.R. I-4719.

[62] *See* Unión de Pequeños Agricultores v. Council, CJEU Case C-50/00 P, 2002 E.C.R. I-6677, para. 42; Segi v. Council, CJEU Case C-355/04 P, 2007 E.C.R. I-1657, para. 38; Unibet (London) Ltd. v. Justitiekanslern, CJEU Case C-432/05, 2007 E.C.R. I-2271, para. 38 ("Under the principle of cooperation laid down in Article 10 EC [now Art. 4(3) TEU], it is for the Member States to ensure judicial protection of an individual's rights under Community law.").

[63] The present author will not be presenting an extensive and detailed analysis of all the relevant CJEU case-law related to this subject. For such analysis, the reader is directed to Asteris Pliakos, *Le contrôle de constitutionnalité et le droit de l'Union européenne: la réaffirmation du principe de primauté*, 46 CAHIERS DE DROIT EUROPÉEN 487 (2010); Olivier Peiffert, *L'encadrement des règles constitutionnelles par le droit de l'Union européenne*, 47 CAHIERS DE DROIT EUROPÉEN 433 (2011); Ingolf Pernice, *Der Schutz nationaler Identität in der Europäischen Union*, 136 ARCHIV DES ÖFFENTLICHEN RECHTS 185, 207–20 (2011).

[64] *See generally* Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, CJEU Case C-36/02, 2004 E.C.R. I-9609 [hereinafter Omega].

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human dignity (under German Basic Law, Art. 1) with the freedom to provide services when it held that: "Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services."[65]

Furthermore, in *Laval*,[66] the CJEU made an express reference to the importance of the right to collective action enshrined in Art. 17 of the Swedish Constitution, and pointed out that exercising the right to take collective action "for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty."[67] In addition, the CJEU has seemingly given discretion to the national courts to apply the proportionality test (although retaining the ability to provide guidance to the domestic judge), saying in *Viking Line*: "[I]t is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements [of proportionality]."[68]

In *Sayn-Wittgenstein*, in which the complainant argued that an Austrian constitutional rule prohibiting use of noble titles infringed her free movement rights, the CJEU referred for the first time to Art. 4(2) TEU: "in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic."[69] The CJEU in *Sayn-Wittgenstein* appears impliedly to have used Art. 4(2) TEU to support the justification of the restriction on EU rights caused by the Austrian

[65] *Id.* at para. 35.

[66] *See* Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, CJEU Case C-341/05, 2007 E.C.R. I-11767, para. 92.

[67] *Id.* at para. 103. In support of this proposition, the CJEU referred to Criminal proceedings against Arblade, CJEU Joined Cases C-369/96 and C-376/96, 1999 E.C.R. I-8453, para. 36; Mazzoleni and Inter Surveillance Assistance SARL, CJEU Case C-165/98, 2001 E.C.R. I-2189, para. 27; Finalarte v. Urlaubs- und Lohnausgleichskasse der Bauwirtschaft, CJEU Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, 2001 E.C.R. I-7831, para. 33; Int'l Transp. Workers' Fed'n v. Viking Line ABP, CJEU Case C-438/05, 2007 E.C.R. I-10779, para. 77 [hereinafter Viking Line].

[68] *Viking Line*, *supra* note 67, at para. 85.

[69] Sayn-Wittgenstein v. Landeshauptmann von Wien, CJEU Case C-208/09, 2010 E.C.R. I-13693, para. 96 [hereinafter Sayn-Wittgenstein]. This approach underlines the point, when referring to the nature of the essential core of sovereignty or the constitutional identity of Member States, of which the form of government–whether monarchy or republic–constitutes part of such core or identity.

constitutional prohibition on noble titles.[70] Through *Runevič-Vardya*, the CJEU extended the concept of national (constitutional) identity under Art. 4(2) TEU to cover protection of the official language of a Member State being a legitimate aim to restrict EU free movement rights.[71]

The individual *mentalité* of each Member State constitution received support from the CJEU—echoing its earlier ruling in *Omega*[72]—when it stated in *Sayn-Wittgenstein* that: "[T]he specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty."[73] Although this would appear to mean that national (constitutional) identity as a ground for justification might be invoked with respect to specific national interests, even if they are not shared among the majority of Member States, this does not imply a blanket acceptance of all national constitutional provisions as furnishing the appropriate basis for justifiable restrictions on the exercise of EU law rights.[74]

