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Katarzyna Granat

**The Role of the (Member) States Legislatures as  
Safeguards of Federalism  
A US-EU Comparative Perspective**

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# **The Role of the (Member) States Legislatures as Safeguards of Federalism**

## **A US-EU Comparative Perspective**

Katarzyna Granat\*

### **Abstract**

This paper discusses the positions of the (member) state legislatures in the US and the EU and their contribution as political safeguards of federalism. It takes as a case study the role of the US National Conference of the State Legislators in the monitoring of unfunded federal mandates, and the function of EU national parliaments in the scrutiny of the subsidiarity principle. The paper offers some insights based on the US experience related to the understanding and functioning of political safeguards of federalism in the EU.

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## Introduction

This paper studies the role of the US state legislatures and EU national parliaments in federal structures and their function as a ‘political safeguard of federalism.’ This notion, coined by Herbert Wechsler, describes the role of States in the appointment and composition of the central government.<sup>1</sup> The paper analyses the role of legislatures from a comparative perspective with a view to offering some insights from the American experience pertinent to the ongoing debate on the strengthening of national parliaments in EU affairs.<sup>2</sup>

In the EU, concerns over a ‘democratic deficit’<sup>3</sup> and the so-called ‘competence creep’<sup>4</sup> led the drafters of the Lisbon Treaty to grant national parliaments an oversight function with respect to the compliance of EU draft legislative acts with the principle of subsidiarity.<sup>5</sup> More than that, as explained by Lindseth, the reinforcement of the role of the national parliaments within the European legislative process was grounded in the diagnosis of a ‘democratic disconnect’ of the EU supranational institutions.<sup>6</sup> The ‘disconnect’ arose from the assertion that for cultural and historical reasons it is the national level that ultimately carries legitimacy, and without more involvement of national parliaments the EU remains disconnected from this source of legitimacy. This stands in contrast to the idea of the ‘democratic deficit’, which applies to the EU institutions *per se*. As a consequence, democratization efforts should focus on the

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<sup>1</sup> Herbert Wechsler, ‘The Political Safeguards of Federalism. The Role of the States in the Composition and Selection of the National Government’ (1954) 54 *Columbia Law Journal* 543.

<sup>2</sup> The paper does not aim however, to propose legal transplants from one system to another. For currently discussed EU reforms see D. Chalmers, ‘Democratic Self-Government in Europe: Domestic Solutions to the EU Legitimacy Crisis’ Policy Network Paper 2013, available at <http://www.policy-network.net/publications/4399/democratic-self-government-in-europe>; Written Evidence by R. Schütze and D. Wyatt for the UK Government Review of the Balance of Competences available at <https://www.gov.uk/government/consultations/subsidiarity-and-proportionality-review-of-the-balance-of-competences>; House of Lords, European Union Committee, 9th Report of Session 2013-14; House of Commons, European Scrutiny Committee, *Reforming the European Scrutiny System in the House of Commons*, 24th Report of Session 2013-14.

<sup>3</sup> J. H. H. Weiler, ‘In the face of crisis: Input legitimacy, output legitimacy and the political messianism of European integration’ (2012) 34 *Journal of European Integration* 825, 837.

<sup>4</sup> S. Weatherill, ‘Competence creep and competence control’, 23YEL (2004), 1–57.

<sup>5</sup> Art 5(3) TEU.

<sup>6</sup> P. Lindseth, ‘Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity’ in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) at 151.

linkages between EU institutions producing norms and the democratically legitimized national level that oversees and controls them, rather than a ‘democratic deficit’ perspective, which concentrates solely on the democratization of EU institutions independent of the national level.

Moreover, the involvement of national parliaments was also partly inspired by disappointment with the jurisprudence of the ECJ in acting as a judicial guardian of subsidiarity.<sup>7</sup> The jurisprudence of the Court on the subsidiarity principle<sup>8</sup> has fallen under strong criticism, especially the Court’s reluctance to ‘deal with subsidiarity frontally’ and the Court’s ‘misleading application’ of the principle, focusing on the procedural nature of subsidiarity instead of conducting a cost/benefit test for the necessity of EU action.<sup>9</sup> Moreover, the Court’s case law is labelled as a ‘drafting guide,’ meaning that, as long as EU institutions use the Court’s vague vocabulary and draft the EU legislation accordingly, the Court will not annul such an act on the ground of a subsidiarity violation.<sup>10</sup>

To face concerns about democratic legitimacy and the insufficient contribution of the Court to the challenges of EU legislative action, the Lisbon Treaty introduced the Early Warning System (EWS), granting national parliaments the role of ‘watchdogs’ of subsidiarity.<sup>11</sup>

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<sup>7</sup> Granting national parliaments the competence to review the compliance of EU draft legislative acts with subsidiarity is in part motivated by dissatisfaction with the jurisprudence of the ECJ in this respect. See G. Martinico, ‘Dating Cinderella: On subsidiarity as a political safeguard of federalism in the European Union’, 17 EPL (2011), 649–660. The logic inspiring the EWS is that national parliaments may, more effectively than the ECJ, ensure that EU institutions do not acquire powers in violation of subsidiarity, if this happened national parliaments would in fact lose powers, while the ECJ would not.

