

U.S. FEDERALISM AND SPANISH AUTONOMY – LESSONS FROM U.S. FEDERALISM FOR THE EXTERNAL ACTIVITIES OF SUBSTATE ENTITIES

Antonio. F. PÉREZ*

INTRODUCTION

In recent years, the international system has suffered from the influence of two powerful, and perhaps related, forces, one centripetal and the other centrifugal. The most notable example of the centripetal forces is that European countries have placed themselves on the path towards broader economic, and perhaps political, unification, which according to some will involve the construction of a new legal order comparable to the federation of the United States.¹ At the same time, the United States is extending its own

* Associate Professor, Catholic University of America, The Columbus School of Law; A.B., Harvard, 1982; J.D., Columbia, 1985. I thank the law and sociology faculties of the University of A Coruña for their hospitality during my stay at the University, during which this article was written. The article is based in part on the author's presentation to the law faculty of comparative perspectives on federalism and autonomy and, therefore, reflects an initial effort to explain threshold similarities and differences between the two doctrines in the context of issues of concern to international lawyers. I especially thank Professors Gloria Moran Garcia and F. Javier Sanz Larruga for their support during my sabbatical visit to Spain, and I would like to acknowledge the courteous invitation of the editor of this journal, Dr. Romualdo Bermejo Garcia, to submit this article – which I hope may help add to the understanding among U.S. and Spanish international lawyers of the role their respective constitutional systems play in international relations between our two great countries. Spanish quotes are translated into English for English only readers, but the original Spanish version is made available in each case in the footnotes.

1. See Manfred ZULEEG: *What Holds A Nation Together?: Cohesion and Democracy in the United States of America and in the European Union*, 45 AM. J. COMP. L. 505 (Summer 1997); Ernst BENDA: *The Impact of Supranational Institutions on Constitutional Law and Doctrine. The European Experience*, 42 ST.

sphere of free trade to include all of North America through NAFTA and, if President Bush were to have his wishes, to include all commerce throughout the Americas from Alaska to Tierra del Fuego.² In addition, the proliferation of bilateral treaties protecting investment has supported the phenomenon of regional free trade pacts.³ One has to acknowledge, nonetheless, that these measures toward economic integration have developed under a new international economic regime created by the World Trade Organization (WTO) and a new international political and security regime established after the termination of the Cold War with the resurgence of the authority of the Security Council of the United Nations (UN) -- although both of these new realities have been placed in doubt in recent years with the failure of the WTO's Seattle Ministerial and with the disagreement between the United States and Russia over Kosovo which precluded advance Security Council authorization for the North Atlantic Treaty Organization (NATO) intervention. Setting these doubts aside, there is no question that international peace and security during the last decade has enabled the international community now to emphasize institution building to increase economic commerce and competition throughout the vast majority of states and most of all in the United States and European Union (EU).

In the United States, as much as in the Member States of the European Union, these centripetal forces have been accompanied by the internal transfer of competence over many of these subject matters; in the case of the United States, from the states to the federal government and, in the case of the European Union, from the regions to the State Members and from the State Members to the European Community, and it was precisely these competences that in the past were considered powers of the state or the substate entity rather than the supranational or treaty community. The comparison between the U.S. and EU is not exact; nonetheless, both have suffered from internal tension caused by the centralization of authority and in

LOUIS U.L.J. 521 (Spring 1998); Rudolf DOLZER: *Subsidiarity: Toward a New Balance Among the European Community and the Member States?*, 42 ST. LOUIS U.L.J. 521 (Spring 1998). This literature originates in the seminal work of Eric STEIN: *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981); J.H.H. WEILER: *The Transformation of Europe*, 100 YALE L. J. 2403 (1991); and George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

2. See "Trade in the Americas", *The Economist*, April 21, 2001, 19-22.

3. See Kenneth VANDEVELDE: "U.S. Bilateral Investment Treaties: The Second Wave," 14 MICH. J. INT'L L. 621 (1993).

both systems the sub-state entities have launched a counterattack against the centripetal forces which, together with anti-globalization ideology, constitute a new centrifugal force in the international system. At least it is possible to argue that in both systems the growth of theories supporting centrifugal tendencies in the relationship between the central state and sub-state entities, especially in relation to the external activities of sub-state entities, has been related to the widening and deepening of the international economic communities in which both the U.S. and EU participate. It is possible that, as predicted by theory of law and economics, given that sub-state entities can now more readily obtain the benefits of free trade and international security through supranational and international organizations, it has become more efficient to permit decentralization of non-economic authority so that the advantages of local governance can be exploited by transferring authority from the center to the periphery, suggesting that the optimal size of states has reduced through economic integration.⁴

This article will focus on a narrow aspect of the larger question of the effect of international economic integration and increased international security on the national legal order of complex states, such as the United States and Spain. At first glance, the United States and Spain have rather different systems of constitutional law concerning the relationship between the center and periphery. Nonetheless, as this article will argue, it is revealing to explore the recent responses of theories as different as U.S. federalism and Spain's system of autonomous communities to the new international environment in the crucial area of the external activities of sub-state entities. In this way, one can begin to understand the extent to which centripetal and centrifugal forces described above may influence constitutional systems generally.

This article therefore will begin with a comparison of common law and the continental system of legal science, which in each constitutional system operate as a lens through which one can study the substance of constitutional and international law (and, in the case of Spain, also supranational law). These conceptual lenses are necessary for readers or students of both systems to translate the opinions of the U.S. Supreme Court and Spain's Constitutional

4. See Alberto ALESINA & Enrico SPOLAORE: *On the Number and Size of Nations* (National Bureau of Economic Research Working Paper No. 5050, 1995) (suggesting that the principal benefit of the size of a state is its ability to produce public goods, such as free trade, and that when these goods are produced by means of international or supranational law the optimal size of a state should decrease.

Tribunal into their respective legal vocabularies. Once these concepts are explicated, it will be possible to analyze the similarities and differences between federalism's organizing concept of dual sovereignty and Spanish autonomy's organizing concept, in my view, of a version of subsidiarity. Thereafter, this article will apply these concepts to the jurisprudence of the U.S. Supreme Court and Spain's Constitutional Tribunal concerning the external activities of sub-state entities, and then it will conclude with some brief comments concerning the significance of these constitutional developments for the state of international law and the comparative study of constitutional law, in particular the relative value of constitutional law methodologies grounded in common law and civil law in responding to international system change.

I. AMERICAN CONSTITUTIONAL COMMON LAW AND SPANISH CONSTITUTIONAL LAW AS SCIENTIFIC DOCTRINE

It is difficult to understand the opinions of tribunals when one does not know the methodological and philosophical premises upon which they are based. Therefore, I will attempt in this section to explicate the assumptions of the U.S. system and, as much as I can having been "trained" in Anglo-American law, the continental system.

A. *The Case-law Method and U.S. Constitutional Law*

It is appropriate to say "trained" in the Anglo-American system because, according to Richard Posner, the famous judge of the U.S. Federal Court of Appeals for the Seventh Circuit, and founder of the Law & Economics approach while a professor at the University of Chicago, the relation between American law teachers and their students is very much like the relationship between a coach or "trainer" of a team sport and the members of the team⁵.

5. See Richard A. POSNER: THE PROBLEMS OF JURISPRUDENCE 99, n. 49 (1990). Posner achieved fame for his studies concerning how common law rules could be explained by means of economic science. And he advocated the judicial use of economic concepts to formulate opinions and legislative use of economic analysis to write statutes. See generally Richard A. POSNER: *Introduction to Law and Economics* (4th ed. 1992).

From this one can deduce that North American legal method is, more than anything else, anti-theoretical and pragmatic, as much in its teaching as in its conceptualization. This concept of law is rooted in U.S. historical experience in which judges produced the vast majority of legal rules and manifests itself in modern times through the revolution in the theory of American law effected in the first decades of the 20th century by the school of "Legal Realism"(which, by the way, has nothing to do with philosophical "Realism" of the Middle Ages, but rather finds its roots in Realism's rival, philosophical Nominalism, insofar as Legal Realism maintains that no system of rules exists *a priori* and, rather, that judges and other legislators create rules through their decisions).

As to the historic function of the judge, it is important to begin our analysis with the fundamental point that judges suffer from limited democratic legitimacy. Accordingly, in the Anglo-American system, judges needed to maintain the illusion that in deciding concrete cases they were not creating new rules but were rather "finding" them in a pre-established system of rules. And what constitutes this system of rules? Not in the doctrine of professors, nor even the doctrine articulated in judicial opinions, but rather in precisely what these opinions hold. The concept through which this idea is expressed, the *holding*, consists in the *ratio decidendi* of the opinion. This means that at the moment an opinion is issued, one really does not know what it means. What a case holds is not just the reasons the judge gives for the judgment, nor the facts of the case. Rather, it is the conjunction of the reasons and the facts. But as we all know, among all the rationales and facts included in a judicial opinion it is difficult to know which of these reasons and facts were by the judge (or by the multiple judges writing opinions that together form a majority) deemed logically necessary to explain the judgment; this is especially true when judges do not make clear which facts are controlling and when they utilize multiple formulas in describing both the facts and the rationales at various levels of generality and abstraction, thus placing in doubt which of these various levels functions as the holding of the opinion. Furthermore, doubt over the holding of a case is exacerbated when judges produce a series of opinions on a particular question, which results in a chain of holdings. Insofar as doubt as to the meaning of each link in that chain complicates the task of interpreting the other links, the shape of chain as a whole is questionable, which in turn further complicates the task of interpreting individual precedents, although a kind of interpretive equilibrium might be achievable in many cases.

Some even argue that, because what is considered a “precedent” is neither more nor less than what a case holds, one can say that *strictu sensu* there are no precedents, because every new case has some factual difference from the supposed line of precedents.⁶ Taking this approach, it is thought that judges and legislators, as well as lawyers who advocate for their clients before judges and legislators, in reality must resolve legal doubts by means of making two types of arguments and decisions: first, they must establish a hierarchy of policies relevant to the decision, including ironically taking into account the policy relating to the functioning of the legal system of the impact a decision will have as a precedent on the policies involved; second, they must analyze the effectiveness of each possible holding in advancing the relevant policies.⁷ Accordingly, American law professors, whether from the neo-Marxist school of “critical legal studies” or the allegedly right-wing school of “law & economics,” agree that what a case, and even a line of cases, holds cannot be explicated through a scientific method that would be capable of giving one and only one determinate solution to fact patterns that present themselves before judges.⁸

How does this conception of American case law affect the development of the work of the Supreme Court of the United States? The place to begin is that the very jurisdiction of the Supreme Court, as well as the rationale for its power to declare unconstitutional federal statutes and other governmental acts, is based on case law methodology. The justification advanced in the seminal case of *Marbury v. Madison* for the Supreme Court’s assertion of the power of constitutional control was precisely that the United States had established a written constitution expressing the will of the people and that federal judges, in deciding concrete cases, were merely performing the

6. See Kenneth J. VANDEVELDE: *Thinking Like a Lawyer: An Introduction to Legal Reasoning* 25-108 (1996).

7. See *ibid.*, 74.

8. See POSNER: *op. cit.*, 130 (law & economics); Duncan Kennedy, one of the fathers of critical legal studies is quoted in promotional materials for Vandeveld’s book as saying, “Part I of this book contains the best introduction to legal reasoning that I know of.” The most famous author taking a contrary position, Ronald Dworkin, is widely considered to argue that law functions as a kind of moral philosophy and that the judge, whom he metaphorically names Hercules, can analyze all the elements of the legal system to reach a single solution to any particular problem. See generally TAKING RIGHTS SERIOUSLY (1977) and LAW’S EMPIRE (1986). Undoubtedly, Dworkin’s position reflects the minority view, not only among professors but even more so among practitioners, judges as well as lawyers. Hercules remains a mythological figure in the law of the United States.

function of deciding those cases on the basis of the law expressing the will of the people, including of necessity higher-order law applicable to those concrete case.⁹ More critically, the use of common-law methodology in performing this function was grounded in the specific textual basis found in Article III of the Constitution, which established clearly that the federal judicial power extended only to actual “cases.”¹⁰ This reference to “cases” as the implicit limit of the function of constitutional control of the Supreme and lower federal courts led to the critical decision of the first Chief Justice, ¹¹ John Jay, and his fellow justices of the Supreme Court in 1793 to reject the request of the first president of the United States, George Washington, for an advisory opinion concerning certain questions of public international law emerging out of the French Revolutionary Wars, thus establishing a precedent that federal judicial power did not extend to abstract questions but rather was limited to issues where judicial power in itself was capable of giving a remedy or changing a legal relation.¹² Thus, the textual basis for the Supreme Court’s jurisdiction and constitutional function was understood in *Marbury v. Madison* to make clear that constitutional decision-making by the Court was similar to common-law decision-making of ordinary courts. Accordingly, the Court’s work risked the same uncertainty, but benefited from the same capacity for evolution, as did the common law.

Indeed, one can speak of a “constitutional common law,” not only in the content of constitutional law but also in the very method of constitutional adjudication. In one sense, the Supreme Court is widely believed to be mandated to create new constitutional law by means of a generous interpretation of prior precedents, and this conception has played a major role in the development of the Supreme Court’s jurisprudence for the protection of

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

10. *Constitution of the U.S.*, Article III, section. 2 (“the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority....”).

11. In U.S. practice, the officers of inferior courts are referred to as “judges,” while the judges of the Supreme Court are referred to as “the Justices,” and the presiding officer of the Supreme Court, referred to as the “Chief Justice,” is selected by the president of the United States with the advice and consent of the Senate rather than, as in Spain, by a vote of the other justices. See Vicki C. Jackson & Mark Tushnet, *COMPARATIVE CONSTITUTIONAL LAW* 488-98 (1999).