A coming together on a shared understanding of Member States' constitutional identities has also been heralded by various domestic constitutional tribunals within the context of the review of the 2003 Constitutional Treaty and the 2009 Lisbon Treaty.[75] Sabel and Gerstenberg have even argued that the potential clash of jurisdictions within the EU is actually being resolved by the formation of a "novel order of coordinate constitutionalism" in which, *inter alia*, the CJEU and national (constitutional) courts agree to defer to one another's decisions, provided these decisions respect mutually agreed essentials.[76]

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[70] Thus amounting to a subsidiary argument in the understanding of Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417, 1424 (2011).

[71] *See* Runevič-Vardyn v. Vilniaus miesto savivaldybės administracija, CJEU Case C-391/09, 2011 E.C.R. I-3787, para. 86. As the CJEU had previously done in Groener, *supra* note 61, at para. 18, when it considered that the maintenance and promotion of the Irish language could be qualified as an "expression of national identity and culture," as contended by the Irish Government.

[72] *See* Omega, *supra* note 64, at para. 31.

[73] Sayn-Wittgenstein, *supra* note 69, at para. 87.

[74] *See* Hanneke van Eijken*, Case C-391/09,* Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija *and Others, Judgment of the Court (Second Chamber) of 12 May 2011,* 49 COMMON MKT. L. REV. 809, 820 (2012).

[75] *See* Christoph Grabenwarter, *National Constitutional Law Relating to the European Union*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 83, 85–91, 116–23 (Armin von Bogdandy & Jürgen Bast eds., 2010).

[76] *See* Charles F. Sabel & Oliver Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, 16 EUR. L.J. 511, 512 (2010).

E. Concluding Remarks

Instead of providing a conclusion *strictu senso*, I would, rather, prefer to end this Comment with a few further thoughts with respect to the direction of future research on this fascinating topic.

What may be of further interest in examining the behavior and responses of constitutional courts is the extent to which they are (pre-)dominant in their field: indeed, all three courts in González Pascual's study have the jurisdiction to rule on the failure to observe the jurisdictional allocations between federal and constituent members, but what is not necessarily factored in is the existence in Germany of a constitutional court for each *Land* (with Schleswig-Holstein finally establishing one in 2008).[77] Moreover, the principle of co-operative constitutionalism may also be found in Italy, but does this also ring true in a similar way in Spain?[78]

I can envisage this work developing further along the lines of examining the way in which other constitutional courts operate by using an equality of citizens approach in delimiting boundaries between "federal" and "constituent members"—*e.g.*, Belgium and the United Kingdom—and perhaps further afield to consider Canada and Australia. Is there a difference between a common law and a civil law approach to the way courts intervene and rule in such matters? How is that played out? As an adjunct to this point, the research might usefully be extended to examine competence norm interpretation beyond the article's focused area of the equality-federalism discourse, again within a comparative context. For example, such research is already well established in the field of the trade-federalism discourse wherein expansive constitutional court interpretations of federal trade powers—*e.g.*, the Commerce Clause of the US Constitution, and the trade and commerce powers in Canada and Australia[79]—have led to the recalibration of the federal-state bargain.

Lastly, an EU dimension to these norm interpretations and how they actually apply in the Union context might reveal points of interest in the developing field of competences between the Member States and the European Union. Overall, however, González Pascual

[77]*See generally* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. I, Art. 93 (Ger.); Art. 134 COSTITUZIONE [COST.](It.); C.E., B.O.E. Art. 161 (Spain).

[78]*See* Federal and Regional States, *supra* note 21, at 39–42.

[79]*See* U.S. CONST. art. I, § 8, cl. 3; Constitution Act, 1867, 30 & 31 10 Vict., c. 91(2) (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.); and AUSTRALIAN CONSTITUTION s 51(i). *See, e.g.*, Lino Graglia, *United States v Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996); Robert J. Pushaw, *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185 (2006); Greg Taylor, *The Commerce Clause–Commonwealth Comparisons*, 24 BOSTON COMP. INT'L AND COMP. L. REV. 235 (2001).

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has made a measured and useful contribution to the evolution of the present debate that is to be welcomed, and which will hopefully engender further consideration of the area.

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