<sup>8</sup> See ECJ’s cases: Case C-84/94 *United Kingdom v. Council* [1996] ECLI:EU:C:1996:431. (Working Time Directive); Case C-233/94 *Germany v. Parliament and Council* [1997] ECLI:EU:C:1997:231 (Deposit-Guarantee Schemes); and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECLI:EU:C:2002:741. These cases are discussed in Antonio Estella De Noriega, *The EU principle of subsidiarity and its critique* (Oxford University Press 2002).

<sup>9</sup> G. Martinico, ‘Dating Cinderella’ at 655.

<sup>10</sup> S. Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has Become a Drafting Guide’ (2011) 12 German Law Journal 827.

<sup>11</sup> I. Cooper, ‘The watchdogs of subsidiarity: National Parliaments and the logic of arguing in the EU’ (2006) 44 *JCMS* 281.

In contrast to the EU, no mechanism similar to the EWS exists in the US constitutional system. The US does not encounter the European problem of the democratic legitimacy of its central institutions. Moreover, in the US Supreme Court review of the limits of enumerated powers granted to Congress under Article I of the US Constitution is well established.<sup>12</sup> Nonetheless, the aim of this paper is to explore the contribution of US state legislatures as safeguards of federalism. The focus will be on another issue that exists alongside subsidiarity, namely the question of which level of government should bear the cost of implementing federal legislation.<sup>13</sup> Specifically, the Unfunded Mandate Reform Act (UMRA) of 1995 aimed at limiting the practice of imposing federal unfunded mandates on State and local level government. In general terms, an unfunded mandate is a compulsory federal program or regulation that requires a State or local government to perform certain actions without providing financing in this respect.<sup>14</sup> Consequently, this contribution 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 out parallels and differences with the involvement of national parliaments under the EWS.<sup>15</sup>

The paper first discusses the notion of ‘political safeguards of federalism’ introduced by Herbert Wechsler. In light of this, in Section 2 the US Constitution and the EU Treaties are studied in order to discover the role of the respective (member) state legislatures in the systems of cooperative federalism. Section 3 analyses the role of the state legislatures under the fiscal federalism regime of UMRA and the role of NCSL in reviewing the unfunded mandates imposed upon the States. Finally, Section 4 offers insights from the functioning of NCSL for national parliaments within the EU system.

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<sup>12</sup> J.C. Yoo, ‘The Judicial Safeguards of Federalism’ (1996) 70 *S. Cal. L. Rev.*, 1311.

<sup>13</sup> 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 *Columbia Journal of European Law* 403, 414.

<sup>14</sup> See R.J. Dilger & R.S. Beth, Unfunded Mandates Reform Act: History, Impact, and Issues, Congressional Research Service, 17.11.2014 available at <https://fas.org/sgp/crs/misc/R40957.pdf> at 2.

<sup>15</sup> On the notion of informal safeguards of federalism see J. D. Nugent, *Safeguarding Federalism. How States Protect Their Interests in National Policymaking* (University of Oklahoma Press 2009) at 54ff.



## 1. Political Safeguards of Federalism

This paper aims to present and compare ‘political safeguards of federalism’ chosen in the US and the EU.<sup>16</sup> The comparative approach is based on the wider notion of federal union under which the EU can also be classified. Specifically, as Schütze explains, the EU stands on federal ‘middle ground’ since it has a ‘mixed or compound structure [...] combining international and national elements.’<sup>17</sup> Schütze does not follow the view that the EU’s federal tradition of indivisible sovereignty implies the 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 paper takes this broader approach and adopts the view that the subsidiarity principle, strengthened by the scrutiny of national parliaments, represents a ‘political safeguard of federalism’ in the EU.<sup>18</sup>

The US literature offers different types of safeguards of federalism, in other words, tools to maintain the balance of power between State and national government. Bednar puts forward four types of institutional characteristics that offer safeguards against transgressions by the federal government: structural, popular, political and judicial safeguards.<sup>19</sup> The first category, structural safeguards, aims at preventing the encroachment of the federal government, including enumerated powers, fragmentation (separation of powers) and State incorporation (for example, representation in the Senate).<sup>20</sup> The second of Bednar’s safeguards, the popular (electoral) one, with its main focus on the electoral process, aims at controlling the boundaries of federal and State authority by the citizens (electorate) that exercise control directly over government officials.<sup>21</sup> The political safeguard put forward by Bednar relies on the organization of the integrated party system in a way that brings together the officials of federal and

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<sup>16</sup> For the application of the notion of ‘political safeguards of federalism’ in the EU context see R. Schütze, *From Dual to Cooperative Federalism* (OUP, 2009) at 257 ff.