12. See Lawrence H. TRIBE: *American Constitutional Law* 328 (3rd ed. 2000)(the so-called “Correspondences of the Justices,” Letter of John Jay to George Washington, August 8, 1793)).

human rights, reaching even the point of the Supreme Court's describing itself as the "ultimate interpreter" of the Constitution.¹³ But in another sense, this concept can justify a more restrained approach. Accordingly, various U.S. law professors have advanced the argument that the most appropriate approach for the Supreme Court is to resolve concrete cases by saying the least possible, a view rooted in Chief Justice John Marshall's distinction in *Marbury* between legal and political questions.¹⁴

Related factors also contribute to a culture of restrained constitutional adjudication by the Supreme Court and the lower federal courts. The fact that the justices of the Supreme Court are divided in the vast majority of cases, and these divisions are well known to the public, highlights the contestability of the premises of their constitutional reasoning. Furthermore, the discretion exercised by the justices as to the selection of the cases they will decide permits them to avoid legal issues that in reality require further development of public opinion before judicial pronouncements would receive public acceptance. Indeed, without breaching the constitution, such questions, as much as possible, can be decided by means of political competition in the democratic process. This restrained conception of the U.S. Supreme Court's method of constitutional control thus performs a democratizing function that leaves as many issues as possible open to resolution through the expression of the will of the American people.

Nonetheless, it is undeniable that, when the moment that political development and legal doctrine coincide arrives, the Supreme Court has the capacity, through the common-law method, to re-read its constitutional precedents and to find in them new holdings. The common-law method

13. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (involving the decision of one state of the United States to refuse to follow a precedent of the U.S. Supreme Court in which the Court had declared unconstitutional racial desegregation in state public schools).

14. See Alexander BICKEL: *The Least Dangerous Branch* (1962) (arguing for methods through which the Supreme Court could avoid deciding cases requiring premature analysis of constitutional doctrine). Cass R. Sunstein recently has advanced a similar thesis, although under the theory that law, as such, is an "completely-theorized" system, and therefore should not be extended beyond its normal confines. See Cass R. SUNSTEIN: *General Propositions and Concrete Cases (with special reference to affirmative action and free speech)*, 31 WAKE FOREST L. REV. 369 (1996). In the field of comparative constitutional law, Professor Howard has made similar arguments with respect to the possibility of finding universal laws to aid in the writing of new constitutions for the new democracies of the world, each state in his views being a constitutional world unto itself. See A. DICK HOWARD: *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383 (1996).

permits the Supreme Court to narrow or expand the scope of its precedents when necessary to adapt the constitution to new political forces, as this article will show, especially in interpreting the text and underlying postulates governing the distribution or attribution of competence between the federal government and the states, the doctrine of federalism.¹⁵ This process facilitates the adaptation of the constitution to new realities.

B. *The Continental System and Constitutional Doctrine*

By contrast, the continental system is based on other premises concerning the function of judges and therefore their method of constitutional control, which in theory should result in less flexibility. It would not be necessary to remind a student of continental law of the modern origins of the continental system: in the Napoleonic Code, as a unique source or the manifestation of the sovereignty of the people, or of the origins of that code and the Code of Justinian¹⁶; nor the influence of the conception of law as science developed by German scholars in the 19th century¹⁷; nor of the reality that the vast majority of judges in the continental system are state functionaries and that it was only in this century that European judges acquired the function of constitutional review, and then only the judges of specific constitutional courts.¹⁸ It is clear that the United States does not share in this tradition, neither in the practical organization of the judicial power nor in the conception of law as a social science much like politics, economics or sociology. One can suppose for purposes of discussion, therefore, that the principal methodological difference between Anglo-American and continental systems lies in their very conception of the sources of law.

As noted, Anglo-Saxon law finds its sources primarily in the holdings of cases, while in the continental system sources are found in the general

15. See, *infra*, text accompanying notes 61-67 (analyzing changes in the Supreme Court's jurisprudence for the protection of state sovereignty).

16. See A. FERNÁNDEZ BARRIERO: *La Tradición Romanística en la Cultura Jurídica Europea* 103-110 (1992).

17. See *ibid.*, 111-118.

18. See Vicki C. JACKSON & Mark TUSHNET: *op. cit.*, 456-491.

principles of law¹⁹ (and, in the case of the Constitution, in its “superior values”).²⁰ Jurisprudence in itself has little value and, with few exceptions, does not function as precedent in the same way as common law, where in theory at least a single precedent binds. This gives the doctrine of legal scholars such a major role that students of the law and lawyers in Spain perhaps read academic commentary before they read judicial opinions, while one could say that American students and lawyers even after reading statutes do not believe they know what they require until they have read the opinions interpreting them. It might not be an exaggeration to say that sometimes lawyers do not even read statutes or regulations before researching judicial opinions. Along these lines, the American professor of comparative law, George Fletcher has said that when he was a young student in Europe, he learned from his German teacher that in the continental system “what cases said had less importance than what scholars thought the cases said or, at least, what scholars said the cases said. In that moment I understood the difference between the German and American legal traditions.”²¹ For Fletcher this also meant that in the Anglo-American system, scholars and judges thus have greater liberty to investigate jurisprudence as a source of law in a way that is impossible in the Continental system -- that is, as “a source of experience, drama, and insight.”²² Be that as it may, at the very least we can say that, contrary to the Anglo-American system where cases rule, scholarly doctrine in the world of Continental law functions as the test of legitimacy.

Continental law’s emphasis on the primacy of doctrine manifests itself also in Spain’s system of constitutional control, where responsibility for this function is concentrated in the hands of a small number of mandarins. Spain’s Constitutional Tribunal exercises the power of constitutional control not only in concrete cases but also, to a limited degree, in relation to abstract questions

19. Article 1.4 of the Spanish Civil Code provides that these “shall be applied as law or custom, without prejudice to their character as informing the legal system.” (The original Spanish text provides: “se aplicaran en efecto de ley o costumbre, sin perjuicio de su carácter de informador del ordenamiento jurídico”).

20. Article 1.1 of the Constitution of Spain provides: “Spain is constituted as a social and democratic state of law, which advances liberty, justice, equality and political pluralism as the superior values of its legal order.” (The original Spanish states: “España se constituye en un Estado social y democrático de Derecho, que propugna como valores superiores de su ordenamiento jurídico la libertad, la justicia, la igualdad y el pluralismo político....”)

21. George P. FLETCHER: *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP.L. 683, 692 (1998).

22. *Ibid.*

unrelated to actual disputes between parties.²³ Furthermore, the Constitution makes clear that the opinions of the Constitutional Tribunal "that declare the unconstitutionality of a law or rule with legal effect and which do not limit themselves to having merely advisory effect have full effects as applied to all,"²⁴ the so-called *erga omnes* effect,²⁵ which theoretically does not exist in the Anglo-American system.²⁶ According to López Guerra, former vice-president of the Tribunal, its opinions "establish the manner of interpreting as concordant the Constitution's apparently disconnected and contradictory precepts."²⁷ It has even been said that the Constitutional Tribunal functions as an "an integrating organ, since its function consists in searching for a dialectical synthesis between the unity of the state and the plurality of powers into which the state is divided, as much in the horizontal as in the vertical sense."²⁸

Yet, these functions in the legal system of Spain establish a new methodological role for the Constitutional Tribunal, one that is perhaps related to the mode of analysis employed by the Supreme Court of the United States. Is it possible then that jurisprudence could also function as a source of law by means of the opinions of the Constitutional Tribunal? At the very least, one should note the López Guerra seeks to revive the dynamic tradition of Roman praetorian law, and perhaps the case law method, when he

23. See Luis LÓPEZ GUERRA: *Las Sentencias Básicas del Tribunal Constitucional* 20-23 (2000).

24. The Constitution of Spain, Article 164.1 ("que declaran la inconstitucionalidad de una ley o de una norma con fuerza de ley y todas las que no se limiten a la estimación subjetiva de un derecho, tienen plenos efectos frente a todos"). In addition, judges are obligated to apply law "in accordance with the interpretation that results from the decisions given by the Constitutional Tribunal in all types of procedures." See Ley Orgánica del Poder Constitucional, Article 5.1 ("conforme a la interpretación que resulte de las resoluciones dictadas por el Tribunal Constitucional en todos tipos de procesos").

25. See Jorge DE ESTEBAN & Pedro J. GONZÁLEZ-TREVIJANO: *Curso de Derecho Constitucional Español* III 211 (1994).

26. See TRIBE: *op. cit.*, 254-58 (explaining that the dictum of *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), does not generally represent the function or theory of judicial review in the United States).

27. See LÓPEZ GUERRA: *op. cit.*, 17 ("establecen la forma de interpretar concordantemente preceptos aparentemente opuestos, o desconectados entre sí, de la Constitución").

28. See DE ESTEBAN & GONZÁLEZ-TREVIJANO, *op. cit.*, 175 ("órgano integrador, puesto que su función consiste en buscar la síntesis dialéctica entre la unidad del Estado y la pluralidad de poderes en que se divide este, tanto en sentido horizontal, como vertical").

comments that “constitutional jurisprudence’s *creative force* derives from the binding force of its conclusions; not only its concrete decision concerning whether the rule in question does or does not conform to the Constitution but also in the reasoning contained in the opinion, its *ratio decidendi*, which reveals or discovers constitutional criteria or mandates to be followed by the other actors of the legal order.”²⁹ In addition, even though the Civil Code does not include jurisprudence among the sources of ordinary law in the legal system, according to one author, the jurisprudence of the Constitutional Tribunal not only treats it as a source of constitutional law but also acts as though “the content of the Constitution is determined, by interpretive means, by the Constitution Tribunal.”³⁰ If, indeed, the Constitutional Tribunal has this creative function generally, that function necessarily extends to the development of jurisprudence concerning Spain’s system of autonomy. In fact, the jurisprudence of the Constitutional Tribunal has a unique role with respect to the development of constitutional doctrine for the “the new semi-federal Spanish state,” so much so, according to López Guerra, that one can speak of a “case law regime of Autonomy.”³¹

29. See LÓPEZ GUERRA, *op. cit.*, 24 (“la fuerza creadora de la jurisprudencia constitucional deriva de la fuerza vinculante de sus resoluciones; no solo de la decisión concreta, sobre si la norma cuestionada es o no es conforme con la Constitución, sino también del razonamiento contenido en la Sentencia, de su *ratio decidendi*, que revela o descubre criterios o mandatos constitucionales a seguir por los demás actores del ordenamiento”) (emphasis in the original); see *ibid.*, 18 n. 5 (citing professor Italiano G. Rolla, who also believes that the “*rationes decidendi*” of Constitutional Tribunals “gives birth to a pretorian law capable of influencing the life of the legal system”) (“hace nacer un derecho pretoriano capaz de influir sobre la vida real del ordenamiento”).

30. See IVÁN C. IBÁN: *Introducción al Derecho Español*, 25 (2000) (“el contenido de la [Constitución] esta fijado, por vía interpretativa, por el Tribunal Constitucional”). The same author argues for the conclusion that jurisprudence also is included in ordinary law indirectly, because “procedural law foresees the possibility of seeking review before the Supreme Court of a judicial act in violation of the legal order or its jurisprudence), which indicates that jurisprudence is deemed to constitute a source of law whose violation gives rise to a right to judicial relief.” *Ibid.*, 25-26 (“es la previsión en el Derecho procesal de la posibilidad de imponer un recurso de casación ante el Tribunal Supremo, contra resoluciones judiciales,... por ... infracción de las normas del ordenamiento jurídico o la jurisprudencia”) (internal quotations omitted).

31. See LÓPEZ GUERRA: *op. cit.*, 25 (“nuevo Estado semifederal español” that one can speak of. “un Estado jurisprudencia de las Autonomías”). Also according to Iván C. Ibán, “as to what competences the Autonomous Communities may assume, the Constitution opts for an extraordinarily complex system, which obligates the Constitutional Tribunal to intervene to define its exact reach.” IBAN: *op. cit.*, 71 (“por

Therefore, in both the American and Spanish legal systems, federalism and autonomy, respectively, have a special relationship with each system's method of constitutional law. The next section of this article will explain how powers are distributed in each system and how jurisprudence plays a role in establishing that distribution. Thereafter it will be possible to explain how jurisprudence functions in the particular area of the external action of sub-state entities and thereby provide a basis for evaluation of the role that case law method or jurisprudence can play in accommodating federalism and autonomy to current changes in the international system.

II THE ALLOCATION OF PUBLIC POWER BY THE SOVEREIGN: FEDERALISM AS A SYSTEM OF POLITICAL COMPETITION AND AUTONOMY AS A MEANS TO SERVE THE PUBLIC INTEREST

Relations between the center and periphery are both of constitutional dimension in the U.S. and Spain. Clearly, their historical origins distinguish them, with the center emerging as a creature of the current peripheral units in the U.S. and the current peripheral units emerging out of the unitary state in recent Spanish history. But, as this section will argue, the differences between federalism and autonomy lie less in these different historical trajectories than in their underlying rationales, with U.S. federalism reinforcing political competition as the bedrock of American democracy and Spanish autonomy implementing a vision of cooperative solidarity in the pursuit of the general interest.

A. *U.S. Federalism*

U.S. federalism is not even understood well in the United States. In recent years, the Supreme Court has given new meaning to the doctrine, new at least for the generations of professors, students and lawyers trained after the Second World War. It might be sufficient, for purposes of our analysis, to explicate the key recent opinions of the Supreme Court demonstrating the new vigor in federalism. Yet these recent opinions cannot be understood

lo que toca a las competencias que pueden asumir las comunidades autónomas, la [Constitución] opta por un sistema extraordinariamente complejo que viene obligando al Tribunal Constitucional a intervenir para precisar su alcance exacto”).

without focusing on how federalism was conceived during the period between the political reform of President Roosevelt and the counter-revolution advanced by President Reagan as well as a series of Republican presidents who as much as Roosevelt were able to over time select a majority of the members of the Supreme Court.

