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Thorsten Kingreen*

A Federalist New Deal for a more perfect European Union

> *"The most prominent evil of all federal systems is the complicated nature of the means they employ."*[1]

> *"The taxing power of the Federal Government, my dear; the taxing power is sufficient for everything you want and need."*[2]

The European Crisis is a crisis of the legal framework of European legislation. The post-crisis regulation is executive-ridden, it weaks the stakeholder of a transnational democratic governance, the European Parliament. This horizontal shift of powers can be traced back to our comprehension of the E.U.'s federalist framework with its asymmetry between a centralized monetary and a decentralized economic, fiscal and social policy. As the E.U. is supposed to lack economic, fiscal, and social policy competences, it oversights the relevant policies of the Member States rather than shaping its own policy in accordance with the democratic rules in the Treaties. Taking up the debates on U. S. Federalism, this Article argues for A Federalist New Deal which departs from the idea that the E.U. and its Member States occupy separate worlds of governance with exclusive legal competences. The core element of the Federalist New Deal is a cooperative federalism that is legally safeguarded by a substantive judicial control rather than a formalistic division into mutually exclusive spheres and politically safeguarded by the national parliaments.

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[1] *Alexis de Tocqueville*, Democracy in America, Democracy in America Vol. I, 1838, p. 196.

[2] Insiders' tip from *Harlan Stone*, Justice at the U. S. Supreme Court (and later Chief Justice) to *Frances Perkins*, U.S. Secretary of Labor and in the charge of the implementation of the US-New Deal in the 1930ies, at a tea party in 1934. Frances Perkins related this story in a speech to Social Security Administration employees in October 1962, s. http://www.ssa.gov/history/perkins5.html. S. furthermore *Jonathan Alter*, The defining moment. FDR hundred days and the triumph of hope, 2007, p. 313 and *Burt Solomon*, FDR v. The constitution: The court packing fight and the triumph of democracy, 2008, p. 203.

I. Crisis? What crisis?

Forty years ago, in 1975, the famous band Supertramp issued its gorgeous album "Crisis? What crisis?" The cover depicts a man relaxing on a sunlounger, listening to the radio and enjoying a beer. The dazzling colours of the 70s round out the foreground while the grey industrial wasteland in the background seems to be far away: "Life is terrific; don't bug me with crisis ramblings!" If a crisis goes on for too long, people get tired of it. That was the situation in the European Union in 2014: Indeed, we have earmarked guarantees for unimaginable sums of money to save the Euro and financial institutions. It was money we never would have spent for social, environmental, or cultural purposes, money which will not be available for those purposes in the future.[3] But no hard feelings: Greece is still alive, as is the Euro. The big crisis had vanished from the newspapers and screens. "Crisis? What Crisis?"

Since the January 2015 elections in Greece, the crisis is back. Back? Realistically, it never went away. It had disappeared from the European front pages, but not from daily life in Greece. But what crisis are we talking about? A *national* election brought to mind the fact that Greece still suffers from a dramatic social crisis, one for which it blames the European reform guidelines. But do *national* governments and *national* parliaments have the legal power to adjudicate the budget or the social benefits of other Member States? If it is true that we are talking about a *European* crisis, shouldn't *European* authorities be the relevant stakeholders to overcome the crisis?

Europe is not simply undergoing a temporary economic crisis, it is facing a stage of stark political transition:[4] After the politicking of economic emergency management, the legal and political impact of the crisis on Europe's condition and Constitution becomes manifest.[5] This Article will argue that the European crisis is not characterized solely by calamitous economic structures, fractious debt deliberations and uncertain monetary policy. Rather, it is a crisis of a constitutional order, a crossroads for the legal framework of European legislation. This is apparent in the legal actions that are supposed to overcome the current crisis and to prevent future crises: The first urgent measures intended to stabilize the European Monetary Union

[3] *Stefan Kadelbach*, Lehren aus der Finanzkrise – ein Vorschlag zur Reform der Politischen Institutionen der Europäischen Union, 48 Europarecht, p. 489, 489 (2013).
[4] *Brigid Laffan*, The State of our Unsettled Union, 12 International Journal of Constitutional Law, 853, 854 pp. (2014).
[5] *Edoardo Chiti/Pedro Gustavo Teixiera*, The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis, 50 Common Market Law Review, p. 683 (2013); *Stephane Pinon*, Crise économique européenne et crise institutionnelle à tous les étages, 567 Revue de l'Union Européenne, 218 (2013); *Nicole Scicluna*, Politicization without Democratization: How the Eurozone Crisis is transforming EU Law and Politics, 12 International Journal of Constitutional Law, p. 545 (2014).

(EMU), the European Stability Mechanism ("Euro rescue fund") and the European Fiscal Compact ("Fiscal Stability Treaty"), have been erected outside of the legal system of the European Union.[6] Although they concern E.U. matters and rely upon E.U. institutions, they are structured as contracts under international law rather than E.U. legal acts adopted according to the procedure provided by Art. 289, 290 TFEU ("Union method"[7]). This enduring bypass of the regular procedures implies that E.U. Law is unable to solve the E.U.'s problems; it has strengthened the national governments that are the contracting parties[8] and has weakened the stakeholders of Europe's integration, particularly the European Parliament, which has no significant role in the crisis regulation.[9] But also the new "regular" legal mechanisms for avoiding future economic and fiscal shocks strengthen the executive power at the expense of the legislative bodies. The so-called Six-pack, consisting of five regulations and one directive, empowers the Council and the Commission to engage in strong preventative monitoring of the economic policies and budgets of the Member States.[10] Within the so-called European Semester[11], the European Commission analyzes the fiscal and structural reform policies of every Member State, provides recommendations, and monitors their implementation.[12] These recommendations, which have to be published, are very detailed and include all policy fields, including education, social, and labor and tax policy.[13] Furthermore, the so-called two-pack

[6] *Alicia Hinarejos*, Fiscal Federalism in the European Union: Evolution and Future Choices for EMU, 50 Common Market Law Review, 1621, 1627 pp. (2013); *Steve Peers*, Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework, 9 European Constitutional Law Review, 37, 40 pp. (2013).

[7] The German jurisprudence's differentiation between „Gemeinschaftsmethode" (this means the union method!) and „Unionsmethode" (that refers to the former intergovernmental method in the area of freedom, security and justice prior to the Lisbon Treaty) is not compatible with the usage in other languages and is, therefore, not used in this article.

[8] Very concerned about Germanys dominance: *Nicole Scicluna*, Politicization without Democratization: How the Eurozone Crisis is transforming EU Law and Politics, 12 International Journal of Constitutional Law, 545, 553 (2014): „German-dominated intergouvernalism", after digging up *Carl Schmitt*.

[9] *Edoardo Chiti/Pedro Gustavo Teixiera*, The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis, 50 Common Market Law Review, p. 683, 704 pp. (2013); *Stefan Kadelbach*, Lehren aus der Finanzkrise – ein Vorschlag zur Reform der Politischen Institutionen der Europäischen Union, 48 Europarecht, p. 489, 495 p. (2013); *Daniel Thym*, Flexible Integration: Garant oder Gefahr für die Einheit und die Legitimation des Unionsrechts?, Europarecht Beiheft, p. 23, 43 p. (2/2013); *Robert Uerpmann-Wittzack*, Völkerrecht als Ausweichordnung – am Beispiel der Euro-Rettung, 48 Europarecht Beiheft, p. 49, 53 pp. (2/2013).

[10] The most important laws in this context are Regulation No. 1175/2011 of the European Parliament and the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies and Regulation No. 1176/2011 of the European Parliament and the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances.

[11] Art. 2a Reg. 1175/2011/EU modifying Reg. 1466/97/EC.

[12] See more detailed e. g. *Armin Hatje*, Auf dem Weg zu einer europäischen Wirtschaftsregierung: Das Europäische Semester als Instrument wirtschaftspolitischer Integration in der EU, in: Ulrich Becker/Armin Hatje/Michael Potacs/Nina Wunderlich (ed.), Verfassung und Verwaltung in Europa. Festschrift für Jürgen Schwarze zum 70. Geburtstag, p. 594, 600 pp. (2014).

[13] See the Country Reports in the European Semester 2015 in: http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm.

(consisting of two regulations) urges Member States whose currency is the Euro to submit draft budgets for the following year to the Commission even before they have been evaluated or approved by the national parliaments.[14] Member States with structural and financial problems are subject to a special intensified surveillance.[15] These provisions enable the E.U.'s executive institutions to control the whole range of economic policies of the Member States. The formulation and passing of political guidelines and the surveillance of national budgets (and with this, of national parliaments) by executive bodies is a further step to weaken Europe's democracy.

In this Article, I argue that Europe's escape into intergovernmentalism and executive oversight of national parliaments can be traced back to our predominant comprehension of the E.U.'s federalist framework. This understanding is the underlying reason for the reframing of the horizontal balance between the European institutions. With regard to the Member States whose currency is the Euro (Art. 3(1) lit. c) TFEU), the Commission emphasizes, that the EMU is "unique among modern monetary unions in that it combines a centralized monetary policy with decentralized responsibility for most economic policies."[16] Allowing Member States to set up independent budgets, collect and enforce taxes, launch social policy programs, and regulate banking industries without being required to pay attention to the single currency threatens monetary stability.[17] Yet, "this asymmetry between integrated financial markets on the one hand, and a financial stability architecture still nationally segmented on the other"[18] stems from a dualistic understanding of federalism. The provisions on legislative competences (Art. 2-6 TFEU) leave euro-centric monetary policy in the hands of the Union (Art. 3(1) lit. c) TFEU) while economic, social, and fiscal policy are supposed to remain in the hands of the Member States.[19] Hence, there is a correlation between the vertical distribution of competences between the E.U. and Member States and the horizontal shift between the legislative and the executive powers: As the E.U. allegedly lacks the legal power to construct its own economic, fiscal and

[14] See Art. 4, 6 Reg. 473/2013/EU.
[15] Art. 9 pp. Reg. 473/2013/EU.
[16] European Commission, A blueprint for a deep and genuine economic and monetary union. Launching a European Debate, COM(2012) 777 final/2, p. 2.
[17] *Dariusz Adamski*, National Power Games and Structural Failures in the European Macroeconomic Governance, 49 Common Market Law Review, p. 1319, 1329 pp. (2012).
[18] European Commission, A blueprint for a deep and genuine economic and monetary union. Launching a European Debate, COM(2012) 777 final/2, p. 3.
[19] Bundesverfassungsgericht, 2 BvR 2728/13, Decision of January 14, 2014, para 64 pp. See for the controversial debate *Christian Calliess*, Die Reform der Wirtschafts- und Währungsunion als Herausforderung für die Integrationsarchitektur der EU, 66 Die öffentliche Verwaltung. 785, 790 pp. (2013); *Wolfgang Durner/Christian Hillgruber*, Review of the Balance of Competences, 28 Zeitschrift für Gesetzgebung, 105, 123 pp. (2013); *Martin Nettesheim*, Kompetenzdenken als Legitimationsdenken, 69 Juristenzeitung, p. 585, 586 pp. (2014); *Matthias Ruffert*, Mehr Europa – eine rechtswissenschaftliche Perspektive, 28 Zeitschrift für Gesetzgebung, 1, 9 pp. (2013).

social policy, Member States defer on matters of international law and their parliaments are subject to a strong executive surveillance.

Indeed, the E.U. lacks a general economic, fiscal, and social policy competence, which is why it oversees the policies of its Member States rather than shaping its own policy in accordance with the democratic rules in the Treaties. On a fundamental level, this problem can only be tackled by amending the Treaties, a monumental (and very unlikely) move. However, a "Federalist New Deal" is also possible within the existing Treaties, which contain more potential for coordinated democratic regulation than is commonly assumed. This Article opposes the dualist view of European federalism, which sees the Union and its Member States as operating within their own independent and separated political spheres. I will instead argue for a "cooperative" interpretation of the E.U.'s federalist framework, with "cooperative" intended to mean the vertical cooperation between the E.U. and its Member States as well as the horizontal interaction between the legal and political safeguards of federalism.

For a variety of reasons, I will use social policy as a reference point throughout this article to better outline the features of legal and political safeguards of E.U. federalism. Chapter II will elaborate upon those reasons, while Chapter III will address the roles of the Supreme Courts as legal safeguards of federalism and argue for a more cooperationist interpretation of constitutional provisions on legislative power. Chapter IV will cement this approach by placing the federalist principle within the context of substantive law and by laying out the political safeguards of a cooperative federalism. The interaction between the legal and political safeguards will be demonstrated by outlining the development of the jurisprudence and academic discussion in the parent country of federalism, the United States of America. In chapter V, I will return to Greece.

II. Social policy as reference field for the Federalist New Deal

There are four main reasons for choosing social policy as reference field for a Federalist New Deal. These reasons reveal the benefits of an "Europeanization" of social policy as well as the problems and limits of such a process. They also demonstrate that a new federalist approach to the E.U. needs to evade the binary schematism of "more or less Europe".

Firstly, social welfare law is the paradigm for multilevel government regulation. On the one hand, the principle of social equality requires common (i.e. federal) rules establishing social security standards. On the other hand, social welfare law guarantees individual entitlements,

requiring personalized solutions that are generated closer to the people. In practice, this means employing regional or even local solutions. Decentralized arrangements consider different understandings about the extent to which public influence on social welfare is acceptable, viewing the states as laboratories for social policy-making. With this in mind, both federalism and social policy require uniformity as well as diversity and reflect the tension between these competing principles.

Secondly, social policy offers an excellent paradigm for examining the failure of the federalist asymmetry of the EMU. The EMU and social policy have proven to be two sides of the same coin. On the one hand, social policy is the major item of expenditure in the public budgets and therefore wields significant economic and monetary relevance. Failing national health care systems, pension schemes dogged by unsustainable financing, and skyrocketing unemployment rates jeopardize the national economies, and, along with them, the EMU. On the other hand, the budget restraints imposed by the E.U.'s intergovernmental anti-crisis programs bar the affected Member States from taking countermeasures against these social distortions.[20] Because of this nexus, the EMU also has a "social dimension" which is why the Commission entertains the idea "of progressive pooling of sovereignty and thus responsibility and solidarity competences at European level"[21]. There has even been discussion of an EMU unemployment insurance program, which would improve social cohesion and allow for better absorption of asymmetric economic shocks.[22] This intermingling of State and supranational structure is unthinkable from a dualistic federalist perspective, which sees Member States as solely responsible for social policy.

Thirdly, social policy is an important indicator for cross-border solidarity. In all federalist systems, in the E.U.[23] as well as in the U.S.[24], a cardinal question is whether and under which conditions Member States have an obligation to provide social benefits to citizens from other

[20] See for Greece and Ireland *Eftychia Achtsioglou/Michael Doherty*, There Must Be Some Way Out of Here: The Crisis, Labour Rights and Member States in the Eye of the Storm, 20 European Law Review, p. 219, 225 p. (2014). - In the extremely crisis-ridden Member States (Greece, Spain) the youth unemployment rates have popped up meanwhile at nearly 60%, see Eurostat October 2014, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics.

[21] European Commission, Strengthening the social dimension of the economic and monetary union, COM(2013) 690 final, p. 12.

