

National Parliaments as Political Safeguards of Federalism: Interparliamentary Cooperation in the EU, the US and Switzerland

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1. Introduction

This chapter studies the role of parliaments at non-central level in federal systems. To this end, it analyses the function of US State legislatures, national parliaments (NPs) in the EU and Swiss cantonal parliaments as ‘political safeguards of federalism’. This notion, introduced by Herbert Wechsler in the US context, describes the mechanisms that offer States protection from federal overreach and focuses on the role of States in the appointment and composition of the central government.¹ The aim of the ‘political safeguarding of federalism’ is to maintain an optimal balance between the States and federal government rather than to advance State autonomy, thereby seeking to ‘achieve a well-functioning *national* democracy’.²

The chapter adopts a comparative perspective in order to gain insights from the American and Swiss experiences that could inform the ongoing debate on the strengthening of NPs in EU affairs through interparliamentary cooperation.³ The comparison is based upon the wider notion of a federal union, under which the EU can be classified. As Schütze explains, the EU stands on a federal ‘middle ground’, since it has a ‘mixed or compound structure [...] combining international and national elements’.⁴ He does not follow the view that the EU’s federal tradition of indivisible sovereignty implies a notion of a federation as a national state. Instead, he argues that the federal label can be applied beyond the state and that it encapsulates the idea of a ‘Federation of States’. This chapter takes this broader approach and adopts the view that the subsidiarity principle, strengthened by the scrutiny of NPs, represents the EU’s own political safeguard of federalism that allows for comparisons with similar safeguards in other federal systems.⁵

In the EU, concerns over a ‘democratic deficit’⁶ and the so-called ‘competence creep’⁷ led the drafters of the Lisbon Treaty to grant NPs an oversight function with respect to the compliance of EU draft legislative acts with the principle of subsidiarity.⁸ More than this, as explained by Lindseth, the reinforcement of the role of NPs within the EU legislative process was grounded in a ‘democratic

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¹ H Wechsler, ‘The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government’ (1954) 54 Colum L Rev 543.

² H Gerken, A Holtzblatt, ‘The Political Safeguards of Horizontal Federalism’ (2014) 113 Michigan L Rev 57, 68.

³ See the currently discussed reforms in: House of Lords, European Union Committee, *The Role of National Parliaments in the European Union*, 9th Report of Session 2013-14.

⁴ R Schütze, *From Dual to Cooperative Federalism* (OUP 2009), 70.

⁵ See in contrast Lindseth’s argument that the ‘increase in the national parliamentary role is a further reflection of the fundamentally administrative character of European integration’. PL Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010) 227.

⁶ J H H Weiler, ‘In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messiahism of European Integration’ (2012) 34 J Eur Integration 825, 837.

⁷ S Weatherill, ‘Competence Creep and Competence Control’ (2004) 23 YEL 1.

⁸ Art 5(3) TEU.

disconnect' between EU institutions and EU citizens.⁹ This disconnect arose from the assertion that, for cultural and historical reasons, it is the national level that ultimately enjoys the highest degree of democratic legitimacy, and without more involvement of NPs, the EU would remain disconnected from this source of legitimacy. This stands in contrast to the idea of the 'democratic deficit', which concentrates solely on the democratisation of EU institutions independently of the national level. This chapter departs from this approach and argues that efforts towards greater democratisation of the EU should focus on enhancing the linkages between EU institutions that produce legal norms and the national level that oversees these institutions.

The involvement of NPs was also partly inspired by disappointment with the jurisprudence of the Court of Justice of the European Union, and its fulfilment of the function of judicial guardian of subsidiarity.¹⁰ Its jurisprudence on the subsidiarity principle¹¹ has been subject to strong criticism, especially the Court's reluctance to 'deal with subsidiarity frontally' and the Court's 'misleading application' of this principle by focusing on the procedural dimension of subsidiarity instead of conducting a cost/benefit test of the necessity of EU action.¹² Moreover, the Court's case law is labelled a 'drafting guide', meaning that as long as EU institutions use the Court's vague vocabulary and draft EU legislation accordingly, the Court will not annul such acts on the grounds of a violation of subsidiarity.¹³ To address such concerns about democratic legitimacy and the insufficient contribution of the Court to address the challenges facing EU legislative action, the Lisbon Treaty introduced the so-called early warning system (EWS), granting NPs the role of 'watchdogs' of subsidiarity.¹⁴ The EWS creates a link between EU institutions and NPs by involving the latter in the subsidiarity control of draft legislation put forward by the European Commission.

In contrast to the EU, no mechanism similar to the EWS exists in the US or Swiss constitutional systems. Nonetheless, State legislatures and cantonal parliaments have also taken an active role in safeguarding balanced relations between States and the federation and between cantons respectively. This chapter focuses on fiscal federalism in the US, horizontal federalism in Switzerland, and the contribution of interparliamentary cooperation to the safeguarding of the federal structure of government. Section 2 discusses Wechsler's notion of 'political safeguards of federalism'. With regard to the US, the focus will be on the question of the level of government that should bear the cost of implementing federal legislation.¹⁵ Specifically, Section 3 studies the Unfunded Mandate Reform Act (UMRA) of 1995 that aims to limit the practice of imposing federal unfunded mandates on State and local governments. In general terms, an unfunded mandate is a compulsory federal law that requires a State or local government

⁹ P Lindseth, 'Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002) 151. See also his chapter on mediated legitimacy in this volume.

¹⁰ See G Martinico, 'Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union' (2011) 17 EPL 649.

¹¹ See an analysis of this problematic case law in: A Estella De Noriega, *The EU Principle of Subsidiarity and its Critique* (OUP, 2002).

¹² Martinico, 'Dating Cinderella' (n 10) 655.

¹³ S Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has Become a Drafting Guide' (2011) 12 German LJ 827.

¹⁴ I Cooper, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU' (2006) 44 JCMS 281.

¹⁵ See the differences between the EU and the US in financing of federal policies in I Pernice, 'Framework Revisited: Constitutional, Federal and Subsidiarity Issues' (1995) 2 Colum J Eur L 403, 414.

to perform certain actions without providing federal funding for it.¹⁶ For instance, the 1990 Americans with Disabilities Act obliges state and local governments to make buildings accessible to disabled people and to finance it from their own budgets. This section also explores the role of the National Conference of State Legislatures (NCSL), an ‘informal political safeguard of federalism’, in the operation of the unfunded mandate in the US federal system, and draws parallels and highlights differences with the involvement of NPs in the EWS.¹⁷ Section 4 studies the involvement of the Swiss cantonal parliaments in issues related to federalism. Although sufficient political safeguards of federalism seem to be in force in Switzerland, when it comes to intercantonal treaties, intercantonal parliamentary cooperation is still developing. To respond to the dominance of cantonal executives in this aspect of horizontal federalism, cantonal parliaments have launched a number of regional conferences, while a national conference is underway. Finally, Section 5 offers insights from the functioning of the NCSL and Swiss conferences for the involvement of NPs within the EU system. The key finding of the chapter is that, in all of the cases studied, interparliamentary cooperation was used by the legislatures to strengthen their position in the relations between the parliament and government in the system of vertical (the EU and the US) or horizontal (Switzerland) federalism.