<sup>17</sup> *Ibid.* at 70.

<sup>18</sup> See in contrast Lindseth, who argues that ‘increase in the national parliamentary role is a further reflection of the fundamentally administrative character of European integration.’ P.L. Lindseth, *Power and legitimacy: Reconciling Europe and the nation-State* (OUP, 2010) at 227.

<sup>19</sup> J. Bednar, *The Robust Federation. Principles of Design* (CUP, 2008) at 96ff.

<sup>20</sup> *Ibid.* at 99ff.

<sup>21</sup> *Ibid.* at 108ff.

State level.<sup>22</sup> Finally, Bednar’s judicial safeguards rely on courts for the constitutional adjudication of government action.<sup>23</sup> What follows from Bednar’s categorization is that political safeguards have a different meaning to those in Wechsler’s article discussed below. This paper will look predominantly at political safeguards as described by Wechsler, but in addition will elaborate on the other understandings of political safeguards of federalism by American scholars of federalism.

In Herbert Wechsler’s view the ‘political safeguards of federalism’ are ‘well adapted to retarding or restraining new intrusions by the center on the domain of the States.’<sup>24</sup> What follows from that is that courts do not need to police federalism on behalf of States since the latter are adequately represented in Congress.<sup>25</sup> This argument is maintained by a number of sources within the US federalism debate. First, the US federal tradition ‘supports placing the burden of persuasion on those urging national action.’<sup>26</sup> Second, in Wechsler’s view, ‘[S]tates are the strategic yardsticks for measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics.’<sup>27</sup> Yet, as Wechsler underlines, it is not only about existence of States, but rather about the role they play in the selection and composition of the national parliament and government. Namely, ‘the people of the [S]tates’ choose the members of both chambers of the Congress and the President.<sup>28</sup> Third, the equality of the States in the Senate enables blocking legislation by a coalition of States whose population is just a fraction of the total number of citizens.<sup>29</sup> In the same vein, the House of Representatives safeguards federalism through States’ control of voters’

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<sup>22</sup> Ibid. at 113ff.

<sup>23</sup> Ibid. at 119 ff.

<sup>24</sup> Wechsler, ‘The Political Safeguards of federalism’ at 558.

<sup>25</sup> Ibid. at 559.

<sup>26</sup> Ibid. at 545.

<sup>27</sup> Ibid. at 546.

<sup>28</sup> Ibid. In connection to this, more recently it has been argued that the selection mechanism of national officials for the Congress, and more specifically the national election cycles, may have an impact on the support for coercive federal policies. Specifically, national lawmakers are less willing to limit State authority in election years, which may in turn offer some protection for States’ governments This finding is consistent with Wechsler’s argument that selection of national parliament is at least an ‘intermittent’ political safeguard of federalism. See S. Nicholson-Crotty, ‘National Election Cycles and the Intermittent Political Safeguards of Federalism’ 38 *Publius: The Journal of Federalism* 2, 295.

<sup>29</sup> Wechsler, ‘The Political Safeguards of federalism’ at 547.

qualifications.<sup>30</sup> Finally, Wechsler argues that the presidential office, although the ‘repository of “national spirit” in the central government’ due to the election method by Electoral College, also requires that the President is ‘responsive to local values that have large support within the [S]tates.’<sup>31</sup>

Wechsler’s notion of ‘political safeguards of federalism’ was also relied on by the US Supreme Court in the *Garcia v. San Antonio Metropolitan Transit Authority* case concerning the question of whether the Congress could extend the Fair Labor Standards Act under the Commerce Clause of the Constitution, requiring minimum wage and overtime pay for employees, to State and local governments.<sup>32</sup> The US Supreme Court decided that the ‘political safeguards of federalism,’ meaning the role of states in the selection of the executive and legislative branches of the federal government, was sufficient protection from federal commerce power that would excessively burden the States. In the view of the Court, ‘[i]t is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.’ Hence, ‘[t]he political process ensures that laws that unduly burden the States will not be promulgated.’<sup>33</sup>

