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Limits to the Union's 'Internal Market' Competence(s): Constitutional Comparisons

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Introduction

The enumeration principle forms the constitutional core of every federation, and structures the division of powers in the United States and the European Union.¹ Federal constitutions thereby present a picture of thematically limited competences. Yet this picture is—partly—misleading. Many federal unions enjoy a functional competence that cuts horizontally across (almost) all other policy areas. This competence typically relates to the establishment and functioning of a Union-wide market. The advantages of an economic 'unity in diversity' were identified early on by the American founding fathers:

[a]n unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States.²

* This chapter draws extensively on my *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford and New York: Oxford University Press, 2009).

¹ For the US Constitution, see art I, s 1 (emphasis added): '[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives'; as well as the Tenth Amendment: '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' For the EU this follows from the 'principle of conferral' as expressed in art 5(2) TEU: '[u]nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'

² A. Hamilton, 'Federalist No. 11', in A. Hamilton, J. Madison, and J. Jay, *The Federalist* (Cambridge and New York: Cambridge University Press, 2003), 46, at 51.

Trade and commerce were consequently of central concern to the Federation. The free circulation of commodities would increase the wealth of the 'nation(s)'.³ The same point would be made, almost 200 years later, on the other side of the Atlantic:

[t]he object of a European common market should be to create a vast zone of common economic policy, constituting a powerful unit of production and permitting a continuous expansion, an increased stability, an accelerated raising of the standard of living, and the development of harmonious relations between its Member States. To attain these objectives, a fusion of the separate markets is an absolute necessity.⁴

Both Union-wide markets would have to be created by federal law aiming to establish a degree of legal 'unity' amidst the diverse state markets.⁵ But to what extent should such legal unity be created through federal legislation? Would *any* diversity among state laws—like 'labour law' or 'public health laws'—undermine free commerce and trade?

These constitutional questions have been raised in the United States and the European Union, and this Chapter wishes to analyse their respective answers. Section I starts with the—older—American 'internal market' competence: the 'Commerce Clause'. The latter allows Congress 'to regulate Commerce... among the several States'.⁶ It has been the chief competence to deregulate and re-regulate the American federal market.⁷ The European Union's internal market competence(s) will be analysed in section II. We shall see here that Article 114 TFEU has—like the US 'Commerce Clause'—been given an (almost) unlimited scope. Nonetheless: both the American and the European internal market powers have encountered *some* political and legal limits, and section III will compare these constitutional limitations by means of a 'Conclusion'.

I. The 'Internal Market' Competence in the United States

One of the central tasks of the 1787 US Constitution had been the creation of an internal market. The ability of the states to create obstacles to trade had been obstructive for federal commerce,⁸ and the (second) American Constitution

³ On the impact of Adam Smith on the American Founders, see S. Fleishacker, 'Adam Smith's reception among the American founders, 1776–1790' (2002) 59 *William & Mary Quarterly* 897.

⁴ Comité Intergouvernemental Créé par la Conférence de Messine, Rapport des Chefs De Delegation ('Spaak Report'), as translated by J.J.A. Ellis, 'Source Material for Article 85(1) of the EEC Treaty' (1963) 32 *Fordham Law Review* 247, at 249.

⁵ Cf. A. Hamilton, 'Federalist No. 22', in Hamilton and others (n 2) 98: '[t]he want of a power to regulate commerce is by all parties allowed to be of the number. The utility of such a power has been anticipated under the first head of our inquiries; and for this reason, as well as from the universal conviction entertained upon the subject, little need be added in this place. It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence.'

⁶ US Constitution, art I, s 8 (Clause 3).

⁷ On the (deregulatory) 'dormant' part of the 'Commerce Clause', see J.N. Eule, 'Laying the Dormant Commerce Clause to Rest' (1982) 91 *Yale Law Journal* 425; as well as M. Tushnet, 'Rethinking the Dormant Commerce Clause' (1979) *Wisconsin Law Review* 125.

⁸ Under Articles of Confederation, there had been no 'Commerce Clause'.

therefore provided Congress with the power ‘to regulate Commerce . . . among the several States’.⁹ This provision would soon prove to be the broadest power of the American Federation.¹⁰ However, the scope of this power had to be limited. Even the most ‘nationalist’ reading of the Constitution could not deny this: federal powers were enumerated powers; and ‘enumeration presupposes something not enumerated’.¹¹ But where would interstate commerce begin and intrastate commerce end? What were the constitutional or political limits to the American ‘internal market’ competence? These questions have received different answers in the constitutional history of the United States.

1. The ‘Commerce Clause’ before the ‘New Deal’: internal and external constitutional limits

In the early history of the ‘Commerce Clause’, the Supreme Court had devised two strategies to restrict this Union competence. The first strategy was to develop *internal* limitations to the competence. This was complemented by a second strategy that would impose *external* boundaries to the ‘Commerce Clause’.

We find a good illustration of the first strategy in *Hammer v Dagenhart*.¹² Would the ‘Commerce Clause’ generally allow the Federal Government to prohibit or ban interstate commerce with regard to a product? The ‘Federal Child Labor Act’ had aimed at standardizing the ages at which children could be employed in mining and manufacture. And, in the absence of a specific power to regulate working hours, Congress had used its general competence under the ‘Commerce Clause’ by simply prohibiting interstate commerce in those goods that shared in the ‘original sin’ of child labour. Would ‘the power to *regulate* given to Congress incidentally include[] the authority to *prohibit* the movement of ordinary commodities?’¹³ The Supreme Court did not think so. It invalidated the federal law, since it could not

⁹ US Constitution, art I, s 8 (cl 3).

¹⁰ The provision is often supported by the ‘Necessary and Proper Clause’. This is the last clause in art I, s 8, and provides Congress with the power ‘[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States’. In American constitutional practice, the clause can only be used in combination with one of the ‘foregoing powers’. The ‘sweeping clause’ is thus ‘not a self-contained power’ as it ‘must always be tied to the exercise of some other identifiable constitutional power of the national government’ (G. Lawson and P.B. Granger, ‘The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause’ (1993-94) 43 *Duke Law Journal* 267, at 274–5). The ‘Necessary and Proper Clause’ thus requires the presence of an expressly enumerated power in the Constitution. In this sense: R. Beck, ‘The New Jurisprudence of the Necessary and Proper Clause’ (2002) *University of Illinois Law Review* 581, at 592: ‘[t]he clause merely confirmed the existence of lesser powers, not expressly detailed in the Constitution, which would serve as the means of carrying the enumerated powers into effect.’ The ‘Necessary and Proper Clause’ may then best be identified with a rule of interpretation for the scope of an express power. It allows the—very—wide exercise of a ‘pre-existing’ power, see *McCulloch v Maryland* 17 US 316 [1819], 421: ‘[I]f 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.’