2. Political Safeguards of Federalism

2.1 US Political Safeguards of Federalism

In Wechsler’s view, the political safeguards of federalism serve to prevent or limit intrusions by the federal government on the realm of the States.¹⁸ As a consequence, courts do not need to police federalism on behalf of States because the latter are adequately represented in Congress.¹⁹

First, according to Wechsler, the US federal tradition ‘supports placing the burden of persuasion on those urging national action’.²⁰ Second, States play a central role in the selection and composition of the federal parliament and government. Specifically, members of both houses of Congress are elected on the basis of electoral districts formed across the States and, as such, are politically accountable to the voters of their home State,²¹ although the Senate only became directly elected after the 17th Amendment of the US Constitution adopted in 1913. Furthermore, the US President is elected by electors appointed by each individual State.²² Third, the equality of States in the Senate enables the blocking of legislation by a coalition of States whose population is just a fraction of the total number of citizens.²³ In the same vein, States can influence the House of Representatives through State control over voters’ qualifications (criteria by which people are eligible to vote) and districting (the redrawing of borders between electoral

¹⁶ See RJ Dilger & RS Beth, ‘Unfunded Mandates Reform Act: History, Impact, and Issues, Congressional Research Service’ available at <https://fas.org/sgp/crs/misc/R40957.pdf>.

¹⁷ See on the notion of informal safeguards of federalism in: JD Nugent, *Safeguarding Federalism. How States Protect Their Interests in National Policymaking* (University of Oklahoma Press, 2009) 54ff.

¹⁸ Wechsler, ‘The Political Safeguards of federalism’ (n 1) 558.

¹⁹ *ibid*, 559. See a contrasting view claiming that judicial review is necessary to maintain and reinforce the political safeguards of federalism in: L A Baker, ‘Putting the Safeguards Back into the Political Safeguards of Federalism’ (2001) 46 Villanova L Rev 951.

²⁰ *ibid*, 545.

²¹ Art I, Section 2 of the US Constitution and Clause 1 of 17th Amendment to the US Constitution.

²² Art II, Section 1 of the US Constitution.

²³ Wechsler, ‘The Political Safeguards of federalism’ (n 1) 547.

districts).²⁴ While the former means of State influence is arguably severely restricted by the prohibitions against the denial of franchise, especially by virtue of the 15th and 19th Amendments, the latter means remains prevalent today under the label of gerrymandering. Finally, Wechsler argues that although the US President is the ‘repository of “national spirit” in the central government’, due to his or her election by the Electoral College, he or she is also required to be ‘responsive to local values that have large support within the [S]tates’.²⁵

The political safeguards have been negatively assessed in the literature since State legislatures do not have any important powers in federal elections except for setting residence requirements, which is difficult to transform into an effective way to influence national policy.²⁶ At the same time, the US President’s veto power over federal legislation is more a sign of his or her competition for power with the States rather than of responsiveness to local values.²⁷ Other critics point out that the political safeguards are ‘ahistorical’, since the Framers saw the Constitution as providing for judicial review of the balance of power between the national and State levels; while it is a historical fact, it is argued, that the political safeguards were not the only safeguards of federalism.²⁸

Wechsler’s notion of the political safeguards of federalism was relied on by the US Supreme Court in the *Garcia v. San Antonio Metropolitan Transit Authority* case, which concerned the question of whether, under the Constitution’s Commerce Clause, Congress could extend to State and local governments the Fair Labor Standards Act requiring minimum wage and overtime pay for employees.²⁹ The US Supreme Court decided that the political safeguards of federalism provided sufficient protection from federal commerce power that would excessively burden the States. However, the dissenting opinion of Justice Powell, which was joined by Chief Justice Rehnquist and Justice O’Connor, pointed out that Wechsler’s view that the structure of the federal government sufficiently protects the States did not reflect the current state of affairs.³⁰ Their opinion is echoed in the literature: the adoption of the 17th Amendment, although acknowledged by Wechsler, directs the attention of Senators towards national rather than State issues.³¹ Others argue that, despite this change, the Senate still protects federalism because Senators participate in federal lawmaking procedures to the same extent as prior to this amendment.³²

A number of US scholars understand the system of political parties as a political safeguard of federalism. Although they are focused on the election process of their members rather than on the political program of those members and although they lack a strong centralised organisation, political parties work together at all levels so that the party’s candidate is elected.³³ They influence federalism by creating political frameworks where politicians at different levels of government depend upon each other to get elected and stay in office.³⁴ Specifically, political parties act as safeguards of federalism by focusing on long-term

²⁴ *ibid*, 549ff.

²⁵ *ibid*, 558.

²⁶ J Pittenger, ‘*Garcia* and the Political Safeguards of Federalism: Is there a Better Solution to the Conundrum of the Tenth Amendment?’ (1992) 22 *Publius: The Journal of Federalism* 1, 3.

²⁷ *ibid*.

²⁸ See J C Yoo, ‘The Judicial Safeguards of Federalism’ (1996) 70 *S Cal L Rev* 1311, 1357 and 1381.

²⁹ *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S 528 (1985). See fn. 11 of the judgement.

³⁰ See fn. 9 of the dissenting opinion.

³¹ Pittenger, ‘*Garcia* and the Political Safeguards of Federalism’ (n 32) 2.

³² B R Clark, ‘Separation of Powers as Safeguard of Federalism’ (2001) 79 *Texas L Rev* 1328, 1371.

³³ L Kramer, ‘Putting the Politics Back into the Political Safeguards’ (2000) 100 *Colum L Rev* 215, 278ff.

³⁴ *ibid*, 282.

benefits and developing priorities of a national rather than local character.³⁵ Moreover, implementation of federal statutes is perceived as an important way for States to protect their powers. Specifically, major pieces of federal legislation, such as the Affordable Care Act of 2010, require implementation by the States and this empowers them to ‘limit or shape the federalization of government functions’.³⁶ Finally, the scholarship identifies ‘informal political safeguards of federalism’ and defines them as ‘informal modes of intergovernmental representation through which State officials apprise federal policymakers of the interests of State governments’.³⁷ While sharing Wechsler’s idea that representation is key to the preservation of the authority of State governments, Nugent argues that the best safeguards in this respect are State officials themselves rather than members of Congress or the US President.³⁸ This chapter focuses on NCLS, which gathers officials of State legislatures.

2.2. Swiss Political Safeguards of Federalism

The Swiss Constitution foresees that ‘[t]he principle of subsidiarity must be observed in the allocation and performance of state tasks’.³⁹ However, in contrast to the EU, no safeguards similar to the EWS have been introduced in Switzerland. Instead, a number of other mechanisms are in force that might be seen as political safeguards of federalism.