[22] See the former Commissioner for Employment, Social Affairs and Inclusion *László Andor*, Designing a Unemployment Insurance Scheme, Intereconomics 2014, p. 184; furthermore *Sebastian Dullien*, Why a European Unemployment Insurance would help to make European Monetary Union more sustainable, Global Labour Column Number 183, September 2014, http://column.global-labour-university.org.; *Dirk Neumann/Matthias Dolls*, Effekte einer europäischen Arbeitslosenversicherung, March 8, 2015, http://www.treffpunkteuropa.de/effekte-einer-europaischen-arbeitslosenversicherung.

[23] See Art. 24 Dir. 2004/38/EU and e. g. Case C-333/13, *Dano*, EU:C:2014:2358.

[24] U. S. Saenz v. Roe, 526 U.S. 489 (1999).

Member States. In Germany, even the nationality law was partially a result of attempting to address this problem because the question of membership in a community arose from the entitlement for social benefits.[25] So far, the welfare state function turns out to be not only an instrument of mediating class conflict but also a mechanism of state- and nation-building.[26] That is why the transfer of competences from the Member States to the E.U. in the realm of social policy is a politically sensitive issue. The Member States fear for their sovereignty if they lose the ability to make binding decisions on these matters. There is another reason for the sensitivity surrounding social policy. The acceptance of social security systems depends upon the level of solidarity between members of a community, but the sense of solidarity is often stronger in smaller communities.[27] The legitimizing requirements for social allocation rise, therefore, with the magnitude of a political community. In this context, one has to face the problem of path dependency: All Member States have established sophisticated social security systems. These systems contain elements of intergenerational redistribution and are thus designed as long-term insurance courses. As a result, they protect confidence in the sustainable existence of insurance histories, which one cannot meddle with willy-nilly.[28] In other words, an Europeanization of these systems has to face up to a legacy-problem: Long-term systems based on trust have fundamental problems bailing out the financial legacies of other systems.

Finally, using social policy as an example of the federal dilemma can inform the debate on comparative federalism.[29] In Parts III and IV of this Article, I will outline the federalist jurisprudence of the U.S. Supreme Court and the inspiring scientific debate in the U. S. in order to illustrate that federalism is not a static principle, but a flexible mechanism for the decentralization of power. Accordingly, the legal interpretation of provisions concerning the federal distribution of competences may be subject to change. The jurisprudence of the U.S. Supreme Court on matters of federalism will also highlight the juridification of political conflicts and the politicization of legal interpretation. Controversies over federalism in the United States are often proxy wars about major political issues. The U.S. Supreme Court often appears more politically polarized than other constitutional courts, particularly in the realm of

[25] *Thorsten Kingreen*, Soziale Rechte und Migration, 2010, p. 13 pp.; see also *Alexander Graser*, Gemeinschaften ohne Grenzen, 2008, p. 69 pp.
[26] *Herbert Obinger/Stephan Leibfried/Francis G. Castles*, Bypasses to a Social Europe? Lessons from Federal Experience, 12 Journal of European Public Policy, p. 545 pp. (2005).
[27] *Alexander Graser*, Confidence and the question of political levels – towards a multilevel system of social security in Europe?, in: Danny Pieters (ed.), Confidence and changes: Managing social protection in the New Millennium, 2000, p. 215, 220.
[28] The integration of the retirees from former GDR in the (West-)German pension insurance fund in the 1990ies shows, however, that this is very sophisticated but not impossible.
[29] See above I.

social policy.[30] Since 1929, the major disputes of American federalism have taken place in this area. This trend continues to the present day, as recent legal controversies over U.S. health insurance reforms reveal. U.S. jurisprudence holds some very interesting lessons for the interpretation of E.U. provisions on legislative power. In the U.S. as well as the E.U. social policy is primarily based on statutory provisions concerning cross-border trade rather than direct legislative stipulations on the subject (which the U.S. constitution does not even contain). The United States Supreme Court faces the problem of overlaps between a broad transversal competence for interstate commerce on the one side and narrowly-drawn competences for special areas such as social policy on the other side. This is also the crucial federalist challenge in the E.U.

III. The legal safeguards of federalism

The following two chapters will outline the debates surrounding the development of U.S. federalism and will examine whether they are productive for the E.U. discussion. Indeed, federalism is context-sensitive.[31] The U.S. is a full-fledged nation-state with more than 200 years of constitutional tradition whereas the E.U. is still a developing political system with an uncertain political perspective.[32] But as federalism spread from the U. S. to Europe and throughout the world (to countries such as Argentina, Australia, Brazil, Canada, India, Mexico and South Africa), it became not only a national, but a worldwide constitutional topic and as such, part of a global constitutionalism.[33] A European jurisprudence that is not nationally introverted and completely separated from political and social sciences has to examine whether there are historical experiences with federalism in transnational economic crises which may be

[30] *Adam Liptak*, The Polarized Court, The New York Times, May 11, 2014.

[31] *Vicki C. Jackson*, Narratives of Federalism: Of Continuities and Comparative Constitutional Experience, 51 Duke Law Journal, p. 223, 272 pp. (2001). See also *Gábor Halmai*, The Use of Foreign Law in Constitutional Interpretation, in: Michel Rosenfeld/András Sajó (ed.), The Oxford Handbook of Comparative Constitutional Law, 2012, p. 1328, 1330 pp. - There is a strong resistance against comparative constitutional law above all in the U. S. Supreme Court: Its conservative majority deems "such comparative analysis inappropriate to the task of interpreting a constitution": U.S., Printz v. United States, 521 U. S. 898, 911 (1997). This breakup of constitutional communication wanes the influence of the U. S. Supreme Court on the jurisdiction of other courts (*Adam Liptak*, U. S. Court is now guiding fewer Nations, The New York Times, September 17, 2008). See furthermore *Norman Dorsen*, The Relevance of Foreign Legal Materials in U. S. Constitutional Cases. A Conversation between Justice Antonin Scalia and Justice Stephen Breyer, 3 International Journal on Constitutional Law, p. 519-541 (2005).

[32] *Alberto Sbragia*, The United States and the European Union: Comparing Two Sui Generis Systems, in: Anand Menon/Martin Schain (ed.), Comparative federalism: The European Union and the United States in Comparative Perspective, 2006, p. 15, 15 p.

[33] See *Bruce Ackerman*, The Rise of World Constitutionalism, 83 Virginia Law Review, 771, 794 pp. (1997); see also *Susanne Baer*, Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz, 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, p. 735, 738 pp. (2004).

helpful in understanding European federalism(s).[34] The issues arising from this challenge are to weigh the advantages of integration and fragmentation against the tension between centralized and decentralized solutions. This is similar to the problems of demarcation found in individual law cases. The answers in every federal state may be different, but gaining an understanding of these solutions will enhance the federalist debate elsewhere.[35]

1. Is federalism a legal topic?

Is federalism a legal topic at all, or is it simply a political question inappropriate for judicial review? Is the political process the best safeguard of federalism? The following chapter will present Supreme Court decisions that attempt an answer to those questions, with varying degrees of success.

Decades ago, the U.S. Supreme Court seemed inclined to leave the question of federalism to the realm of politics. By 1942, the Court in *Wickard v. Filburn* had declared that effective restraints on federal power "must proceed from political rather than from judicial process."[36] Some years later, in 1954, leading scholar Herbert Wechsler justified this judicial withdrawal by appealing to the political involvement of the states in both Houses of Congress, which he regarded as sufficient to protect them against federal overreaching.[37] In *Garcia v. San Antonio Metropolitan Transit Authority*, a 5-4 majority of the Supreme Court took up this idea: "The States' continued role in the federal system is primarily guaranteed not by any externally imposed limits on the commerce power, but by the structure of the Federal Government itself. In these cases, the political process effectively protected that role."[38] Therefore, declared the Court, "the fundamental limitation that the constitutional scheme imposes on the Commerce

[34] *Ran Hirschl*, Editorial: From Comparative Constitutional Law to Comparative Constitutional Studies, 11 International Journal of Constitutional Law, p. 1, 11 (2013) arguing, "that there cannot be a coherent positivist (as in 'is,' not 'ought') study of comparative constitutional law without the social sciences in general, and political science in particular". See also *Alex Mills*, Federalism in the European Union and the United States: Subsidiarity, private law, and the conflict of laws, 32 University of Pennsylvania Journal of International Law, p. 369, 370 (2010).

[35] See *Daniel Halberstam/Mathias Reimann*, Federalism and Legal Unification. Comparing Methods, Results, and Explanations across 20 Systems, University of Michigan Law School, Public Law and Legal Theory Working Paper No. 186, September 2011; *Franz C. Mayer*, Kompetenzverschiebungen als Krisenfolge? Die US-Verfassungsentwicklung seit dem New Deal und Lehren für die Euro-Krise, 69 Juristenzeitung, p. 593, 597 pp. (2014).

[36] U. S. Wickard v. Filburn 317 U.S. 111, 120 (1942).

[37] *Herbert Wechsler*, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Columbia Law Review, p. 543, 552 pp. (1954). See also *Larry Kramer*, Putting the Politics back into the Political Safeguards of Federalism, 100 Columbia Law Review, 215, 278 pp. (2000), pointing out, that the most important safeguards of federalism are today the political parties, the administrative bureaucracy and the intergovernmental lobby.

[38] U. S. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 528 p. (1985).

Clause to protect the 'States as States' is one of process, rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process, rather than to dictate a 'sacred province of state autonomy'."[39]

The idea that the states can help themselves via political influence on the federal legislative level is of dubious import. The four dissenting judges in *Garcia* cast doubt on the real influence of the states, noting that federal legislation is primarily drafted by the immense federal bureaucracy (where state influence is low) rather than the Houses of Congress. The dissent rejected the majority's assertion that "the state's role in our system of government is a matter of constitutional law, not legislative grace."[40] The U.S. Constitution was designed to insulate some matters from the political process and those matters should not be passed back to politics.[41] The federalist framework follows from constitutional provisions that draw lines between the legislative competences of the federal government and the states. These provisions have to be interpreted authoritatively by the Supreme Court as the legal safeguard of federalism, which is why the Court has not addressed the political question doctrine since *Garcia.*[42]

2. From dual to cooperative federalism; and back?

There are two general hermeneutical methods for the demarcation of legislative competences.[43] The first one, dual federalism, is based on a concept of two separate and sovereign spheres of government. Dual federalism implies that the national government and the states are operating in two "mutually exclusive, reciprocally limiting fields of power"[44]. In a famously dismissive article, Edward Corwin singled out four characteristics of dual federalism: "1. The national government is one of enumerated powers only; 2. The purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of

[39] U. S. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 554 (1985).
[40] U. S. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 567, 576 (1985), dissent Powell.
[41] *Carol Lynn Tebben*, Is Federalism a Political Question? An Application of the Marshallian Framework to Garcia, 20 Publius, p. 113 pp. (1990).
[42] Indeed, there are some topics where the political question doctrine is accepted, see *Erwin Chemerinsky*, Constitutional Law, 4th ed. 2013, p. 91 pp.
[43] The following distinction between dual and cooperative federalism refers solely to the legislative and not the executive power. "Cooperative federalism" is therefore only used when "federal law allows *legislative* choices at the implementation level" (*Robert Schütze*, From Dual to Cooperative Federalism. The changing structure of European Law, 2009, p. 1).
[44] *Alpheus Thomas Mason*, The Role of the Court, in: Valerie A. Earle (ed.), Federalism: Infinite Variety in Theory and Practice, 1968, p. 8, 24 p.

government are 'sovereign' and hence 'equal'; 4. The relation of the two centers with each other is one of tension rather than collaboration."[45] In contrast, cooperative federalism means that the legislative power over a specific topic is shared between the federal government and the states. "Cooperation" in this sense does not mean that the Federation and its States legislate in the same area at the same time.[46] Instead, cooperative federalism describes a constitutional pattern in which two governments act in complementary ways within the same policy area.[47] Dual and cooperative federalism *are not mutually exclusive*. Indeed, both the U.S. and E.U. constitutions combine exclusive and shared competences. However, laws normally have an impact on policy areas beyond those defined by their constitutional provisions. In these cases, constitutional courts may follow different courses: They either try to define the measure's main topic and ascribe it exclusively to one level of government (a dualistic approach), or they conclude that a measure affects both spheres and consider whether it curtails the operations of any one sphere in a disproportionate manner (a cooperative approach).

a) The jurisdiction of the U. S. Supreme Court

All of the legislative powers granted in Art. 1 of the U.S. Constitution are federal powers. The powers not delegated by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people (see the 10th Amendment). The most important and controversial federal legislative competence is found in the Commerce Clause, which allows Congress to regulate commerce with foreign nations and among the states (Art. 1[8]).

aa) Dual federalism

In its early Commerce Clause jurisprudence ranging from the second half of the 19th century to 1935, the Supreme Court espoused the concept of dual federalism. It declared that "the 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."[48]

The judicial limitation of Congress' commerce power began as a result of the economic and social changes that occurred at the end of the 19th century. As a response to the industrial

[45] *Edward S. Corwin*, The Passing of Dual federalism, 36 Virginia Law Review, p. 1, 4 (1950).
[46] This would cause collisions between federal and state law, which is regulated by the federal supremacy clauses such as Art. 6(2) of the US constitution.
[47] *Robert Schütze*, From Dual to Cooperative Federalism. The Changing Structure of European Law, 2009, p. 347.
[48] U. S. Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1858); U.S., Collector v. Day, 78 U.S. 113, 124 (1871).

revolution and the formation of a national economy, Congress began to wield the Commerce Clause as the most suitable legislative competence for national regulation.[49] The era of dual federalism was ushered in by the Supreme Court's analysis of the Sherman Antitrust Act of 1890, which was designed to protect competitive markets from monopoly power.[50] A sugar refining company that controlled almost the entire sugar-producing industry brought a lawsuit challenging the act, arguing that the power to regulate interstate commerce does not include the power to regulate the production of sugar at the local level. The Supreme Court agreed. In *United States v. Knight,* the Court stressed that "commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly."[51] The Supreme Court feared the "journey to a forbidden end": If "commerce" were interpreted to include production, "Congress would be invested, to the exclusion of the States, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining - in short, every branch of human industry."[52]

The 10th Amendment formed an important pillar of the dual federalism philosophy. The Supreme Court argued that the Amendment reserves the police power (broadly defined as the capacity of the states to make laws for the welfare of their inhabitants) to the states, even if an activity is commercial in nature. This interpretation took center stage in *Hammer v. Dagenhart,*[53] which dealt with a federal law prohibiting the interstate transportation of goods made at factories in which children were employed. Although the law was only applicable to interstate commerce, the Supreme Court declared it unconstitutional because it had the effect of regulating production. In the eyes of the Court, the 10th Amendment reserved such regulation to the states as a proper exercise of their police power.[54] As a result, early U.S. social welfare legislation was dashed against the "either-or logic"[55] of dual federalism: Either a law falls within the scope of the commerce power or it is an unconstitutional exercise of federal police power – *tertium non datur*! Even at such an early stage, the dualist doctrine proved impossible to follow consistently. Some years before *Hammer v. Dagenhart*, the Court upheld a federal