¹¹ *Gibbons v Ogden* 22 US 1 [1824].

¹² *Hammer v Dagenhart* 247 US 251 [1918].

¹³ *Hammer v Dagenhart* (n 12) 270, emphasis added.

be shown to have any positive effect on interstate commerce. The power to regulate commerce was 'directly the contrary of the assumed right to forbid commerce from moving and thus destroying it as to particular commodities'.¹⁴ The power to regulate commerce was a power to 'regulate', not to 'prohibit'.¹⁵ Could the 'Commerce Clause' nonetheless be used to remove distortions of competition flowing from disparities in state labour laws? The Court categorically rejected this view.¹⁶

More important was a second limitation strategy applied to the 'Commerce Clause'. It was informed by the idea that the 1787 Constitution had split the atom of sovereignty,¹⁷ and had established a governmental system of *dual* federalism. 'The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved.'¹⁸ '[T]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres.'¹⁹ The philosophy of dual federalism, while advocating the idea of autonomous federal powers, thus insisted on the idea of 'implied limitations'.²⁰ What were these implied—external—boundaries that were limiting the 'Commerce Clause'? Prior to the 'New Deal', the Supreme Court here drew on the idea of *exclusive* state police powers.

We find a good illustration of this type of reasoning in *United States v Knight*.²¹ The case involved a challenge to the 1890 'Sherman (Antitrust) Act', which had tackled unlawful restraints and monopolies. To what extent could the Union regulate competition law? The Supreme Court thought that 'the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals' was 'a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive'. 'The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states.' However, the Court equally recognized that it was

vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government.²²

¹⁴ *Hammer v Dagenhart* (n 12).

¹⁵ See *Champion v Ames (Lottery Cases)* 188 US 321 [1903]: '[t]he authority given to Congress was not to prohibit, but only to regulate.'

¹⁶ *Hammer v Dagenhart* (n 12) 273.

¹⁷ *US Term Limits Inc v Thornton* 514 US 779 [1995], 838 (Justice Kennedy, concurring).

¹⁸ *Chisholm v State of Georgia* 2 US 419 [1793], 435.

¹⁹ *Ableman v Booth* 62 US 506 [1859], 516.

²⁰ W.F. Dodd, 'Implied Powers and Implied Limitations in Constitutional Law' (1919) 29 *Yale Law Journal* 137.

²¹ *United States v Knight* 156 US 1 [1895]. ²² *United States v Knight* (n 21) 11 and 13.

From this, the Court concluded that since ‘commerce succeeds to manufacture, and is not a part of it’,²³ the federal power could not extend to the regulation of the latter. The exclusive powers of the states would thus limit the (exclusive) federal power to regulate commerce.

2. The ‘Commerce Clause’ after the ‘New Deal’: From ‘constitutional’ to ‘political’ safeguards?

Reforms follow crises. The ‘reformation’ of American federalism followed the Great Depression of 1929. The spirit of the time was this:

[a]rchitecturally we have an antiquated frame of government when we lack nation-wide power to deal with nation-wide conditions that can not be dealt with effectively by the several states. It is abundantly clear that the states could not do much to revive agriculture and industry. If it were clear that the nation by national regulation could do a lot to revive and maintain agriculture and industry, it would then be clear that the nation ought to have the power to do it.²⁴

The economic crisis had affected the entire Union market, and thus demanded Union-wide solutions. To reinvigorate the American economy, a series of statutes had been enacted to regulate the federal market.²⁵ (Yet this ‘new nationalism’ was first blocked by a dual federalist Supreme Court.²⁶ The reforms were judicially vetoed, and it was only after the Roosevelt administration threatened to ‘pack’ the Court, that the ‘switch in time that saved the nine’ endorsed the birth of a new era.) The subsequent ‘nationalist’ re-interpretation of the ‘Commerce Clause’ gradually discarded any internal and external limitations around that federal competence.

We can see this new constitutional spirit at work in *Jones & Laughlin*.²⁷ This case concerned the constitutionality of the ‘National Labor Relations Act’ (1935), which had been challenged ‘as an attempt to regulate all industry, thus invalidating

²³ *United States v Knight* (n 21) 12. The well-known passage from *Kidd v Pearson* 128 US 1 [1888], 20–22 reads: ‘[n]o distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock-raising, domestic fisheries, mining,—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?’

²⁴ T.R. Powell, ‘Some Aspects of Constitutionalism and Federalism’ (1935-36) 14 *North Carolina Law Review* 1, at 26.

²⁵ For a brief summary, see R.L. Stern, ‘The Commerce Clause and the National Economy, 1933–1946’ (1945-46) 59 *Harvard Law Review* 645, at 653.

²⁶ The Supreme Court dealt with the ‘Agricultural Adjustment Act’ in *United States v Butler et al* 297 US 1 [1936]; and the ‘National Industrial Recovery Act’ in *Schechter Poultry Corp v United States* 295 US 495 [1935].

²⁷ *National Labor Relations Board v Jones & Laughlin Steel Corp* 301 US 1 [1937].

the reserved powers of the States over their local concerns'.²⁸ In its judgment, the Court abruptly abandoned the interpretative approach that had tried to distinguish between 'commerce' and 'production':

[t]he congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection or advancement'; to adopt measures 'to promote its growth and insure its safety'; 'to foster, protect, control, and restrain.' *That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'* Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.²⁹

Instead of concentrating on the thematic distinction between (interstate) *commerce* and (intrastate) *production*, the Court here concentrated exclusively on the effects of the federal legislation. The Court's new effect-centred test thereby cut across all the categories of dual federalism that had previously tried to protect exclusive state powers. Focusing on the consequences and not the 'nature' of activities, this new test could capture all activities—even 'trivial' or 'local' ones—whose accumulative effect might be 'far from trivial'.³⁰ Were there thus no external limits to the 'Commerce Clause'? For a time, not even the Tenth Amendment appeared to provide any external boundaries for the 'Commerce Clause'.³¹ The Supreme Court indeed seemed to totally abdicate its judicial review function by relying on the

²⁸ *National Labor Relations Board v Jones & Laughlin Steel Corp* (n 27) 29, emphasis added.