First, the Council of States, the Upper House of the Swiss Federal Assembly, consists of representatives of cantons elected according to the rules set by each canton.⁴⁰ Currently, in almost all cantons members of the Council of States are elected through direct elections at the same time as members of the National Council, the Lower House of the Federal Assembly.⁴¹ As a consequence, members of the Council of States represent the citizens of their own canton, and not necessarily the canton as such.⁴²

Second, in the realm of direct democracy, a referendum is necessary for the passage of amendments to the Federal Constitution, for the accession of Switzerland to international organisations, and for emergency federal acts that do not have a constitutional basis and that are valid for more than one year. Such a referendum requires a majority of votes of both ‘the People and cantons’ – thus, a double majority.⁴³

In addition to the Council of States and the referendum procedures, cantons can directly participate in the shaping of federal legislation through the petition process. This allows a number of constitutional actors,

³⁵ J Bednar, *The Robust Federation* (CUP 2008) 116. On political parties as political safeguards see also S Jenkins and D D Roscoe, ‘Parties as the Political Safeguards of Federalism: The Impact of Local Party Activity on National Elections’ (2014) 44 *Publius: The Journal of Federalism* 519, 537.

³⁶ A R Gluck, ‘Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ *Gamble*’ (2013) 81 *Fordham L Rev* 1749, 1768.

³⁷ J D Nugent, ‘The Informal Political Safeguards of Federalism’ (2002) at 3 https://www.academia.edu/801677/The_Informal_Political_Safeguards_of_Federalism. This notion is further elaborated on in Nugent, *Safeguarding Federalism* (n 17) 54ff.

³⁸ *ibid*, 4.

³⁹ Art 5a of Swiss Constitution.

⁴⁰ Art 150 of the Swiss Constitution.

⁴¹ The only exception is canton Appenzell-Rhodes-Intérieures, where members of the Council of States are elected by *Landsgemeinde*.

⁴² H Kriesi and A H Trechsel, *The Politics of Switzerland: Continuity and Change in a Consensus Democracy* (CUP 2008) 39.

⁴³ Art 140(1) of Swiss Constitution. The ‘double majority’ means the majority of the voters and the majority of 12 out of 23 votes (there are 26 cantons, but six of them count as half-cantons and have half a vote).

including the cantons, to submit a legislative proposal to the Federal Assembly.⁴⁴ Moreover, eight cantons may start a referendum procedure against a federal law within 100 days of the official publication of the act.⁴⁵ In 2003, eleven cantons, in an effort coordinated by the Conference of Cantonal Governments, which is a political platform gathering cantonal executives, successfully triggered this mechanism against a tax reform that would have significantly decreased the tax revenues of cantons.⁴⁶ This case exemplifies the fact that cantons can be veto players in the federal legislative process if they coordinate their action.⁴⁷

Finally, in contrast to the EU and US systems, the Swiss Constitution does not provide for judicial review of the constitutionality of federal laws, although some attempts were made to introduce such a procedure.⁴⁸ Specifically, the institution of referendum itself led to the rejection of such judicial safeguards of federalism.⁴⁹ In a 1939 referendum, the Swiss people rejected a constitutional amendment put forward by means of the popular initiative which sought ‘protection of the constitutional rights of the citizens (expansion of the constitutional jurisdiction)’ and which thus proposed the introduction of constitutional review of federal legislation.⁵⁰ In consequence, the Federal Supreme Court of Switzerland cannot review acts of the Federal Parliament for their compatibility with the Swiss Constitution, but enacted federal acts can be subject to referendum if at least 50.000 people or eight cantons request it.⁵¹ Such referendums play an important role in preventing violations of cantonal powers guaranteed in the Constitution.⁵²

2.3 EU Political Safeguards of Federalism

Within the EU, it is the principle of subsidiarity that acts as a political safeguard of federalism.⁵³ To this end, the Lisbon Treaty granted NPs a role in the enforcement of this principle through the EWS, anchored in Articles 6 and 7 of Protocol no. 2.⁵⁴ Hence, in contrast to the US and Switzerland, NPs are tasked with the operationalisation of the political safeguards of federalism in the EU legal order.

The EWS procedure allows NPs to submit, within eight weeks of the date of transmission of a draft EU legislative act, a reasoned opinion to the Commission explaining why the draft does not comply with subsidiarity. Depending on the number of reasoned opinions, which count as votes (each chamber of a bicameral parliament has one vote, while unicameral parliaments have two votes), NPs may trigger two

⁴⁴ Art 160(1) of Swiss Constitution. However, bills initiated by cantons in the framework of the ‘parliamentary initiative’ constitute a very small portion of all bills. See Kriesi and Trechsel, *The Politics of Switzerland* (n 42) 39.

⁴⁵ Art 141 of Swiss Constitution.

⁴⁶ W Linder and I Steffen, ‘Swiss Confederation’ in K Le Roy and C Saunders (eds.), *Legislative, Executive, and Judicial Governance in Federal Countries* (McGill-Queen’s University Press, 2006) 308.

⁴⁷ Kriesi and Trechsel, *The Politics of Switzerland* (n 42) 40.

⁴⁸ E C Ritaine and A-S Papeil, ‘Federalism and Legal Unification in Switzerland’ in D Halberstam and M Reimann (eds), *Federalism and Legal Unification* (Springer, 2014) 453.

⁴⁹ D Halberstam, ‘Comparative Federalism and the Role of the Judiciary’ in G A Caldeira, R D Kelemen, and K E Whittington (eds), *The Oxford Handbook of Law and Politics* (OUP 2010) 147.

⁵⁰ *Eidgenössische Volksinitiative Wahrung der verfassungsmässigen Rechte der Bürger (Erweiterung der Verfassungsgerichtsbarkeit)* available at <https://www.admin.ch/ch/d/pore/vi/vis40.html>. See also T Fleiner, ‘Constitutional Revision: The Case of Switzerland’ in X Contiades (ed), *Engineering Constitutional Change* (Routledge 2013) 343.

⁵¹ Art 141 of Swiss Constitution.

⁵² T Fleiner, ‘The Current Situation of Federalism in Switzerland’ (2009) 9 *Revista d’Estudis Autònoms i Federals* 51, 61.

⁵³ Schütze, *From Dual to Cooperative Federalism* (n 4) 243.

⁵⁴ *ibid*, 257.

procedures. First, in the procedure labelled the ‘yellow card’, if the number of reasoned opinions reaches at least one third of all the votes allocated to NPs, or one quarter of the votes for the proposals in the area of freedom, security and justice, the Commission may decide to maintain, amend or withdraw the draft, giving reasons for its decision. Second, in the procedure commonly referred to as the ‘orange card’, if reasoned opinions represent at least the majority of votes assigned to NPs, the Commission may, again, decide to maintain, amend or withdraw the draft. If it maintains the draft, a majority of 55% of the votes in the Council or a majority of the votes cast in the European Parliament (EP) is required to halt the legislative procedure. Furthermore, the so-called ‘political dialogue’ initiated in 2006 by the President of the Commission José Manuel Barroso, and hence often referred to as ‘Barroso Initiative’, complements the exchange between NPs and the Commission beyond the EWS.⁵⁵

3. The Interparliamentary Cooperation in the US

In the EU, subsidiarity monitoring was introduced to ensure democratic oversight over the exercise of non-exclusive EU competences. In the US, State legislatures did not develop such a mechanism because of the well-established review of competence exercised by the US Supreme Court, the existence of a set of political safeguards of federalism, and the lack of a similar democratic deficit problem. This does not mean, however, that there is no role for State legislatures in US federalism. The US case could actually provide useful insights for the EU debate on subsidiarity and this is examined below with the example of fiscal federalism, introduction of UMRA and the role of the NCSL.⁵⁶