[49] *Paul D. Moreno*, The American State from the Civil War to the New Deal, 2013, p. 32 pp.
[50] *Paul D. Moreno*, The American State from the Civil War to the New Deal, 2013, p. 32 pp.
[51] U. S. United States v Knight, 156 U. S. 1, 12 (1895).
[52] U. S. United States v. Knight, 156 U. S. 1, 14 (1895); see moreover U. S., Carter v. Carter Coal Co, 298 U. S. 238, 299 pp. (1936).
[53] U. S. Hammer v. Dagenhart, 247 U. S. 251 (1918).
[54] U. S. Hammer v. Dagenhart, 247 U. S. 251, 273 p. (1918).
[55] *Robert Schütze*, From Dual to Cooperative Federalism. The Changing Structure of European Law, 2009, p. 92.

law prohibiting the shipment of lottery tickets in interstate commerce.[56] In both cases, Congress was seeking to stop an intrastate activity (child labor and gambling) by exercising federal power under the Commerce Clause. Nonetheless the Court declared the lottery regulation constitutional by establishing a "de facto federal police power"[57] whereas the labor regulation was held unconstitutional, because police power is supposed to be exclusively granted to the states.[58]

Hammer and *Knight* are eye-opening decisions because, in the end, they both failed to strengthen state autonomy. Even if the states did enjoy exclusive constitutional power to regulate production monopolies and labor conditions, they still could not exercise that power due to the cross-border effects of production monopolies and the competitive disadvantages caused by strict labor regulations. The dualistic demarcation between commerce and production thus caused "a realm of no-power, 'a twilight zone', 'a no-man's land'"[59]. The Supreme Court accepted this lapse of judicial certainty with equanimity, theorizing that "if no such power has been granted, none can be exercised."[60] Conceptually, this posed little problem, as the Tenth Amendment grants powers not only to federal and state governments, but also to the people, who may induce an amendment. Given the great difficulty of such a feat, in reality the Supreme Court left the American people struggling with monopoly prices on sugar and wrestling with the specter of child labor. Acting in the name of state sovereignty, the Supreme Court – "deeply committed to laisser-faire economics"[61] – narrowed the commerce clause as a matter of fact in order to stop the federal government's economic regulations.

bb) Cooperative federalism

(1) Great Depression and New Deal

At the end of the 1920s, the United States was devastated by an economic crisis unprecedented in its severity, its duration, and its global dimensions. After the "Black Tuesday"

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[56] U. S. Champion v. Ames, 188 U.S. 321 (1903). See furthermore U. S., Hoke & Economides v. United States, 227 U.S. 308, 320 pp. (1913), where The Court upheld a law that forbid the interstate transportation of women for prostitution or other "immoral purpose".

[57] *Paul D. Moreno*, The American State from the Civil War to the New Deal. The Twilight of Constitutionalism and the Triumph of Progressivism, 2013, p. 70 pp.

[58] *Erwin Chemerinsky*, Constitutional Law, 4th ed. 2013, p. 168 arguing that a conservative Court was rather willing to accept moral than economic regulation; against that explication: *Paul D. Moreno*, The American State from the Civil War to the New Deal. The Twilight of Constitutionalism and the Triumph of Progressivism, 2013, p. 77.

[59] *Edward S. Corwin*, The Passing of Dual Federalism, 36 Virginia Law Review, p. 1, 22 (1950); see also *H. Ehmke*, Wirtschaft und Verfassung. Die Verfassungsrechtsprechung des Supreme Court zur Wirtschaftsregulierung, 1961, S. 124 p. and *H.-H. Trute*, Zur Entwicklung des Föderalismus in den Vereinigten Staaten von Amerika, 49 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, S. 195, 227 (1989).

[60] U. S., Kansas v. Colorado, 206 U. S. 46, 90 p. (1907).

[61] *Erwin Chemerinsky*, Constitutional Law, 4th ed. 2013, p. 162.

stock market crash of October 1929, the economic system went into "a state of shock"[62]. Within a few weeks, more than a third of the stock market's value vanished.[63] Banks, which had invested their clients' savings in the stock market, were forced to close,[64] causing panicked withdrawals across the country. The ensuing Great Depression, which spread throughout the Western industrialized world in the aftermath of the stock market crash, was characterized by a dwindling spiral of dropping consumer spending, declines in industrial outputs, and skyrocketing unemployment. By 1933, the peak of the Great Depression, 13 to 15 million Americans were unemployed (one quarter of the workforce), one million farmers had lost their property, and nearly half of the banks (about 5000) had failed.[65] Social benefits, which had the potential to lessen the dramatic surge in poverty, were considered incompatible with deep-rooted American traditions such as self-responsibility, individualism, and laissez-faire economics. In line with this anti-interventionist tradition, Republican President Herbert Hoover underestimated the severity of the situation and favored local and state solutions (the "American way") when tasked with combating national problems. The federal government did not begin to take serious steps to alleviate the crisis until 1932,[66] too late for Hoover to be re-elected in November of that year.

It was left to Hoover's Democratic successor Franklin D. Roosevelt to start an unprecedented public investment program in 1933, which he termed the "New Deal for the American People". The famous New Deal programs established institutions now considered integral components of American society, forming the basis for a social welfare system that continues to function in the 21st century. This holds true today,[67] even in the midst of current discussions calling for a new social contract to reconstruct fragile social infrastructure after the 2008 financial crisis (a "Living New Deal").[68] During the first hundred days of Roosevelt's term, the banking and monetary systems were stabilized, and public works, housing, and rural

[62] *Jonathan Alter*, The Defining Moment. FDR Hundred Days and the Triumph of Hope, 2007, p. 1.
[63] *John A. Garraty*, The Great Depression, 1986, p. 31; *Eric Rauchway*, The Great Depression and the New Deal, 2008, p. 19.
[64] More than 1300 until the end of 1930, *John A. Garraty*, The Great Depression, 1986, p. 34.
[65] *John A. Garraty*, The Great Depression, 1986, p. 52 pp., 100 pp.
[66] *David M. Kennedy*, Freedom from fear. The American People in Depression and War 1929-1945, 1999, p. 43 pp., 70 pp. Hoover rejected federal unemployment reliefs still in 1931, see *Eric Rauchway*, The Great Depression and the New Deal, 2008, p. 31 and *Elliot A. Rosen*, Roosevelt, The Great Depression and the Economics of Recovery, 2005, p. 2, citing Hoover: "The American people have not forgotten how to take care of themselves" and "should not delegate their welfare to distant bureaucracies." Only in 1932 the administration created the Reconstruction Finance Corporation, which sponsored public projects such as the Golden Gate Bridge in San Francisco.
[67] *Eric Rauchway*, The Great Depression and the New Deal, 2008, p. 1.
[68] http://livingnewdeal.org; see also *George Packer*, The unwinding, 2013.

programs were set up in order to solve the most acute hardships (the "First New Deal").[69] While this first stage enjoyed a broad public support, many subsequent programs instituted during the following years (1935-1938, the "Second New Deal") were very controversial. The Second New Deal consisted of a tremendous infrastructure program,[70] comprised of the two most important labor and social welfare acts in American history: the National Labor Relations Act (Wagner Act), which guaranteed workers collective bargaining rights through unions and the Social Security Act, which Roosevelt once described as "the cornerstone" of his administration.[71] The Social Security Act founded a federal system of retirement pensions that replaced inadequate state systems, established a federally-run unemployment insurance program, and created welfare benefits for handicapped persons and needy families. Frances Perkins, U.S. Secretary of Labor, and the most important promoter of the Social Security Act, also advocated the adoption of universal health insurance. This, however, proved politically unfeasible.[72]

[69] *David M. Kennedy*, Freedom from Fear. The American People in Depression and War 1929-1945, 1999, p. 139 pp.; *Eric Rauchway*, The Great Depression and the New Deal, 2008, p. 56 pp.

[70] Many public projects (schools, courthouses, theaters, libraries, parks and hospitals) have been realized in the 30s as well as mega-projects like the La Guardia Airport in New York and the Bay Bridge between Oakland and San Francisco, see *David M. Kennedy*, Freedom from Fear. The American People in Depression and War 1929-1945, 1999, p. 252.

[71] *Jonathan Alter*, The Defining Moment. FDR Hundred Days and the Triumph of Hope, 2007, p. 318.

[72] *Jonathan Alter*, The Defining Moment. FDR Hundred Days and the Triumph of Hope, 2007, p. 315; *Jonathan Oberlander*, Medicare: The Great Transformation, in: James A. Morone/Daniel C. Ehlke (ed.), Health Politics and Policy, 5th ed. 2013, p. 126, 127.

(2) Reforms follow crises: The decline of dual federalism

The New Deal can also be characterized as a Federalist New Deal since it marked the beginning of a conceptual transition from dual to cooperative federalism in the Supreme Court's jurisprudence. This transition, however, was a long time coming.[73]

Bound by its static dual federalism approach, the Supreme Court invalidated several New Deal laws between 1934 and 1936. Some of these decisions were unanimous, while other rulings were made against the objections of a minority of three or four judges.[74] As a consequence of these decisions, only state and local governments were authorized to identify and implement countermeasures against a crisis of national dimensions. Whether as a result of the political pressure of the economic crisis or as a savvy reaction to Roosevelt's controversial court-packing plan,[75] the Supreme Court fundamentally shifted direction in the spring of 1937. The starting point for this new era of federalism was the decision in *National Labor Relations Board v. Jones & Laughlin* concerning the constitutionality of the Wagner Act.[76] Had the Supreme Court declared this Act to be unconstitutional as well, it would have eliminated one of the pillars of Roosevelt's social welfare reforms. In a 5-4 decision, the Court abandoned the dualist differentiation between interstate commerce and intrastate production, choosing to focus primarily on the effects of federal legislation.[77]

In the course of declaring the Social Security Act constitutional in *Steward Machines Co. v. Davis,* the Court labeled the states only as "quasi-sovereign".[78] The decision dealt with a tax designed to motivate the states to adopt laws for funding and payment of unemployment compensation. The constitutionality of this tax puts the second citation above this article in context[79] and informs the 2012 decision regarding the constitutionality of the health care reform law.[80] Additionally, it is significant to note that these decisions showcase the Supreme Court's important role in determining political questions under the guise of rational constitutional

[73] *William E. Leuchtenburg*, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt, 1995, p. 213 pp.; *Richard A. Maidment*, The Judicial Response to the New Deal. The US Supreme Court and Economic Regulation, 1934-1936, p. 55 pp., 82 pp., 105 pp.
[74] See U. S. Railroad Retirement Board v. Alton, 295 U. S. 330 (1935); U. S. Schechter Poultry Co. v. United States, 295 U. S. 495 (1935); U. S., United States v. Butler, 297 U. S. 1 (1936) and U. S. Carter Coal Co., 298 U. S. 238 (1936).
[75] See *Paul D. Moreno*, The American State from the Civil War to the New Deal. The Twilight of Constitutionalism and the Triumph of Progressivism, 2013, p. 288 pp. and *Jeff Shesol*, Franklin Roosevelt v. Supreme Court, 2010.
[76] U. S. National Labor Relations Board v. Jones and Laughlin Stelle Corporation, 301 U. S. 1 (1937).
[77] U. S. National Labor Relations Board v. Jones and Laughlin Stelle Corporation, 301 U. S. 1, 37 (1937).
[78] U. S. Stewart Machines Co v. Davis, 301 U. S. 548, 593 (1937).
[79] See Footnote 2.
[80] See infra cc).

interpretation.[81] The Roosevelt administration had to expect constitutional impediments to implementing a federally-run unemployment insurance program because the insurance would have had affected all companies, including those in the manufacturing industry (deemed "production" and historically unregulated by the federal government). After Justice Harlan Stone's insiders' tip that the federal taxing power would be a sufficient legal foundation for a federally-run reform, the administration decided to impose a national tax on most companies. Companies located in states with unemployment insurance programs that fulfilled federal conditions were allowed to credit up to 90% of the federal tax paid to the state unemployment fund. Unsurprisingly, the Supreme Court accepted the law as a constitutional exercise of the federal tax power.[82]

In *Carmichael v. Southern Coal & Coke Co.* (decided on the same day as *Steward Machines*), the Court championed a theory of mutually responsible social policy and made a demonstrative break from the concept of dual sovereignty: "The United States and the State of Alabama are not alien governments," the Court opined. "They co-exist within the same territory. Unemployment is their common concern. Together the two statutes before us embody a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without cooperation to each other. *The constitution does not prohibit such a cooperation*."[83] In *United States v. Darby*, the Supreme Court rejected the former interpretation of the Tenth Amendment as a constitutional limit on Congress' power, declaring that it "states but a truism that all is retained that has not been surrendered" and is therefore only declaratory.[84]

Following in the footsteps of Roosevelt's New Deal, Supreme Court jurisprudence initiated a Federalist New Deal. Between 1937 and 1992, not one federal law was invalidated as exceeding Congress's Commerce clause power.[85] Due to the Court's broad interpretation of Art. 1 sect. 8, the Commerce Clause even gave Congress the authority to enact the Civil Rights Act of 1964.[86] Scholars noted in unison that dual federalism was dead.[87] The model of

[81] See infra b) bb) for the German Bundesverfassungsgericht.
[82] U. S. Stewart Machines Co v. Davis, 301 U. S. 548, 586 pp. (1937).
[83] U. S. Carmichael v. Southern Coal & Coke Co, 301 U. S. 495, 526 (1937); emphasis added.
[84] U. S. United States v. Darby, 312 U. S. 100, 124 (1941).
[85] *Erwin Chemerinsky*, Constitutional Law, 4th ed. 2013, p. 177. Only in National League of Cities v. Usery (426 U. S. 833 [1976]) the Supreme Court held the Fair Labor Standard Act, which required payment of a minimum wage to state and local employees, as a violation of the X. Amendment. But this decision was overruled by the Garcia decision, see supra 1.
[86] U. S. Heart of Atlanta Motel v. United States, 379 U. S. 241 (1964).
[87] Famous: *Edward S. Corwin*, The Passing of Dual Federalism, 36 Virginia Law Review, p. 1, 17 (1950): dual federalism "in ruins"; see later e. g. *Christopher K. Bader*, A Dynamic Defense of Cooperative Federalism, 35

completely separated spheres would render unnecessary the Supremacy Clause in Art. 6 cl. 2 of the Constitution, which mandates that federal law holds sway over conflicting state law (preemption).[88] This provision implies an overlap between federal and state governments, and only makes sense if no strict dualist separation of legislative powers exists.[89] The death of the separate spheres doctrine was hastened by outside forces as well. In the years after the "Federalist New Deal," concurrent federal-state regulation became the normative approach in large part due to the close intersection of modern economies. This is why "[t]here is hardly any activity that does not involve the federal, state, and some local government in important responsibilities."[90] It is impossible to wall off an intrastate market from the rest of the national economy or to isolate specific activities such as "production" from other steps in the chain of commerce.[91]

cc) New Federalism

In the 1990s, the Supreme Court began to reverse its broad interpretation of the Commerce Clause. It is no accident that this "new federalism" arose out of fundamental controversies within U.S. society.