²⁹ *National Labor Relations Board v Jones & Laughlin Steel Corp* (n 27) 36–37, emphasis added.

³⁰ *Wickard v Filburn* 317 US 111 [1942], 127–128: '[t]he maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for the market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.'

³¹ Cf. *United States v Darby* 312 US 100 [1941], 124: '[t]he amendment state[d] but a truism that all is retained which has not been surrendered'. Instead of constituting an independent limit on the 'Commerce Clause', the Tenth Amendment must be 'construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end'. In *National League of Cities v Usery* 426 US 833 [1976], the Supreme Court had still found the 'truism' to be of some significance. This 'exception' to the inoperability of the Tenth Amendment as an external limit on the 'Commerce Clause' was explicitly overruled in *Garcia v San Antonio Metropolitan Transit Authority* 469 US 528 [1985], where the Supreme Court held: '[w]e therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional"... We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on a priori definitions of state sovereignty' (*Garcia v San Antonio Metropolitan Transit Authority* 446–548).

theory of the ‘political safeguards of federalism’.³² This new reasoning is exemplified in *Garcia v San Antonio Metropolitan Transit Authority*:

[i]t is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. . . . The States were vested with indirect influence over the House of Representatives and . . . were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. The significance attached to the States’ equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State’s consent. . . . *Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress’ authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through State participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.*³³

The denial of any—internal or external—constitutional safeguards of federalism was the strongest expression of the ‘new nationalism’ following the New Deal. The Court here left the scope of the ‘Commerce Clause’ completely in the hands of the federal legislator.

However, this theory of the political safeguards of federalism is difficult to defend;³⁴ and the Supreme Court’s celebration of judicial passivism was indeed not to last. The Court thus revived the idea of *some* constitutional boundaries around the ‘Commerce Clause’ in *United States v Lopez*.³⁵ The respondent had violated the 1990 ‘Gun-Free School Act’ by knowingly carrying a firearm on school premises, and challenged the federal law as an unconstitutional exercise of the ‘Commerce Clause’ power. Reasserting the importance of judicial review, the Court emphatically confirmed that the ‘Commerce Clause’ ‘is subject to outer limits’.³⁶

But wherein lay these ‘outer limits’? Systematizing its past precedents, the Court distinguished three classes of legitimate federal legislation:

[f]irst, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate activities having a substantial relation to interstate commerce.³⁷

³² On the theory of the political safeguards of federalism, see H. Wechsler, ‘The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government’ (1954) 54 *Columbia Law Review* 543.

³³ *Garcia v San Antonio Metropolitan Transit Authority* (n 31) 550–551 and 556, emphasis added.

³⁴ L. Tribe, *American Constitutional Law*, Vol. 1 (New York: Foundation Press, 2000), 865–6: ‘[t]he political safeguards of federalism cannot always be counted on to prevent state-subordinating excesses of federal legislative power. The fact that Congress is made up of (and represents) individuals obviously does not guarantee that that body . . . will always act in accordance with individual rights; so too the fact that Congress is made up of (and reflects) the elected representatives of states does not assure that the nation’s legislature will always adequate respect to the rights of states.’

³⁵ *United States v Lopez* 514 US 549 [1995].

³⁶ *United States v Lopez* (n 35) 557.

³⁷ *United States v Lopez* (n 35) 558–559, references omitted.

Undoubtedly, it was this third class of federal laws that would pose the greatest threat to the legislative autonomy of the states. And the Court therefore 'clarified' that the 'Commerce Clause' could only be of federal avail to regulate an economic activity that would 'substantially affect' interstate commerce.³⁸

This first—internal—limitation would be joined by a second limitation in *National Federation of Independent Business v Sebelius*.³⁹ The case involved a challenge to the 2010 'Patient Protection and Affordable Care Act'. The latter required all individuals—unless exempted—to purchase a minimum health insurance policy. The plaintiffs alleged that the individual mandate exceeded the boundaries of the 'Commerce Clause'. The Government objected that this was not the case, since a failure to purchase the insurance would have 'a substantial and deleterious effect on interstate commerce'.⁴⁰ This argument chartered new constitutional territory: the federal law compelled individuals to become active in the market on the grounds that their *inactivity* would (substantially) affect interstate commerce.⁴¹ However, should the power to regulate commerce not 'presuppose... the existence of commercial *activity* to be regulated'? The Supreme Court indeed thought so:

[c]onstruing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him... *The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. We have said that Congress can anticipate the effects on commerce of an economic activity. But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.*⁴²

The power to 'regulate' commerce thus did *not* entail the power to 'create' commerce. The individual mandate could thus not be based on the 'Commerce Clause'.

Would the *post*-New Deal jurisprudence also see the revival of *external* constitutional limits to the 'Commerce Clause'? Judicial intervention indeed revived in relation to the Tenth Amendment. To maintain the 'etiquette of federalism',⁴³ the Federal Government would not be able to rely on the 'Commerce Clause' to

³⁸ *United States v Lopez* (n 35) 560.

³⁹ *National Federation of Independent Business v Sebelius* 567 US [2012]. An electronic copy of the judgment is available at: <<http://supreme.justia.com/cases/federal/us/567/11-393>>.

⁴⁰ *National Federation of Independent Business v Sebelius* (n 39) 17.

⁴¹ *National Federation of Independent Business v Sebelius* (n 39) 18: '[b]ut Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product. Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes "the most telling indication of [a] severe constitutional problem... is the lack of historical precedent" for Congress's action.'

⁴² *National Federation of Independent Business v Sebelius* (n 39) 20 and 26, emphasis added.

⁴³ M.D. Adler and S.F. Kreimer, 'The New Etiquette of Federalism: New York, Printz, and Yeskey' (1998) *Supreme Court Review* 71.