In the same judgment however, the ‘political safeguards of federalism’ were criticized by the dissenting Justice Powell (joined by Chief Justice Rehnquist and Justice O’Connor), who pointed out that Wechsler’s view that the structure of the federal government sufficiently protects the States does not reflect the current state of affairs.<sup>34</sup> This opinion is echoed in literature on the subject. Some scholars state that the introduction of the 17<sup>th</sup> Amendment, although acknowledged by Wechsler, undermines his thesis since it marks a significant change for the US political system by directing the attention of

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<sup>30</sup> Ibid. at 549ff. Wechsler indicates that the electorate ‘tend[s] to buttress what traditionally dominant State interests conceive to be their special State position’) and districting (‘more active localism and resistance to new federal intrusion centers in [the] 51% of districts’).

<sup>31</sup> Ibid. at 558.

<sup>32</sup> *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S 528 (1985). See fn. 11 of the judgement.

<sup>33</sup> Ibid.

<sup>34</sup> See fn. 9 of the dissent.

Senators towards State issues in national level policy-making.<sup>35</sup> Others, despite this change, argue that the Senate still protects federalism because the senators participate in federal lawmaking procedures and the adoption of federal laws to the same extent as before the amendment of the Constitution.<sup>36</sup> The electoral aspect of the ‘political safeguards’ has been negatively assessed in the literature. Legislatures do not have any important powers in federal elections except setting residence requirements, which is difficult to transform into an effective way to influence national policy in any case, while the president competes with States for power rather than vetoing federal legislation due to responsiveness to local values.<sup>37</sup>

Although Wechsler’s thesis has its critics,<sup>38</sup> the idea of political safeguards is not only interpreted as an avenue to protect State autonomy,<sup>39</sup> but it can be seen as a way to safeguard ‘well-functioning democracy’ through State power.<sup>40</sup> Building on Wechsler’s perception of Congress as an adequate ‘safeguard of federalism’ Gluck’s ‘national federalism,’ describing the allocation of State and federal power, views Congress as the primary source of federalism standing on at least an equal footing with the courts when it comes to its role in the shaping of federalism.<sup>41</sup> ‘National federalism’ specifically points to the federal statutory law adopted by Congress which leaves to the States its implementation or which incorporates State law into the federal statute.

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<sup>35</sup> 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, 2.

<sup>36</sup> B. R. Clark, ‘Separation of Powers as Safeguard of Federalism’ (2001) 79 *Tex. L. Rev* 1328, 1371.

<sup>37</sup> Pittenger, ‘*Garcia* and the Political Safeguards of Federalism’ at 4.

<sup>38</sup> See detailed criticism of Wechsler’s arguments in L. Kramer, ‘Putting the Politics Back into the Political Safeguards’ (2000) 100 *Columbia L. Rev.* 215, 220ff. Moreover, Yoo describes ‘political safeguards’ as ‘ahistorical’ since the Framers saw the Constitution as providing for judicial review of the balance of power between the national and State level, while as a historical fact Yoo argues that the political safeguards were not the only safeguards of federalism. See Yoo, ‘The Judicial Safeguards of Federalism’ 1357 & 1381.

<sup>39</sup> A. R. Gluck, ‘Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble’ (2013) 81 *Fordham L. Rev.* 1749.

<sup>40</sup> See interpretation of Wechsler’s ‘political safeguards of federalism’ by Gerken in H. K. Gerken, ‘The Political Safeguards of Horizontal Federalism’ (2014) 113 *Michigan L. Rev.* 57, 68 and in H. K. Gerken, ‘Federalism as the New Nationalism: An Overview’ (2014) 123 *Yale L. J.* 1889, 1891.

<sup>41</sup> A. R. Gluck, ‘Our [National] Federalism’ (2014) 123 *Yale L. J.* 1996, 1999.

Other sources of political safeguards indicated in the literature are political parties, which give States a ‘powerful voice’ in national councils.<sup>42</sup> Specifically, the US political parties are ‘not especially programmatic’ and ‘non-centralized.’<sup>43</sup> Their influence on federalism operates by creating political frameworks where the politicians at different levels of government depend on each other for getting elected and staying in office.<sup>44</sup> Political parties allow States to ‘remain a powerful locus of political and lawmaking authority.’<sup>45</sup>

Bednar understands the system of political parties as a political safeguard of federalism in the sense that political parties bind politicians to the goals designated by the party and help overcome the self-interest of politicians and encompass the preferences of all voters. Specifically, political parties act as safeguards by offering organizational cooperation, preference for long-term benefits, and national rather than local priorities.<sup>46</sup> Jenkins and Roscoe confirm that local party activities affect election outcomes at the federal level in a way that is sufficient to provide safeguarding effects in all political contexts.<sup>47</sup> These scholars underline however that it remains uncertain whether the successful politicians return the favour by offering ‘federalism-preserving policies’.<sup>48</sup>

Finally, John Nugent 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.’<sup>49</sup> Nugent agrees with Wechsler on representation as key to safeguarding the authority of State governments. However, his main point is that it is State officials themselves instead of

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<sup>42</sup> Kramer, ‘Putting the Politics Back into the Political Safeguards’ at 233.