In *United States v. Lopez* the Court struck down the Gun-Free School Zones Act, which made it a federal offense for any individual to knowingly possess guns in schools.[92] In a 5-4 decision, the majority chose not to resurrect the dualist differentiation between "commerce" and "production".[93] The Court accepted that "Congress is empowered to regulate and protect the instrumentalities of interstate commerce […], *even though the threat may come only from intrastate activities.*"[94] It referred to its decisions accepting a cooperative concept of federalism, but it imposed heightened requirements for regulating "economic activity" under the Commerce

Whittier Law Review, 161 (2013-2014); *Norman R. Williams*, The Commerce Clause and the Myth of Dual Federalism, 54 University of California Los Angeles Law Review, 1847, 1923 (2007); *Ernest A. Young*, The Puzzling Persistence of Dual Federalism, in: James E. Fleming/Jacob T. Levy (ed.), Federalism and Subsidiarity, 2014, p. 34, 53.

[88] U.S. Gibbons v. Ogden, 22 U.S. 1, 211 (1824), s. for the difficult decision whether a state law is preempted by federal law *Erwin Chemerinsky*, Constitutional Law, 4th ed. 2013, p. 432 pp.

[89] *Edward S. Corwin*, The Twilight of the Supreme Court: A history of Our Constitutional Theory, 1934, p. 183.

[90] *Morton Grodzins*, The American Federal System, in: Robert A. Goldwin (ed.), A Nation of States: Essays on the American Federal System, 1961, p. 1 p. *Michael Fehling*, Mechanismen der Kompetenzabgrenzung in föderativen Systemen im Vergleich, in: Josef Aulehner et. al. (ed.), Föderalismus – Auflösung oder Zukunft der Staatlichkeit?, 1997, p. 30 (52 p.).

[91] *Ernest A. Young*, Dual Federalism, Concurrent Jurisdiction and the Foreign Affairs Exception, 69 The George Washington Law Review, 139, 152 (2001).

[92] U.S. United States v. Lopez, 514 U. S. 549 (1995); see also U.S. United States v. Morrison 529 U. S. 529 (2000).

[93] *Norman R. Williams*, The commerce clause and the Myth of Dual Federalism, 54 UCLA L. Rev. (2007), 1847 (1918).

[94] U.S. United States v. Lopez, 514 U. S. 549, 558 (1995), emphasis added.

Clause. But the Court demanded that the regulated "economic activity" must be affected "substantially"[95] rather than "simply". The law in *Lopez* bore no substantial relation to an "economic activity"[96] because the possession of a gun is a "non-economic" matter and the case concerned "a local student at a local school"[97]. In other words, *Lopez* can be read as a decision which accepts federal regulation over public education (thereby espousing cooperative federalism) but which activates the principle of subsidiarity by checking whether the regulations prohibiting guns in schools have to be the same all over the United States.[98] This question is of primary importance when analyzing issues where the states differ in their opinions and traditions. Indeed, the Supreme Court did not pursue this concept with any degree of consistency. In *Gonzales v. Raich,* a local physician prescribed marijuana to a local patient in compliance with California's state law allowing for medicinal use. One might think that the possession of marijuana is as "non-economic" as the possession of a firearm. Surprisingly, *Raich* upheld a federal law criminalizing the *production (!)* and the *local (!) use of* homegrown cannabis, even where states had already approved of its use for medicinal purposes.[99] It is unclear why this rationale could not have been applied to uphold the law criminalizing the possession of guns in schools.[100] Reading *Lopez* and *Gonzalez* together, the question arises whether the Court is truly protecting state's rights or simply picking desirable policy practices and reasoning backward to find a legal justification.

In *NFIB v. Sebelius*, the Supreme Court's 5-4 majority interpreted the Commerce Clause in a new dualist way. The Affordable Care Act's individual mandate, which requires most Americans to maintain "minimum essential" health insurance coverage, was deemed an improper exercise of Commerce Clause authority because the power to regulate commerce "presupposes the existence of commercial activity to be regulated"[101] and the mandate "does not regulate existing commercial activity." Writing for the majority, Chief Justice John Roberts opined that the mandate "instead compels individuals to *become* active in commerce by purchasing a product."[102] Here, as in *Lopez,* the Court builds two spheres concerning commerce,

[95] U.S. United States v. Lopez, 514 U. S. 549, 559 (1995).
[96] U.S. United States v. Lopez, 514 U. S. 549, 560 (1995).The demarcation between "economic" and "non-economic" is inoperable, see *Norman R. Williams*, The Commerce Clause and the Myth of Dual Federalism, 54 UCLA Law Review (2007), 1847 (1918 pp.).
[97] U.S. United States v. Lopez, 514 U. S. 549, 567 (1995).
[98] See infra 3. b) bb).
[99] U.S. Gonzalez v. Raich, 545 U. S. 1 (2005).
[100] *Steven G. Calabresi/Lucy D. Bickford*, Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law, Northwestern University School of Law, Working Paper no. 215, p. 1, 42.
[101] U.S. National Federation of Independent Business v. Sebelius, 131 S. Ct. 2566, 2586 (2012).
[102] U.S. National Federation of Independent Business v. Sebelius, 131 S. Ct. 2566, 2573 (2012); emphasis in the original.

which are not identical to the pre-New-Deal differentiation between "commerce" and "production". Whereas the regulation of existing commerce is subject to Congress's power, only the states can "create" new commerce. The *Sebelius* dissent considered this attempted differentiation between active participants (insured individuals or those who want to buy health insurance) and non-active participants (those who chose not to buy health insurance) an "untenable" exercise in judicial line-drawing, because "the unique attributes of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets."[103] The dissent also pointed to the problem of a "twilight zone"[104] caused by the dualist approach of the majority, arguing that "states cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual state, would be 'bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose'."[105]

The *Sebelius* judgment shows that dual federalism "dies hard"[106]. The majority's distinction between activity and inactivity has no connection with the traditional distinction between national and local concerns,[107] which is indeed systemically relevant to the distribution of competences in a federal state.[108] However, it may have a lot to do with the American tradition of protecting individual liberty by strengthening state's rights and the undaunted American faith in laissez-faire economics.[109] At the end of the day, a 5-4 majority of the Court saved the individual mandate with a strange twist. The ACA provides that those individuals who do not comply with the mandate have to make a payment that the ACA described as "penalty", but that the Court's majority described as a tax. The Court "read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that

[103] U.S. National Federation of Independent Business v. Sebelius, 131 S. Ct. 2566, 2623 (2012).
[104] See supra aa).
[105] U.S. National Federation of Independent Business v. Sebelius, 131 S. Ct. 2566, 2612 (2012) citing the Supreme Court's decision Helvering v. Davis, 301 U. S. 619, 644 (1937).
[106] *Ernest A. Young*, The Puzzling Persistence of Dual Federalism, in: James E. Fleming/Jacob T. Levy (ed.), Federalism and subsidiarity, 2014, p. 34, 58 paraphrasing Justice Scalia's famous description of the *Lemon* test in the Court's Establishment Clause jurisprudence: "Like some ghoul in a latenight horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, [dual federalism] stalks our [federalism] jurisprudence once again."
[107] *Mark A. Hall*, Commerce Clause Challenges to Health Care Reform, 159 University Pennsylvania Law Review, 1825, 1827 pp. (2011); *David Orentlicher*, Constitutional Challenges to the Health Care Mandate: Based in Politics not in Law, 160 University Pennsylvania Law Review, 19, 22 pp. (2011); *Peter J. Smith*, Federalism, Lochner, and the Individual Mandate, 91 Boston University Law Review, 1723, 1729 pp. (2011).
[108] See U. S. United States v. Morrison, 529 U. S. 598, 617 p. (2000): The Constitution „requires a distinction between what is truly national and truly local."
[109] *Aziz Huq*, Federalism, Liberty, and Risk in NFIB v. Sebelius, Public Law and Legal Theory working papers No. 425, p. 1, 10 pp. (2013) and *Peter J. Smith*, Federalism, Lochner, and the Individual Mandate, 91 Boston University Law Review, 1723, 1742 pp. (2011).

product."[110] With this interpretation of the penalty as a tax, the majority could base the individual mandate on Congress' power to lay and collect taxes (Art. 1 Sect. 8 Cl. 1). Reflecting on the reinterpretation of the penalty as a tax, the conservative dissent mockingly noted that "the Court today decides to save a statute Congress did not write."[111] Indeed, the decision stands in the tradition of *Steward Machines Co v. Davis,*[112] where the Court saved the Social Security Act by situating it within the taxing power. Harlan Stone's insiders' tip still holds true![113]

b) The jurisdiction of the European Constitutional Courts

aa) Constitutional framework

Switching from U.S. to European law, one faces similar problems. The constitutional framework of legislative competences in the E.U. follows from Art. 2 pp. TFEU. They establish two important principles. First, Art. 5(2) TEU states that competences not conferred upon the Union in the Treaties remain with the Member States. Second, according to Art. 4(1) TFEU, the Union shall share competence with its Member States where the Treaties confer upon it a competence which does not relate to the areas referred to in Article 3 (exclusive E.U. competence; namely the monetary policy for the Member States whose currency is the Euro) and Article 6 (complementary E.U. competence). Although it had been discussed prior to the Constitutional Treaty, a catalogue of the Member States's exclusive competences was never realized.[114]

"Shared competences" within a statute allow both the Union and its Member States to legislate and adopt legally binding acts in that area (Art. 2[2] TFEU), and the wording ("which does not relate to the areas") clearly shows that this is the rule.[115] However, there are dualistic elements within these cooperative criteria. The provisions within the Treaties that relate to each

[110] U.S. National Federation of Independent Business v. Sebelius, 131 S. Ct. 2566, 2593 (2012). This interpretation was really sophisticated because the Anti-Injunction-Act bars suit for the purpose of restraining the assessment or collection of taxes – that's why the Supreme Court interprets the "payment" in this context as a penalty and not a tax (p. 2584)! See the dissenters' critics against the interpretation as a tax on p. 2651.
[111] U.S. National Federation of Independent Business v. Sebelius, 131 S. Ct. 2566, 2676 (2012), dissent Scalia, Kennedy, Thomas, Alito. See also *David B. Rivkin/Lee A. Casey*, NFIB v. Sebelius and the Triumph of Fig-Leaf Federalism, Cato Supreme Law Review, 31 ,51 (2011-2012): "breathtaking assertion of judicial power".
[112] See above bb) (2).
[113] See Footnote 1.
[114] *Barbara Gustaferro*, Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause, Jean Monnet Working Papers 1/2012, p. 16 pp.
[115] See e. g. *Christian Calliess*, in: Christian Calliess/Matthias Ruffert (ed.), EUV/AEUV, 4th ed. 2011, Art. 4 AEUV para. 2; *Martin Nettesheim*, in: Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (ed.), Das Recht der Europäischen Union, Art. 4 AEUV [2014] para. 5 p.

policy area establish the standards for the allocation of shared competences (exhibiting a dualistic approach, Art. 2[6] TFEU). Some provisions even seem to protect exclusive spheres of power, such as the provision that the Union's competences in social policy "shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs" (Art. 153[5] TFEU; see also Art. 168(7) TFEU concerning the health care system). However, these restrictions refer only to the competences explicitly guaranteed by these provisions! They do not hinder the Union's ability to act with regard to these topics on the basis of other provisions, particularly those concerning the internal market. That is why it is impossible to separate specific policies from the E.U.'s influence. Because of this, interwoven substantive criteria are required to define legislative competences. This Article's analysis of "living federalism" in secondary law will demonstrate that cooperative interweaving between the Union and its Member States is a reality in social and health policy as well.[116]

bb) The jurisdiction of the German *Bundesverfassungsgericht*

Traditionally, the political process of making secondary law in the E.U. was considered much more important for the reinforcement of federalism than the legal protection offered by the European Court of Justice. Up to now, the ECJ has handed down only a few relatively unproductive decisions on the question of dual or cooperative federalism.[117] However, due to the specific construction of the E.U., national constitutional courts also have the legal power to check whether the Union transgresses the competences transferred by the States.[118] The German *Bundesverfassungsgericht* takes this role very seriously. In several decisions since its Maastricht judgment in 1993,[119] it has asserted its role as legal safeguard for the German Nationalstaat. Its crucial concern is the democratic principle and, therefore, the reinforcement of the German *Bundestag*.[120] In particular, two decisions may be taken as evidence for the *Bundesverfassungsgericht*'s inclination towards a dualist conception of federalism.

In its decision concerning the Treaty of Lisbon, the *Bundesverfassungsgericht* established constitutional confines for the transfer of sovereign powers to the E.U.[121] It assumes that the fundamental political decisions are still "related to the nation-state, language, history and

[116] See infra IV. 1. b).
[117] See e. g. Case C-376/98, *Germany v. Parliament and Council*, EU:C:2000:544 and Case C-370/12, *Pringle*, EU:C:2012:756.
[118] Bundesverfassungsgericht, 2 BvR 2728/13, Decision of January 14, 2014 para 26.
[119] Bundesverfassungsgericht, 2 BvR 2134, 2159/92 of October 12, 1993.
[120] Bundesverfassungsgericht, 2 BvE 2/08 and others of June 30, 2009, para. 246; see also *Peter M. Huber*, The Federal Constitutional Court and European Integration, 21 European Public Law, p. 83, 94 pp. (2015). Sceptical *Martin Nettesheim*, Postpolitik aus Karlsruhe, 68 Merkur, 481, 484 pp. (2014).
[121] Bundesverfassungsgericht, 2 BvE 2/08 and others of June 30, 2009.

culture". The democratic principle and the principle of subsidiarity thus require restricting the transfer of powers, "particularly in central areas of the space of personal development and the shaping of living conditions by social policy."[122] This is a convincing argument derived from Art. 4(2) TEU, which states that the E.U. must provide better justifications for establishing a federal law concerning political issues "that rely especially on cultural, historical and linguistic perceptions"[123] and that bear a strong reference "to the cultural roots and values of every state"[124] compared to the justifications required for the establishment of threshold values in public procurement. However, this line of reasoning fails to explain the *Bundesverfassungsgericht*'s surprising conclusion that there are five sensitive policy areas which are supposed to be reserved to the Nationalstaat (criminal law, police and the military, fundamental fiscal decisions on public revenue and public expenditure, decisions regarding the shaping of living conditions in a social state and decisions of particular cultural importance, such as family law, schools and the education system, and relationships to religious communities).[125] This very German attempt to define necessary state functions is actually considered a failure[126] because there are no constitutional arguments that explain why certain policy areas "necessarily" belong to the State(s) while others do not. The *Bundesverfassungsgericht* does not mention the endless and fruitless German debate. Indeed, the Court's five categories seem as haphazard as the few eclectic references it makes to jurisprudential literature. Furthermore, the case presented no compelling reason to dredge up the old debate in the first place. The Lisbon Treaty did not transfer relevant powers in these policy fields, especially not in the realm of social welfare law. When the *Bundesverfassungsgericht* held that "the essential decisions in social policy must be made by the German legislative bodies on their own responsibility,"[127] it should have at least identified which social policy decisions were considered "essential" and which were not. The Court should have also addressed why the decisions already taken over by the European bodies[128] were not "essential". In summary, the main objection against the Lisbon decision is not the substantive criteria itself (which can be read to argue for state responsibility) but the consequences drawn from these criteria. The Court's reasoning is suitable for applying a

[122] Bundesverfassungsgericht, 2 BvE 2/08 and others of June 30, 2009, para. 251.
[123] Bundesverfassungsgericht, 2 BvE 2/08 and others of June 30, 2009, para. 249.
[124] Bundesverfassungsgericht, 2 BvE 2/08 and others of June 30, 2009, para. 260.
[125] Bundesverfassungsgericht, 2 BvE 2/08 and others of June 30, 2009, para. 252.
[126] *Daniel Halberstam/Christoph Möllers*, The German Constitutional Court Says "Ja zu Deutschland", 10 German Law Journal, 1241, 1249 pp. (2010).
[127] Bundesverfassungsgericht, 2 BvE 2/08 and others of June 30, 2009, para. 259.
[128] See IV. 1. b).

heightened scrutiny to proposed justifications regarding federal regulation, but it provides no intrinsic basis for the exclusion of entire policy areas from Union power eo ipso.