‘commandeer’ the ‘States as States’ to implement federal laws.⁴⁴ Thus ‘even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts’.⁴⁵ What was the philosophy behind this constitutional prohibition? ‘States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government.’ And having retained a ‘residuary and inviolable sovereignty’, the Union could not ‘compel the States to enact or administer a federal regulatory program’.⁴⁶ The non-commandeering principle would thus externally limit the ‘Commerce Clause’. The latter could not be used as a constitutional basis to force the states to adopt ‘harmonized’ state laws.

II. The ‘Internal Market’ Competence(s) of the European Union

The principal idea behind the European (Economic) Community was the creation of a ‘common market’. The gradual unification of national markets was to be achieved by two complementary mechanisms. In the first place, the Treaties themselves would ‘negate’ certain national barriers to intra-European trade.⁴⁷ A second constitutional instrument was ‘positive integration’. Europe would be competent to adopt legislation for the ‘approximation of the laws of Member States to the extent required for the proper functioning of the common market’.⁴⁸ The original harmonisation competence for the ‘common market’ was contained in Articles 115 TFEU.⁴⁹ It was the European equivalent of the

⁴⁴ In *New York v United States* 505 US 144 (1992), petitioners had not contended that the Tenth Amendment limited the power of Congress to act in relation to the subject matter at issue (and the Court would affirm that Congress had power over the issue). They had only contended that the manner in which Congress had exercised its power was unconstitutional. The question was, whether ‘Congress may use the states as implements of regulation; that is, whether Congress may direct or otherwise motivate the states to regulate in a particular field or a particular way’.

⁴⁵ *New York v United States* (n 44) 166.

⁴⁶ *New York v United States* (n 44) 188 (with reference to the Federalist No. 39). According to E.H. Caminker, ‘State Sovereignty and Subordinancy: May Congress Commandeer State Officers to implement Federal Law?’ (1995) 95 *Columbia Law Review* 1001, this formal understanding of the states as institutionally autonomous entities is ‘quite new’: ‘[u]ntil quite recently, the Supreme Court attempted to secure its view of the proper allocation of power between the two governmental systems through efforts to circumscribe the substantive content of enumerated federal power.’

⁴⁷ Art 3(a)–(c) of the original EEC Treaty. In its subsequent titles, the Treaty would lay down specific provisions on the free movement of goods, persons, services, and capital. The most well-known of these ‘dormant Commerce Clauses’ is art 34 TFEU. The provision reads: ‘[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.’

⁴⁸ Art 3(h) of the EEC Treaty.

⁴⁹ The Union’s harmonization competences were scattered across the Treaty. Examples at the time of the adoption of the EEC Treaty were: ex-art 27 for the harmonization of customs legislation; ex-Art 54(3)(g) in the field of company law; ex-art 56(2) in the area of justified restrictions on the freedom of establishment and free provision of services; ex-art 57(2) and (3) concerning access and exercise of professional activities; ex-art 70 gave a specific harmonization competence as regards free movement of capital; ex-art 99 was confined to indirect taxation; and ex-art 117 was to permit the harmonization of social systems.

'Commerce Clause' and allowed the European Union to 'issue *directives* for the *approximation* of such provisions laid down by law, regulation or administrative action in Member States as *directly affect* the establishment or functioning of the common market'.

From the very beginning, the scope of Article 115 TFEU appeared 'quite simply unlimited'.⁵⁰ The Court had given wide interpretations to the concepts of 'directive' and 'approximation',⁵¹ and had conveniently swept the need to show that national legislation 'directly affect[ed]' the common market under the constitutional carpet.⁵² The (almost) unlimited scope of the Union's original internal market competence nonetheless encountered a *political* limit. For any Union law adopted under Article 115 TFEU requires the unanimous consent of the Member States in the Council. This political safeguard of federalism would substantially limit the exercise of the competence in the Union's early life.⁵³ The 1986 Single European Act however gave the Union's harmonization competence a 'brilliant assistant': Article 114 TFEU.⁵⁴ The constitutional neighbour textually widened the Union's internal market competence;⁵⁵ and—importantly—it no longer required a unanimous decision of all Member States.⁵⁶ Would the rise of decisional supranationalism—and the consequent decline in the political safeguards of federalism—induce the Court to strengthen the judicial safeguards of federalism? Would the Court consequently develop internal or external constitutional limits to the Union's (supranational) internal market competence?

⁵⁰ P. Leleux, 'Le rapprochement des législations dans la communauté économique européenne' (1968) 4 *Cahiers De Droit Européen* 129, at 138.

⁵¹ On the 'transformation' of the directive into a directly effective and (potentially) field-pre-emptive instrument, see R. Schütze, *European Constitutional Law* (Cambridge and New York: Cambridge University Press, 2012), 323 *et seq.*, as well as 371 *et seq.* On the wide notion of 'approximation', see section II.1.a.

⁵² On the function and scope of art 115 TFEU in the Union legal order, see F. Marx, *Funktion und Grenzen der Rechtsangleichung nach Art.100 EWG-Vertrag* (Cologne, Berlin, Bonn, and Munich: Heymanns, 1976); and C. Eiden, *Die Rechtsangleichung gemäß Art.100 des EWG-Vertrages* (Berlin: Duncker & Humblot, 1984).

⁵³ On this point, see A. Dashwood, 'Hastening Slowly: The Community's Path Towards Harmonization', in H. Wallace, W. Wallace, and C. Webb (eds.), *Policy-Making in the European Community* (London and New York: Wiley & Sons Ltd, 1983), 177.

⁵⁴ D. Vignes, 'The Harmonisation of National Legislation and the EEC' (1990) 15 *European Law Review* 358, at 367.

⁵⁵ Constitutionally, art 114 TFEU no longer contained the—by now obsolete—references to 'directives' as instruments of harmonization; nor did it mention the 'direct [e]ffect' of national laws on the internal market.

⁵⁶ This reinforcement of the Union's harmonization power would, however, be thematically limited, since the new competence could 'not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons' (art 114(2) TFEU). Obstacles to trade or distortions of competition arising from regulatory barriers within these areas would thus still have to be eliminated by recourse to art 115, or one of the special legal bases provided for in the Treaty (e.g. art 113 for the harmonization of indirect taxation).