<sup>43</sup> Ibid at 279.

<sup>44</sup> Ibid at 282.

<sup>45</sup> Ibid at 285.

<sup>46</sup> Bednar, *The Robust Federation* at 116.

<sup>47</sup> 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.

<sup>48</sup> Ibid.

<sup>49</sup> J. D. Nugent, ‘The Informal Political Safeguards of Federalism’, (2002) at 3 [https://www.academia.edu/801677/The\\_Informal\\_Political\\_Safeguards\\_of\\_Federalism](https://www.academia.edu/801677/The_Informal_Political_Safeguards_of_Federalism). This notion is further elaborated on in Nugent, *Safeguarding Federalism*, 54ff.

Congress members or the US President that best represent the interests of State governments.<sup>50</sup> While certain studies on State officials as safeguards of federalism have been conducted and their role in this respect seems important despite some flaws,<sup>51</sup> this paper focuses on NCLS since it gathers officials of state legislatures.

Turning quickly to the EU, it is the principle of subsidiarity that acts as a political safeguard of federalism.<sup>52</sup> To this end, the Lisbon Treaty granted national parliaments a role in its enforcement through the EWS, anchored in Protocol No. 2.<sup>53</sup> Hence, in contrast to the US, national parliaments are tasked with the operationalization of the political safeguards of federalism in the EU legal order. In this respect, the following section deals with a more general role of legislatures in a federation and compares the position of the (member) state legislatures under the respective legal frameworks.

## **2. Comparison of the Position of (Member) State Legislatures under EU Treaties and the US Constitution**

This section presents the formal powers of national parliaments and state legislatures as granted by the Lisbon Treaty and the US Constitution, in order to determine their role in US and EU federalism respectively. At first glance, in the US state legislatures are only included in the text of the Constitution in a marginal sense when compared to the EU. In the EU, Article 12 TEU, which was introduced by the Lisbon Treaty, lists the main functions of national parliaments in the EU and recognizes the contribution of national parliaments to the good functioning of the EU. In contrast, in the US Constitution no articles are fully dedicated to the functions of state legislatures in the same way as with the Congress, the Presidency and the Judiciary. Article IV of the US Constitution, which regulates the powers of the States, only marginally touches upon state legislatures. Instead, their functions are spread across different provisions.

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<sup>50</sup> Ibid at 4.

<sup>51</sup> See study on National Governors Association by J. M. Jensen, 'State Representation in Washington and the Political Safeguards of Federalism' (2013) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2300599](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300599) and in J. D. Nugent, *Safeguarding Federalism. How States Protect Their Interests in National Policymaking* (University of Oklahoma Press 2009), at 115ff.

<sup>52</sup> Schütze, *From Dual to Cooperative Federalism* at 243.

<sup>53</sup> Ibid. at 257.

The following section contrasts the functions and powers of EU national parliaments and US state legislatures with regard to the composition and selection of the US central government, the accession of new States to the EU, and amendment of the US Constitution. I focus on these three functions since they are the only ones that were assigned to state legislatures by the US Constitution.

### **2.1. Composition and Selection of Central Government**

The first function of the US state legislatures is directly connected to Wechsler's notion of 'political safeguards of federalism' and deals with their powers in relation to the composition and selection of the central government. Specifically, Article I, Section 3 of the US Constitution lays down that '[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.' The 17th Amendment changed this by introducing popular elections of Senators on a State-by-State basis.<sup>54</sup> As Congressional debates at the time show, the main reason for the introduction of this amendment was the fact that the procedure 'invit[ed] corruption from great moneyed interests seeking to secure or to hold unmolested the power to tax the American people by controlling the United States Senate, and invit[ed] corruption from men of great wealth seeking a similar power or seeking the honor and prestige of the office', the amendment should hence 'restore the public confidence in the Senate.'<sup>55</sup> It was also argued that the popular vote will help with the fact that legislatures often could not agree on the candidate which resulted in 'legislative deadlocks, which (...) have frequently deprived certain States of an equal representation [in the Senate].'<sup>56</sup>

The EU gives no comparable role to national parliaments with regard to the composition and appointment of members of EU institutions. In accordance with Article 10 TEU

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<sup>54</sup> The amendment was passed on May 13, 1912 and became part of the Constitution on April 8, 1913 after it had been ratified by 36 States, although around 200 previous proposals to introduce popular vote elections failed. 'Amendments to the Constitution: A brief legislative history, Prepared for the use of the subcommittee on the Constitution,' Committee on the Judiciary, United States Senate, U.S. Government Printing Office (1985), at 45.