3.1. Unfunded Mandates: Rationale and Contents

The goal of UMRA was to limit the practice whereby a federal unfunded mandate is imposed upon State and local governments, and to raise awareness about the fiscal impact that federal legislation has on the States. Due to a shift in its approach in the 1970s and 1980s, the federal government was introducing more intrusive compulsory programs and regulations requiring compliance by States and smaller entities (localities).⁵⁷ UMRA was supposed to prevent federal legislation and regulation from imposing costly obligations on States and localities.⁵⁸ More specifically, the objective was to reduce the number of unfunded mandates and provide Congress with information on the costs of federal legislation leading to a more informed decision-making process in this institution.⁵⁹ Arguments against UMRA were that broad national issues – such as those in the fields of the environment, the economy, health, immigration and education – demand national solutions, which necessitate the adoption of unfunded mandates.⁶⁰ Moreover, in order to avoid ‘[S]tate shopping’, certain issues of an interstate nature need to be addressed at the federal level.⁶¹ Finally, it was underlined that federal mandates dictate the necessary minimum requirements (‘floors’) in some regulatory areas, such as the environment or workplace conditions.⁶²

⁵⁵ D Jančić, ‘The Game of Cards: National Parliaments in the EU and the Future of the Early Warning System and the Political Dialogue’ (2015) 52 CML Rev 939, 948 ff.

⁵⁶ R W Adler, ‘Unfunded Mandates and Fiscal Federalism: A Critique’ (1997) 50 Vanderbilt L Rev 1137.

⁵⁷ Dilger and Beth, ‘Unfunded Mandates Reform Act’ (n 16 above) 2.

⁵⁸ *ibid.*

⁵⁹ S Anderson & R Constantine, ‘Unfunded mandates’ Briefing Paper No. 7, Harvard Law School, p 13, available at http://www.law.harvard.edu/faculty/hjackson/UnfundedMandates_7.pdf.

⁶⁰ Congressional Record, Senate, Senator Lautenberg, 12 January 1995, p 862.

⁶¹ *ibid.*

⁶² *ibid.*

By introducing several reforms, UMRA addressed the problems arising from the fact that the federal government may require a State government to take action without allocating funds for the latter to cover the costs associated with it. UMRA is thus supposed to make it harder to enact unfunded mandates.⁶³ The Act proposes specific tools to achieve this, such as information requirements and the point of order vote, which are discussed in turn below.

First, the information requirements demand for Congress to be better informed about the cost of mandates. UMRA requires from the Congressional Budget Office (CBO) to prepare information statements on the mandates and their costs.⁶⁴ This obligation should arguably make it easier to solve problems related to collective action and free-riding.⁶⁵

Second, UMRA establishes a congressional point of order against legislation containing significant federal government mandates without providing funding for their implementation and on bills that lack a CBO assessment. If a point of order is raised and accepted, it will be debated for 20 minutes followed by a vote on whether to continue consideration of the legislation. Such a vote is seen as a ‘speed bump’, allowing members of Congress to initiate debate and a vote on unfunded mandates independently from the vote on the legislation itself.⁶⁶ In the extreme, a point of order may stop the legislation. In addition, the very possibility of a point of order being raised can lead to a change of the legislative proposal to ensure consistency with UMRA requirements.⁶⁷ Finally, UMRA altered the balance of power within Congress. It shifted decisions on unfunded mandates towards the plenary, giving members and party leaders greater influence if they can command the necessary majority, while taking power away from the committees, which might be much more willing to adopt unfunded mandates, even if their adoption would be inefficient or would happen at the cost of federalism.⁶⁸

One of the weaknesses of UMRA is that points of order can be overridden by a simple majority of the Representatives in the House, and since 2006 by 60 Senators in the Senate.⁶⁹ Another oft-mentioned weak point is the Act’s narrowness, because the rights it affords do not apply to obligations that States must fulfil in order to receive federal assistance.⁷⁰ In addition, UMRA contains a list of situations where its application is excluded, for example in case of bills that enforce the constitutional rights of individuals.⁷¹ Indeed, an empirical study has shown that UMRA did not substantively decrease the number of unfunded

⁶³ T J Conlan, J D Riggle and D E Schwartz, ‘Deregulating Federalism? The Politics of Mandate Reform in the 104th Congress’ (1995) 25 *Publius: The Journal of Federalism* 23, 37. Unfunded mandates, however, are not forbidden by UMRA.

⁶⁴ Some parallels could be drawn here with the EU’s impact assessments and a ‘move towards proceduralisation’ in subsidiarity monitoring. See X Groussot and S Bogojević, ‘Subsidiarity as a Procedural Safeguard of Federalism’ in L Azoulai (ed.), *The Question of Competence in the European Union* (OUP 2014).

⁶⁵ E Garrett, ‘Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995’ (1997) 45 *U Kansas L Rev* 1113.

⁶⁶ P L Posner, ‘The Politics of Coercive Federalism’ in T Conlan and P L Posner (eds.), *Intergovernmental Management for the 21st Century* (Brookings Institution Press 2008) 297.

⁶⁷ *ibid.*

⁶⁸ E Garrett, ‘Framework Legislation and Federalism’ (2008) 83 *Notre Dame L Rev* 1495, 1521ff.

⁶⁹ Anderson and Constantine, ‘Unfunded mandates’ (n 59) 19. See also Garrett, ‘Framework Legislation and Federalism’ (n 68) 1502.

⁷⁰ Garrett, ‘Framework Legislation and Federalism’ (n 68) 1499ff.

⁷¹ 2 USC 658a. The issue of narrowness of scrutiny is also pertinent in the case of the EWS. See F Fabbrini and K 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’ (2013) 50 *CML Rev* 115.

mandates imposed by the federal government.⁷² Arguably, the reasons included ‘information asymmetries, the difficulties of monitoring political agents; and the self-promoting behaviour of mandate-dispensing officers’.⁷³ Specifically, disorganised voters blame local authorities instead of the State or federal government for local tax rises caused by unfunded mandates. This contrasts with interest groups, which are well-organised and capable of influencing federal legislators, thus benefiting from the mandated services.⁷⁴

The assessment of UMRA is therefore not entirely positive. Congress adopted a number of new bills requiring that more attention be paid to State and local interests during the federal legislative process.⁷⁵ Yet, UMRA remains the key accomplishment in this respect.

3.2 The National Conference of State Legislatures

Although UMRA rules were supposed to limit the enactment of unfunded mandates, legislation containing such mandates was still pursued. Consequently, this situation demanded a degree of continuing oversight.⁷⁶ The State legislatures’ control over this type of mandates is primarily exercised by the NCSL. This section analyses the involvement of State legislatures in scrutinising unfunded mandates in order to draw insights for the EU from the experience of US interparliamentary cooperation.