1. Internal limits: harmonization for the internal market

a) *The concept of ‘approximation’ or ‘harmonization’*

Would the idea of ‘approximation’ or ‘harmonization’ conceptually require the *prior* and *subsequent* existence of national laws regulating trade within the European market?⁵⁷

For a long time, European constitutional thought strongly linked the concept of harmonization to the *subsequent* approximation of national laws. Originally, this was the result of the harmonization instrument of the ‘directive’.⁵⁸ Directives require Member States to adopt national legislation that will implement the European command. The result of a directive would thus be ‘harmonized’ *national* rules; and it seemed that the *subsequent* existence of national rules was a conceptual characteristic of the notion of harmonization. This however changed with the Single European Act, which decoupled the idea of harmonization from the ‘directive’. The Union could henceforth adopt any measure under its internal market competence, and this included ‘regulations’ as instruments of *direct* Union legislation.⁵⁹

But would harmonization measures not have to be at least generally applicable? For how could an individual decision—an executive act—ever harmonize national laws? In *Germany v Council*,⁶⁰ this constitutional delicacy was placed on the judicial table. Germany argued that the power to ‘harmonize’ precluded the executive power from adopting decisions;⁶¹ and since Article 9 of the Product Safety Directive granted such a power in certain situations, the provision had to be void.⁶² The Court held otherwise:

[t]he measures which the Council is empowered to take under that provision are aimed at ‘the establishment and functioning of the internal market’. In certain fields, and particularly

⁵⁷ In this sense: J. Usher, ‘Harmonisation of Legislation’, in D. Lasok and others (eds.), *Les Communautés Européennes en Fonctionnement* (Brussels: Bruylant, 1981), 171, at 174, arguing that the concept of ‘approximation’ ‘would appear necessarily to imply that the matter in question is governed by national rules in the first place, and remains governed by national rules after they have been harmonized’.

⁵⁸ According to art 288(3) TFEU, ‘[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’.

⁵⁹ On the Union instrument of ‘regulation’, see Schütze (n 51) 317 *et seq.*

⁶⁰ Case C-359/92 *Germany v Council* [1994] ECR I-3681.

⁶¹ Germany’s principal claim in this respect is quoted in para 17: ‘[t]he German Government objects to that argument essentially on the ground that the sole aim of Article [114] *et seq.* of the [FEU] Treaty, and of Article [114] (1) in particular, is the approximation of laws and that those articles do not therefore confer power to apply the law to individual cases in the place of the national authorities, as permitted by Article 9 of the directive.’

⁶² Directive 92/59/EEC on general product safety, [1992] OJ L 228/24, which is now replaced by Directive 2001/95/EC on general product safety, [2002] OJ L 11/4. Art 9 provided as follows: ‘[i]f the Commission becomes aware, through notification given by the Member States or through information provided by them, in particular under Article 7 or Article 8, of the existence of a serious and immediate risk from a product to the health and safety of consumers in various Member States and if: (a) one or more Member States have adopted measures entailing restrictions on the marketing of the product or requiring its withdrawal from the market, such as those provided for in Article 6(1) (d) to (h); (b) Member States differ on the adoption of measures to deal with the risk in question;

in that of product safety, the approximation of general laws alone may not be sufficient to ensure the unity of the market. Consequently, the concept of 'measures for the approximation' of legislation must be interpreted as encompassing the Council's power to lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products.⁶³

Article 114 TFEU would thus entitle the Union to adopt executive decisions. (Yet, since the ruling dealt with a *state*-addressed decision, its constitutional impact might have been confined to that category.) Yet, could the provision also be employed for the establishment of a centralized authorization procedure operated by the Commission or even the creation of the Union's own executive infrastructure?⁶⁴

Subsequent jurisprudence clarified that Article 114 could indeed be used for both purposes. For the adoption of decisions addressed to individuals, the cause célèbre is *United Kingdom v Parliament and Council*.⁶⁵ The case concerned the validity of Regulation 2065/2003, which tried to ensure the effective functioning of the internal market through a Union authorization procedure. The legislative measure delegated the power to grant or reject authorizations to the Commission; and its decisions were addressed to the individual applicant.⁶⁶ The British Government protested: 'The legislative power conferred by Article [114 TFEU] is a power to harmonise national laws, not a power to establish [Union] bodies or to confer tasks on such bodies, or to establish procedures for the approval of lists of authorised products.'⁶⁷ Yet in its judgment, the Court confirmed this very power.⁶⁸ The Union legislator would enjoy 'a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the harmonisation technique'.⁶⁹ This granted the Union an (almost) total freedom with regard to the

(c) the risk cannot be dealt with, in view of the nature of the safety issue posed by the product and in a manner compatible with the urgency of the case, under the other procedures laid down by the specific [Union] legislation applicable to the product or category of products concerned; and (d) the risk can be eliminated effectively only by adopting appropriate measures applicable at [Union] level, in order to ensure the protection of the health and safety of consumers and the proper functioning of the common market, the Commission, after consulting the Member States and at the request of at least one of them, may adopt a decision, in accordance with the procedure laid down in Article 11, requiring Member States to take temporary measures from among those listed in Article 6(1)(d) to (h).'⁷⁰

⁶³ *Germany v Council* (n 60) paras 37–38, emphasis added.

⁶⁴ For a recent and critical analysis of this question in the context of the European Banking Authority, see E. Fahey, 'Does the Emperor have Financial Cloth? Reflections on the Legal Basis of the European Banking Authority' (2011) 74 *Modern Law Review* 581.

⁶⁵ Case 66/04 *United Kingdom v Parliament and Council* [2005] ECR I-10553. In relation to the use of art 114 TFEU to create a Union body, see Case C-217/04 *United Kingdom v Parliament and Council (ENISA)* [2006] ECR I-3771, esp para 44: '[t]he legislature may deem it necessary to provide for the establishment of a [Union] body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate.'

⁶⁶ Art 9(1)(b) of the Regulation; and see also: art 11(1) of the Regulation.

⁶⁷ *United Kingdom v Parliament and Council* (n 65) para 18, emphasis added.

⁶⁸ *United Kingdom v Parliament and Council* (n 65) para 64.