<sup>55</sup> Representative Hobson, 47 Congressional Record - House (April 11, 1911), p. 211.

<sup>56</sup> Representative Adair, 47 Congressional Record - House (April 11, 1911), p. 209.

‘Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.’ In this sense, the role of the national parliaments is to keep their national governments in check over the decisions they take at the EU level.<sup>57</sup> Moreover, EU citizens are represented by Members of the European Parliament (MEPs), whom they directly elect. However, until the elections in 1979 MEPs were appointed by national parliaments. In contrast to the situation in the US before the 17th amendment, the MEPs had a dual mandate.<sup>58</sup> Although this link between national parliaments and the EP does not exist anymore, some national parliaments allow MEPs to participate in the meetings of their European Affairs Committees and there exist a number of forums of inter-parliamentary exchange.

Moreover, according to Article I, Section 4 of the US Constitution, state legislatures set the time, place and manner of the holding of elections for both chambers of the Congress. With regard to the election of the US President, Article II, Section 2 of the US Constitution indicates that state legislatures ‘direct’ the manner in which electors are appointed. The number of electors is equal to the sum of the senators and representatives to which a State is entitled.

In contrast, in the EU the Treaties provide only a general rule in Article 14(3) TEU that ‘The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.’ The Election Act of 1976 foresees however that the electoral procedures, except for some aspects such as the stipulation of

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<sup>57</sup> The mechanisms of how national parliaments keep their governments accountable in EU affairs is a subject of vast scholarly literature. See especially A. Maurer and W. Wessels (eds), *National Parliaments on their Ways to Europe Losers or Latecomers?* (Nomos 2001) and C. Heffler, Ch. Neuhold, O. Rozenberg, J. Smith (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave 2015). With regard to the European Council’s accountability see C. Heffler & others, ‘National Parliaments: Their Emerging Control over the European Council’ 89 Policy Paper, Notre Europe, Jacques Delors Institute available at <http://www.europarl.europa.eu/document/activities/cont/201303/20130327ATT63968/20130327ATT63968EN.pdf>.

<sup>58</sup> Art. 137 EEC Treaty. The change was seen as ‘an indispensable element in achieving further progress towards integration and establishing a better equilibrium between the Community institutions on a democratic basis.’ See European Parliament Resolution on the adoption of a draft convention introducing elections to the European Parliament by direct universal suffrage, 11.2.75, O.J. C 32/15.



proportional representation, are to be regulated by national procedures in member States, which implies involvement of national parliaments. Moreover, the President of the European Council who, when set against the US system, fulfills mostly coordinating and representative functions while defining the general political direction and priorities of the EU, is elected by a qualified majority of the European Council consisting of the heads of States or governments of the member states.<sup>59</sup>

## **2.2. Formation and Admission of New States**

The following function, assigned to state legislatures by the US Constitution in Article IV Section 3, concerns the requirement of consent of state legislatures (and of the Congress) when a new State is formed within the jurisdiction of any other State or when a new State is formed as a consequence of the unification of two or more States. There is, however, no role for state legislatures with regard to the admission of new States, since the Congress exercises this function. Specifically, the relevant procedure includes first a petition of the territory for statehood, then an enabling act of Congress with an authorization for the inhabitants to draft a constitution, next the acceptance of the constitution and finally the act of admission passed by the Congress.<sup>60</sup>

In contrast to that, as provided for by Article 12 TEU, national parliaments are notified of applications for accession to the EU. In addition, Article 49 TEU indicates that the accession agreement has to be ratified by the Member States ‘in accordance with their respective constitutional requirements.’ This means in fact that national parliaments will have to approve such an agreement, before the executive ratifies it. Moreover, the question that has recently been addressed concerns the membership in the EU of the territories of current member states in case of their secession, more specifically of Scotland and Catalonia. Regardless of the legal basis chosen for their EU accession, either via a Treaty amendment procedure (Article 48 TEU) or via application for EU

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<sup>59</sup> Art 15(5)-(6) TEU.