1. *The Post-New Deal Constitution*

In theory, there are two types of limits on the power of the federal government of the United States. First, it is quite clear that, at least with respect to internal matters,³² the government of the United States enjoys only certain powers, whether explicit or implicit, although these powers may be elaborated in accordance with what is “necessary and proper” (which has been interpreted to reach everything which is useful).³³ Therefore, these powers have their own internal limits, known as the doctrine of “enumerated” powers. Second, even when a governmental act falls within the internal limits of the enumerated powers, that is to say within the competence attributed to the federal institution by the Constitution, in addition that federal act may be challenged on the basis of an external limit drawn from the Constitution, which in the case of federalism in principal part is the text and constitutional principles related to the 10th amendment to the Constitution, which reserves to the states or the people those powers which the Constitution has not delegated to the federal government or denied to the states.

The trajectory of the doctrine of internal limits traces the economic history of the United States. During the decade of economic depression preceding World War II, President Roosevelt and the Congress that supported him launched a new politics known as the “New Deal,” which imposed

32. See, *infra*, text accompanying notes 41-42.

33. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (interpreting Article I, Section 8, Clause 18, the so-called “Necessary and Proper” Clause of the U.S. Constitution and, on that basis in relation to the explicit or enumerated powers to pay federal debts and impose federal taxes, affirming the creation of a Bank of the United States). According to John Marshall, Chief Justice of the Supreme Court, the Necessary and Proper Clause, taking into account that the Constitution had been written to last for the ages, had to be interpreted in the following way: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.” *Ibid.*, 421.

controls on prices and output of goods and services whether or not they involved commerce between citizens of different states. At first glance, this appeared to the Supreme Court of the day to have no legitimate relation to inter-state commerce, which the Constitution indicated was the premise for Congress' regulatory authority.³⁴ The text of the Constitution plainly provided that this power extended only to commerce "among" the states and therefore the Supreme Court in a series of opinions decided that the New Deal violated the Constitution.³⁵ These cases followed a line of jurisprudence more than forty years old, which had maintained that Congress could not regulate intra-state commerce if the effect on inter-state commerce was only indirect or if the commerce regulated was intrinsically intra-state.³⁶

Without undermining these earlier precedents, the Supreme Court changed direction and affirmed the Congress's power to enact legislation regulating labor relations on a national scale, thus validating President Roosevelt's renewed efforts to address tendencies in the free market economy then thought to have contributed to worsening the effects of economic depression. Deciding the famous case of *NLRB v. Jones & Laughlin Steel Corp.*, the Court held that the a regulated activity—in the facts of that case, the intra-state contract relationship between an employer and its employees—"affected" inter-state commerce in the sense required under the federal Constitution.³⁷ A few years later, in *Wickard v. Filburn*,³⁸ the Supreme Court decided that Congress could regulate crops grown not for sale but rather solely for consumption, on the theory that such production and all similar production cumulatively had a potential effect on inter-state commerce.

The Supreme Court's post-New Deal jurisprudence permitted the inference that the Constitution imposed no limits on federal regulatory power over the economy and anything that could conceivably affect the inter-state economy. In any event, the Court relied on that line of cases to approve even laws adopted by Congress in order to carry out a revolution in the protection of the fundamental rights of African-Americans, on the theory that American

34. See *ibid.*, Article I, section 8, clause 3 ("To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.").

35. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 256 (1936).

36. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895)(holding that the regulation of intra-state manufacturing did not fall within the power to regulated inter-state commerce)

37. See *NLRB v. Jones & Laughlin Steel*, 295 U.S. 495, 550 (1937).

38. See *Wickard v. Filburn*, 317 U.S. 111, 121 (1942).

racism reduced the participation of African-Americans in federally-protected inter-state commerce, not only through blocking their access to the instrumentalities of inter-state commerce, such as inter-state highways constructed with federal assistance, but also their access to intra-state activities that could affect inter-state commerce.³⁹ In addition, with the approval of the Supreme Court Congress created in effect a federal code of crimes, where for more than a century the general “police power” —that is to say, the function of protecting the public primarily through criminal law— was exclusively located in the states.⁴⁰ Thus interpreted, federal power over inter-state commerce could justify governmental acts directed toward the construction of a new —and perhaps, in President Johnson’s phrase, “Great”— society.

Another key factor in the capacity of the federal government to secure the harmonization of state policy in accordance with federal preferences was the growth of federal tax receipts, which permitted the federal government to offer states a percentage of those revenues in return for state commitments to follow federal harmonization of state policy in any number of areas. This power to condition the distribution of resources permitted the federal government to persuade the states even to change the drinking age in all states to a federal standard,⁴¹ even though the constitutional amendment repealing an earlier constitutional amendment prohibiting alcohol had given states exclusive power over this subject.⁴² Now that there were no true internal limits on the federal commerce power, the growth of federal resources enabled the transfer to the federal government of responsibility for matters that had since the beginning of the Republic been the responsibility of the states.

39. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (sustaining application of anti-discrimination law to a hotel near a federally-subsidized highway); and *Katzenbach v. McClung*, 379 U.S. 294 (1964) (same result with respect to a restaurant near a federal highway).

40. See *U.S. v. Perez*, 402 U.S. 146 (1971) (sustaining a federal law grounded in the determination that intra-state “loan sharking,” defined in terms of credit supplied with extortionate or excessive rates of interest, was the kind of activity employed by inter-state organized crime).

41. See *U.S. v. Dole*, 483 U.S. 203 (1987) (requiring only that the conditions for provision of federal funds to states be connected to the general welfare and have some connection to defined federal projects or programs).

42. See *Constitution of the United States*, Amendment 21, section 2 (which prohibits inter-state commerce in alcohol for consumption in a state when such consumption would violate the law of that state).

Therefore, the New Deal generation and its successors began to believe that the protections of federalism were only those that were deemed necessary by the members of the Senate. This was because in that chamber of the legislature the peoples of the states were represented equally, thereby giving the small states representation disproportionate to their population, and assuring, in contrast to the House of Representatives where representation is proportionate to population, that the interests of states as states would be defended during the legislative process.⁴³ (Admittedly, however, this protection of states as such diminished after an amendment to the Constitution in 1913 transferred from state legislatures to the peoples of the states the right directly to select their representatives to the Federal Senate.⁴⁴) According to this theory, the 10th Amendment functions solely as a political principle, rather than as a legal basis upon which to challenge federal action. Indeed, after a few doctrinal turns, ⁴⁵ the Supreme Court declared that the 10th Amendment was not a basis for judicial relief even in the case of federal regulation of a state government's relationship with its own administrative staff.⁴⁶

Yet, the Court's doctrinal turns manifested continuing internal tension in its reasoning, for even during this period, the Court evidenced some hesitation over the absence of protection for state sovereignty implied in the post-New Deal jurisprudence. For expansion of federal power which provoked an initial, failed effort to interpret the 10th amendment as imposing some limits on federal power grounded in historical experience that would supply criteria through which to distinguish sovereign acts of states from those activities in which they were simply participants in commerce. This distinction also found its way into a related area of constitutional law, the so-called "Dormant Commerce Clause," which prohibits states from intervening to undercut the federally-protected, common market. For more than a hundred years, the Supreme Court considered this prohibition to be implied in the express grant

43. See Herbert WECHSLER: *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

44. See *Constitution of the United States*, Amendment 17 (1913).

45. See *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968) (deciding that the 10th Amendment did not invalidate federal regulation of labor conditions of state employers).

46. See *García v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruling *National League of Cities v. Usery*, 26 U.S. 833 (1976).

of authority for the federal government to regulate inter-state commerce.⁴⁷ In the late stages of the expansion of federal power under the Commerce Clause, the Supreme Court found an exception to the prohibition under the Dormant Commerce Clause when a state merely participated in, and did not regulate, its market. The Court decided in *Hughes v. Alexandria Scrap Corp.* that the State of Maryland had not violated the Dormant Commerce Clause when, in a program to facilitate elimination of abandoned automobiles, it had purchased those wrecks from its own residents at prices higher than those offered to non-residents. The Court declared that the state as a purchaser was free to purchase from whomever and at whatever price it wished, presumably for the purpose of benefiting preferentially its own residents in the expenditure of state funds.⁴⁸

Turning explicitly to the 10th Amendment in the same year that *Hughes v. Alexandria Scrap* recognized in the Dormant Commerce Clause context of a states' rights as market participant to express its sovereignty, the Court also decided that the exercise of federal regulatory power over commerce, although within the internal limits of that power, could yet violate the Constitution. In *National League of Cities v. Usery*, the Court held that state sovereignty included the relationship between a state and its employers because that relationship had traditionally been part of state sovereignty.⁴⁹ The state could thus favor or disfavor its own employees as it wished, without federal interference. Arguably, as in *Hughes v. Alexandria Scrap*, the Court saw in the state's traditional relationships with its residents and employees the core of state sovereignty. Yet, after attempting to apply this formula in a series of cases,⁵⁰ in *García v. San Antonio Metropolitan Transit Authority* a majority of the Court declared that it was not possible to construct a stable test to protect state sovereignty under the 10th Amendment, because history did not supply criteria that were sufficiently clear upon which to base the reasoning of a judicial decision.⁵¹ In effect, the Supreme Court decided

47. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 318 (1852); see *TRIBE: op. cit.*, 1030--1047 (treating this case as an example of that doctrine, even though the opinion explicitly makes clear that the Supreme Court interpreted a federal statute to govern and thereby invalidate a Pennsylvania rule requiring all foreign ships carrying specified tonnage of bituminous coal to employ local pilots while in Pennsylvania waters).

48. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 833 (1976).

49. See *National League of Cities v. Usery*, *op. cit.*, 840-45.

50. See *TRIBE, op. cit.*, 863-77 (analyzing those opinions).

51. See *García v. San Antonio Metropolitan Transit Authority*, *op. cit.*, 546-47.

that, because the option of reasoned common-law decision-making was unavailable, its only recourse was to give up on the task of given meaning to the 10th Amendment; thus, it concluded, citizens would have to rely on the so-called “political safeguards of federalism” to protect state sovereignty.

2. *The Neo-Federalist Response*

After a half-century of the creation of a federal common market and the construction of a national state capable of affecting perhaps every aspect of life relating to that national market, by the mid-1980s the conclusion that the “political safeguards of federalism” were the only permissible mode of constitutional protection for state sovereignty became increasingly problematic. Indeed, it did not survive a decade, for as the political process in the U.S. changed course, and as its composition changed, so did the Supreme Court. Rather than leaving it to the political process to amend the Constitution, the Court instead returned to the roots of the U.S. political system, its re-reading of the philosophy of the Framers of the U.S. Constitution, to construct the tools that would enable it to change direction so as to adapt to the nation’s new political balance and the Court’s own changed composition. The Supreme Court articulated this new conception of federalism most clearly in *U.S. Term Limits, Inc. v. Thornton*.⁵²

In *U.S. Term Limits*, the issue addressed by the Court arose out of a popular movement for the establishment of limits to the terms of state representatives to the federal House and Senate, implemented without federal constitutional amendment and instead by means of state law. (Notably, the 17th Amendment was preceded by a movement also involving only state action, one in which state legislators committed themselves to follow a popular vote for the selection of representatives to the federal Senate.) In this particular case, the State of Arkansas had imposed term limits on its representatives and senators, not by means of a state law but rather by means of a popular referendum thereby amending the constitution of Arkansas. The narrow legal question was whether the text of the federal constitution establishing the qualifications of office for federal representatives and senators was or was not a complete enumeration of those qualifications, which would determine whether or not the states could add to those

52. See *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

qualifications, including the criterion that a senator or representative must not have served more than a specified number of terms.⁵³ The majority and minority of the Supreme Court divided on this narrow interpretive point, but their reasons for reading the controlling constitutional clause differently shed light on a more fundamental difference concerning their views on the relation between the states and the federal government.

For the majority, Justice Stevens concluded —following what he considered to be the highly-persuasive, if not controlling, precedent that Congress itself could not itself add qualifications to those found in the text of the Constitution⁵⁴— that the constitutional text was complete in itself and that, therefore, the states also were not authorized to add qualifications. His premise for identifying the reserved powers of the states under the 10th Amendment was that these powers included only those powers held by states prior to the transfer of the enumerated powers to the federal government by the Federal Constitution of 1789. Accordingly, the states could not reserve a power to add to qualifications for a federal office not in existence prior to its creation by the Constitution.⁵⁵ Furthermore, Stevens supposed that the representatives and senators selected by a state were not representatives of merely that state but rather, at the same time, were representatives of the people of all of the United States. Thus, one state by itself could not interfere with the relationship established in the Constitution between a federal representative or senator and the people of the United States as a whole.⁵⁶

Perhaps even more significant for the future trajectory of the Supreme Court's doctrine in this area, Justice Kennedy, whose fifth vote was necessary to form a majority for the opinion written by Justice Stevens, added his own analysis. In his opinion, Kennedy emphasized the dual sovereignty of the states and the federation, each meriting the protection of the Supreme Court.

53. See *Constitution of the United States*, Article I, section 2, clause 2 ("no Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen") and Article I, section 3, n. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen"). The related issue of whether the measure could be treated as a ballot access limitation, rather than a term limit adding to the qualifications of office, is not pertinent to the analysis of this essay.