One of the ways for State governments to influence federal policy making is through intergovernmental lobbying during the federal legislative process.⁷⁷ When it comes to parliaments, this is performed by the NCSL. The NCSL dates back to 1975 and aims to ‘improve the quality and effectiveness of State legislatures; promote policy innovation and communication among State legislatures and ensure State legislatures a strong, cohesive voice in the federal system’.⁷⁸ It has a bipartisan character, serving both Republicans and Democrats, and supports both legislators and legislative staff. The Executive Committee is the governing body of the NCSL, and is composed of legislators and legislative staff, who broadly represent the leadership and top staff of State legislatures. Each State has a liaison officer at the NCSL so that State legislators and their staff receive the necessary information. The NCSL meets twice a year, in autumn at the Forum and in summer at the Legislative Summit. Those two meetings gather the Standing Committees, which are the main institutional feature of the NCSL and which are composed of State legislators and legislative staff appointed by State legislatures. They put forward policy directives and approve resolutions on State-federal issues, except for when the question at stake is internal to the States concerned. Besides committee meetings, the Forum and the Legislative Summit also feature a Business Meeting. During those meetings, the legislators vote by jurisdiction on a policy directive at the Forum and once adopted at the Legislative Summit, it evolves into an official policy directive. Those directives then become a basis for the NCSL’s office in Washington D.C. to lobby Congress, the White House and federal agencies.

⁷² S Nicholson-Crotty, ‘National Election Cycles and the Intermittent Political Safeguards of Federalism’ (2008) 38 *Publius: The Journal of Federalism* 295, 304.

⁷³ E A Zelinsky, ‘The Unsolved Problem of the Unfunded Mandate’ (1997) 23 *Ohio N U L Rev* 741, 744.

⁷⁴ *ibid.*

⁷⁵ See examples of such acts in J Dinan, ‘Strengthening the Political Safeguards of Federalism: The Fate of Recent Federalism Legislation in the U.S. Congress’ (2004) 34 *Publius: The Journal of Federalism* 55, 61.

⁷⁶ See examples in: Anderson and Constantine, ‘Unfunded Mandates’ (n 59) 9.

⁷⁷ J Dinan, ‘Relations between State and National Governments’ in D P Haider-Markel, *The Oxford Handbook of State and Local Government* (OUP 2014) 16.

⁷⁸ See <http://www.ncsl.org/aboutus.aspx>.

3.3. The Involvement of the NCSL in Unfunded Mandates

The NCSL opposes the imposition of unfunded federal mandates and the unjustified pre-emption of State authority, and strives to provide State legislatures with some flexibility for innovation and responsiveness to their citizens' needs.⁷⁹ For this purpose, the NCSL monitors mandates in federal laws and lists them in the Catalogue of Cost Shifts to States.⁸⁰ Prepared within the NCSL Standing Committee on Budgets and Revenue, the Catalogue traces the costs that the federal government imposes on the States by means of proposed and adopted legislation in which the CBO has identified a federal mandate. In doing so, the NCSL adopts a definition of unfunded mandates that is broader than that provided by UMRA, because it includes any federal act that leads to the spending of State or local funds. In contrast, an unfunded mandate under UMRA is more narrowly defined as 'any provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments or that would reduce or eliminate the amount of authorisation of appropriations' that would have covered the costs of existing mandates.⁸¹ This excludes, for example, costs arising from non-mandatory entitlement programs, such as Medicaid, which the NCSL sees as unfunded mandates.⁸² In addition, UMRA does not officially declare a measure an unfunded mandate if the total annual cost to the States does not exceed a certain minimum threshold.⁸³

The NCSL encourages Congress to avoid imposing new federal unfunded mandates on State and local governments. Specifically, the NCSL points out to Congress those cases where legislation should not be adopted because it will place a burden on the States. Two examples of this are presented below.

The first example is the NCSL's reaction to the federal Prison Rape Elimination Act (PREA), which was adopted in 2003. This Act dealt with the sexual assault of prisoners by setting standards for physical space for prisoners and training staff in detention facilities. If these standards were not fulfilled, prisons would lose 5 percent of their funding from any federal grant used for 'prison purposes', including from funds unrelated to the operation of prisons, such as for the reintegration of prisoners. The NCSL supported an amendment proposed by Senator Cornyn in September 2014, which sought to restrict the scope of the penalty – and thereby reduce the cost to the States – to funds directly related to the administration and operation of the prison.⁸⁴ The amendment was supported by the Chairman of the Senate Judiciary Committee, Patrick Leahy, making it the Leahy/Cornyn amendment. The amendment passed the Senate Judiciary Committee by a vote of 13-5, but Congress adjourned before the amendment could be voted on in the House, so it was not adopted.

The second example concerned the draft Digital Accountability and Transparency Act (DATA Act), which was passed by the House of Representatives in 2012. It required that recipients of federal funds, including State and local governments, submit quarterly reports to a newly created Federal Accountability and Spending Transparency Board on how they had used the funds awarded. The NCSL opposed the reporting requirement on the grounds that no funds for establishing such a procedure were allocated to the

⁷⁹ See <http://www.ncsl.org/ncsl-in-dc.aspx>.

⁸⁰ See <http://www.ncsl.org/print/standcomm/scbudg/catalog.pdf>.

⁸¹ 2 USC 658, Sec. 421 (5).

⁸² See the discussion at <http://www.ncsl.org/blog/2016/03/01/at-what-cost-ncsl-president-testifies-on-unfunded-mandates.aspx>.

⁸³ \$50 million in 1996, adjusted annually for inflation.

⁸⁴ See http://www.ncsl.org/documents/Statefed/Cornyn_PREA_penalty_amendment_Ltr.pdf.

States and thus the act presented an unfunded federal mandate.⁸⁵ While the bill did not become law because the Congress adjourned, a new bill incorporating the essence of the failed DATA Bill was enacted in 2014. This law did not contain any unfunded mandates under UMRA, which suggests that the NCSL's action had been successful.⁸⁶ In sum, the NCSL took a leading role in protecting States from costly mandates imposed by federal legislation.

4 Interparliamentary Cooperation in Switzerland

Although Swiss cantonal parliaments do not act as guardians of the subsidiarity principle to the same extent as NPs in the EU do, they did develop interparliamentary cooperation as a means of strengthening their influence on cantonal executives. Hence, their cooperation does not concern vertical federalism as in the cases of the EU and the US. In Switzerland, cantonal parliaments cooperate on matters of horizontal federalism – those arising between the cantons. The core of the cooperation between cantonal parliaments takes place regarding intercantonal treaties, which are traditionally dominated by cantonal executives.⁸⁷ Cantonal parliaments may only approve such treaties without the possibility to amend them.⁸⁸ In this context, cooperation between the cantonal parliaments of Northwestern Switzerland, Western Switzerland and the Intercantonal Legislative Conference show the possibilities of overcoming the dominance of the cantonal executives. The ongoing discussion on the creation of a National Conference of Cantonal Parliaments also indicates that further development of intercantonal parliamentary cooperation is needed. The following sections elaborate on the operation of these interparliamentary conferences.