<sup>60</sup> P. Rodgers, *United States Constitutional Law: An Introduction*, (McFarland & Company Publishers 2011) at 100.

membership (Article 49 TEU),<sup>61</sup> national parliaments might be involved in such a process by their participation in the process of ratification or approval in accordance with the national requirements.

### **2.3. Constitutional/Treaty Amendment Procedure**

Furthermore, (member) state legislatures have powers in the constitutional/treaty amendment processes. According to Article V of the US Constitution, it is not only Congress that can propose amendments, but if requested by state legislatures representing two thirds of the States, Congress has to call a convention where amendments may be proposed. In both cases, the amendment will only be valid if ratified by state legislatures representing three fourths of the States or by State conventions representing three fourths of the States.

Likewise, in the EU, national parliaments participate in the revision of the Treaties (Articles 12e and 48 TEU). One of the methods of the ordinary revision procedure is the Convention method, in which the representatives of national parliaments participate in amending the Treaty together with the Heads of State or Government of the Member States, representatives of the European Parliament (EP) and of the Commission.<sup>62</sup> Within the simplified treaty revision procedure the European Council may amend all or part of the provisions of Part Three of the TFEU,<sup>63</sup> or, in specific cases, change the method of decision making from unanimity to qualified majority and from special to ordinary legislative procedure.<sup>64</sup> In the latter case, each national parliament may oppose the draft decision of the European Council within six months, and in case of such opposition, the decision cannot be adopted.<sup>65</sup> Finally, any amendment, whether within the ordinary or simplified treaty amendment procedure, has to be ratified or approved

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<sup>61</sup> C. Closa (ed), *Troubled Membership: Dealing with secession from a member State and withdrawal from the EU*, EUI Working Paper, RSCAS 2014/91 at 9.

<sup>62</sup> Art. 48(3) TEU. On the Treaty revision procedures see B De Witte, 'Treaty revision in the European Union: constitutional change through international law' (2004) 35 *Netherlands Yearbook of International Law* 51.

<sup>63</sup> Art. 48(6) TEU.

<sup>64</sup> Art. 48(7) TEU.

<sup>65</sup> See K. Granat, 'Interparliamentary cooperation and the simplified revision procedures', in N. Lupo, C. Fasone (eds), *Interparliamentary Cooperation in the composite European Constitution* (Hart 2016) (forthcoming).

by all the Member States in accordance with their respective constitutional requirements, which demand that the national parliament agrees to it.<sup>66</sup>

#### **2.4. Early Warning System**

There is hence rather little similarity between the constitutional roles of (member) state legislatures on both sides of the Atlantic. Article 12 TEU, which lists the main functions of national parliaments, also includes other competences that are not provided for their American counterparts. For example, national parliaments participate in the evaluation mechanisms for the implementation of the Union policies in the area of FSJ - in the political monitoring of Europol and the evaluation of Eurojust's activities.<sup>67</sup> Most importantly however, national parliaments exercise three functions that are crucial from the perspective of this paper and are connected to their main role of subsidiarity watchdogs and political guardians of the EU federalism. They all receive draft legislative acts from the EU and monitor their compatibility with the principle of subsidiarity (the EWS).<sup>68</sup> In addition, national parliaments participate in interparliamentary cooperation with the EP.<sup>69</sup>

The EWS procedure established in Article 6 of Protocol no. 2 allows national parliaments to submit, within eight weeks from the date of transmission of a draft legislative act, a reasoned opinion to the EU Commission explaining why the draft at issue is not in compliance with the principle of subsidiarity. Depending on the number of reasoned opinions counted as votes, national parliaments may trigger two special procedures. First, in the procedure labeled as the 'yellow card,' if the number of reasoned opinions is equal to at least one third of all the votes allocated to national parliaments, the Commission may decide to maintain, amend or withdraw the draft, giving reasons for its decision.<sup>70</sup> Second, in the procedure commonly referred to as the 'orange card,' if the reasoned opinions against a proposal within the ordinary legislative

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<sup>66</sup> See Art. 48(4) and 48(6) TEU.

<sup>67</sup> Art. 12(c) TEU.

<sup>68</sup> Art. 12(a) and (b) TEU.

<sup>69</sup> Art. 12(f) TEU.

<sup>70</sup> For the proposals in the area of freedom, security and justice, the threshold is one quarter of the votes of national parliaments.

procedure represent at least the majority of votes assigned to national parliaments, the Commission may 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 EP confirming a subsidiarity violation will halt the legislative procedure.