The second relevant decision, the OMT judgment,[129] concerned a decision by the European Central Bank (ECB). The ECB has announced a plan to buy unlimited amounts of Member States' government bonds, so long as these Member States participate in a reform program. The stated aim of these Outright Monetary Transactions was to safeguard an appropriate monetary policy transmission and enforce the consistency of the monetary policy. Among other things, the OMT plan raised the question of whether the ECB had the proper competence for this decision, because the Union's competence and, therefore, the ECB's mandate, is limited to the field of monetary policy (Art. 119, 127 pp. TFEU) and does not allow the Union to pursue its own economic policy. The *Bundesverfassungsgericht* held that the purchase of government bonds is an act of economic policy rather than monetary policy.[130] The Court gave a detailed explanation for this view, but there is one key statement which reveals that the *Bundesverfassungsgericht* is "breaking bad." The Court emphasized that the OMT program aimed to neutralize spreads on selected Member States' government bonds within the Euro currency area, and considered itself in possession of the needed expertise to decide whether this objective concerns the Euro or the budgets of the Member States: "According to the European Central Bank, these spreads are partly based on fear of investors of a reversibility of the euro; however, according to the convincing expertise of the *Bundesbank*, such interest rate spreads only reflect the scepticism of market participants that individual Member States will show sufficient budgetary discipline to stay permanently solvent."[131] This is surprising because the Court itself takes the view that an EU decision can only be declared "ultra vires" in case of a manifest transgression[132] of the Union's competences. The *Bundesverfassungsgericht* engages in a landmark dispute among economists[133] and considers itself competent to decide the conflict by declaring the ECB's point of view "irrelevant".[134] As a result, a single constitutional court usurped the power to demarcate the currency from economic policy by deciding a fundamental economic dispute by itself.[135]

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[129] Bundesverfassungsgericht, 2 BvR 2728/13, Decision of January 14, 2014.
[130] Bundesverfassungsgericht, 2 BvR 2728/13, Decision of January 14, 2014, para 64 pp.
[131] Bundesverfassungsgericht, 2 BvR 2728/13, Decision of January 14, 2014, para 71.
[132] Bundesverfassungsgericht, 2 BvR 2661/06, Decision of July 6, 2010, para 61.
[133] See *Matthias Goldmann*, Adjudicating Economics?, 14 German Law Journal, 265, 269 pp. (2014).
[134] Bundesverfassungsgericht, Decision of January 14, 2014, 2 BvR 2728/13, para 95 pp. – At least in retrospect, it is hard to deny that the OMT-policy has contributed significantly to the stabilization of the Euro and therefore had at least also monetary implications.
[135] The decision is contested also intra-court (see the dissenting opinions *Gertrude Lübbe-Wolff* and *Michael Gerhardt*) and subject of widespread scholarship criticism: *Werner Heun*, Eine verfassungswidrige

The *Bundesverfassungsgericht* is, as of now, committed to a rigid conception of dual federalism. It believes in the perfection of a catalogue of competences that makes a clear distinction between policy areas: Either an act concerns monetary policy or it touches economic policy; there is no overlap between these fields. To be more precise, even if there were an overlap from an economic perspective, the policy fields can still be separated by jurisprudential interpretation.[136] The *Bundesverfassungsgericht* follows in the footsteps of the U.S. Supreme Court's pre-New Deal jurisprudence by making federalism simpler than it actually is.[137] However complex the EMU may be, the *Bundesverfassungsgericht* makes the world straightforward! This positivistic construct of separated systems that are separated from each other is not appropriate for drawing boundaries between overlapping competences.[138] Even a short glance at European social policy reveals that legal acts usually concern multiple policy fields. For example, no one has ever claimed that European legislation on the coordination of the social security systems is unconstitutional because it not only concerned the internal market but also social policy.[139]

In light of these considerations, it was not surprising that the ECJ refused to track the *Bundesverfassungsgericht*'s dualistic approach. Yet, its starting point is and has to be dualistic: the delimitation between monetary and economic policy. The Court held that the objectives and the instruments of a measure are relevant for the delimitation of competences[140] and that the objectives and instruments of the OMT program concern mainly monetary policy.[141] But the Court's decision is remarkable in its refusal to establish a dualistic "either-or": Unlike the Bundesverfassungsgericht, the ECJ does not try to separate monetary and economic policy strictly. The Court does not deny that the OMT plan obviously has indirect effects on the economic realm, and the decision encourages the ECB to support the economic policies of the Union with its monetary policy.[142] Therefore, the main question is not whether the ECB has a

Verfassungsgerichtsentscheidung – der Vorlagebeschluss des BVerfG vom 14. 1. 2014, 69 Juristenzeitung, 331, 331 pp. (2014); *Roland Ismer/Dominica Wiesner*, Der OMT-Beschluss des Bundesverfassungsgerichts. Eine dogmatische Kritik auf Grundlage juristisch-ökonomischer Analyse, 68 Die öffentliche Verwaltung, 81, 86 pp. (2015); *Mattias Kumm*, Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and what the CJEU Might Do about it, 14 German Law Journal, 203, 214 (2014); *Franz C. Mayer*, Rebels without a cause? A critical analysis of the German Constitutional Court's OMT reference, 14 German Law Journal, 117, 134 (2014); *Alexander Thiele*, Das Mandat der EZB und die Krise des Euro, 2013, p. 57 pp.

[136] See *Mattias Wendel*, Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference, 10 European Constitutional Law Review, 263, 292 ff. (2014).

[137] See the first citation in the beginning of this article.

[138] See *Rupert Stettner*, Grundfragen einer Kompetenzlehre, 1983, p. 412 f.

[139] See infra IV. 1. b).

[140] Case C-62/14, *Gauweiler and others*, EU:C:2015:400, para 46.

[141] Case C-62/14, *Gauweiler and others*, EU:C:2015:400, para 48 pp. 53 pp.

[142] Case C-62/14, *Gauweiler and others*, EU:C:2015:400, para 59.

general power to issue the OMT program, but how far said power extends. That is why the ECJ focuses on substantive requirements for the use of the monetary power, above all the principle of proportionality,[143] which is the most important provision for protecting Member States in cooperative arrangements.[144] The Court held that "a review of compliance with certain procedural guarantees is of fundamental importance"[145] to the exercise of the Union's competences. On the one hand, the Court's decision emphasizes common concerns regarding the EMU's functionality. On the other hand, it sets substantive limits for the exercise of power by E.U. institutions.

3. Substantive criteria for the demarcation of competences

a) Foundation: Democratic accountability

To summarize the preceding part, the jurisprudence of both the U.S. Supreme Court and the German *Bundesverfassungsgericht* demonstrate that a dualistic approach establishing exclusive spheres of competencies and pretending that these demarcations are rational cannot adequately capture federalism.[146] The dualistic approach promises legal rationality, but leads only to confusion without truly protecting the states or the people. By contrast, the ECJ's decision on the OMT program includes a clear commitment to a cooperative federalism acknowledging that the Member States cannot be protected by a dualistic delimitation of competences.

Notwithstanding these different approaches, the Constitutional Courts agree that there need to be some criteria for the demarcation of power for federalism to work. The U.S. Supreme Court and the German *Bundesverfassungsgericht* justify their roles as legal safeguards of federalism by emphasizing the necessity of democratic accountability, arguing that people must be able to know whom they can hold responsible for political decisions.[147] Political responsibility would become illusory if there were no boundaries between federal and state authorities.[148]

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[143] Case C-62/14, *Gauweiler and others*, EU:C:2015:400, para 66-92.
[144] See infra 3. b) bb).
[145] Case C-62/14, *Gauweiler and others*, EU:C:2015:400, para 69.
[146] See e. g. *Daniel Halberstam*, Federalism: Theory, Policy, Law, in: Michel Rosenfeld/András Sajó (ed.), The Oxford Handbook of Comparative Constitutional Law, 2012, p. 576 (580); *Robert Schütze*, From Dual to Cooperative Federalism. The Changing Structure of European Law, 2009, p. 345 pp.
[147] U.S. New York v. United States, 505 U. S. 144, 168 p. (1992); Bundesverfassungsgericht, 2 BvR 2433 and 2434/04, Decision of December 20, 2007, para. 158 and 2 BvE 2/08 and others of June 30, 2009, para. 246.
[148] U.S. United States v. Lopez, 514 U. S. 549, 576 p. (1995), concurrence Kennedy.

Alexis de Tocqueville pointed out federalism's fundamental struggles with complexity and accountability over two hundred years ago.[149] The overlap between the different levels of government makes it difficult for voters "to determine which set of officials is responsible for which duties."[150] A dual approach to federalism would, in theory, provide greater clarification and transparency. However, the accountability argument promises too much.[151] It relies on an idealized notion of voters who make decisions by analyzing the federalist structure of the issues that will determine their vote, and it underestimates the complexity of political decisions in federalist systems. It would doubtless be easier to achieve political accountability without the E.U., which constitutes the fourth level of government in Europe in addition to the national, regional and local levels! Truth be told, a unitary state with centralized legislation and implementation of laws would be the best way to strengthen political accountability,[152] because complexity is a notorious problem in federalist systems. As "responsibility is hard to fix because it is shared,"[153] the "accountability argument" is directed in the end against federalism. Thus, it is somewhat tricky to justify dual federalism with an anti-federalist argument.

A simple antidote might be to create a catalogue of the exclusive competences of both the Union and its Member States.[154] But this "romanticizing federalism" assumes a 19th century idyllic pre-industrial world with small-scale structures and economic areas independent from each other. Yet, it was not suitable for the United States in 1929, and it is even less suitable in the globalized world of the 21st century. Such a structural dichotomy no longer exists anywhere in the world. Shared competences are the rule and exclusive competences the exception.

b) Protecting States' discretion in cooperative federalism

Federalism is not just a political question. If it is a legal topic, though, there must be a legal mechanism for the delimitation of competences and a Supreme Court empowered to apply that mechanism.[155] The delimitation criteria must be as sophisticated as the social reality it seeks to

[149] See Footnote 1. See furthermore *Stefan Oeter*, Federalism and Democracy, in: Armin von Bogdandy/J. Bast (ed.), Principles of European Constitutional Law, 2nd ed. 2010, p. 55, 72 pp.
[150] *Roderick M. Hills*, The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Michigan Law Review 813, 826 (1997-1998).
[151] The principle is therefore contested also in U.S. scholarship, see *Andrew B. Coan*, Commandeering, Coercion, and the deep structure of American federalism, 95 Boston University Law Review, 1, 13 pp. (2015).
[152] *Roderick M. Hills*, The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Michigan Law Review 813, 828 (1997-1998).
[153] *Martha Derthick*, The Influence of Federal Grants: Public Assistance in Massachusetts, 1970, p. 118.
[154] See *Wolfgang Durner/Christian Hillgruber*, Review of the Balance of Competences, 28 Zeitschrift für Gesetzgebung, 105, 123 pp. (2013).
[155] See supra III. 1.

address, because federalism is complicated![156] In both the U.S. and the E.U., the demarcation of competences is still dominated by a dualistic approach. This is an appropriate starting point, when the relevant provisions make distinctions between certain policy fields, but when those provisions overlap or the constitution prescribes a shared responsibility, Supreme Courts are forced to develop a non-dualistic doctrine for the protection of the states.[157] This doctrine must take into account the gradual nature of federal-state boundaries in cooperative federalism, seeing as the competences are shared and overlapping. In cooperative arrangements, the formalist method of creating separate spheres of sovereignty has to be replaced by substantive law criteria that protect the states from excessive federal influence.

aa) The anti-coercion principle in the jurisdiction of the U.S. Supreme Court

With the anti-coercion principle, the U.S. Supreme Court has developed a flexible but effective instrument for protecting the states from federal government overreach in a cooperative arrangement. The anti-coercion principle is the Supreme Court's substantive tool for examining whether the requirements in a federal law are appropriate and whether they allow the states sufficient discretion in regards to implementation. In other words, it specifies the principle of proportionality,[158] which is also the most important criteria in European law for allocating competences within cooperative frameworks.[159] The importance of the anti-coercion principle derives from the system of federal grants-in-aid, an enormously important concept that must be comprehended in order to understand American federalism. Federal grants-in-aid are intended to motivate the states to implement laws and programs with sp**e**cific requirements and standards set by the federal government. The states are free to adopt laws fulfilling these conditions. If they do, the states or their citizens receive federal financial support that is tied to the legislation. But the states are also free to go their own ways without federal support. As of 2011, the federal government had funded nearly a thousand grant programs, dozens of which focused on health care.[160] The most important of these programs is Medicaid,[161] the health care program for needy families.[162]

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[156] See the Tocqueville citation at the beginning of this article.
[157] *Philipp Weiser*, Towards a Constitutional Architecture for Cooperative Federalism, 79 North Carolina Law Review, p. 663, 700 (2001): „A Constitutional Law for Cooperative Federalism."
[158] Without knowing it because of the lack of comparative constitutionalism, see *Daniel Halberstam*, Federalism: Theory, Policy, Law, in: Michel Rosenfeld/András Sajó (ed.), The Oxford Handbook of Comparative Constitutional Law, 2012, p. 576, 607.
[159] See infra bb).
[160] *R. J. Dilger*, Federal Grants-in-Aid: An Historical Perspective, 2011, p. 6 p.
[161] Since the introduction of Medicaid in 1965, the grants have grown up from 10 Mill. $ (1965) to nearly 300 billion $ in 2011; the percentage for health grants grew up from 6% to 48%.
[162] See infra IV. 1. a).