54. See *Powell v. McCormack*, 395 U.S. 486 (1969).

55. See *U.S. Term Limits*, *op cit.*, 804.

56. See *ibid.*, 803.

In a statement cited by the Supreme Court in later cases protecting state sovereignty, Justice Kennedy wrote: "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it"⁵⁷ One should note that the U.S. constitutional theory articulated by James Madison, the most famous framer of the Constitution⁵⁸ —at least according to one of Madison's most well-known modern interpreters, Bruce Ackerman⁵⁹— similarly emphasized not only the dual American citizenship but also the dual capacity of the people of the United States, in the following sense: if the people are ultimately the only source of law, one justifies the superiority of constitutional law over normal law only to the extent that "the people" constitutes itself in a political movement for the creation of higher-order law. But the two different sovereignties in U.S. federalism imply that there are two different "sovereign peoples" and each person is a "citizen exercising powers of sovereignty" only at the moment each of these sovereignties assembles to create higher order law. This would imply that citizens participating in one political process, as was the case for the citizens of Arkansas in *U.S. Term Limits* in amending their state constitution, were not exercising their powers of sovereignty with respect to the other, the national political community, for clearly in that case the separate federal political community capable of creating superior law of national scope had not assembled through a constitutionally-prescribed amendment process. Consistent with this line of reasoning, Justice Kennedy's emphasis on the dual political communities and dual sets of rights and responsibilities implied that the Supreme Court was obligated to protect both sets of political processes, the state as much as the federal, which in turn foreshadowed stronger Supreme Court protection of state sovereignty against federal power.

With respect to the conflict between federal power over commerce and state sovereignty, the search for new doctrines began in *New York v. United*

57. See *ibid.*, 836 (Kennedy, J., concurring).

58. See James MADISON: *The Federalist*, Nos. 10, 38-39 and 51 (Clinton Rossiter ed., 1961).

59. See generally BRUCE ACKERMAN: *We the People* (1991).

States.⁶⁰ In that case, the Supreme Court concluded that federalism principles rooted in the Constitution, although not strictly grounded in the 10th Amendment, imposed certain implicit limits on federal conduct. This opinion, together with *Printz v. United States*,⁶¹ establish that there are constitutional limits on the federal government's power to build the common market, although these limits operate to protect the two political processes established under the principles of dual sovereignty as reconstructed in *U.S. Term Limits*, rather than a specific content whether defined in terms of particular powers or historically- approved activities.

New York involved a challenge against a federal statute seeking to give effect to a plan that had in fact originated in a state effort to stimulate the construction of storage sites for low-level nuclear waste. The provisions requiring states to "take title" over certain nuclear wastes or regulate those wastes according to criteria established by Congress was deemed to violate the Constitution's principles of federalism, even though the regulatory standards imposed by Congress were identical to those initially proposed by the states, including the State of New York.⁶² Because it was clear under settled doctrine that the federal government lacked the power to direct the states to take title over private property, the only question remaining was whether the federal government had the right to direct a state to exercise its legislative powers in a particular way. According to Justice O'Connor, the protection of both the state and federal political processes is at risk when the federal government obligates a state government to exercise its legislative powers. This is because accountability in both political processes would be diminished, when representatives in either political system would seek to avoid responsibility for the costs and other negative consequences of any policy choice. In *New York*, both the states and the federal government could plausibly deny political responsibility by blaming the other for their role in the policy choice, and the true costs to taxpayers of the policy never were clearly addressed at the federal level, because these costs were shifted to the states. This confusion, in turn, would frustrate the capacity of citizens in either political system to vindicate their own interests, including even their interest in the critical decision concerning which level of government, the

60. See *New York v. United States*, 505 U.S. 144 (1992).

61. See *Printz v. United States*, 521 U.S. 98 (1997).

62. See *New York v. United States*, *op cit.*, 153.

state or the federal, should be given responsibility for solving the low-level nuclear waste problem.⁶³

The theory of federalism as reinforcing accountability in the political process was extended in *Printz* when Congress sought to require the local police departments of the states independently to conduct background investigations on potential handgun purchasers during a specified period until a federal database of ineligible purchasers was compiled. Justice Scalia, speaking for the majority, explained that the principles of *New York* precluding the federal government from requiring the state legislative branch to adopt a federal policy were equally applicable when the federal government attempted to obligate the state executive to execute a federal policy. According to Justice Scalia, when the federal Congress imposed a policy and obligations on the states without itself paying for the implementation of those obligations, not only did it avoid responsibility for itself finding the resources to implement that policy, but it also intervened in the state decision-making process on how best to use the state's own resources. Accordingly, the state would be able to blame the federal government for the failures of a policy and federal representatives would be able to take credit for a policy's successes without having to pay the political price of justifying the additional tax revenues implementation of that policy would require.⁶⁴ Notably, Justice Breyer in dissent explained his doubts concerning the doctrinal course taken by the majority by making reference to the experience of the European Economic Community (EEC) in requiring its State Members to execute EEC "Directives" through the adoption of national legislation. In this way Justice Breyer sought to establish that accountability in the political process was nonetheless possible even if Congress were to employ means, such as those employed by the EEC, notwithstanding the majority's concern that principles of U.S. federalism would be compromised.⁶⁵ Justice Scalia replied that U.S. federalism had different origins from European constitutionalism, in particular that the Framers of

63. See *ibid.* 168-69.

64. See *Printz v. United States*, *op. cit.*, 923-25. Perhaps more important, Scalia added that the method employed by Congress in this case could violate federal separation of powers principals, because the Congress could be seen as employing state executive power to execute a federal policy when the Constitution gave the federal executive power exclusively to the executive branch. *Ibid.*, 923 n. 12.

65. See *ibid.*, 976-977 (Breyer, J., dissenting).

U.S. federalism had rejected European models of government in effect during the period when the U.S. Constitution was founded.⁶⁶

With the transformation of the federalist theory of dual sovereignty now as dual citizenship, the Supreme Court had available to it the theoretical tools to reinterpret its jurisprudence concerning the Federal Commerce Clause power. In *United States v. Lopez*,⁶⁷ and to some degree also in *United States v. Morrison*,⁶⁸ the Court sought to vindicate the interests of states in their own self-government through protecting the boundary between state and federal political processes. A majority of the Court in *Lopez* decided that the federal inter-state commerce power did not extend so far as to allow Congress to enact a law prohibiting, with certain exceptions, possession of handguns within a specified distance from schools. Chief Justice Rehnquist explained for the Court that Congress, in the process of considering the legislation, had not made clear its reasons for concluding that handgun possession near schools affected inter-state commerce.⁶⁹ This key finding, therefore, enabled the minority justices to interpret the majority's opinion as following the doctrinal path blazed in *New York* and *U.S Term Limits* seeking to protect the political process so as to ensure the vigor of the "political safeguards" of U.S. federalism.⁷⁰ Yet Justice Rehnquist, seeking to reconcile the new doctrine with the Court's earlier jurisprudence, also explained that none of the stongest precedents in support of federal power over inter-state commerce had employed the so-called "cumulative effect" theory articulated in *Wickard v. Filburn* in a context not involving activity of an economic character.⁷¹ Accordingly, Justice Rehnquist's overall view of the case was informed by the fear that, if federal commerce power were extended to non-economic contexts such as was the case in *Lopez*, it would be possible for the federal government to regulate matters, such as local public education or the family, that since the beginning of the Republic had been regulated by state law alone.⁷²

The tension evident in *Lopez* between the old and new federalisms is even more evident in *Morrison*. On one hand, although *Lopez*'s emphasis on

66. See *ibid.*, 921 n. 11.

67. See *United States v. Lopez*, 514 U.S. 549 (1995).

68. See *United States v. Morrison*, 529 U.S. 598 (2000).

69. See *United States v. Lopez*, *op cit.*, 563.

70. See *ibid.*, 615, 619 (Breyer, J., dissenting).

71. See *ibid.*, 560.

72. See *ibid.*, 564

the need for transparency in the federal legislative process seems to be fully consistent with the approach articulated in *U.S. Term Limits*, *New York*, and *Printz*, the Court's majority in *Morrison* may have sought to establish internal limits on federal power over inter-state commerce framed in terms of a particular substantive content, in a way reminiscent of the classification methodology the Court employed to protect state sovereignty prior to the interpretive revolution of *Jones & Laughlin Steel* and *Wickard v. Filburn*. In *Morrison*, a case concerning sexual assault at a public university in the state of Virginia, the Court rejected the use of the Commerce Clause power as the basis for a federal law providing civil remedies. Again, Chief Justice Rehnquist explained that the federal civil remedy was in no way related to inter-state commerce because the "cumulative effect" method was inapplicable to non-economic subject matter, such as was involved in that case, even though Congress had expressly made clear findings that it believed that the intra-state activities regulated by the statute did indeed affect inter-state commerce in the sense required by the Constitution.⁷³ In accordance with the need to protect dual sovereignty, Rehnquist added that the protection of political accountability warranted the construction of a very clear boundary between "the local" and "the national," a point Rehnquist considered implicit in all the Court's Commerce Clause precedents.⁷⁴ Accordingly, it could be argued that *Morrison* sought to reverse the Court's course in the protection of federalism toward tradition and history as the criteria for distinguishing "the local" from "the national," although the Court had deemed those criteria inadequate in *Garcia*, in interpreting the external, 10th Amendment limit on federal intrusion into state sovereignty.

On the other hand, Rehnquist's majority opinion focused on the fact that, like the law invalidated in *Lopez*, the statutory provision in question in *Morrison* lacked a jurisdictional element, which implied that, in order to grant a federal remedy, federal courts hearing cases brought under the statute would not need to determine the existence of facts establishing their jurisdiction, namely, that the facts of the case affected inter-state commerce in the sense required by the Constitution; this was so even though other provisions of the

73. See *United States v. Morrison*, *op. cit.*, 610-18 (Rehnquist, J., majority). If this broad reading of *United States v. Morrison* is correct, it may well call into question the Court's past approval of Congress' reliance on the Commerce clause to enact anti-discrimination legislation generally, but most notably in the context of racial discrimination. See *Heart of Atlanta Motel, Inc. v. United States and Katzenbach v. McClung*, *op. cit.*

74. See *United States v. Morrison*, *op. cit.*, 616 nn. 6-7.

statute imposing federal criminal sanctions did include such a jurisdictional element and on that basis had been approved by several federal appellate courts.⁷⁵ With the absence of that jurisdictional element in the statute's civil provisions, Congress in effect could circumvent the judiciary's own power to determine the basis for its own jurisdiction, which would have permitted the Congress to avoid responsibility for crossing the constitutional frontier between "the local" and "the national." In addition, as in *Printz*, this act could constitute an invasion by the legislative branch of the federal government of the territory of another branch of government, in this case the judicial branch. One must note that the U.S. system of separation of powers protects not only the separation between the legislative and executive branches but also ensures the integrity of the judicial branch against invasion from the political branches. Thus, the limits imposed on the judicial power by the statute invalidated in *Morrison* would have permitted Congress to avoid not only its responsibility to the people not to transgress the limits of its powers under the Federal Commerce Clause but also the limits on its powers imposed the constitutionally-based integrity of the judicial branch. Thus, it might still be possible to interpret *Morrison*, not as implementing a theory of federalism grounded in the protection of determinate substantive content demarcated by history and tradition, but rather as the essentially procedural doctrine directed towards the maintenance of political competition between the states and the federal government seeking the support of their citizens, respectively, as elaborated in *U.S. Term Limits*, *New York*, *Printz*, and *Lopez*.

Notably, writing again in dissent in *Morrison*, Justice Breyer did not share Chief Justice Rehnquist's desire to impose clear boundaries between "the local" and "the national." Breyer argued in *Morrison*, as he had argued in *Printz*, that lessons from the study of comparative constitutional law could support a more flexible approach. In this case, he invoked European-style "subsidiarity" as a possible model for conceiving a less rigid means for facilitating the allocation of authority between the federal government and the states so to ensure the protection of the interests of the states and accordingly the protection of the interests of their citizens.⁷⁶ It is to this conception of the relationship between the central government and sub-state entities, which

75. See *ibid.*, 614 n. 5.

76. See *ibid.*, 654, 663 (BREYER, J.: dissenting opinion citing: BERMANN: *supra* n. 1; Vicki JACKSON: *Federalism and the Uses and Limits of Law*, 111 *Harv. L. Rev.* 2180 (1998); and Steven GARDBAUM: *Rethinking Constitutional Federalism*, 74 *Texas. L. Rev.* 795 (1996)).

focuses on cooperation for the maximization of citizens' interests rather than the protection of political competition, that we now turn.

B. *Spanish Autonomy*

Doctrine concerning autonomy enjoyed by Spain's Autonomous Communities makes clear that —although the Constitution does not refer to the Autonomous Communities as part of the central state, indeed implicitly referring to the "State" in such a way as to exclude the Autonomous Communities— they are indeed deemed to be part of the unitary Spanish state.⁷⁷ In addition, it is quite clear that the ruling principle of this unitary, albeit autonomous, state is that each entity's autonomy is ordered in terms of the interests of the Spanish people rather than the interests of government organs themselves. The theory operates in the following way: general interests are more important than regional interests, and the power of self-government reaches only so far as the management by the regions (including the provinces of Spain, which also enjoy their own sphere of autonomy) do not conflict with the general interests of the people defended by the central organs of government.⁷⁸

The text reflects this overall constitutional purpose of policy coordination. Although certain areas are deemed in theory to be exclusively national —including "international relations"⁷⁹; "foreign commerce"⁸⁰; "maritime fishing, without prejudice to the competence of the Autonomous Communities over the organization of that sector"⁸¹— the precise boundaries are not finally determined by the initial constitutional allocation of responsibilities. On one hand, the Autonomous Communities may assume responsibility over these matters by means of organic laws providing for "the development of the economy of the Autonomous Community subject to the

77. See José Juan GONZÁLEZ ENCINAR: *El Estado Unitario-Federal: La Autonomía como principio estructural del Estado* 58-71 and 111-123 (1985); see also JAVIER RUIPEREZ: *Constitución y Autodeterminación* 129-143 (1995).

78. See ANTONIO TORRES DEL MORAL: *2 Principios de Derecho Constitucional* 295-373 (1992).

79. *The Constitution of Spain*, Article 149.3 ("relaciones internacionales").

80. *Ibid.*, Article 149.10 ("comercio exterior").