⁶⁹ *United Kingdom v Parliament and Council* (n 65) para 45. This was confirmed in: Case C-217/04 *United Kingdom v Parliament and Council* (2006) ECR I-3771 para 43.

formal type of harmonization action. This freedom of form complemented the substantive freedom of the Union legislator. For the Court has never identified the concept of harmonization with a 'medium' regulatory standard, and indeed grants the Union legislator a wide substantive discretion.⁷⁰

What about the *prior* existence of national laws as a precondition for Article 114 TFEU? This question was the subject of *Spain v Council*.⁷¹ The European legislator believed the national protection period for medicinal products to be insufficient, and saw this insufficiency as penalizing European pharmaceutical research. It had therefore created a supplementary protection certificate, which could be granted under the same conditions as national patents by each of the Member States.⁷² Two major constitutional hurdles seemed to oppose the legality of this European law. First, Article 114 TFEU could theoretically not be used to create *new* rights as it could only harmonize *existing* rights.⁷³ Secondly, at the time of its adoption only *two* Member States had legislation concerning a supplementary certificate.

The Court took the first hurdle by force. It simply rejected the claim that the European law created a new right.⁷⁴ Concentrating on the second hurdle, the Court then addressed the question whether Article 114 required the *pre*-existence of diverse national laws. In the eyes of the Court, this was not the case. The Union could use its internal market competence 'to prevent the heterogeneous development of national laws leading to further disparities which would be likely to create obstacles to the free movement of medicinal products within the [Union] and thus directly affect the establishment and the functioning of the internal market'.⁷⁵ The Union was thus entitled to use its harmonization power to prevent the *potential* fragmentation of the internal market.⁷⁶

⁷⁰ For an early version of this argument, see T. Vogelaar, 'The Approximation of the Laws of the Member States under the Treaty of Rome' (1975) 12 *Common Market Law Review* 211, at 213. The Union standard will nonetheless be subject to the principle of proportionality (cf. art 5(4) TEU). One substantive orientation for the Union harmonization standard can be found in art 114 (3) TFEU, which reads: '[t]he Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.'

⁷¹ Case C-350/92 *Spain v Council* [1995] ECR I-1985. But see now also Case C-58/08 *Vodafone and others v Secretary of State for Business, Enterprise and Regulatory Reform* (2010) ECR I-4999.

⁷² Reg 1768/92 concerning the creation of a supplementary protection certificate for medicinal products [1992] OJ L182/1.

⁷³ Legislation for the creation of new rights will have to be based on Art 352 TFEU, cf. *Spain v Council* (n 71) para 23 (with reference to Opinion 1/94 on the competence of the Community to conclude international agreements concerning services and the protection of intellectual property, [1994] ECR I-5267 para 59).

⁷⁴ *Spain v Council* (n 71) para 27.

⁷⁵ *Spain v Council* (n 71) para 35 (with reference to the sixth recital of Regulation 1768/92).

⁷⁶ On the idea of 'preventive' harmonization in the internal market, see M. Seidel, 'Präventive Rechtsangleichung im Bereich des Gemeinsamen Marktes' (2006) 41 *Europarecht* 26. For some limits, see however: Case C-436/03 *Parliament and Council* [2006] ECR I-3733 para 44, emphasis added. The Court here confirmed and extended the point made in relation to intellectual property law (cf. *Spain v Council* (n 71); as well as Case C-377/98 *Netherlands v Council and Parliament* [2001] ECR I-7079) to 'new legal forms in addition to the national forms of cooperative societies' (para 40).

b) The 'establishment' or 'functioning' of the Internal Market

The Union's competence to harmonize national laws is a functional competence. It is not thematically limited, and applies to *any* measure that affects the establishment or functioning of the internal market.⁷⁷ The former alternative concerns obstacles to intra-Union trade; whereas the latter alternative captures distortions of competition resulting from disparities between national laws. However, *to what extent* would Union legislation have to serve the 'establishment' or 'functioning' of the internal market? What effects would the Union law have to have on the internal market?

Until the end of the twentieth century, the jurisprudence of the Court had unequivocally confirmed the widest possible reading of the European 'Commerce Clause'. Yet, the Court finally confirmed the existence of constitutional limits in *Germany v Parliament and Council (Tobacco Advertising)*.⁷⁸ The bone of contention was a European law that banned the advertising and sponsorship of tobacco products.⁷⁹ Could a prohibition or ban be based on the Union's *Commerce Clause*? Germany objected to the idea. It argued that the Union's internal market power could only be used to promote the internal market; and this was not so in the event, where the federal legislation constituted, in practice, a total prohibition of tobacco advertising.⁸⁰ Further, even if total bans could legitimately be based on Article 114 on the grounds of removing distortions of competition, this second alternative would have to be limited to cases where the distortion was 'considerable'.⁸¹

The Court accepted—to the surprise of many—these invitations and annulled, for the first time in its history, a European law on the grounds that it went beyond the Union's 'Commerce Clause'. Emphatically, the Court pointed out that the latter could not grant the Union a general power to regulate the internal market:

[t]o construe that article as meaning that it vests in the [Union] legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article [5 TEU] that the powers of the [Union] are limited to those specifically conferred on it. Moreover, a measure adopted on the basis of Article [114] of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal

⁷⁷ Cf. S. Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' (2011) 12 *German Law Journal* 827, at 831: '[a]rticle [114] is functionally driven: any national measure may be harmonized provided that leads to an improvement in the functioning of the internal market envisaged by Article 26 TFEU[.]'

⁷⁸ Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419.

⁷⁹ Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L 213/9.

⁸⁰ Germany had pointed out that the sole form of advertising allowed under the Directive was advertising at the point of sale, which only accounted for 2 per cent of the tobacco industry's advertising expenditure (*Tobacco Advertising* (n 78) para 24).

⁸¹ *Tobacco Advertising* (n 78) para 29. There was case law to support this claim, e.g. Case 91/79 *Commission v Italy* [1980] ECR 1099 para 8; as well as Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867 para 23.

market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article [114] as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory.⁸²

What consequences did the Court draw from this statement of principle? The Court split its analysis into an ‘establishment’ and ‘functioning’ part and analysed, in turn, the two alternative applications of the Union’s harmonization power.

Regarding the elimination of obstacles to free movement, the Court qualified its generous ruling in *Spain v Council*. While accepting that ‘recourse to Article [114] as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws’, the Court nonetheless insisted that ‘*the emergence of such obstacles must be likely* and the measure in question must be designed to prevent them’.⁸³ Were future obstacles to intra-Union trade in tobacco advertising likely? The Court accepted this for press products. ‘However, for numerous types of advertising of tobacco products, the prohibition under Article 3(1) of the Directive cannot be justified by the need to eliminate obstacles to the free movement of advertising media or the freedom to provide services in the field of advertising’.⁸⁴ In the light of this, the European legislature had not been entitled to rely on its internal market power on the grounds that the measure would eliminate obstacles to free movement.