In *South Dakota v. Dole* (1987), the Supreme Court established four requirements for distributing federal funds based on the spending clause: The funding must be (1) established in pursuit of the general welfare, (2) the conditions for using federal funds have to be reasonably related to the legislation's stated goals and (3) must be unambiguous, and (4) the conditions imposed on the states have to be constitutional.[163] The National Minimum Drinking Age Act, which withheld 10% of federal highway funding from states that did not maintain a minimum legal drinking age of 21, fulfilled these requirements.[164] In subsequent decisions, the Supreme Court developed an additional limit to this test: the anti-coercion principle. The Court derived this principle from the Tenth Amendment, which had been effectively discarded as limit on federal power with the Federalist New Deal.[165] The Court resurrected it as a substantive tool for protecting states against disproportional conditions rather than as a basis for a revival of dual federalism.[166] For example, *New York v. United States* concerned provisions in a federal act which included three types of incentives intended to encourage the States to provide for the disposal of low-level radioactive waste generated within their borders.[167] It was beyond dispute that the commerce clause gave Congress the power to regulate the disposal of radioactive waste. The constitutional question was if, and to what extent, the Tenth Amendment protects the states against "commandeering" federal laws. While the monetary and access incentives, encouraging states to open waste sites and allowing compliant states to deny access to those sites, were declared constitutional, the Supreme Court invalidated the third type of incentive. This third provision, the take title provision, mandated that those states unable to dispose of their radioactive waste would take title to that waste and, in the event of any damages, would have the obligations and liabilities of ownership.[168]

The Court's dissenting minority warned that there may be a hitch in the anti-coercion doctrine.[169] The welcome idea of protecting the states via the principle of proportionality will backfire when (as in *New York v. United States*) the federal government has the power to regulate directly. Such power preempts other rules and prevents the states from retaining any real influence. In contrast, the anti-commandeering doctrine will strengthen the states' position when preemption is not a feasible alternative. In *Printz v. United States*, the Court held that

[163] U. S. South Dakota v. Dole, 483 U. S. 203, 207 (1987).
[164] U. S. South Dakota v. Dole, 483 U. S. 203, 209 pp. (1987).
[165] See U. S. United States v. Darby, 312 U. S. 100, 124 (1941).
[166] See *Brietta Clark*, Safeguarding Federalism by saving health reform: Implications of National Federation of Independent Business v. Sebelius, 541 Loyola Los Angeles Law Review, 541, 605 p. (2013).
[167] U.S. New York v. United States, 505 U. S. 144 (1992).
[168] U.S. New York v. United States, 505 U. S. 144, 169 pp. (1992).
[169] U.S. New York v. United States, 505 U. S. 144, 188 pp. (1992).

Congress could not, even on an interim basis, order state executive officials to help conduct background checks on would-be handgun purchasers.[170] Unlike in *New York v. United States*, practical considerations (absence of an instantly available computer database) would have hindered the federal government's direct regulation. In *Printz*, the anti-commandeering principle truly did strengthen state autonomy.[171] The same applies to *NFIB v. Sebelius*, which dealt with the loss of all federal Medicaid grants to states that refused to adopt the federal government's conditions. Here, too, it would not have been feasible to eliminate traditional federal-state cooperation on Medicaid programs in favor of solely federal solutions.[172] In a 7-2 majority, the Supreme Court held that "the legitimacy of attaching conditions to federal grants to the States depends on the voluntariness" of adopting the legislation. In *Sebelius*, that crucial element of willingness was merely a theoretical construct. Had they refused to expand the program, the states would have lost all of their Medicaid funding (amounting to one-fifth of their total budget). The Court complained that "the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head."[173] The majority decreed connection between the Medicaid expansion and the loss of *all* federal grants coercive, disproportionate, and unconstitutional.

bb) Legal protection of the E.U. Member States by substantive criteria

As previously established,[174] the E.U. Treaties' provisions regarding the distribution of competences reflect a model of cooperative federalism. This is characterized by a consistent exchange of complementary legislative competences within all applicable policy fields, with the one exception being foreign policy.[175] These provisions define the federal competences in more detail, but it is not possible to identify fixed spheres of power reserved to the states due to the broad interpretation of the provisions on the internal market (the E.U. interstate commerce clause).[176] Therefore, substantive criteria are determinative in the delimitation of competences: these include the protection of national identity (Art. 4[2] TEU) and the principles of subsidiarity (Art. 5[3] TEU) and proportionality (Art. 5[4] TEU). These key principles may

[170] U.S. Printz v. United States, 521 U. S. 898, 922 pp. (1997).
[171] *Neil S. Siegel*, Commandeering and its Alternatives: A Federal Perspective, 59 Vanderbilt Law Review, 1629, 1666 p. (2006).
[172] See infra IV. 1. a).
[173] U.S. National Federation of Independent Business v. Sebelius, 131 S. Ct. 2566, 2604 (2012).
[174] See 2. b).
[175] *Robert Schütze*, From Dual to Cooperative Federalism. The Changing Structure of European Law, 2009, p. 347.
[176] See for the reference field social policy infra IV. 1. b).

provide a suitable basis that would allow the ECJ to author and implement substantive sub-principles (such as the anti-coercion principle).

Art. 4(2) TEU may be interpreted with reference to the jurisdiction of the ECJ concerning the fundamental freedoms. Here, the ECJ accepts a wide measure of discretion "in areas in which there are significant moral, religious and cultural differences between the Member States."[177] In that case, the E.U. legislature must consider and justify the necessity of common European regulations.[178] The term "fundamental structures" in Art. 4(2) TEU may also be related to social security systems overall. All Member States have a long tradition of maintaining social security systems, which are an important part of national identity. Consisting of historically evolved and highly complex institutions and structures, but they are also faced with the problem of path dependence. Historical patterns force the persistence and protection of vested rights, which then prevail over political and economic rationalities. Social security systems are part of national legacies, which makes any reform relatively difficult to justify even though underfunded social security systems continue to pose a dramatic threat to the monetary Union.

The balance of the second principle, the subsidiarity rule (Art. 5[3] TEU), may be disappointing up to now.[179] The question of whether the Member States could achieve a goal as well as the E.U. could is largely political in nature.[180] Therefore, the ECJ leaves broad discretion to the Member States with regard to this question.[181] The ECJ has not yet declared a Member State to be in violation of the principle. Indeed, as the decisions of the German *Bundesverfassungsgericht* prove, the principle of subsidiarity is not necessarily unsuitable as a legal safeguard of federalism.[182] In recent years, however, the idea that an ex ante political review should complement an ex post judicial review has come into vogue.[183] As a result, the E.U. Treaty empowers the national parliaments to act as the political safeguards of federalism by establishing an "early warning mechanism." According to Art. 5(3, second subparagraph) and 12 lit. c) TEU, the national parliaments ensure compliance with the principle of subsidiarity

[177] Case C-463/13, *Stanley v. Ministero dell'Economia e delle Finanze*, EU:C:2015:25, para. 51.
[178] This is the appropriate approach of the Bundesverfassungsgericht, 2 BvE 2/08 and others of June 30, 2009, para. 249, 251, 260.
[179] See *Jürgen Bast*, in: Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (ed.), Das Recht der Europäischen Union, Art. 5 EUV [2013] before para. 1.
[180] *Martin Nettesheim*, Subsidiarität durch politische Verhandlung - Art. 5 Abs. 3 EUV als entmaterialisierte Verfahrensnorm, in: Doris König/Dirk Uwer (ed.), Grenzen europäischer Normgebung, 2014, p. 35 pp.
[181] See e. g. Cases C-154/04 and C-155/04, Alliance for Natural Health, para. 104 ff.; C-58/08, Vodafone, para 76 pp.; C-176/09, Luxemburg/Parliament and Council, para. 80 pp.; C-539/09, Commission/Germany, para 84.
[182] See e. g. Bundesverfassungsgericht, 2 BvF 1/01, Decision of October 24, 2002.
[183] The European Convention, CONV 286/02, page 3 p.

in accordance with the procedure set out in the Protocol on the Application of the Principles of Subsidiarity and Proportionality. These provisions demonstrate the correlation between the legal and the political safeguards of federalism.[184]

Until the ECJ's OMT decision,[185] the principle of proportionality (Art. 5[4] TEU) had marginal significance for the legal safeguarding of federalism. Its roots are in the rule of law and fundamental rights and freedoms, not in federalism.[186] Nevertheless, the OMT decision proves that the principle has an important role to play in the demarcation of competences. Unlike the subsidiarity test, the principle of proportionality applies to both shared and exclusive competences (such as the monetary power for the Euro-Member States).[187] For a dualistic approach, the application of the principle of proportionality in exclusive areas does not make sense because an exclusive competence does not affect other competences and, therefore, does not need substantive limits. Yet these limits are important to a theory of cooperative federalism because this concept acknowledges that even exclusive competences overlap with other non-exclusive competences (such as the economic policy in E.U. Law). Therefore, the detailed review of the principle of proportionality in the Court's decision offers an evident commitment to cooperative federalism. In accordance with the wording of Art. 5(4) TEU, the Court primarily reviews the appropriateness and necessity of the OMT program.[188] But for the first time, the Court addresses also the third component of proportionality: Reasonableness.[189] Reasonableness "calls for a weighing-up exercise which, in the circumstances of the case, requires an analysis of whether the 'benefits' of the measure at issue outweigh the 'costs'."[190] This is very important: It is self-evident and follows from the principle of subsidiarity that the Union should not exceed what is necessary to achieve the goals set out in the Treaties. Reasonableness goes beyond the scope of the subsidiarity principle, though. Even if a Union regulation is deemed more suitable for achieving the Treaties' goals, there may be Member State interests that militate against the Union's competence. The most effective instrument for maintaining legal control of competences would therefore be a principle of proportionality containing a reasonableness test. This principle could be applied not only in order to review

[184] See infra IV. 2.
[185] See supra 2. b) bb).
[186] See e. g. *Johannes Saurer*, Der kompetenzrechtliche Verhältnismäßigkeitsgrundsatz im Recht der Europäischen Union, 69 Juristenzeitung, 281, 281 p. (2014).
[187] See e. g. *Stefan Kadelbach*, in: Hans von der Groeben/Jürgen Schwarze/Armin Hatje (ed.), Europäisches Unionsrecht, Art. 5 EUV [2015] para 50.
[188] Case C-62/14, *Gauweiler and others*, EU:C:2015:400, para. 72 pp. 81 pp.
[189] Case C-62/14, *Gauweiler and others*, EU:C:2015:400, para. 91. AG Cruz Villalón labels it as "proportionality stricto sensu", Opinion C-62/14, *Gauweiler and others*, EU:C:2015:7, para. 186.
[190] AG Cruz Villalón, Opinion C-62/14, *Gauweiler and others*, EU:C:2015:7, para. 186.

whether the Union is authorized to regulate but also *how* it should regulate. Furthermore, the reasonableness test makes it possible to integrate an anti-coercion principle modeled after American jurisprudence. This principle would have the primary function of protecting the national parliaments' roles as the political safeguards of federalism in the process of implementing directives.[191]

This smooth control of competences strikes a balance between the principles of rigidity and flexibility.[192] On the one hand, a judicial review that employs consistent standards is an essential constitutional demand, because legal competences are not politically disposable. On the other hand, this review must consider economic, technological, and social change and must be kept open to accommodate further developments. Therefore, the ECJ should allow the Union a certain amount of leeway in assessing the necessity of central regulation. The ECJ must also recognize that political stakeholders are acting as protectors of federalism.[193] Indeed, the substantive criteria may be a gateway to a political preconception that influences legal interpretation. The development of the U.S. Supreme Court's jurisprudence demonstrates that federalism is both a legal and a political question and is therefore a lively system. The quality of the legal safeguarding of federalism will, therefore, depend upon both legal sensitivity and intra-Court control, which may be advanced by dissenting opinions. Dissenting opinions in the interpretation of constitutional law express honesty: They reveal that constitutional interpretation may turn on non-legal understandings. For this reason, the majority of E.U. Member States, as well as the International Court of Justice and the European Court of Human Rights, issue dissenting opinions.[194] In the ECJ, dissenting opinions could also express the Member States' different legal traditions and would stylistically improve the decisions, which are sometimes very difficult to read due to the requirement of unanimous judicial assent. Dissenting opinions could possibly act as an important tool for the hermeneutical development of a European Federalist New Deal.

[191] See infra IV. 2.
[192] See *Michael Fehling*, Mechanismen der Kompetenzabgrenzung in föderativen Systemen im Vergleich, in: Josef Aulehner et. al. (ed.), Föderalismus – Auflösung oder Zukunft der Staatlichkeit?, 1997, p. 30, 42 pp., 50 pp.
[193] See infra IV. 2.
[194] European Parliament, Dissenting Opinions in the Supreme Courts of the Member States, p. 17 pp. (2012).

IV. The political safeguards of federalism

Legal scholarship tends to diminish the debate on federalism on its legal protection. On an academic level, this debate is largely conducted among the clouds of theoretical, high-end controversies regarding sovereignty and the "legally right federalism" that the constitution provides.[195] These esoteric discussions fail to address federalism's political dimensions, particularly the ways in which it is protected through the political process. With that said, U.S. federalism scholarship has favored a non-constitutional approach to federalism in recent years. Several articles stress that federalism as a constitutional principle can only be understood by analyzing the reality of federalism in statutory law, that is, within each single policymaking area (federalism in context[196]) These articles focus on institutional rules, structures, and the practices of federal-state relations in order to evaluate how the states' interests are safeguarded through the policymaking process. Unlike the classical theory of the political safeguards of federalism (which is considered to have failed[197]), the non-constitutional approach does not deal with the states' influence on federal legislation in the Houses of Congress. Instead, it analyzes the states' role in the process of implementing federal laws, and assumes that federalism's primary safeguards are state legislators and authorities who are involved in the legislative translation and executive administration of federal law. The second part of this chapter will outline the influence that the E.U. Member States have in the political process.[198]

1. Federalism in context

Since the New Deal, the U.S. federal government has assumed more and more legislative competences. Yet this shift is not "federalism's demise but rather a change in the mechanisms that safeguard the place of states in our system."[199] Federalism is considered secure "as long as states enjoy a space in which to set their own policies without the federal government's interference."[200] Therefore, the states' role in the process of implementing federal law is supposed to function as the most important safeguard mechanism,[201] guaranteeing plurality and

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[195] *Heather K. Gerken*, Our Federalism(s), 53 William and Mary Law Review, p. 1549, 1551 (2012); *Abbe R. Gluck*, Federalism from federal statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble, 81 Fordham Law Review, 1749, 1765 pp. (2013)

[196] See 1.

[197] See supra III. 1.

[198] See 2.

[199] *Jessica Bulman-Pozen*, From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism, 123 The Yale Law Review, 1920, 1924 (2014).

[200] *Jessica Bulman-Pozen*, From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism, 123 The Yale Law Review, 1920, 1928 (2014).

[201] *Christopher K. Bader*, A Dynamic Defense of Cooperative Federalism, 35 Whittier Law Review, p. 161, 168 (2013-2014); *Jessica Bulman-Pozen*, From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism, 123 The Yale Law Review, p. 1920 pp. (2014); *Heather K. Gerken*, Our Federalism(s),

dialogue between the federal and the state levels.[202] An analysis of state participation requires a *non-constitutional, legislation-focused approach* to the everyday practice of federalism, revealing a multi-level interaction ("marble-cake federalism"[203]) between federal and state governments that does not fit the dualistic image of autonomy and separateness. Social policy provides an ideal example of this "intrastatutory federalism"[204] because all social security branches require a multilayered framework consisting of centralized rules and decentralized specification and implementation. The following chapter will outline this cooperation using U.S. health policy as an example. In Europe, social policy is also an appropriate reference area for placing federalism in context, because it disproves the perception of separated spheres of government.

a) Cooperative regulation and implementation of U. S. health care law

There is no one United States health care system. Instead, there are several pillars of health care with different federalist arrangements.[205] The spectrum ranges from areas where only the states are competent (such as medical licensing and practice regulation) to Medicare, which is regulated, administered, and financed entirely by the federal government without much state involvement. There are also cooperative arrangements in health policy such as Medicaid, which has a federal legal framework that induces the states to establish their own programs by means of federal grants. This heterogeneous framework is at best marginally related to constitutional presetting, but has much to do with political processes and historical path dependences.