4.1. The Interparliamentary Conference of Northwestern Switzerland

The Interparliamentary Conference of Northwestern Switzerland (*Interparlamentarische Konferenz der Nordwestschweiz* – IPK) consists of the representatives of five cantonal parliaments (Bern, Solothurn, Basel-Stadt, Basel-Landschaft and Aargau). Each cantonal parliament has six representatives: the president and vice-president of the parliament, the former president and three permanent members of the cantonal parliament.⁸⁹ The permanent members are part of the working committee.⁹⁰ As a rule, the conference meets once a year in October.⁹¹

The conference aims to foster the exchange of information between the cantonal parliaments of Northwestern Switzerland, in particular on regional issues and projects prior to their discussion in cantonal parliaments.⁹² The Secretariat of the conference, the functions of which are performed by the Chancellery of Basel-Landschaft canton, facilitates the smooth exchange of information between this conference and the conference of the cantonal governments of the same region.⁹³

⁸⁵ See <http://www.ncsl.org/press-room/digital-accountability-and-transparency-act.aspx>.

⁸⁶ Congressional Budget Office, Cost Estimate, S. 994 DATA Act, Summary, 5.12.2013.

⁸⁷ M Stöbel, *Exekutivföderalismus in der Schweiz? Einbezug der Parlamente bei interkantonalen Vereinbarungen* (Nomos 2014) 88.

⁸⁸ *ibid.*, 116.

⁸⁹ §2 Agreement on the Interparliamentary Conference of Northwestern Switzerland of 7.12.1978 (*Vereinbarung über die Interparlamentarische Konferenz der Nordwestschweiz vom 07.12.1978*).

⁹⁰ *ibid.*, §3.

⁹¹ *ibid.*, §5.

⁹² *ibid.*, §1.

⁹³ *ibid.*, §6.

The topics that the conference has dealt with in recent years concerned specific policies, such as energy, health, the economic conditions in Northwestern Switzerland, but also the more general questions of federalism, such as fiscal transfers and cross-subsidisation between different cantons.⁹⁴ In 2010, the conference discussed the purpose of intercantonal cooperation.⁹⁵ It underlined that cooperation between cantonal parliaments seeks to strike a balance between efficiency and legitimacy. This is important because greater cooperation can facilitate efficiency at the cost of diminished legitimacy given that cantons only send a delegation (thus ensuring a lower level of legitimacy because not all members of the legislature are represented) and that representation of the voters is indirect.⁹⁶

4.2. Cooperation of Cantonal Parliaments of Western Switzerland

The second example of intercantonal cooperation in Switzerland concerns the six French-speaking cantons of Western Switzerland (Fribourg, Vaud, Valais, Neuchâtel, Genève and Jura). Their cooperation, commonly referred to as *CoParl* or *ParlVer*, began in 2002 in the form of the ‘*Convention des conventions*’,⁹⁷ which had the objective of improving the involvement of cantonal parliaments in intercantonal treaties beyond simply accepting or rejecting the final agreement.⁹⁸ Due to the lack of impact in practice,⁹⁹ the *Convention* was replaced in 2011 with *ParlVer*, which obliges cantonal governments to inform parliaments on foreign policy at least once a year.¹⁰⁰ The main reform, however, is the establishment of the Office for Interparliamentary Coordination (*Interparlamentarische Koordinationssstelle*).

This Office consists of one member and one deputy from each cantonal parliament.¹⁰¹ The Office assists and coordinates the exchange of information concerning intercantonal and international treaties that affect the six cantons.¹⁰² It also provides and updates the documents on intercantonal cooperation and intercantonal treaties to which the cantons of this Swiss region become parties.¹⁰³ The Office also acts as a point of contact with the governmental conference of Western Swiss cantons and with the relevant regional conferences,¹⁰⁴ which keep the Office informed of any relevant treaties.¹⁰⁵

⁹⁴ See the recent topics of the yearly meetings at <https://www.baselland.ch/ipk.315649.0.html>.

⁹⁵ See https://www.baselland.ch/fileadmin/baselland/files/docs/parl-lk/ipk/ptk_basel_2010-10-29_komplett.pdf.

⁹⁶ *Protokoll der IPK-Informationstagung 2010 ‘Interkantonale Zusammenarbeit in der Nordwestschweiz-mehr als Informationsaustausch?’*, 29.10.2010, p. 11.

⁹⁷ *Vereinbarung vom 9. März 2001 zwischen den Kantonen Freiburg, Waadt, Wallis, Neuenburg, Genf und Jura über die Aushandlung, Ratifikation, Ausführung und Änderung der interkantonalen Verträge und der Vereinbarungen der Kantone mit dem Ausland*. The name *Convention des conventions* is hence a shorthand for the name of this agreement: convention on treaty-making powers of the cantons.

⁹⁸ Strebel, *Exekutivföderalismus in der Schweiz?* (n 87) 380.

⁹⁹ *ibid*, 381.

¹⁰⁰ Art 3(1) *Vertrag vom 5. März 2010 über die Mitwirkung der Kantonsparlamente bei der Ausarbeitung, der Ratifizierung, dem Vollzug und der Änderung von interkantonalen Verträgen und von Verträgen der Kantone mit dem Ausland (Vertrag über die Mitwirkung der Parlamente, ParlVer)*.

¹⁰¹ Art 4 *ParlVer*.

¹⁰² Art 5(1) *ParlVer*. The work of the Coordination office is regulated in detail in the Regulation of Interparliamentary Office of Coordination.

¹⁰³ Art 5(2) *ParlVer*.

¹⁰⁴ Art 5(3) *ParlVer*.

¹⁰⁵ Art 6 *ParlVer*.

Another reform of *ParlVer* was the establishment of a clear scope of cooperation, which was missing in the *Convention des conventions*.¹⁰⁶ If a treaty affects at least two cantons of Western Switzerland in a manner that requires parliamentary approval, the parliaments call an interparliamentary commission (*interparlamentarische Kommission*) consisting of seven representatives of each of the cantons.¹⁰⁷ The commission issues an opinion on the treaty, which is forwarded to the executives for consideration.¹⁰⁸ Before signing the intercantonal treaty, the executives report back to the commission on the effect of the latter's opinion.¹⁰⁹ If necessary, the commission can reply with additional requests.¹¹⁰ Finally, after the executives sign the treaty, the relevant parliaments receive it for approval. At this point, they are also provided with the opinion prepared by the commission.¹¹¹

4.3. Intercantonal Legislative Conference

Following the example of the interparliamentary commission of the cantons of Western Switzerland, the German-speaking cantons established the Intercantonal Legislative Conference (*Interkantonale Legislativkonferenz* – ILK) in 2011. This conference similarly aims to enhance the influence of cantonal parliaments on intercantonal treaties and is convened only when necessary. This is the case when at least two cantons request a discussion of an intercantonal treaty or whenever such a treaty involves endowing an institution with parliamentary tasks concerning voting, legislative or oversight functions.¹¹² The ILK consists of three members from each cantonal parliament.¹¹³ Unlike Western Switzerland's interparliamentary commission, the ILK has an informal character.¹¹⁴ The ILK aims to formulate a common position by consensus, which is then communicated to the relevant executives and cantonal parliaments.¹¹⁵

The first cantonal treaty for which the ILK was convened concerned the agreement on higher education (*Hochschulkonkordat*) concluded in July 2012.¹¹⁶ The ILK submitted an opinion requesting from cantonal executives to keep the legislatures informed on higher education policy as well as asking for the creation of an intercantonal supervisory body.¹¹⁷ The first request succeeded in a number of cantons, while the second one was implemented in a couple of intercantonal agreements.¹¹⁸

¹⁰⁶ See http://www.fr.ch/cha/de/pub/mobile/aussenbeziehungen/gesetzliche_grundlagen_.htm.