81. *Ibid.*, Article 149.19 ("pesca marítima, sin perjuicio a las competencias que en la ordenación del sector se atribuyan a las Comunidades Autónomas").

objectives established by national economic policy.”⁸² Also, the central state may “in areas of national competence ... attribute to any or all of the Autonomous Communities the authority to adopt for itself legislative rules within the scope of the principles, bases, and directives fixed by the law of the state.”⁸³ On the other, the central state “may adopt laws establishing principles necessary to harmonize the regulatory rules of the Autonomous Communities, even in the case of subject matter within their competence, when this is required by the general interest. It is the responsibility of the Spanish Parliament by absolute majority of each house, to make this determination.”⁸⁴ Thus, the overriding theme is one of centrally-directed policy coordination.

A structural interpretation also suggests that the logic of harmonization under Spain’s Constitution, much like harmonization efforts under the law of the EEC, undermines the protection of regional interests. One could note that—contrary to the United States, where dual sovereignty expresses itself in two systems of courts, two systems of law, and in theory, through the 10th Amendment reserves to the states any residual authorities not granted by the Constitution—Spanish Autonomy provides for only one system of courts,⁸⁵ for the most part one system of civil and criminal law,⁸⁶ and reserves to the central government all powers not given to the Autonomous Communities. Indeed, it is clear that the exercise of authority by an Autonomous Community depends in the first instance on the inclusion of that authority in the statute establishing the Autonomous Community,⁸⁷ and insofar as there

82. *Ibid.*, Article 148.13 (“fomento del desarrollo económico de la Comunidad Autónoma dentro los objetivos marcados por la política económica nacional”).

83. *Ibid.*, Article 150.1 (“en materias de competencia estatal... atribuir a todas o a alguna de las Comunidades Autónomas la facultad de dictar, para sí mismas, normas legislativas en el marco de los principios, bases y directrices fijados por una ley estatal”).

84. *Ibid.*, Article 150.3 (“podrá dictar leyes que establezcan los principios necesarios para armonizar las disposiciones normativas de las Comunidades Autónomas, aun en el caso de materias atribuidas a la competencia de estas, cuando así lo exija el interés general. Corresponde a las Cortes Generales, por mayoría absoluta de cada Cámara, la apreciación de esta necesidad.”).

85. *The Constitution of Spain*, Article 117.5 (“El principio de la unidad jurisdiccional es la base de la organización y el funcionamiento de los Tribunales.”).

86. See IBÁN: *op. cit.*, 141-43.

87. Yet, inclusion in a statute establishing a community’s autonomy of a competence violating the constitutionally-required allocation of competences could still later face constitutional challenge, although early autonomy statutes might be blessed with a presumption of constitutionality. Compare Pablo PÉREZ TREMPES:

are doubts one refers to the supplementary function of the law of the central state.⁸⁸

Close inspection of the jurisprudence of the Constitutional Tribunal reveals full support for policy harmonization and centralized coordination. In *Subvenciones al Turismo Rural*, while the Constitutional Tribunal declares that "State coordination is constitutionally permissible only if 'it were necessary to ensure the full effectiveness of a policy within the scope of the basic organization of a sector and to guarantee the fulfillment and enjoyment of its full potential throughout the national territory, taking into account the need not to exceed the budget allocated to that sector'," a close reading of the full opinion indicates that in reality central state power is far broader than even this dictum suggests.⁸⁹ In the same way, when the Constitutional

Constitución Española y Comunidad Europea, 112 (1993) (expressing doubt as to the constitutionality of the provision of the Autonomy Statute for the Basque Country insisting that no treaty may diminish the authorities granted to the Basque Autonomous Community without first amending the Statute itself); and, *infra*, text accompanying notes 125-26 (citing the *Judgment of the Constitutional Tribunal*, No. 252/88, December 20, 1988, Case on *Comercio de Carnes*, fund. jur. n° 2 (affirming the supremacy of systematic interpretation of the Constitution over Autonomy Statutes).

88. Article 149 of the Constitution of Spain provides that "Authorities not expressly attributed by this Constitution to the State may be exercised by the Autonomous Communities by virtue of their respective Statutes. Competence over those matters that have not been assumed by the Statutes on Autonomy shall belong to the State, whose rules in the case of conflict shall be superior to those Autonomous Communities with respect to all matters not within their exclusive competence. State law shall, in all cases, supplement the law of the Autonomous Communities." *Ibid.* ("Las materias no atribuidas expresamente al Estado por esta Constitución podrán corresponder a las Comunidades Autónomas, en virtud de sus respectivos Estatutos. La competencia sobre las materias que no se hayan asumido por los Estatutos de Autonomía corresponderá al Estado, cuyas normas prevalecerán en caso de conflicto, sobre las de las Comunidades Autónomas en todo lo que no este atribuido a la exclusiva competencia de estas. El derecho estatal será, en todo caso, supletorio del derecho de las Comunidades Autónomas.")

89. *Judgment of the Constitutional Tribunal*, No. 75/89, April 21, 1989, Case on *Subvenciones al turismo rural*, fund. jur. no. 5 (citing STC 95/1986) ("la gestión directa por el Estado... sólo sería constitucionalmente admisible si resultase imprescindible para asegurar su plena efectividad dentro de la ordenación básica del sector y para garantizar las mismas posibilidades de obtención y disfrute por parte de sus potenciales destinatarios en todo el territorio nacional, siendo al tiempo un medio necesario para evitar que se sobrepase la cuantía global de los fondos o de los créditos que hayan de destinarse al sector").

It is possible to read the Tribunal's judgment in this case as strongly protective of the rights of the Autonomous Communities. This is because in its judgment the Tribunal recognized that the central government was competent to "coordinate

Tribunal stated in *Ordenación de Transportes Terrestres* that “the supplementary character of State law... does not of itself constitute a grant of authority,” in reality it expressed no more than a tautology that did not undercut the authority of the central state to pursue policies of harmonization.⁹⁰ Accordingly, a close reading of the relevant opinions both

economic planning” but not to “encourage any activity relating to tourism.” *Ibid.*, fund. jur. no. 4 (“coordinación de la planificación económica” but not “para fomentar cualquier actividad en materia de turismo.”). It thus decided that the government had invaded a competence reserved to the Autonomous Communities with respect to tourism, noting that “the matter was precisely one in which regional uniqueness and peculiarities are more relevant and in which direct management by the Autonomous Communities of government assistance to the sector is necessary to define and achieve their own policies concerning the marginal and atypical features of the tourist sector, applying means selected by the State but adapting them to the particular circumstances of their territory.” *Ibid.*, fund. jur. no. 5 (“precisamente de una materia en la que las singularidades y peculiaridades regionales han de ser más relevantes y en las que la gestión directa de las ayudas por las Comunidades Autónomas resulta mas necesaria para poder definir y llevar a cabo una política propia en relación con esos sectores turístico marginales o atípicos, aplicando las medidas estatales pero adaptándolas a las peculiares circunstancias de su territorio”).

Nonetheless, this is not the only possible reading of the opinion. The Tribunal also observed that the particular facts of the case did not relate to “exceptional measures seeking to balance inequalities in regions or sectors but rather in encouraging in general throughout the national territory distinct tourist activities differing from the general supply of tourist activities available throughout the country.” *Ibid.* (“medidas excepcionales que traten de reequilibrar desigualdades regionales o sectoriales, sino de fomentar en general en todo el territorio nacional actividades turísticas distintas de las que constituye la masificada oferta turística común”). This language suggests that the disposition of the case in favor of the Autonomous Community, Galicia, depended entirely on the narrow point that the contradiction between the asserted objectives of the central state and the means it chose to achieve them, rather than on the broader claim that there were intrinsic limits on the central government’s use of the power to subsidize the activities of the Autonomous Communities.

90. *Judgment of the Constitutional Tribunal*, No. 118/96, June 27, 1996, Case on *Ordenación de Transportes Terrestres*, fund. jur. no. 6 (“la supletoriedad del Derecho estatal ... por su misma naturaleza, no comporta atribución competencial alguna”). Nonetheless, the Tribunal characterized the question in issue as narrow and of limited significance, premising its reasoning on the idea that the State “lacked specific authority” with respect to the precise conduct at issue; and, with respect to the supplementary effect of State law. *Namely, whether it could* in itself function as a source of law, the Tribunal noted that “the precept that is challenged appears to be tautological, which could perhaps be accused of being wrong but not of being unconstitutional.” *Ibid.*, fund. jur. no. 3 (“carece de competencias específicas” but “el precepto que se impugna tiene un marco carácter tautológico, por lo que podría ser tachado de técnicamente incorrecto; pero no de inconstitucional.”). Accordingly, the Tribunal’s opinion did not in any way diminish the superiority of State law insofar as it is based on authorities other than the general supplementary effect of all State law.

with respect to the power to condition funding of policies implemented by the autonomous communities and with respect to the supplementary function of State law, reveals that while neither the power to subsidize nor the supplementary function of State law in themselves constitute powers that permit the State to direct the activities of the Autonomous Communities, together these authorities function to support and facilitate the State's authority recognized by the Constitutional Tribunal to pursue policies of national harmonization.

Perhaps it would be useful in this context to observe that the principle of harmonization is similar to that employed by the European Commission, and approved by the Court of Justice of the European Communities, to facilitate European integration and the development of an *acquis communautaire*. It has been written that the EU principle of harmonization in itself has no logical limits.⁹¹ To correct this defect, and thereby restrain the expansionist tendencies of the European harmonization project as well as protect the autonomy of the Member States of the European Union, the Treaty of Maastricht for the first time included in the *acquis communautaire* the principle of subsidiarity.⁹² The same centrifugal force operating at the level of the European legal system giving rise to subsidiarity also spawned the creation of the Committee of the Regions and clarification and further elaboration of the principle of subsidiarity through the Protocol of Edinburgh.⁹³ Nonetheless, it

91. See Koen LENAERTS, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 210 (1990) ("At this time there is no doubt about the constitutional character of the Treaties of the European Communities.").

92. The principle of subsidiarity can be the basis for a judicial "challenge against a Community act in violation of that principle," according to Araceli Mangas Martín and Diego J. Liñan Noguera. See INSTITUCIONES Y DERECHO DE LA UNIÓN EUROPEA 49 (2d ed. 1999) ("impugnación de un acto comunitario que violase dicho principio"). Other authors, on the other hand, including a then sitting judge of the Court of First Instance of the European Communities, depreciate the principle of subsidiarity. See Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 FORDHAM INT'L L.J. 846, 893 (1994) (arguing that the then new principle of subsidiarity does not function as a constitutional norm dividing powers among the State Members of the European Community and the Community, but is rather a "political principle, a kind of rule of reason," guiding the exercise of their powers by Community institutions).

93. See MANGAS MARTÍN & LIÑAN NOGUERO, *ibid.*, 48-49; y Jaime RODRÍGUEZ-ARANA, *Sobre el Principio de Subsidiariedad*, XVII JORNADAS DE ESTUDIO: VOL. 1, LA CONSTITUCIÓN ESPAÑOLA EN EL ORDENAMIENTO JURÍDICO COMUNITARIO EUROPEO (II) 749, 772 (1998). These authors argue that the scope of subsidiarity reaches the relationship between the European Communities and the regions of Europe,

is highly doubtful that subsidiarity could operate to protect the autonomy of regions or, in Spain's case, its Autonomous Communities from the transfer of authority from a Member State to the institutions of the EU. Moreover, it is even doubtful that the principle of subsidiarity applies to the relationship between the EU and the regions of Europe themselves.⁹⁴ Indeed, it is clear that regions lack *jus standi* before the European Court of Justice, except as mere private legal persons who, as such, are not entitled to invoke the principle of subsidiarity when they appear before the Court of Justice.⁹⁵ Even if it were possible to construct some mode of protection based on subsidiarity for Europe's regions through the European Court of Justice, it would be doubtful whether such protection could affect the scope of the concept of autonomy established under Spain's own Constitution, for it appears settled that without constitutional amendment the law of the EU could not transgress certain basic limits established by Spain's legal order.⁹⁶ And what are those limits? In order to understand the limits of autonomy and how they may be shaped, it might be useful to focus on the apparent tension in Spain's Constitution between the "indissoluble unity of the Spanish nation"⁹⁷ and the

including perhaps the Autonomous Communities of Spain. See MANGAS MARTÍN & LIÑAN Noguero, *ibid.*, 48.

94. See José Manuel SOBRINO HEREDIA, *Introducción*, in LA ACCIÓN EXTERIOR DE LAS COMUNIDADES AUTÓNOMAS: ESPECIAL REFERENCIA A GALICIA 43 (2001)(referring to the rejection of the opinion of the Committee on the Regions which had proposed the revision of the Treaty of Maastricht so as to apply subsidiarity in this case).

95. See Manuel FRAGA IRIBARNE, *Prologo*, in LA ACCIÓN EXTERIOR DE LAS COMUNIDADES AUTÓNOMAS: ESPECIAL REFERENCIA A GALICIA 15 (2001)(arguing for *jus standi*).

96. According to Mangas Martín and Liñan Noguero: "The limits, which are very difficult to breach, of the current Constitution, may be found in a attribution of sovereignty that would place in peril the survival of the very Constitution and the State itself, affecting its essential elements such as its character as social and democratic state (political and labor pluralisms, the rule of law), national unity, an official common language, the system of autonomy, the constitutional structure of public power, the monarchical form of the State, and respect for the fundamental rights and liberties recognized in Title I." *Op. cit.*, 266-67 (analyzing the Judgment of the Constitutional Tribunal concerning the Treaty of Maastricht, July 1, 1992, see BOE, July 24, 1992) ("Los limites, muy dificiles de franquear en la vigente Constitución, se encontrarían en una atribución de soberanía que pusiera en peligro la pervivencia de la propia Constitución y del Estado mismo, afectando a sus elementos esenciales como son el Estado social y democrático (pluralismo político y sindica, imperio del Derecho), la unidad nacional, la lengua común oficial, el sistema autonómico, la estructura constitucional de los poderes públicos, la forma monárquica del Estado y el respeto a los derechos y libertades fundamentales reconocidas en el Título I").