The most important pillar of the U.S. health system is health coverage provided by *private insurance companies*. Employers normally arrange group insurance policies for their employees with a private health insurance company and pay most of the costs for the coverage. Until the Affordable Care Act (ACA) became effective in 2014,[206] there was no legal obligation

53 William and Mary Law Review, p. 1549 pp. (2012); *Abbe R. Gluck*, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale Law Journal, p. 534, 564 pp. (2011); *Gillian E. Metzger*, Administrative Law as the New Federalism, 57 Duke Law Journal, p. 2023, 2047 pp. (2008); *John D. Nugent*, Safeguarding Federalism: How States Protect Their Interests in National Policymaking, 2009, p. 168 pp.

[202] *Robert A. Shapiro*, From Dualist Federalism to Interactive Federalism, 56 Emory Law Journal, p. 1, 8 (1/2006-2007).

[203] *Morton Grodzins*, The American System. A New View of Government in the United States, 1966, p. 8.

[204] *Abbe R. Gluck*, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale Law Journal, p. 534 pp. (2011).

[205] *Abbe R. Gluck*, Federalism from Federal Statutes: Health Reform, Medicaid, and the old-fashioned Federalists' Gamble, 81 Fordham Law Review, 1749, 1759 pp. (2013); *Sam Solomon*, Health Exchange Federalism: Striking the Balance between State Flexibility and Consumer Protection in ACA Implementation, 34 Cardozo Law Review, p. 2073, 2092 pp. (2013).

[206] Some provisions will become effective only in 2018.

to conclude these insurance contracts. Traditionally, insurance regulation was left to the states, which developed strictures concerning financial solvency, rate regulation, and market conduct.[207] The ACA expands federal influence in matters of insurance regulation[208] without federalizing the industry entirely.[209] From a federalist perspective, the establishment of insurance exchanges is one of the ACA's most important innovations. The exchanges are supposed to inform consumers about the conditions of the health insurance companies and act as marketplaces for individuals and small businesses shopping for coverage. There was a long dispute between the House of Representatives and the Senate over whether the states or the federal government would run the insurance exchanges. Eventually, Congress adopted the Senate's state-run solutions, acquiescing to long-standing tradition. However, this may run afoul of the Supreme Court's anti-coercion statements in *New York* and *Printz*.[210] That is why the ACA empowered the states to decide whether to establish the health insurance exchanges before January 1, 2014, without obliging them to do so. If a state chooses not to act, the federal government is charged with establishing and operating the exchange, while federal-state partnerships are also permitted. By April of 2015, only fourteen states had chosen to run their exchanges without federal support. Thirty-seven states (most of them Republican-controlled) either did not establish exchanges (because legislation to that effect failed or was not even introduced)[211] or chose to organize their exchanges in hybrid arrangements with the federal government.[212] The insurance exchange arrangement has been labeled as "parallel federalism" because it leads to parallel modes of legislation and administration in the states.[213] The federal law is implemented by either the federal government, the states, or federal-state joint action. This parallelism may cause a good deal of coordination problems,[214] but this is typical of federalist trial-and-error developments searching for the best solution.

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[207] *Joshua Phares Ackerman*, The Unintended Federalism Consequences of the Affordable Care Act's Insurance Market Reforms, 34 Pace Law Review, p. 273, 281 pp. (2014).

[208] See more detailed *Frank J. Thompson* and *Joel C. Cantor*, Federalism and Health Care Policy, in: James A. Morone/Daniel C. Ehlke (ed.), Health Politics and Policy, 5th ed. 2013, p. 94 (106); for more details see *Joshua Phares Ackerman*, The Unintended Federalism Consequences of the Affordable Care Act's Insurance Market Reforms, 34 Pace Law Review (2014), p. 273 (314 pp.).

[209] See for that "field-claiming-federalism" *Abbe R. Gluck*, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale Law Journal (2011), p. 534 (587).

[210] See supra III. 3. b) aa).

[211] This can be explained by the fact that a lot of these states had filed lawsuits against the ACA and had therefore no inducement to begin with the process of implementation.

[212] Kaiser Family Foundation, State Health Insurance Marketplace Types; http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/#map.

[213] *Abbe R. Gluck*, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale Law Journal, p. 534, 585 p. (2011).

[214] *Sam Solomon*, Health Exchange Federalism: Striking the Balance between State Flexibility and Consumer Protection in ACA Implementation, 34 Cardozo Law Review, 2073, 2099 p. (2013).

Medicare, established in 1965, is part of the federally-run retirement security system established by the Social Security Act of 1935. Originally, the plan was to combine the financial pension system in the Social Security Act with a universal health insurance system. President Roosevelt abandoned this scheme due to fear that the inclusion of health insurance would jeopardize the enactment of the entire Social Security Act.[215] Because a program with general eligibility was politically unenforceable, the health care program's political stakeholders changed their strategy after 1945 and promoted health insurance with eligibility restricted to the elderly. This type of health insurance plan was politically viable as supplement to the already existing and popular old-age security system.[216] That is the sole reason why Medicare is, until the present day, a federally-run program without comparable state competences.

Medicaid, a similar program established in 1965 to provide health care to needy people, was forced to break new ground because a federal social security system did not yet exist at that time. This explains its different institutional design, which has become prototypical for federal-state cooperation in social policy. The federal law establishes broad standards, parameters, and requirements for Medicaid programs such as (some, but not all) eligibility criteria and what services shall be provided. The states have the option of implementing the programs by enacting the necessary laws and creating agencies to administer the program. They have no obligation to start the program,[217] but if they choose to do so they receive matching funds from the federal government ($431 billion in 2012).[218] The grants "feature a mix of incentives and regulation."[219] On the one hand, the federal law merely sets the general framework and grants the states broad discretion and flexibility in implementing the federal guidelines. States have used this freedom to change delivery methods, alter benefits and cost sharing, modify provider reimbursements, and increase the number of people eligible for coverage.[220] A great deal of the impetus for the expansion of Medicaid and the improvement of medical care emanated from

[215] See supra III. 2. b) aa).
[216] *Jonathan Oberlander*, Medicare: The Great Transformation, in: James A. Morone/Daniel C. Ehlke (ed.), Health Politics and Policy, 5th ed. 2013, p. 126, 127.
[217] It took until 1982, when the last state (Arizona) decided to implement Medicaid!
[218] The average of the federal share for the states was 57% in 2012, 74% in the poorest state Mississippi and nowhere less than 50%, see Kaiser Family Foundation, Federal and state share of Medicaid spending, http://kff.org/medicaid/state-indicator/federalstate-share-of-spending.
[219] *Frank J. Thompson* and *Joel C. Cantor*, Federalism and Health Care Policy, in: James A. Morone/Daniel C. Ehlke (ed.), Health Politics and Policy, 5th ed. 2013, p. 94, 98.
[220] *Brietta Clark*, Safeguarding Federalism by Saving Health Reform: Implications of National Federation of Independent Business v. Sebelius, 541 Loyola Los Angeles Law Review (2013), 541, 553. Eventually, the waivers achieve many of the goals of decentralization and experimentation, see *Samuel R. Bagenstos*, Federalism by Waiver after the Health Care Case, Michigan Law. Public Law and Legal Theory Research Paper Series, Paper No. 294, p. 1, 12 (October 2012).

the states.[221] In some states, Medicaid acts as a proxy for a universal healthcare system with coverage for all. Currently, the federal government mandates only 40% of Medicaid expenditures. The majority of Medicaid spending is "state-made"[222]. On the other hand, the fund system requires the federal government to conduct legal governance and monitoring in order to assure that the states remain in compliance with federal conditions. This federal influence is frequently the subject of (partisan) disagreements.[223] When a program starts, the federally mandated targets are often not very tough and the states are inclined to implement them in order to receive the grants. Once they take part in the program, however, the states lose their exit option. When federal, political and financial pressures increase, the states are stuck administering a program they originally implemented in reliance upon their political discretion. However, vertical networks between federal and state authorities, which are archetypal of cooperative federalism, also arise out of the system of grants-in-aid,[224] and not only in the realm of health policy. These federal-state networks occasionally produce stronger loyalities to the other level of government and may play an influential role in the process of checks and balances on government power.[225]

The ACA expands the Medicaid coverage to nearly all non-elderly adults with incomes up to 138% of the federal poverty level (about $ 33,000 for a family of four).[226] In most states, this qualifies as a huge expansion. Before the ACA, Medicaid required neither a minimum income level nor coverage for childless adults.[227] The federal funding is very generous: Between 2014 and 2016, the federal government pays 100% of Medicaid costs for newly eligible enrollees, declining to 90% by 2020.[228] The ACA originally threatened non-compliant states with the loss of all federal funds, not just those tied to the expansion of Medicaid. Indeed, the Supreme Court

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[221] *Abbe R. Gluck*, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale Law Journal (2011), p. 534, 562 p., 568. A very progressive state in that sense was Oregon with its Health Plan in 1993.

[222] *Colleen M. Grogan*, Medicaid: Designed to Grow, in: James A. Morone/Daniel C. Ehlke (ed.), Health Politics and Policy, 5th ed. 2013, p. 142, 153.

[223] See *Jessica Bulman-Pozen*, From Sovereignty and Process to Administration and Politics: The Afterlife of American federalism, 123 The Yale Law Journal (2014), 1920, 1948 p.: "partisan federalism".

[224] Which includes above all in health care policy also "uncooperative federalism", see *Jessica Bulman-Pozen/Heather K. Gerken*, Uncooperative Federalism, 118 Yale Law Journal (2009), p. 1256 (1258 p.).

[225] *Abbe R. Gluck*, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale Law Journal (2011), p. 534, 570.

[226] *Colleen M. Grogan*, Medicaid: Designed to grow, in: James A. Morone/Daniel C. Ehlke (ed.), Health Politics and Policy, 5th ed. 2013, p. 142, 147 p.

[227] See Kaiser Family Foundation, Medicaid Eligibility for Adults as of January 1, 2014; http://kff.org/medicaid/fact-sheet/medicaid-eligibility-for-adults-as-of-january-1-2014/

[228] *Sherry Glied/Stephanie Ma*, How States Stand to Gain or Lose Federal Funds by Opting In or Out of the Medicaid Expansion, The Commonwealth Fund Dec. 2013, p. 1, 2.

ruled these provisions coercive and unconstitutional.[229] The states can therefore decide whether or not to participate without fearing to loose all Medicaid funds. As of April 2015, 29 states (including D.C.) have decided to adopt the expansion, six are still discussing it and 16 states have elected not to adopt the expansion at this time.[230] This arrangement may demonstrate the flexibility of a parallel federalism and its potential for enabling political compromise in situations where the states are actually free to make decisions rather than being commandeered by the federal government.

[229] See supra III. 3. b) aa).
[230] Kaiser Family Foundation, Status of State Action on the Medicaid Expansion Decision, http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/

b) E.U. social policy

European Union law is still far away from featuring a federalist interplay at the level and complexity of U.S. health care law. E.U. social policy, however, shows the need of federalism in context, because it reveals that the widespread perception of social policy as an exclusive Member State competence is too simplistic.

According to Art. 4 sect. 2 lit. b) TFEU, Union and Member States share competence in social policy "for the aspects defined in this treaty." This obviously refers to Art. 151 pp. TFEU[231] and especially to Art. 153(1) and (2) TFEU, which authorize the Union to adopt directives with minimum requirements for the improvement of the working environment in order to protect workers' health and safety, improve working conditions, social security and social protection of workers and so on. The Union has adopted many directives in this field,[232] which the States then transformed into national law.

Yet, the Union is not merely limited to adopting directives in those areas and instituting only minimum requirements. The majority of social policy regulations and directives are not based on Art. 153 TFEU. For instance, Regulation No. 883/2004/EC aims to coordinate the social security systems of the Member States in order to facilitate the free movement of persons. The Member States must therefore guarantee that the periods of insurance, employment, or residence of migrant workers in an E.U. country are recognized in all of the other E.U. countries and that workers receive benefits, regardless of which state they happen to be in when they become sick. Art. 24(1), Directive 38/2004/EC obliges the Member States to guarantee equal social benefit treatment to nationals from all other Member States. As a result, each Member State must provide essentially the same benefits to nationals of other Member States as they provide their own nationals. This obligation has triggered fundamental controversies regarding solidarity between the Member States.[233] These legal acts, while doubtless concerning social policy, are based upon principles of freedom of movement rather than social policy competences (Art. 18, 21, 46, 48, 50 TFEU). Internal market regulation and social policy are intertwined and cannot be separated with regard to the distribution of competences. These competences are not precluded by Art. 151 pp. TFEU, because provisions concerning the

[231] *Martin Nettesheim*, in: Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (ed.), Das Recht der Europäischen Union, Art. 4 AEUV [2014] para. 13.
[232] *Martina Benecke*, in: Eberhard/Grabitz/Meinhard Hilf/Martin Nettesheim (ed.), Das Recht der Europäischen Union, Art. 153 AEUV [2014] para. 14 pp. and *Ulrike Davy*, Sozialpolitik der Union, in: Matthias Niedobitek (ed.), Europarecht – Politiken der Union, 2014, § 7 para 68 pp.
[233] S. supra II.

internal market are included in the phrase "for the aspects defined in this treaty," (Art. 4[2] TFEU) not "for the aspects defined in the Art. 151 pp. TFEU".

The interconnection between E.U. and Member States' social policy may eventually be demonstrated by the Posted Workers Directive 91/76/EC. This regulation applies to undertakings that make use of the E.U.'s guarantee of freedom of movement by posting workers in another Member State's territory for a limited period of time in order to provide services. The Directive is based on Art. 50(1) and 59(1) TFEU, which empowers the Union to protect freedom of establishment and to liberalize the provision of services. This liberalization, though, has important social policy implications. In order to protect the social rights of these workers, the Directive contains core minimum working conditions that the host country must provide to posted workers, such as maximum work periods and minimum rest periods, minimum paid annual holidays, and minimum pay rates. The Directive establishes these minimum requirements but does not preclude Member States from granting posted workers access to the protections of the State's employment legislation or collective agreements, which are often even more favorable to workers. In addition, the unions also have the right to take collective action, including the right to strike, in order to enforce collective agreements (Art. 28 CFR). But collective actions restrict the free establishment and the transnational provision of services. That is why, in two cases, the ECJ has declared collective actions against private undertakings to be incompatible with these freedoms and the relevant provisions of the Directive 91/76/EC.[234] The ECJ also decided that collective action is not compatible with these rules when public contract awards contain collective agreement wage requirements.[235] The Directive and these controversial decisions[236] are illuminating because they, once again, demonstrate that E.U. social policy is primarily based on the internal market provisions rather than provisions about social policy. These rulings affect the pay, the right of association, and the right to strike despite the fact that Art. 153(5) TFEU seems to exclude these topics from Union's legislative competence![237] In a dualistic sense, even these areas are not reserved to the Member States.