However, recourse to the competence could still have been justified by means of the second alternative in Article 114: the elimination of distortions of competition. Here, though, the Court accepted Germany’s invitation and introduced a second internal limitation: the distortion of competition would have to be *appreciable*. In the absence of such a requirement, the powers of the [Union] legislature would be practically unlimited. Constitutionally, the federal legislator could thus not pass laws under Article 114 ‘with a view to eliminating the smallest distortions of competition’.⁸⁵ And since the national laws at issue had only a ‘remote and indirect’ effect on competition, disparities between them could not lead to distortions that were appreciable.⁸⁶ The Directive could thus neither have been legitimately based on the second prong of the internal market power and the Court consequently annulled the European law.

With *Tobacco Advertising*, the Court consequently accepted *some* effects-related internal limits on the Union’s internal market power. First, a simple disparity in national laws will not be enough to trigger the Union’s Commerce Clause. The disparity must give rise to obstacles in trade or appreciable distortions in competition. While Article 114 TFEU can be used to ‘harmonize’ *future* disparities in national laws, it must be ‘likely’ that the divergent development of national laws leads to obstacles in trade. (The Court has—strangely—come to verbalize this requirement by extending the constitutional criterion of a ‘direct effect’—textually mandated

⁸² *Tobacco Advertising* (n 78) paras 83–84.

⁸³ *Tobacco Advertising* (n 78) para 86, emphasis added.

⁸⁴ *Tobacco Advertising* (n 78) paras 97 and 99.

⁸⁶ *Tobacco Advertising* (n 78) para 109.

⁸⁵ *Tobacco Advertising* (n 78) paras 106–107.

only in Article 115 TFEU—to Article 114 TFEU.)⁸⁷ And secondly, the Union measure must actually contribute to the elimination of obstacles to free movement or distortions of competition.⁸⁸ These two constitutional limits to the Union's 'Commerce Clause' were confirmed *in abstracto* by subsequent jurisprudence; yet, their concrete application has led to renewed accusations that Article 114 grants the Union a general competence for the internal market.⁸⁹

2. External limits: constitutional 'saving clauses' for state 'police powers'?

From the beginning, certain provisions within the Treaties could be read as constitutional guarantees for national exclusive powers. Apart from the mysterious Article 345 TFEU,⁹⁰ one of the prominent candidates was Article 36 TFEU. The provision allows states to justify a violation of the free movement of goods on grounds of, *inter alia*, public morality, public policy, and public security. Had these policy fields remained within the exclusive powers of the states? The European Court gave short shrift to that argument in *Simmenthal*.⁹¹ Pointing out that Article 36 TFEU was 'not designed to reserve certain matters to the exclusive jurisdiction of Member States',⁹² the Member States could not insist on their stricter national laws where Union legislation provided for the necessary protection of the interests in Article 36 TFEU. Reacting to this early defeat, the Member States have increasingly used subsequent Treaty amendments to insert provisions designed to protect national powers within the Treaty. The most important species of these clauses

⁸⁷ Cf. Case C-210/03 *Swedish Match* [2004] ECR I-11893 para 29; as well as Case 380/03 *Germany v Parliament and Council (Tobacco Advertising II)* [2006] ECR I-11573 para 37. See also: Case C-58/08 *R, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* (2010) ECR I-4999 para 32 (emphasis added): '[w]hile a mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify the choice of Article [114 TFEU] as a legal basis, the [Union] legislature may have recourse to it in particular where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market.'

⁸⁸ Case C-491/01 *British American Tobacco* [2002] ECR I-11453 para 60.

⁸⁹ This has led D. Wyatt, 'Community Competence to Regulate the Internal Market', *Oxford Faculty of Law Research Paper* 9/2007, 23 to query whether *Tobacco Advertising* was a 'false dawn'. For an analysis of legislative and judicial practice after *Tobacco Advertising*, see also the excellent analysis by Weatherill (n 77).

⁹⁰ The provision reads: '[t]his Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.'

⁹¹ Case 35/76 *Simmenthal v Italian Minister of Finance* [1976] ECR 1871.

⁹² *Simmenthal v Italian Minister of Finance* (n 91) para 14. However, for a judicial 'slip of the tongue', see Case 265/95 *Commission v France* [1997] ECR I-6959 paras 32–33: '[a]rticle [34 TFEU] therefore requires the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article [4(3) TEU] of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory. In the latter context, the Member States, which retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security, unquestionably enjoy a margin of discretion in determining what measures are most appropriate to eliminate barriers to the importation of products in a given situation.'

excludes the Union from harmonizing national laws within a specific policy area.⁹³ For example: within its ‘public health’ competence under Article 168 TFEU, the Union is entitled to adopt health measures ‘*excluding any harmonisation* of the laws and regulations of the Member States’.⁹⁴

Would these ‘saving clauses’ externally limit the Union’s internal market competence? The European Court has expressed a negative inclination in *Germany v Parliament and Council (Tobacco Advertising)*.⁹⁵ While admitting that ‘[t]he national measures *affected* [were] to a large extent inspired by public health policy objectives’,⁹⁶ the Union harmonization measure was nonetheless legitimate. For Article 168 (5) TFEU did ‘not mean that harmonizing measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health’.⁹⁷ ‘[T]he [Union] legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made.’⁹⁸ The express saving clause would thus *not* operate as an external limitation on Article 114 TFEU. Where Union legislation served an internal market objective, the Union legislator could enter into health-related fields. However, the Court conceded that these saving clauses did have some constitutional significance: the Union must not use its internal market power ‘to circumvent the express exclusion of harmonisation laid down in Article [168 (5)] of the Treaty’.⁹⁹

While these local ‘savings clauses’ do consequently not directly limit Article 114 TFEU, the latter will nonetheless find an absolute external limit in the ‘constitutional identity’ of the European Union.¹⁰⁰ And since the Lisbon Treaty introduced Article 4(2) TEU, the new provision might potentially even extend this external limit to the protection of the constitutional identity of the Member States.¹⁰¹

⁹³ For an overview of the various types of constitutional ‘saving clauses’ in the Union legal order, see R Schütze, ‘The European Community’s Federal Order of Competences: A Retrospective Analysis’, in M. Dougan and S. Currie (eds.), *Fifty Years of the European Treaties—Looking back and Thinking Forward* (Oxford and Portland, Or.: Hart, 2009), 63, at 87–90.