97. *Ibid.*, Article 2 ("la indissoluble unidad de la Nación española").

potentially competing principle of the putative superior value of “political pluralism.”⁹⁸

On one hand, clearly the “unity of the nation,” according to Article 2 of the Constitution, “recognizes” at the same time “the right to autonomy of all the nationalities and regions that together form Spain and to solidarity among all of them.”⁹⁹ One must note that, just as according to the text of Article 2, the “unity of the nation” is deemed to pre-date the Constitution, one could also say that the “nationalities and regions” are also deemed to be preexisting entities, a thesis supported not only by the text of Article 2 but also by the *Primera Disposición Adicional* appended to the Constitution, which provides that the Constitution “shall protect and respect the historic rights of the the foral territories.”¹⁰⁰ Following this line of analysis, José Luis Mielan Gil, the Rector of the University of A Coruña, argues for a point of departure for constitutional analysis in which Spain, as a country in existence prior to its most recent Constitution, finds its roots in a history linked to the so-called foral rights and in which the Church played a significant role, thus implying that the Constitution of this complex state ought to be interpreted in accordance with that history.¹⁰¹ Accordingly, he argues that this implies that the Constitutional Tribunal ought to protect the autonomy of the successor institutions to Spain’s “territories” in a way that would sustain their identity as entities with their own histories. Arguably, the Constitutional Tribunal could undertake this structural responsibility even when the governments of the Autonomous Communities might appear to have waived their core rights to autonomy and the preservation of their historic distinctiveness.¹⁰² If so, the

98. *The Constitution of Spain*, Article 1.1.

99. *Ibid.*, *The Constitution of Spain*, Article 2 (“reconoce ... el derecho a la autonomía de las nacionalidades y regiones que la integran y la solidaridad entre todas ellas”).

100. *The Constitution of Spain*, *Primera Disposición Adicional* (“ampara y respeta los derechos históricos de los territorios forales”).

101. See José Luis MEILÁN GIL: *El fundamento constitucional del pluralismo autonómico*, in *EUROPA, Galicia: La Religión como elemento impulsor de la ideología nacionalista* 257, 262-63 (Gloria Moran ed. 1997).

102. See generally IVÁN IBÁN: *op. cit.*, 144-45. Ibán observes that the legislative organs of the Autonomous Communities promulgate compilations of so-called “foral” laws with identical content, demonstrating that “the authority for these laws is autonomic and not national” yet “the Autonomous Communities have in the end suppressed foral law, which had survived even in periods of the sharpest centralization.” *Ibid.* (“que la fuerza normativa es autonómica y no nacional”, tal que “las comunidades autónomas han concluido por suprimir el Derecho foral, que resistió en los momentos de más agudo centralismo”).

Constitutional Tribunal perhaps then could follow a line of analysis pursued by the U.S. Supreme Court by which it does not permit the States of the United States to abandon their own sovereignty even when their putative tribunes in the federal Senate would have renounced those protections.¹⁰³

On the other hand, the self-governance rights of the autonomous communities are arguably linked, at least according to the text of Article 2, with solidarity with the other autonomous communities and with the State, thus requiring that all territorially-based entities participate cooperatively in the life of the nation and of the other regions of Spain. Moreover, the object of the Constitution, including the its *Primera Disposición Adicional*, arguably is not the specific historical configurations established in the so-called "foral laws." This conclusion is grounded on the defeat in the Senado during the constitutional drafting process of a proposed amendment referring specifically to these historic rights.¹⁰⁴ Thus, one could suppose that it is, indeed, the principle of solidarity that supplies content to the constitutionally-prescribed superior value of political pluralism; in fact, political pluralism in this sense has been understood as a background philosophic matter as merely linking the two chief elements of democracy – the participation of all in political life, and tolerance for fundamentally different points of view.¹⁰⁵ Indeed, De Esteban and González-Trevijano go so far as to argue that political pluralism as a value is limited to Articles 6 and 7 of the Constitution, which refer only to political parties and labor unions.¹⁰⁶ By contrast, they argue, the "indivisibility" of the nation "precedes the Constitution itself, and it follows that the Spanish Constitution does not grant the right of self-determination to the peoples composing it."¹⁰⁷ This narrow view of the constitutional requirement of political pluralism might then suggest that the right of Spain's autonomous communities to express their own identity in a way that is not in

103. See, *supra*, text accompanying notes 44 – 52.

104. See JORGE DE ESTEBAN y PEDRO J. GONZÁLEZ-TREVIJANO, *Curso de Derecho Constitucional Español* I, 95-96 (1992). In addition, the *Disposicion Derogatoria* of the Constitution specifically set aside the Royal Decree of October 25, 1839 conferring so-called foral rights to the Basque Provinces. See *ibid.*, 128-29.

105. See Milagros OTERO PARGA: *Valores Constitucionales: Introducción a la Filosofía del Derecho: axiológica jurídica* 133-65 (1999).

106. See DE ESTEBAN y GONZÁLEZ-TREVIJANO, *op. cit.*, 95 (referring specifically to articles 6 and 7).

107. *Ibid.*, 133 ("es también previa a la propia norma constitucional y que, por consiguiente, la Constitución española no admite el derecho de autodeterminación de los pueblos que le componen").

harmony with the identity of the other regions of Spain depends entirely on the political judgments of the political parties who happen to rule at any given moment, a conclusion which is reinforced by the broadest possible reading of the discretion committed by Spain's Constitution to the Cortes Generales.¹⁰⁸ Limits on the Cortes Generales' discretion operate merely as a political, rather than a juridical, mode of protection, relying principally on the Senado; indeed, it may be similar to the mere "political safeguards of federalism" approach from which the U.S. Supreme Court apparently has now begun to retreat.¹⁰⁹

Is it possible, then, that the Constitutional Tribunal as supreme interpreter of the Spanish Constitution could, without validating a right of secession, compensate for its broad reading of the harmonization power of the central state? Could it fill gaps in the Constitution by resorting to principles similar to those of the new U.S. federalism reflected in the U.S. Supreme Court's most recent jurisprudence? This might be difficult, for U.S. federalism is based not only on the division of powers, which not even subsidiarity has been deemed to establish under EU law,¹¹⁰ but also on a division of sovereignty, the so-called *imperium in imperio*, which Spanish and continental legal doctrine considers a logical contradiction. In this connection, if one employed political pluralism as the vehicle for constructing the legal relationship between individuals or groups with different political identities, one would need to note that both Spaniards and Americans enjoy two different citizenships. The difference, however, is that while a U.S. citizen is also a citizen of one of the states composing the United States, a Spanish citizen enjoys EU citizenship but does not have a relationship defined in terms of citizenship with an autonomous community.

It is possible, as this article will now argue, that the different trajectories of the jurisprudence of the U.S. Supreme Court and Spain's Constitutional Tribunal relating to the external activities of the U.S. states and Spain's autonomous communities is connected to this central difference. Nonetheless, as this article will also argue, both courts may be moving in the same general direction in adapting their respective doctrines of federalism and autonomy to

108. See *The Constitution of Spain*, Article 150.3.

109. See, *supra*, text accompanying notes 44 – 52..

110. See Milagros OTERO PARGA: *Algunos Aspectos de La División de Poderes y de su Aplicación en el Ordenamiento Jurídico Europeo*, XVII Jornadas De Estudio: Vol. 1, La Constitución Española en el Ordenamiento Jurídico Comunitario Europeo (II) 667, 683-84 (1998).

assure to some degree the right of these sub-state entities to protect their respective sovereignty and interests. Indeed, the Spanish Constitutional Tribunal, rather than relying on doctrinal approaches, is making surprisingly effective use of common-law techniques in constitutional adjudication, suggesting an appropriate reticence to prescribe outcomes that, given the U.S. experience, may better be addressed through the political process.

III. THE EXTERNAL ACTION OF SUB-STATE ENTITIES: RIGIDITY AND FLEXIBILITY IN FEDERALISM AND AUTONOMY

With respect to the sovereignty of states of the U.S. and the autonomy of the autonomous communities of Spain, the division of authority with the central state in external affairs is implicated in two types of activities. The first is the typical case of an international treaty concluded by the central state. The second is the more unusual case of an activity by the sub-state entity having effects outside the nation as a whole. This section will employ case law analysis to demonstrate how the Supreme Court and Constitutional Tribunal have transformed doctrine governing the relationship between the central state and the sub-state entities, albeit through legal tools based on fundamentally different conceptions of the basis for the allocation of authority—federalism as a principle of political competition and autonomy as grounded in cooperative solidarity to advance the general interest.

A. *The Decline and Rise of Dual Sovereignty*

The development of the historic limits of the federal power over inter-state commerce is crucial background for understanding the Supreme Court's jurisprudence concerning the external action of the states and the supposed federal exclusivity in this area. After World War I, the Supreme Court was required to decide if the federal government had violated the Constitution by entering into a treaty with Canada for the protection of migratory birds. Before the conclusion of the treaty, following the Commerce Clause jurisprudence of the period, lower federal courts had concluded that a federal law purporting to regulate birds migrating across state boundaries violated the Constitution, in part because there was no direct effect on inter-state commerce. Writing for the Court in *Missouri v. Holland*, Justice Oliver

Wendell Holmes set aside for purposes of his analysis the question whether Congress could by means of a normal law regulate in this area. Then Holmes, who had fought in the American Civil War 60 years earlier in defense of the idea that the American states were one nation, asserted that the federal power to enter into a so-called constitutional treaty—that is, one concluded by the federal executive with the “advice and consent” of two-thirds of the Senate, rather than mere legislative authorization or sole executive action—invoked external powers of sovereignty which necessarily implied correlative internal regulatory powers for the federal government. According to Justice Holmes, any constitutional limits on the federal power over inter-state commerce, whether through internal limits drawn from the constitutional text itself or external limits derived from the 10th Amendment, did not operate in the same way in a case involving foreign relations.¹¹¹ Nonetheless, one should observe that if, as it was later understood, the ordinary Commerce Clause embraced the regulatory authority exercised in that case, Holmes’ broader theory concerning the expansion of federal internal powers to match the needs of external sovereignty would have been unnecessary to explain the result of the case; indeed, that even Holmes thought his statements could be mere dictum, rather than necessary legal reasoning, is suggested when Holmes merely supposed for purposes of analysis, and did not supply reasoning that would explain, that federal power in the case could not be grounded on the Commerce Clause alone.

In the years before World War II, Justice Sutherland in *United States v. Curtiss-Wright Export Corp.* gave birth to a new, even broader, thesis concerning the origin of federal foreign affairs powers, which in that case modified the internal separation of powers between the legislative and executive branches of the federal government but is nonetheless also significant for the doctrine of federalism. Justice Sutherland found that the federal legislative power, which could not ordinarily in the circumstances of the case be delegated to the federal executive, could nonetheless be delegated in the context of regulatory action in pursuit of foreign policy goals. Justice Sutherland’s thesis was that the powers of external sovereignty of the United States included among them powers which could not be grounded in the text of the Constitution, because every State member of the international community of necessity was entitled to exercise all the powers of external sovereignty in order to protect that state’s interests. Justice Sutherland asserted that the responsibility for preventing U.S. exports of arms

111. See *Missouri v. Holland*, 252 U.S. 416 (1920).

to warring South American countries should be exercised by the President—who, according to John Marshall's famous statement to the House of Representatives, was "the sole organ of the United States" in foreign affairs—upon his determination, as provided in a statute enacted by Congress, that such arms exports would risk continuing the war and thereby in effect threaten U.S. foreign policy interests. Thus, concluded Justice Sutherland, a person violating the export prohibition that entered in force only upon the President's determination, as that authority was delegated to him by Congress, was prosecuted and convicted in accordance with properly enacted law and, therefore, in accordance with constitutionally-guaranteed due process rights.¹¹²

Be that as it may, the extraordinary constitutional powers identified in *Missouri v. Holland* and *United States v. Curtiss-Wright Export Corp.* appeared to be put to rest in *Reid v. Covert*, at least with respect to their potential impact on the exercise of the fundamental individual rights protected by the amendments to the Constitution, collectively known as the "Bill of Rights" of the United States.¹¹³ Reaching the holding that a civilian dependent on a member of the military deployed in Germany pursuant to treaty was constitutionally-entitled to a U.S. civil trial rather than a court-martial, notwithstanding jurisdiction granted by the treaty to the U.S. military, for a crime allegedly committed in Germany, a plurality of the members of the Court concluded that *Missouri v. Holland* and *United States v. Curtiss-Wright Export Corp.* did not control. Justice Holmes had based the theory of an extraordinary federal treaty powers he articulated in *Missouri v. Holland* on constitutional text providing that, while all laws "pursuant to" the Constitution were part of the supreme law of the U.S. binding on the states and superior to all earlier enacted federal law, any treaties made under the "authority of the United States" would also enjoy this supremacy. This suggested to Justice Holmes that treaties, even if not pursuant to the Constitution, would operate as superior law notwithstanding any inconsistencies with the constitutional protection of state sovereignty either in the internal limits of the enumerated powers or the external limits imposed by

112. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

113. See *Reid v. Covert*, 354 U.S. 1 (1954). Only a plurality of the justices in this case thought it necessary to reach this conclusion to sustain the result, although subsequently the Supreme Court has followed the plurality opinion as though it were settled doctrine. See *TRIBE: op. cit.*, 647 n.19 (citing *Boos v. Barry*, 485 U.S. 313, 324 (1988)).

the 10th Amendment.¹¹⁴ Yet Justice Holmes' reasoning also permitted the inference that treaties need not be bound by other limitations, including perhaps even the Bill of Rights, imposed by the Constitution. Justice Black in *Reid v. Covert* explained that Holmes had not realized that the distinction drawn in the Constitution between laws and treaties was intended solely to ensure that the earlier treaties of the United States, including even the Treaty of Paris ending the Revolutionary War against England, would continue to bind the states. Indeed, inclusion of this clause reflected the chief motivation for the assembly of the Constitutional Convention in Philadelphia in 1787 to replace the first Constitution of the United States, the Articles of Confederation.¹¹⁵ At the same time, *Youngstown Sheet & Tube Co. v. Sawyer* in the related area of separation of powers seemed to ignore completely the teaching of *United States v. Curtiss-Wright Export*. The Court reasoned instead in terms of all of the facts and circumstances, including the degree of explicitness in Congressional authorization and the level of impact on domestic activities and rights, to hold that the national interest in the continued production of steel during the U.N.-authorized police action in Korea undertaken by U.S. military forces could not in the absence of explicit Congressional authorization justify federal executive seizure of the steel mills whose production was impeded by labor strife.¹¹⁶ In sum, two lines of precedent compete for constitutional hegemony, giving the Court some degree of discretion in the management of future cases.