One may argue that, so far, E.U. law only affects isolated questions and does not have systematic impacts on the organizational structures or the redistribution effects of social security systems. Yet the distinction between dual and cooperative federalism is not gradual,

[234] Case C-438/05, *Viking Line*, EU:C:2007:772 and Case C-341/05, *Laval*, EU:C:2007:809.
[235] Case C-346/06, *Rüffert*, EU:C:2008:189.
[236] See more detailed *Thorsten Kingreen*, Der Vorschlag des Europäischen Gewerkschaftsbundes für ein soziales Fortschrittsprotokoll, 2014, p. 16 pp.
[237] See *Catherine Barnard/Geert De Baere*, Towards a European Social Union. Achievements and Possibilities under the Current EU Constitutional Framework, KU Leuven Euroforum, 2014, p. 10 pp.

but categorical. Furthermore, the assumption that E.U. social policy plays only a marginal role in social security systems is fallacious. The increased surveillance of public budgets and the mechanisms for preventing and correcting macroeconomic imbalances in the "Six-Pack" and "Two-Pack" regulations[238] may also lead to structural reforms in social security systems. Member States receiving grants from the ESM on the basis of Memoranda of Understanding (Art. 13[3] ESM-Treaty]) are already in the process of restructuring their social security systems.

Furthermore, one can hardly say that the Union has no authority in the field of social redistribution because the European funds redistribute enormous amounts of money. Currently equipped with an annual budget of slightly more than € 12 billion, the European Social Fund (Art. 162-164 TFEU) enables structural improvements to employment policy, primarily in regions with below-average development. Although it formally does not affect the legislative competence held by the Member States, the European Social Fund influences national labor policy to a significant degree through distributions of high subsidies ('golden bridle').[239] Similar to the grants-in-aid found in the U.S. framework, this constitutes a federal equalization scheme in social policy.[240] Within the framework of the Social Fund, it is also conceivable that E.U.-funded social programs could be established that the states may choose to adopt without having the obligation to do so, for example, an additional European unemployment insurance fund for short-term crises[241] or a program that motivates Member States to be more flexible in establishing the retirement age due to the demographic situation.

All in all, the reference area of social policy provides an exemplary demonstration of the idea that the "philosophy of dual federalism has lost touch with a legislative reality within Europe that is increasingly characterized by mutual penetration and interlocking laws."[242] Until now, E.U. social policy has mainly consisted of internal market policy and, increasingly monetary policy; the relevant provisions also give the E.U. the constitutional power to enact additional social policy regulations that are necessary to realize the internal market or sustain the EMU. The nexus between these different policy fields connects the Union's laws with the Member State's Law, which is partly independent from E.U. law and partly transposes E.U.

[238] See I.
[239] See *Thorsten Kingreen*, in: Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (ed.), Das Recht der Europäischen Union, Art. 162 AEUV [2015] para. 2.
[240] *Martin Nettesheim*, Sozialpolitik und Beschäftigungspolitik, in: Thomas Oppermann/Claus-Dieter Classen/Martin Nettesheim (ed.), Europarecht, 6th ed. 2014, § 29 para. 25.
[241] See for that discussion above I.
[242] So generally *Robert Schütze*, From Dual to Cooperative Federalism. The Changing Structure of European Law, 2009, p. 352.

law in national law. The cooperative federalism in social policy also has impacts on judicial review, but only by specifying substantive borders for federal competences, because the Member States are no longer protected by exclusive areas of power that are reserved to them (because they do not exist).

2. The implementation of E.U. Law by the Member States

Both the constitutional framework and the political processes of the E.U. support the idea of protecting federalism through the political process, even more than in the U.S. In the E.U., Member State governments are more powerful than U.S. state governments because they are represented *as governments*[243] in the key decision-making federal institutions, the European Council (Art. 15 TEU) and the Council of Ministers (Art. 16 TEU). Furthermore, Member States‘ authorities are the protagonists in the execution of E.U. law. Thus, the Union needs state bodies to carry out its policies; it needs their regional and local expertise, as well as their readiness to communicate the federal laws to the people on site. As in the U.S., there are no systematic provisions regarding the distribution of executive competences such as there are in the German constitution (Art. 83 pp. GG). This being said, the notion that the execution of E.U. law by national authorities is still the de facto rule and the implementation by E.U. authorities is the exception is merely a descriptive statement without any normative pretension.[244]

Despite the State’s executive branch’s eminent political power, national parliaments are supposed to be the most important safeguards of federalism. This may be surprising because the national parliaments have traditionally been viewed as victims of the integration process because of the transfer of competences to the E.U. and the empowerment of the EP.[245] However, their relatively strong position follows from the feature of democratic governance in the E.U. Whereas state congressional bodies in the U.S. do not have legitimizing relevance to the federal legislature and its implementation, Member States’ parliaments are indispensable to the democratic legitimacy of policymaking within the E.U.[246] The democratic principle and the federal distribution of competences are linked because the transfer of competences from the

[243] *Alberto Sbragia*, The United States and the European Union: Comparing Two Sui Generis Systems, in: Anand Menon/Martin Schain (ed.), Comparative federalism: The European Union and the United States in Comparative Perspective, 2006, p. 15, 31.
[244] *Martin Nettesheim*, Vollzug des Unionsrechts, in: Thomas Oppermann/Claus-Dieter Classen/Martin Nettesheim, Europarecht, 6th ed. 2014, §12 para. 1, 24.
[245] See *Maja Kluger Rasmussen*, The Empowerment of National Parliaments in EU Integration: Victims or Victors?, in: Jack Hayward/Rüdiger K. Wurzel (ed.), European Disunion. Between Sovereignty and Solidarity, 2012, p. 99 pp.
[246] Bundesverfassungsgericht, 2 BvR 2134, 2159/92 of October 12, 1993, para. 100.

Member States to the E.U. has a different impact than the comparable transfer in the U.S. It is not "neutral" from a democratic perspective. The shift of competences to the Union raises the problem of the democratic deficit, which the Union is said to have.[247] In its *Maastricht* decision, the German *Bundesverfassungsgericht* connects the democratic and federal principles by emphasizing that the national parliaments need to be stakeholders for states' rights in order to hold their own ground.[248]

Indeed, the national parliaments are not actively involved in the regular E.U. legislative process.[249] However, they actively contribute to the proper functioning of the Union, namely with respect to the principle of subsidiarity (Art. 12 lit. b) TEU). According to Art. 6 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, this role includes the right to challenge a legislative draft for a failure to comply with the principle of subsidiarity.[250] Art. 8 of the Protocol links the political safeguard function with the legal safeguard function by entitling every national parliament to bring an invalidity action to the ECJ (Art. 263 TFEU) alleging a violation of the principle of subsidiarity. This right has not been used yet, because it is a weak one: Every Member State (meaning every national government) is already able to sue against any European act that it considers to violate the principles of subsidiarity or proportionality. Ordinarily, the national governments can count on parliamentary majorities, which is why the parliaments will not bring an action against the executive's will. The national parliament's right of action therefore has no additional value when compared to the congruent Member States' right to bring an invalidity action. The position of the national parliaments as political safeguards of federalism would be reinforced if parliamentary minorities had the right to sue. For example, one improvement would be to give the right to bring actions concerning federalist issues if, in a quarter of the national parliaments, a quarter of the Members of the respective parliaments supported the action.[251] These parliamentary minorities could then file the lawsuit together at the ECJ. This right would also

[247] See for this never-ending discussion e. g. *Andreas Follesdal/Simon Hix*, Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik, 44 Journal of Common Market Studies 533, 533 p. (2006).
[248] Bundesverfassungsgericht, 2 BvR 2134, 2159/92 of October 12, 1993, para. 100, translation not official, see http://www.judicialstudies.unr.edu/JS_Summer09/JSP_Week_1/German%20ConstCourt%20Maastricht.pdf.
[249] They are even the only stakeholders in the intergovernmental method which is indeed part of the set of problems presented in this article, see above I.
[250] That includes the principle of proportionality, see for this contested view *Christian Calliess*, in: Christian Calliess/Matthias Ruffert (ed.), EUV/AEUV, 4th ed. 2011, Art. 12 EUV para. 36 and *Sven Hölscheidt*, in: Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (ed.), Das Recht der Europäischen Union, Art. 12 EUV [2013] para. 44; against the inclusion of the principle of proportionality e. g. *Federico Fabbrini/Katrazyna Granat*, "Yellow Card, but no Foul": The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike, 50 Common Market Law Review, 115, 120 pp. (2013).
[251] This right should not depend on the population of the states and the number of Members of the parliaments as they safeguard federalism, not interests.

contribute to the intensification of communication and cooperation among the national Parliaments (and the political parties) in E.U. affairs.

Even more important is the role that the national parliaments play in the implementation of E.U. Law. As already pointed out, U.S. scholarship emphasizes the "implementation" of federal law by state authorities as one of the most important tools in the political safeguarding of federalism. The implementation of federal law is a crucial component of the discretion left to the states, which is why it is so important to analyze federal statutory law in order to understand federalism. But "implementation" is usually understood as "enforcement" by executive bodies.[252] E.U. law, by contrast, provides a *legislative* tool with the directive, which is supposed to be subject to *legislative* and not only executive implementation (Art. 288 subparagraph 2 TFEU). The effectiveness of E.U. law depends, therefore, mainly on national parliaments.[253] The scope of the directive is decisive for the discretion of the national parliaments. To put it in other words: The power of the national parliaments in the E.U. depends primarily on the scope and the legal interpretation of E.U. statutory law. This fine-tuning of federalism below the constitutional level demonstrates, once again, that the protection of states' rights depends not so much on the question *whether* the constitution allows the Union to act, but rather, *how* and *to what extent* it preforms the incorporation of the directive in national law.

V. Conclusion: A more perfect Union

The European Union has never had a fundamental inaugural discussion about federalism such as the debate between the federalists and the antifederalists in the U.S. Europe was not supposed to be made all at once. As an unprecedented model of supranational integration, it had to be developed step by step (and repeatedly with two speeds) without infringing upon the sovereignty of the Member States.[254] The spillover strategy from the internal market to other policy branches has been important and politically successful. In a certain sense, though, it was not honest, because it led the public to think that the E.U. and the Member States would remain two separate spheres of governance and that the Member States would continue to be sovereign,

[252] See again infra 1. for the U. S. discussion.
[253] That's why the selection of the directive instead of a regulation should be the rule, see Art. 296(1) TFEU and *Markus Krajewski/Ulrich Röslein*, in: Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (ed.), Das Recht der Europäischen Union, Art. 296 AEUV [2011] para. 51; *Nina Wunderlich/Thomas Pickartz*, Hat die Richtlinie ausgedient? Zur Wahl der Handlungsform nach Art. 296 Abs. 1 AEUV, 49 Europarecht, 659, 663 pp. (2014).
[254] *Stefan Oeter*, Federalism and Democracy, in: Armin von Bogdandy/Jürgen Bast (ed.), Principles of European Constitutional Law, 2nd ed. 2010, p. 55, 57.

at least in regards to the conservation of their "cultural roots and values"[255] and the people's wealth. The European crisis has proven that dualistic thinking is simplistic and puts democratic governance in jeopardy. Due to the purported lack of its own legislative competences, the Union has established a strong regimen of executive control mechanisms over the national budgets. This reduces the political leeway that the national parliaments possess without enforcing the EP in its turn. This strategy of formalistically maintaining dual federalism is also not very honest. In theory, the Member States keep their competences, but in practice, the Commission and the other executive stakeholders are now in the legal position to govern every policy area by controlling national budgets.

The U.S. development demonstrates that a fundamental economic and social crisis may bring about a reframing of federalism, a Federalist New Deal.[256] It is uncertain, however, what this realignment will look like in the E.U. There is a lot of evidence that the E.U. will maintain its two federalisms with different levels of integration. The Treaties allow for such sliding-scale federalism, as disintegration has always been part of the integration process.[257] But a further, deepening integration (especially a separate budget for the euro zone[258]) will intensify disintegration, forcing amendments to the Treaties, a prospect that is not currently on the political agenda.[259] Regardless, this article argues that the existing Treaties already provide legitimate groundwork for further but wary integration. This Federalist New Deal departs from the idea that the E.U. and its Member States occupy separate worlds of governance with exclusive legal competences. It sees the Union and the Member States not as rivals and alien governments, but as co-existing partners with common concerns.[260] The core element of the Federalist New Deal is a cooperative federalism that is legally safeguarded by a substantive

[255] Bundesverfassungsgericht, 2 BvE 2/08 and others of June 30, 2009, para. 260.
[256] *Daniel Halberstam*, A European New Deal, Project Syndicate of June 20, 2012, http://www.project-syndicate.org/commentary/a-european-new-deal.
[257] *Poul Kjaer*, Integration/Desintegration als Code des europäischen Verfassungswandels, in: Andreas Fischer-Lescano/Florian Rödl/Christoph Schmid (ed.), Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa, 2009, p. 385 pp.
[258] See for this discussion, which also includes U. S. experiences *Guntram Wolff*, A budget capacity for Europe's Monetary Union, Bruegel Policy Contribution 22/2012 (http://www.bruegel.org/publications/publication-detail/publication/762-a-budget-for-europes-monetary-union) and *Daniel Gros*, The false promise of the Eurozone budget, Project Syndicate Dec. 2012 (http://www.project-syndicate.org/commentary/the-eurozone-needs-a-banking-union--not-a-budget-by-daniel-gros).
[259] Proactive exception: the French and German ministers of finance Emmanuel Macron/Sigmar Gabriel, Europe cannot wait any longer: France and Germany must drive ahead, The Guardian, June 3d 2015, postulating a budget for the Eurozone and now also the "Five Presidents Report", p. 12 pp., 15 pp. (https://ec.europa.eu/priorities/sites/beta-political/files/5-presidents-report_de_0.pdf).
[260] See the definition of cooperative federalism in U. S. Carmichael v. Southern Coal & Coke Co, 301 U. S. 495, 526 (1937) and replace the U.S. by the E.U. and the State of Alabama by any Member State; it is then appropriate also for the E.U.

judicial control rather than a formalistic division into mutually exclusive spheres. Cooperative federalism will also be politically safeguarded by the national parliaments, who should see a strengthened function in the process of making and implementing E.U. laws. Simply put, cooperative federalism is the basis for further integration in social policy.

The path of least resistance would certainly call for a continuation of the current system. Europe could continue to grapple with executive-ridden federalism and hope that the crisis will eventually come to an end. But, as the painful aftermath of the January 2015 election in Greece has shown, this strategy erodes the democratic principle and the European cohesiveness without safeguarding federalism. It is often said that crises are the hour of the executive. Indeed, in the E.U., years of the executive have resulted from it, leading to a federal twilight zone between a Union that is not supposed to have the legal power to manage the social impacts of the crisis and individual Member States that are unable to solve supranational challenges. As a consequence, big decisions that have significant impacts on fundamental rights are not made in parliaments, but in small, shielded circles that are primarily focused on the economic and monetary dimensions of the crisis. Due to this tunnel vision, and the separation of post-crisis regulation from the democratic process, the political and social dimensions of the crisis have faded into the background.

When considering the Greek election in this light, the Grecian people have only taken what Europe did not give them: a public, democratic discourse about the sense and nonsense of an austerity policy. This renationalization has made it possible for a European issue to be simplistically reduced to a falling-out between Greece and Germany, with both sides resorting to primitive stereotypes we hoped were long gone. This is also why the European Union needs a Federalist New Deal: "in Order to form a more perfect Union"[261].

[261] Preamble to the United States Constitution.