¹⁰⁷ Art 9(1) *ParlVer*.

¹⁰⁸ Arts 9(3) and 10(6) *ParlVer*.

¹⁰⁹ Art 11(1) *ParlVer*.

¹¹⁰ Art 11(2) *ParlVer*.

¹¹¹ Art 13(2) *ParlVer*.

¹¹² Strebel, *Exekutivföderalismus in der Schweiz?* (n 87) 394.

¹¹³ *ibid.*

¹¹⁴ *Grosser Rat, Medienmitteilung*, 2.12.2011, available at http://www.be.ch/portal/de/index/mediencenter/medienmitteilungen.meldungNeu.html/portal/de/meldungen/mm/2011/12/20111208_1743_interkantonale_legislativkonferenzilk-diekantonalenparlamenteset.

¹¹⁵ Strebel, *Exekutivföderalismus in der Schweiz?* (n 87) 394.

¹¹⁶ *Bericht über die Ergebnisse der Vernehmlassung zum Entwurf des Hochschulkonkordats sowie zum Entwurf der Zusammenarbeitsvereinbarung*, 25.03.2013, available at http://www.edudoc.ch/static/web/aktuell/vernehmlassung/hsk_bericht_d.pdf.

¹¹⁷ Strebel, *Exekutivföderalismus in der Schweiz?* (n 87) 401.

¹¹⁸ *ibid.*

4.4. The National Conference of Cantonal Parliaments

In addition to the three mechanisms discussed above, there was a debate in the past about the establishment of a national conference of cantonal parliaments (*Nationale Konferenz der Kantonsparlamente* – NKK) that would have included representatives of all cantonal parliaments.¹¹⁹ The proposal envisaged that the conference would design and evaluate intercantonal treaties as well as represent the interests of the cantons within the Swiss federation and within international organisations.¹²⁰ The proposal for the NKK has not been realised to date.¹²¹ While 14 cantonal parliaments supported its creation, a quorum of 18 parliaments was required for it to be formally established.¹²²

One of the key differences between the *CoParl* on the one hand and the ILK and NKK on the other, is the extent to which cooperation is formalised. While the *CoParl* is anchored in public law and provides for binding involvement of cantonal parliaments, the ILK and NKK represent less formal modes of cooperation with little concrete added value for the legislatures in question.¹²³

In sum, in Switzerland, the participation of cantons in federal decision making is safeguarded through the Council of States, double majority referendums, legislative initiative, and the possibility of initiating a referendum against a federal law. Still, interparliamentary cooperation between cantonal parliaments developed horizontally, namely with regard to intercantonal treaties. The rationale for the participation of legislatures is therefore different than in the EU and the US, because it does not concern vertical relations between the cantons and the federal government. Instead, it developed because of the dominance of cantonal executives in intercantonal treaty making. A parallel between the three polities studied in this chapter is thus that legislatures and their mutual cooperation represent useful institutional avenues for addressing issues related to federalism.

5 Insights for National Parliaments of the EU Member States

In order to draw lessons for the EU from the US and Swiss federal systems, the following section deals with: the issue of the plurality of forums of interparliamentary cooperation; the involvement of the EP, the US Congress and the Swiss Parliament in such forums; the representation of the interests of NPs in the EU; and the use of personal liaisons between different institutions.

5.1. Plurality of Forums

While the sole forum for cooperation between State legislatures in the US is the NCSL, there are three interparliamentary conferences in the EU: one general (COSAC) and two specialised ones (CFSP/CSDP conference and ‘Article 13 Conference’ on economic governance).¹²⁴ Beyond unfunded mandates, the NCSL tackles a wide variety of issues ranging from education, health, and infrastructure to budgetary matters – without having any specialised sectoral bodies. COSAC could hence be seen as the EU’s counterpart of the NCSL, because it discusses both specific policies, such as energy and trade, and more general issues, such as EU democratic legitimacy with a focus on the role of NPs in ensuring it.

¹¹⁹ *Medienmitteilung, Grosser Rat Kanton Basel*, 23.09.2006, available at <http://www.bs.ch/news/2006-09-23-mm-32253.html>.

¹²⁰ *Mitteilungsblatt der Schweizerischen Gesellschaft für Parlamentsfragen* (2006) Vol. 9, No. 2, 19.

¹²¹ D Schwarz, R Steiner and J Fivaz, *Mitwirkungsmöglichkeiten des Urner Landrats* (Universität Bern Kompetenzzentrum für Public Management, 2015) V.

¹²² Strebel, *Exekutivföderalismus in der Schweiz?* (n 87) 403ff.

¹²³ Schwarz, Steiner and Fivaz, ‘Mitwirkungsmöglichkeiten des Urner Landrats’ (n 121) V.

¹²⁴ See chapter by Ian Cooper in this volume.

Nevertheless, the Lisbon Treaty enables the creation of other specialised interparliamentary conferences, whose launch involved disagreements related to their rules of procedure and membership.¹²⁵

To some extent, Switzerland resembles the EU with respect to the number of interparliamentary forums, which however mostly specialise in the same subject matter – intercantonal treaties – and are spread regionally. One example of EU interparliamentary cooperation that has been constituted similarly to the Swiss model refers to the NPs of the Visegrád Group (Poland, the Czech Republic, Slovakia and Hungary), which have since 2003 met once a year to discuss both EU policies and procedural aspects of their scrutiny, such as subsidiarity control.¹²⁶ They convene in different constellations, usually gathering the presidents of these parliaments or the chairpersons of their European affairs or sectoral committees. However, this interparliamentary dialogue remains on the periphery of the EU political process, enjoying only local significance and visibility. Hence, the existence of different types of interparliamentary forums seems to diminish the political visibility of NPs, because the lack of a single overarching parliamentary forum disperses the attention given to their pronouncements.

5.2. Cooperation with the European Parliament

Arguably, the role of NPs in the EU is best captured by the model of a ‘Euro-national parliamentary system’, which demands coordination between different institutional actors – for example, between the EP and NPs.¹²⁷ Under the EWS, NPs participate in a dialogue with the Commission, while in interparliamentary conferences, they involve members of the EP (MEPs). In contrast, the NCSL does not include members of Congress, which, together with the Administration, is the main interlocutor of the NCSL.¹²⁸ This is also not the case with Switzerland, because interparliamentary conferences there focus on intercantonal rather than canton-federation matters.

Cooperation between the EP and NPs has in the past led to conflicts, because the EP preferred the creation of weak conferences, where it was hard to take collective decisions.¹²⁹ Cooperation within the NCSL has a more vertical character, involving State legislators and legislative staff, which is visible in its committee structure. Moreover, while some exchange with members of Congress and the federal government takes place during two major meetings (the Forum and the Legislative Summit), these officials are not members of the NCSL.