Similarly, with respect to the question of the external activities of states, precedents flow in different directions, and demarcating the boundary between state and federal power is as difficult as in the case of the internal effects of federal foreign policy-based action. On one hand, the so-called Dormant Commerce Clause—that is to say, the doctrine that the Federal Commerce Clause by itself bars the states from infringing the federal common market—applies even more vigorously with respect to the foreign commerce of the United States, where the capacity of the United States to function as one entity is even more seriously at risk, than in the case of purely

114. See *Missouri v. Holland*, *op. cit.*, 433. Article VI, section 2 of the U.S. Constitution provides: "This Constitution, and the laws of the United states which shall be made in Pursuance thereof, and all 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 of every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding."

115. See *Reid v. Covert*, *op cit.*, 16.

116. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

internal commerce.¹¹⁷ Moreover, during the Cold War the Supreme Court found it necessary to construct an additional free-floating doctrine adding even to the already significant limits imposed by the Dormant Commerce Clause on the activities of states that could affect the foreign affairs of the United States. In *Zschemig v. Miller* the Supreme Court decided that, although a state's conditioning of rights of inheritance of a foreign national on a right to reciprocal treatment for a similarly-situated U.S. national under the law of that foreign State was constitutional, a state court judge's invidious characterization of Eastern European Communist country's inheritance law applied that statute unconstitutionally, specifically in violation of the implied federal exclusivity in the conduct of the foreign relations of the United States.¹¹⁸ Although the Court had previously decided that state statutes of this kind did not violate the Constitution, and although the federal Executive branch publicly maintained that the state court judge's comments did not impede the foreign policy of the United States, the Supreme Court decided nonetheless that under the particular facts of the case the state judiciary's airing of such views invaded powers of the political branch of the federal government central to the management of the Cold War.¹¹⁹ Notably, because the Supreme Court emphasized the particular facts of the case it is difficult to determine the degree to which *Zschemig v. Miller* will operate as precedent, although it clearly represents the outer perimeter of protection for federal authority through the limitation of state activity having potential effects on U.S. foreign policy interests only tangentially, if at all, related to the foreign commerce of the United States.

On the other hand, a narrower interpretation of federal exclusivity is available. Recently, the Supreme Court evaded the question of *Zschemig v. Miller*'s continued strength as a precedent. In *Crosby v. National Foreign Trade Council*, rather than rely on an implied federal exclusivity in foreign relations, the Court, to invalidate state conduct, decided on the narrower ground of federal preemption of any state conduct on the basis of a federal statute delegating broad discretion to the president with respect to a particular issue to advance the foreign policy interests of the United States¹²⁰. Before

117. See *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S.482 (1984) (holding that the state of Alaska as a seller of its own timber resources could not require in-state processing of that lumber after transferring title to a third party).

118. See *Zschemig v. Miller*, 389 U.S. 429 (1968).

119. See *ibid.*, 434.

120. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

determining the applicability of the potentially broad Dormant Commerce Clause or the potentially even broader doctrine of *Zschernig v. Miller*, the Court first sought to interpret the federal statute authorizing the President to impose specific limitations on investment and other trade with Myanmar, thought by the U.S. Congress to be a dictatorship violating the rights of its citizens. Indeed, this view was shared by many U.S. state governments, including the government of Massachusetts, whose boycott of companies investing in, or otherwise doing business with, Myanmar was intended to encourage the government of Myanmar to restore civil liberties. Although the text of the federal statute did not indicate precisely that Congress intended to prohibit state sanctions, the Court nonetheless concluded that any degree of state discretion in this area was incompatible with the degree of discretion granted by the Congress to the President to enable him to develop and implement a policy capable of achieving the goals of the Congress. Its interpretation of the statute, moreover, the Court declined to apply the so-called “anti-preemption presumption” —that is to say, normally in the absence of a conflict with the specific provisions of a federal statute or a clear expression in the statute to displace state law, a federal statute is to be interpreted to the maximum extent possible so as not to conflict with state law.¹²¹ Rather, according to the Court, Congress’s intention was so clearly inferable from its ample grant of discretion to the President that it was unnecessary to reach the question of the applicability of the presumption in the context of matters relating to foreign policy.¹²² Interestingly, the Court’s focus on the discretion accorded to the President and the correlative need for the states to remove themselves from the field suggests overtones of the Supreme Court’s emphasis on political accountability in its *New York* and *Printz* opinions.

121. See *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933) (the so-called “presumption against preemption”).

122. See *Crosby v. National Foreign Trade Council*, *op. cit.*, 374 n. 8 (citing *United States v. Locke*, 529 U.S. 89 (2000)). It is perhaps notable that the Supreme Court, interpreting a federal statute designed to regulate maritime commerce as applied to state’s interests in the protection of its maritime environment, held that the traditional presumption against preemption was inapplicable, because maritime issues historically, indeed since the very beginnings of the republic, had been regulated by the federal government rather than the states. See *U.S. v. Locke*, 529 U.S. 89, 108 (2000). This analysis may well be comparable to the historically-based strand of the reasoning the Court employed in *National League of Cities v. Usery* and *U.S. v. Morrison*. See, *supra*, text accompanying notes 46 – 50 and 69 – 77.

In sum, one should observe that Justice Sutherland's approach, giving the states practically no role in the conduct of foreign affairs, may be in tension with the views of the Justices now spearheading a revival of federalism through the protection of political competition between the federal government and the states and the reconstruction of limits on the federal authority over inter-state and foreign commerce. In *U.S. Term Limits*, the same justices who helped to form a majority in *New York, Printz, Lopez* and *Morrison* declared that the powers reserved to the states under the 10th Amendment included any and all powers that did not form part of the enumerated powers of the federal government.¹²³ It is quite possible that *Missouri v. Holland* and *Curtiss-Wright Export Corp.* represent a temporary response by the Supreme Court to allow the federal government to defend the interests of a nation that had unexpectedly become a world power, a view advanced by at least one student of the history of the powers of the U.S. states in the 19th century.¹²⁴ When Supreme Court chose to decide *Crosby* on the narrowest possible ground and, in so doing, emphasized presidential discretion and accountability, it may have foreshadowed future resort as a matter of constitutional law to the new internal allocation of competence between the states and the federal government based on reinforcing political accountability to further political competition. The Court's opinion thus leaves open the possibility of constructing an approach that will also vindicate a right of the people to further their foreign affairs interests through both the federal government and, to the extent practicable, through the states.

B. *The Road From Denmark to Brussels*

Like the Supreme Court of the United States, the Constitutional Tribunal of Spain has had to confront the question of the effect of a treaty on the internal distribution of competence between the central state and the sub-state

123. See *U.S. Term Limits v. Thornton*, *op. cit.*, 845 (Justice Thomas, writing in dissent also for Justices Rehnquist, O'Connor, and Scalia). In addition, one should note that Justice Kennedy, although joining the majority in *U.S. Term Limits*, wrote separately to emphasize his own support for the protection of state sovereignty as well, thereby suggesting a more equivocal position on the scope of the powers reserved to the states by principles of federalism and the 10th amendment to the Constitution. See *ibid.*, 836.

124. See G. EDWARD WHITE: *The Transformation of the Constitutional Regime of Foreign Relations*, 85 *Va. L. Rev.* 1 (1999).

entities. The premises for the Tribunal's analysis with respect to the effect of Spain's entry into the EEC on this allocation of competence were explicated in *Comercio de Carnes* along the following lines: "The necessity for collaboration between the central administration and the autonomous administrations derives as much from the need for systematic interpretation of the Constitution as from the Constitution's supremacy over the Statutes of Autonomy, a collaboration which demands in many cases, above all with respect to our admission to the EEC, forms of articulation (for example, implementation of tasks for which the State is responsible instead by the Autonomous Administrations and, therefore but only to that extent, in accordance with the direction and supervision of the Central Administration) which only an inadequate interpretation of the statutes on autonomy and constitutional precepts could obstruct."¹²⁵ Arguably, then, the Constitutional Tribunal emphasized solidarity and cooperation between the state and autonomous communities in furthering the imperative project of Spain's integration into the EEC, thereby suggesting that the settled doctrinal position that core elements of the Spanish Constitution, such as autonomy, should be subordinated to the project of developing a "systematic interpretation" of the Constitution that could further the goal of European integration.

One might argue, however, that the Constitutional Tribunal's opinion in *Comercio de Carnes* includes language suggesting, to the contrary, that the allocation of competence between the state and the autonomous communities would survive the treaty. Addressing the claim of the lawyer for the State that EEC directives provided for "the direct and exclusive exercise of authority by the Central Administration" of certain measures, the Tribunal replied as follows: "It is, consequently, the internal rules delimiting competence that

125. *Judgment of the Constitutional Tribunal*, No. 252/88, Dec. 20, 1988, *Case on Comercio de Carnes*, fund. jur. no. 2. See also *ibid.*, fund. jur. no. 3 ("Tanto de la interpretación sistemática de la Constitución como de la supremacía de esta sobre los Estatutos se deriva la necesidad de colaboración entre la Administración Central y las Administraciones Autonómicas, colaboración que puede exigir en muchos casos, en relación sobre todo, con nuestra incorporación a la CEE, formas de articulación (por ejemplo, realización por la Administración Autónoma de tareas de competencia estatal, con sumisión en consecuencia, y solo en cuanto a ellas, a instrucción y supervisión de la Administración Central) que solo una interpretación inadecuada de los preceptos constitucionales y estatutarios puede obstaculizar"). The Tribunal referred to the "aforementioned general principle of collaboration repeatedly to referred to by the Tribunal as a criterion informing the relations between the State and the Autonomous Communities." *Ibid.* ("principio general de colaboración antes aludido y que repetidamente se ha referido este Tribunal como criterio informador de las relaciones entre el Estado y las Comunidades Autónomas").

must in all cases form the basis of an answer to the conflicts of authority between the State and the Autonomous Communities.” By parity of reasoning, added the Tribunal, the autonomous communities, “for this very same reason, should not consider their own powers expanded beyond their proper scope because of an international connection.”¹²⁶ One must note, nonetheless, that this reply was based on the premise that EEC Directives “limit themselves to specifying the authorities of each of the State Members of the EEC ..., without prejudice therefore as to which Administration—the State or Autonomous Community—is competent to receive that authority and stand watch over the maintenance of the envisioned situation. The only thing the Directives impose at this point, in sum, is that the Central Administration be the only spokesman to the EEC with respect to compliance with Community determinations, but this is an exigency which, as is well understood, may be satisfied through various formulas and means, rather than, as we are given to believe by the lawyer for the State, only through the direct and exclusive exercise of these representative capacities by the Administration of the State.”¹²⁷ Thus, despite language suggesting the contrary, it appears clear that the Tribunal’s opinion actually holds only that the allocation of competence between the State and the Autonomous Communities is not necessarily affected if compliance with the EEC Treaty does not require a change in the internal legal order. Thus understood, the opinion merely interprets the means employed by the central government to comply with Spain’s obligations to the Community. The only necessary central state monopoly of competence, according to the Tribunal, was that only the central state can be the point of contact between Spain and the

126. See *ibid.*, fund. jur. no. 2 (“Son, en consecuencia, las reglas internas de delimitación competencial las que en todo caso han de fundamentar la respuesta a los conflictos de competencia planteados entre el Estado y las Comunidades Autónomas, las cuales, por esta misma razón tampoco podrían considerar ampliado su propio ámbito competencial en virtud de una conexión internacional”).

127. See *ibid.* (“se limitan a precisar que son las autoridades centrales de cada uno de los Estados miembros de la CEE... sin prejuzgar, por consiguiente, cuál deba ser la Administración competente—si la estatal o la autonómica— para la concesión de dichas autorizaciones y para velar por el mantenimiento de las condiciones previstas. Lo único que las Directivas imponen en este punto es, en suma, que la Administración Central sea el interlocutor único de la CEE en lo que toca al efectivo cumplimiento de las determinaciones comunitarias, pero ésta es una exigencia que, como bien se comprende, podría ser satisfecha a través de fórmulas y expedientes diversos, y no solo, frente a lo que da a entender el Abogado del Estado, mediante el ejercicio directo y exclusivo por la Administración del Estado de las intervenciones dichas”).

Community with respect the "fulfillment of Community determinations," which left open the possibility that the Autonomous Communities could in principle engage in contacts with other governments or the EEC unrelated to the fulfillment of Community obligations.