⁹⁴ Art 168(5) TFEU, emphasis added. ⁹⁵ *Germany v Council (Tobacco Advertising)* (n 78).

⁹⁶ *Germany v Council (Tobacco Advertising)* (n 78) para 76, emphasis added.

⁹⁷ *Germany v Council (Tobacco Advertising)* (n 78) para 78.

⁹⁸ *Germany v Council (Tobacco Advertising)* (n 78) para 88.

⁹⁹ *Germany v Council (Tobacco Advertising)* (n 78) para 79.

¹⁰⁰ For this argument, albeit in the context of art 352 TFEU, see Opinion 2/94, *Accession by the European Community to the ECHR* [1996] ECR I-1759.

¹⁰¹ Art 4(2) TEU states: ‘[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.’ The meaning of art 4(2) TEU remains highly controversial. For an excellent overview of the provision—and its potential as a future constitutional tool—see B. Guastaferrro, ‘Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause’ (2012) 31 *Yearbook of European Law* 263.

III. Comparisons and Conclusions

The creation of an 'internal market' is a classic task of many federations. The United States and the European Union both enjoy a legislative competence to achieve this aim. Owing to its functional scope, this internal market competence has been subject to intense constitutional debates on both sides of the Atlantic. For, while there must—in theory—be constitutional limitations to its scope, the extent to which the two federations have exercised their competence has almost continuously expanded in constitutional practice.

This expanding federal universe can best be traced in the history of the United States' 'Commerce Clause'. The extent to which economic 'unity within diversity' could be created has here, however, changed over time. Prior to the 'New Deal', the Union's 'Commerce Clause' was internally and externally limited by solid constitutional safeguards. Internally, the Clause's reference to the 'regulat[ion]' of commerce was taken to exclude general 'prohibitions' of commerce. Further, according to the—then dominant—philosophy of dual federalism, particular policy areas were completely outside the scope of the 'Commerce Clause'. Both constitutional limitations were to wither away in the aftermath of the New Deal, in the course of which the Supreme Court left the federal balance to the political safeguards of federalism. However, should the federal legislator be entitled to autonomously determine the scope of the 'Commerce Clause' without any constitutional limitations? This view was ultimately rejected in *Garcia*, where the Court revived the idea of *judicial* safeguards of federalism. What constitutional boundaries would limit the 'Commerce Clause'? We saw earlier that the Court insists upon three principal limitations. First, federal legislation must regulate (or prohibit¹⁰²) an economic activity that would '*substantially* affect' interstate commerce.¹⁰³ Secondly, while federal legislation can 'regulate', it cannot 'create' federal commerce.¹⁰⁴ Thirdly, there is an external limit to the 'Commerce Clause' in the form of the non-commandeering rule.¹⁰⁵ Federal commerce legislation cannot require state legislatures to adopt 'harmonized' state laws.

What about the European Union's internal market competence? Textually, the latter seemed—at least in one respect—more limited than its American counterpart. For the Union's power to establish its common market appeared to hinge on the 'harmonization' of existing national laws. Yet the European Court of Justice managed to gradually transform this 'harmonization' power into a 'regulatory' power that was—almost—completely independent of the existence of national legislation. This liberation was achieved by means of the doctrine of 'preventive' harmonization, as well as the judicial acceptance of an (almost) unlimited Union discretion with regard to its 'harmonization' techniques. The sole constitutional

¹⁰² Cf. *United States v Lopez* (n 35); as well as: *Gonzales v Raich* 545 US 1 [2005].

¹⁰³ Cf. *United States v Lopez* (n 35) 560.

¹⁰⁴ Cf. *National Federation of Independent Business v Sebelius* (n 39).

¹⁰⁵ Cf. *New York v United States* (n 44).

limit that the Court still appears—at least rhetorically—to confirm is the inability of ‘harmonization measures’ to create ‘new rights’.¹⁰⁶ What about the reference to the ‘establishment’ or ‘functioning’ of the internal market? That a federal law adopted under Article 114 TFEU could not just ‘regulate’ but also generally ‘prohibit’ was confirmed in *Tobacco Advertising*.¹⁰⁷ However, the Court here clarified that those commercial prohibitions, if not likely to remove obstacles to trade, must ‘appreciably’ serve the functioning of the internal market. The federal legislator could thus not pass laws ‘with a view to eliminating the smallest distortions of competition’. The opposite view would be incompatible with the principle of conferred powers on which the Union’s federal structure was based.¹⁰⁸

In conclusion: the internal market competences of both federal unions are horizontal competences that mainly concentrate on the effects of federal legislation. The effects-based test has meant that there are no a priori thematic exclusions from the scope of the Union competences. (The sole external limitation accepted in US jurisprudence is of a formal nature: the states cannot be ‘commandeered’ into harmonizing national law.) In the absence of any tangible internal or external *thematic* limitations on both competences, the only ‘real’ limits have been the political safeguards of federalism. These safeguards appear much stronger in the European Union. For unlike the simple state majority in the US Senate, a qualified majority of states continues to be required to back Union legislation. This higher political hurdle will (partly) diminish, however, once the (new) Lisbon voting system comes into operation.¹⁰⁹ The European Union will thus—even in this respect—follow in the footsteps of the American ‘Commerce Clause’.

¹⁰⁶ Cf. Case C-350/92 *Spain v Council* [1995] ECR I-1985.

¹⁰⁷ *Germany v Parliament and Council (Tobacco Advertising)* (n 78).

¹⁰⁸ *Germany v Parliament and Council (Tobacco Advertising)* (n 78) paras 106–107.

¹⁰⁹ From 1 November 2014 a completely new system of voting is to apply in the Council. This revolutionary change is set out in art 16(4) TEU: ‘[a]s from 1 November 2014, a qualified majority shall be defined as at least 55 per cent of the members of the Council, comprising at least 15 of them and representing Member States comprising at least 65 per cent of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained. The other arrangements governing the qualified majority are laid down in Article 238(2) of the Treaty on the Functioning of the European Union.’