Hence, organising EU interparliamentary cooperation without the EP and without creating a new conference merits consideration. If, for example, the CFSP/CSDP and Article 13 conferences followed the US model, pertinent issues could be discussed in committees and later in plenary sessions with MEPs. Such a system could shield national parliamentarians from possible power struggles with the EP.

¹²⁵ I Cooper, ‘The Politicization of Interparliamentary Relations in the EU: Constructing and Contesting the “Article 13 Conference” on Economic Governance’ (2016) 14 *Comparative European Politics* 196.

¹²⁶ See the overview of their mission and activities at:

http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14731&Itemid=754.

¹²⁷ See C Fasone and N Lupo, ‘Interparliamentary Cooperation in the Framework of Euro-national Parliamentary System’ in N Lupo and C Fasone (eds), *Interparliamentary Cooperation in the Composite European Constitution* (Hart Publishing 2016) 349.

¹²⁸ The representatives of the government, academia and business may also participate in the Forum and Legislative Summit: <http://www.ncsl.org/ncsl-in-dc/standing-committees/budgets-and-revenue/budgets-and-revenue-committee-members.aspx>.

¹²⁹ Cooper, ‘The Politicization of Interparliamentary Relations in the EU’ (n 125) 198.

However, the downside of the exclusion of MEPs would be the limitation of access to EU information directly from the EP as well as further antagonism between MPs and MEPs.

5.3. Aggregation of Interests

The NCSL seems to aggregate various US State interests and to speak with one voice on behalf of States. In Switzerland, although cooperation has a regional character, which does not necessarily mean that the cantonal parliaments are univocal, its aim is similarly to search for consensus and coordination in the oversight over cantonal executives in intercantonal treaty making. In the EU's EWS, however, each national parliament may prepare its own reasoned opinion, which often reflects the specific political, social or geographical concerns of the given parliament. Moreover, NPs were not unanimous on the question of the role of COSAC in coordinating the submission of reasoned opinions to the Commission, and COSAC itself did not see that as a priority. Accordingly, the collection of reasoned opinions by COSAC for the purpose of the EWS stopped with the entry into force of the Lisbon Treaty.¹³⁰

The difference between the roles of the NCSL, the Swiss and EU interparliamentary conferences seems to be related to the fact that in their reasoned opinions, or opinions under 'the political dialogue', NPs are much more motivated by the idiosyncratic interests of the given Member State. In comparison, the NCSL coordinates the position of State legislatures on issues that concern all States, at least when it comes to unfunded mandates, given that the lack of federal funding affects them all equally. Similarly, the regional character of Swiss interparliamentary forums might reduce the divergences between cantonal interests and the unwillingness to create a national conference. These insights show one of the possible obstacles for interparliamentary cooperation in the EU.

5.4. Parliamentary Liaison Officers

The engagement of liaison officers enables the exchange of information between different participants in interparliamentary cooperation. In the US, staff members of the NCSL are assigned to a specific State and ensure communication between the NCSL and State legislatures.¹³¹ In Switzerland, one of the functions of the administrative bodies of the conferences (e.g. the IPK Secretariat or the Office for Interparliamentary Coordination) is to communicate with cantonal executives or the conference of cantonal executives. In the EU, national parliamentary representatives in Brussels (NPRs) have become an important link between NPs and EU institutions.¹³² The difference lies in the forums that these liaison officers link: in the US, it is the conference and State legislatures; in the EU, the link is between the EP and NPs; and in Switzerland, it is between the conferences and cantonal governments. These differences stem from the different tasks of each of these interparliamentary conferences.

Establishing a liaison between a national parliament and the COSAC Secretariat or any other EU interparliamentary conference would be superfluous, because members of NPs constitute the bulk of members of these forums. In addition, NPRs already transmit information on EU affairs from and to NPs. No extra liaison seems necessary to ensure ongoing exchange with interparliamentary conferences. In contrast, the concept of a network of NPRs sharing information from Brussels might be useful for the US,

¹³⁰ 14th Bi-annual Report on EU Practices and Procedures (October 2010), 30. See also Conclusions of the XLIII COSAC, Madrid, 31 May-1 June 2010.

¹³¹ See liaisons by State at <http://www.ncsl.org/aboutus/ncslservice/ncsl-state-liaisons-map.aspx>.

¹³² See their positive role in I Cooper, 'A Yellow Card for the Striker: How National Parliaments Defeated EU Strikes Regulation' (2015) 22 JEPP 1406; and A-L Högenauer and C Neuhold, 'National Parliaments after Lisbon: Administrations on the Rise?' (2015) 38 WEP 335.

since only some State legislatures have an office in Washington D.C.¹³³ In addition, the D.C. Office of the NCSL, as well as the offices and secretariats of the Swiss interparliamentary conferences, might be seen as fulfilling such a role on behalf of State and cantonal legislatures collectively.

6. Conclusion

The objective of this chapter was to draw insights from the American and Swiss practices for the functions that parliaments perform at non-central level in federal systems. Wechsler originally described the political safeguards of federalism in the US as being anchored in the role of States in determining the composition of federal institutions. The NCSL developed as an informal political safeguard of federalism with an active role in the control of unfunded mandates as an important aspect of fiscal federalism. On the other side of the Atlantic, the Swiss constitutional system provides for a number of in-built political safeguards of federalism: the Council of States, whose members are directly elected in the cantons; 'double majority' referendums; legislative initiative of the cantons; and the possibility to initiate a referendum against a federal law. However, cantonal parliaments created additional forms of interparliamentary cooperation within the horizontal dimension of federalism in form of regional conferences in order to strengthen their powers in intercantonal treaty making, which is usually controlled by cantonal executives. In the case of the EU, the subsidiarity principle and its watchdogs, NPs, became a formal political safeguard of federalism under the Lisbon Treaty. Therefore, all of these polities' legislatures assumed roles in developing interparliamentary cooperation, with variations that depended on the problems associated with federalism in each case.

Although State and cantonal legislatures and NPs within the EU deal with different issues of federalism, this chapter has shown that they have adopted a resilient approach towards the federal level, be it as watchdogs of the subsidiarity principle, scrutinisers of federal legislation that places a financial burden on the States, or towards cantonal executives in order to counterbalance the power of governments in the making of intercantonal treaties.

This chapter indicates several conclusions. When it comes to the aggregation of legislatures' interests, NPs in the EU may clearly follow the solutions developed by their US and Swiss counterparts. In the case of liaisons between interparliamentary conferences and parliaments, the structural and institutional dissimilarities between the Swiss, American and EU conferences discourage the application of solutions adopted in Switzerland and the US for the EU, while the EU's NPRs could be a useful model for the NCSL. With regard to the plurality of forums and cooperation with the EP, following the US example in the EU would bring some benefits and some disadvantages. On the one hand, parliamentary cooperation would benefit from increased visibility and lack of conflicts between the EP and NPs. On the other hand, it could lead to a reduction of policy-specific expertise among EU interparliamentary forums, while the absence of MEPs could cut NPs off from an important source of information and support in the EU legislative process. Finally, the effectiveness and impact of interparliamentary cooperation in federal systems remains an issue for further research.w

¹³³ Dinan, 'Relations between State and National Governments' (n 77) 16.