In subsequent opinions, the Tribunal clarified these themes, although neither its language in *Comercio de Carnes* nor in the contemporaneous case *Acuerdo Galicia-Dinamarca*¹²⁸ foreshadowed what appeared to be a doctrinal turn in *Oficina Vasca en Bruselas*.¹²⁹ One should note that the kind of international law involved in *Comercio de Carnes* originated, not in a mere international treaty, but rather in the EEC —thereby implicating Article 93 of Spain's Constitution. This provision enables the central state by treaty to transfer to an "international organization or institution the exercise of competences derived from the Constitution" and "guarantees fulfillment of these treaties and resolutions of international or supranational organizations receiving such grants of authority."¹³⁰ Accordingly, the internal distribution of competence concerning the function of representing the country in respect of its international obligations also presupposed that the competence to conclude the treaty was also held exclusively by the central state. The Constitutional Tribunal, in *Acuerdo Galicia-Dinamarca*, expressly affirmed this implicit premise embedded in *Comercio de Carnes*. However, although it framed the issue of the case as whether the Constitution "eliminated root and branch any form of *ius contrahendi* for the autonomous entities,"¹³¹ in the following paragraph the Tribunal noted merely that the autonomous communities lacked the competence to enter into treaties.¹³² It based its conclusions on the text of the Constitution, citing the exclusive competence of the central state with respect to "international relations,"¹³³ although it made

128. See *Judgment of the Constitutional Tribunal*, No. 137/89, July 20, 1989, Case on *Comunicado de Colaboración suscrito el 2 de noviembre de 1984 entre el Consejero de Ordenación de la Junta de Galicia y la Dirección de Medio Ambiente del Gobierno del Reino de Dinamarca* [Galicia-Dinamarca Agreement].

129. See *Judgment of the Constitutional Tribunal*, No. 165/95, May 26, 1994 [Oficina Vasca en Bruselas].

130. See *Constitution of Spain*, Article 93 ("organización o institución internacional ejercicio de competencias derivadas de la Constitución" and "garantía del cumplimiento de estos tratados y de las resoluciones de los organismos internacionales o supranacional titulares de las cesiones").

131. See *ibid.*, fund. jur. no. 3 ("elimina de raíz cualquiera forma de *ius contrahendi* de los entes autonómicos") (emphasis added).

132. See *ibid.*, fund. jur. no. 4.

133. See *Constitution of Spain*, Article 149. 1.3.

clear that its interpretation was not of the text “considered in isolation, but rather as it was grounded in, and confirmed by, other Constitutional precepts, in the text’s drafting history, and in the legislature’s practical construction of the constitutional text in the drafting of the Statutes of Autonomy.”¹³⁴ Thus, the Tribunal signaled its intention to avoid formalistic analysis and suggested that it might be open, at least in theory, to the possibility of permitting the autonomous communities to engage in some kinds of contacts —perhaps including even contracts not operating as treaties under international law yet establishing rights and duties under municipal law— with such international entities as other sub-state entities, states, and international or supranational organizations.

This possibility for a more open-textured approach in interpreting the external capacities of the autonomous communities may have been realized in the Constitutional Tribunal’s opinion in *Oficina Vasca en Bruselas*. The Tribunal clarified that exclusive central state competence over international relations, as provided under Article 149.1.3, could not be interpreted to prohibit any external action whatsoever by the autonomous communities. This conclusion was grounded on the view that, while the interests protected by the autonomous communities merited constitutional protection when they were not in conflict with the general interests of the community protected by the central state, the gravitational force of the European Union nonetheless could distort the autonomous communities’ performance of their own functions. Indeed, noted the Tribunal, “it is evident that norms and acts of the European Communities may operate not only to limit and restrict the Autonomous Communities’ exercise of their own competences, but also conversely to establish economic incentives and assistance for activities that the Autonomous Communities would then implement.”¹³⁵ More important methodologically, and signaling a turn toward the use of the techniques developed by the Supreme Court of the United States to avoid the kind of

134 See *Acuerdo Galicia-Dinamarca*, *op. cit.*, fund. jur. no. 4 (“aisladamente considerado, sino que encuentra asimismo fundamento y confirmación en otros preceptos de la Constitución, en los antecedentes de la elaboración de esta y en la interpretación efectuada al propósito por el legislador de los Estatutos de Autonomía”).

135. See *Oficina Vasca en Bruselas*, *op. cit.*, fund. jur. 4 (“es evidente que las normas y actos de las Comunidades Europeas pueden entrañar no solo límites y restricciones al ejercicio de las competencias que corresponden a las Comunidades Autónomas sino que también pueden establecer, a la inversa, incentivos y ayudas económicas para las actividades que estos entes llevan a cabo.”).

"systematic interpretation" of the Spanish Constitution the Tribunal had earlier appeared to favor in *Comercio de Carnes*, the Tribunal now decided that the potential conflict between the Basque Autonomous Community's decision to open an office in Brussels to represent Basque interests before the EU and the exclusive responsibility of the central state in international relations could not be adjudicated in the absence of determinate facts allowing the Tribunal to assess whether the potential conflict had ripened into an actual conflict.¹³⁶

Yet, *Oficina Vasca en Bruselas* could be reconciled with *Acuerdo Galicia-Dinamarca* in at least two ways. First, the Tribunal emphasized the fact that, especially after the Treaty of Maastricht, "Europe had come to create a new legal order, the community legal order, that to the combination of states composing the European Communities could be considered as having certain internal effects." It thus added that "undoubtedly the Autonomous Communities have an interest in the development of the Community dimension."¹³⁷ This statement thus facilitates an interpretation of *Oficina Vasca en Bruselas* that would limit its effect as a precedent only to the activities of the autonomous communities having an internal character because of their relation to the supranational EU. Therefore, one could argue it would not conflict with a broad reading of the Tribunal's opinion in *Acuerdo Galicia-Dinamarca* as precluding any purely international, non-EU activities of the autonomous communities.

Second, and suggesting an even less significant retreat from the broadest reading of *Acuerdo Galicia-Dinamarca*, the Tribunal in *Oficina Vasca en Bruselas* emphasized that its reasoning "equally excludes the possibility that the Autonomous Communities could establish permanent organs of representation before the Community institutions, endowed with international personality, because that would imply a prior agreement with the receiving State or international Organization in respect of which those organs would exercise their functions."¹³⁸ But, because Spain already had a prior

136. See *ibid.*, fund. jur. no. 8.

137. See *ibid.*, fund. jur. no. 4 ("Europa ha venido a crear un orden jurídico, el comunitario, que para el conjunto de los Estados componentes de las Comunidades Europeas puede considerarse a ciertos efectos como 'interno'... es indudable que [las Comunidades Autónomas] poseen un interés en el desarrollo de esa dimensión comunitaria.").

138. See *ibid.*, fund. jur. no. 5 ("excluye igualmente que dichos entes puedan establecer órganos permanentes de representación ante esos sujetos, dotados de un

agreement with the Community establishing Spain's right to diplomatic representation in Brussels, and because the Tribunal made clear that Basque Office was required to coordinate its legitimate informational activities with Spain's mission, the Basque Office did not necessarily create an agency purporting to exercise independently a portion of Spain's international rights.¹³⁹ Accordingly, the Constitutional Tribunal was not required to characterize the establishment of the Basque Office as an event requiring a prior international agreement and, therefore, its reasoning could be interpreted as not in conflict with the broad reading of *Acuerdo Galicia-Dinamarca* as prohibiting the autonomous communities from engaging in any kind of international activities, including entering into even agreements other than treaties and any kind of representational or informational activities of a diplomatic character.

Setting aside the potential for a narrow interpretation of *Oficina Vasca en Bruselas*, it is possible that a broad view of the rights of the autonomous communities to represent local interests within the European Union may be linked to the Treaty of Maastricht's creation of a new supranational citizenship for citizens of Spain. Indeed, this new European citizenship was approved by the Constitutional Tribunal, subject to the need for technical amendments to the Spanish Constitution to enable Spain to comply with its obligations to grant voting rights to all EU citizens, before the Treaty of Maastricht could enter into force in Spain.¹⁴⁰ As language in *Oficina Vasca en Bruselas* suggests, this new supranational citizenship for inhabitants of Spain's Autonomous Communities may well give rise to a constitutionally-significant interest in the protection of their local interests through the agency of the autonomous communities, whether acting in a merely representative capacity for citizens of Spain and the EU or on their own behalf as subjects of

estatuto internacional pues ello implicara un previo acuerdo con el Estado receptor o la Organización internacional ante la que ejercen sus funciones.”).

139. See *ibid.*, fund. jur. no. 8 (“the relations [of the Autonomous Communities] the responsibility for whose coordination is entrusted to the Office for Matters related to the European Communities are to those activities, of information and connection with respect to European institutions, that do not impinge upon responsibility for international relations reserved to the State”) (“las relaciones [de las Comunidades Autonomas] cuya coordinación se encomienda al Gabinete para Asuntos relacionados con las Comunidades Europeas se refieren a aquellas actividades de información y conexión respecto de instituciones europeas que no inciden en el ámbito de las relaciones internacionales reservadas al Estado”) (internal quotes omitted).

140. See *Declaration of the Constitutional Tribunal concerning the Treaty of Maastricht*, July 1, 1992, BOE, July 24, 1992.

EU law. Arguably, dual citizenship would provide the analytic key to the evolving jurisprudence of the Constitutional Tribunal concerning activities of the Autonomous Communities which, although once implicating the international relations boundary in the distribution of authority with the State, now could be analyzed solely in terms of the ordinary principles governing the conflict between general and local interests under the Spanish Constitution. Moreover, the domestic federalism principles of the United States, as recently elaborated by the Supreme Court in terms of reinforcing political competition between two competing sovereignties, might also inform the Constitutional Tribunal's continuing assessment of the role of the Autonomous Communities in helping to vindicate both the local and general interests of Spanish citizens in the context of political competition between the Spanish State and the European Union.

Nonetheless, repeating in broad language the dictum of *Acuerdo Galicia-Dinamarca*, the Tribunal declared in *Oficina Vasca en Bruselas* that the interests of the Autonomous Communities themselves could be expressed only to the extent they did not "implicate the exercise of *ius contrahendi*, did not entail immediate obligations to foreign public authorities, did not intrude on the foreign policy of the State, and did not give rise to responsibility for the State with respect to foreign states or international or supranational organizations."¹⁴¹ Thus, the Tribunal left open, as had the U.S. Supreme Court in *Zschernig v. Miller* and *Crosby v. National Foreign Trade Council*, the possibility of controlling the external activities of Spain's sub-state entities if the conditions of international relations required the Tribunal to give more weight to the claim of the central government to protect the general, in this case the external, interests of the political community rather than to the demand of sub-state entities to represent local interests before authorities managing powers now allocated to the EU. Indeed, while U.S. federalism may be less relevant to Spain's constitutional allocation of internal sovereignty, exploring the U.S. experience—in particular, the room for growth U.S. jurisprudence has left open for itself in the allocation of competence over questions of external sovereignty—may well yield insights

141. See *Oficina Vasca en Bruselas*, *op. cit.*, fund. jur. no. 6 ("no impliquen el ejercicio de un *ius contrahendi*, no originen obligaciones inmediatas y actuales frente a poderes públicos extranjeros, no incidan en la política exterior del Estado, y no generen responsabilidad de éste frente a Estados extranjeros u organizaciones inter o supranacionales").

that could reveal and inform new lines of analysis for the nascent Spanish constitutional experience.¹⁴²

IV. CONCLUSIONS: THE ROLE OF CONSTITUTIONAL LAW IN FACILITATING THE CREATION OF NEW INTERNATIONAL LAW

The economic and political tendencies for regional, and global, integration impose centripetal and centrifugal stresses on domestic constitutional systems, although perhaps most severely for complex states such as the United States and Spain. The evolution of their constitutions must take into account two elements that are sometimes in opposition. At one extreme, it is necessary for the central government to retain the discretion necessary to defend the most important interests of the people to whom that government is responsible. These interests in peace and security are of the greatest value when they are at risk, although they also have value when threatened by more insidious forces requiring strategic discipline and patience. This need for discretion applies as much to *Zschernig* during the Cold War as to *Crosby* in the struggle against current dictatorships, and even to *Acuerdo Galicia-Dinamarca* insofar as the integrity of national policy against environmental threats might be undercut by an independent policy of a sub-state entity to protect its own environment with the help of a foreign state.

At the other extreme, the interests, indeed the duties, of all persons to protect their fundamental rights in solidarity with other members of their political communities and to international legal protection for this purpose includes, it seems to me, the right and the duty to participate in international society to protect these fundamental rights. These interests must be protected by means of reducing the level of governmental discretion, especially when

142. According to José Luis MEILÁN GIL: "The experience and techniques of comparative law might be employed with respect to the particular experience of federal states, without undermining precipitously the constitutional design of the autonomic state. Some of the decisions that have been adopted are irreversible; others are not." See *La Ordenación Jurídica de las Autonomías*, 162 (1988)) ("El aprovechamiento de la experiencia y de las técnicas del derecho comparado, singularmente de los Estados federales, puede llevarse a cabo sin desnaturalizar precipitadamente el diseño constitucional del Estado autonómico. Algunas de las decisiones adoptadas son irreversibles, pero no todas").

central governments monopolize the coercive powers of society and use those powers to defend their security interests by whatever means they may find convenient under the pressure of the moment. This need applies as much in *Reid v. Covert*, to protect the right to a civil trial of a civilian dependent accused of committing a criminal offense on the front lines, albeit fortuitously, of the Cold War, as in *Oficina Vasca en Bruselas*, to protect the interests of an autonomous community in standing guard over the potential evolution of the European Union so as to risk its limited rights to self-government under the Spanish Constitution.

The tension between, on the one hand, maximal discretion for the central state and, on the other, ensuring that the rule of law constrains that state's power to oppress, arguably requires different balances as to different subject matters at different moments in the lives of nations. The constitutions of complex states, such the United States and Spain, must retain the flexibility to take the necessary doctrinal turn at the necessary moment. This requires, rather than "systematic" interpretation, a series of cases that, as George Fletcher has suggested, may serve as a "source of experience, drama, and insight." The capacity to respond to the unforeseen requires these virtues rather than, however admirable they may be, the virtues of system and science.