In addition to the EWS, outside the framework of the Treaties, the Commission committed itself to forwarding all new legislative proposals and consultation papers directly to national parliaments. This initiative is named the Barroso Initiative after the President of the Commission at the time and is often also referred to as ‘the political dialogue’.<sup>71</sup>

The US Constitution has granted no similar control function to state legislatures. Yet, at the end of the 18th century the state legislatures attempted to ‘interpose’ or ‘nullify’ the federal legislation in the Virginia and Kentucky Resolutions.<sup>72</sup> Their aim was to gain an exemption from federal legislation rather than to argue for the State level as being a more appropriate level at which to take action and hence this move does not share much resemblance with the EWS.<sup>73</sup>

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<sup>71</sup> Jančić indicates that the political dialogue concerns ‘all aspects of the [Commission’s] political agenda.’ See D. Jančić, ‘The Barroso Initiative: Window Dressing or Democracy Boost’ (2012) 8 *Utrecht Law Review* 78, 80.

<sup>72</sup> Virginia Resolution of 1798 and the Kentucky Resolution, Dec. 3, 1799. They were written by James Madison and Thomas Jefferson and presented an answer to the Alien and Sedition Acts.

<sup>73</sup> It is however not clear whether the resolutions did in fact intend to grant state legislatures nullification powers. Especially, in the case of the resolution drafted by Madison, it was meant to influence the Congress to repeal the legislation at stake, and if unsuccessful, the states could force a constitutional convention in accordance with Article V of the US Constitution. In any case, the resolutions were rejected by the other states. See J. Watkins Jr., *Reclaiming the American Revolution. The Kentucky and Virginia Resolutions and their Legacy* (Palgrave Macmillan 2004), at 73. Note also that the issue of amendment instead of nullification was raised by the Senate of the Commonwealth of Massachusetts, February 9, 1799. Moreover, before the Civil War, the idea of the nullification powers of the states was advocated by John C. Calhoun, who referring to the Virginia resolution, thought of nullification as the ‘fundamental principle of the US system’. His theory of ‘concurrent majority’, referred however to conventions and not state legislatures and proposed that Congress had to accept that a federal law would exist in all states except for those where it was nullified or the Congress could propose a constitutional amendment to be ratified by the states; if approved by three-fourths of states, the federal law would be binding for all the states.<sup>73</sup> See John C. Calhoun’s Fort Hill Address, 1831 in F. D. Drake & L. R. Nelson, *States’ Rights and American federalism. A documentary history* (Greenwood Press 1999), at 105 and Watkins Jr, ‘Reclaiming the American Revolution’ at 103.

### **3. Unfunded Mandates and the Role of the National Conference of State Legislatures**

This section starts with a description of UMRA, explains the reasons for its introduction, and concludes that certain similarities can be drawn between UMRA and the functioning of the EWS. The aim is to draw parallels between the role of (member) state legislatures under the EWS in the EU and under UMRA in the US. Specifically, in the EU, subsidiarity monitoring was introduced to ensure oversight of the exercise of EU competences and safeguard the proximate relationship between EU action and the EU citizen.<sup>74</sup> In the US, state legislatures did not develop an oversight function such as the EWS for a number of reasons mentioned above: the well-established US Supreme Court's competence review, 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. Indeed, the US case could provide useful insights for the EU debate on subsidiarity. The example given in this paper concerns their role under the fiscal federalism regime within the NCSL.<sup>75</sup>

A direct comparison between the function of UMRA and the EU subsidiarity principle was proposed by Lazer and Mayer-Schoeneberger who examined the 'where' question of policy making in the legislative process on both sides of the Atlantic, arguing that the US and the EU 'respond[ed] to attacks on the legitimacy of 'federal' governance by building into the legislative or regulatory processes a federalism or subsidiarity criterion'.<sup>76</sup> The authors dealt with the 'where criterion' of policy-making as a question of 'how a decision to introduce a given policy at a particular level of government – federal versus State, EU versus national – is made.' Within the US legislative branch, they established that 'the Congress does not require any analysis of the rationale for significant legislation at the federal rather than State or local levels.' Examining the EU subsidiarity also here they stated that the Commission did not vigorously pursue the 'where' criterion. They

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<sup>74</sup> Art. 5(3) TEU.

<sup>75</sup> R. W. Adler, 'Unfunded Mandates and Fiscal Federalism: A Critique' (1997) 50 *Vanderbilt L. Rev.* 1137.

<sup>76</sup> See D. Lazer and V. Mayer-Schoenberger, 'Blueprints for Change: Devolution and Subsidiarity in the United States and the European Union' in K. Nicolaidis, R. Howse, *The federal vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP, 2001) at 119.

concluded that ‘in neither the EU nor the US have “where” criteria found a natural home in central institutions. Where subsidiarity/federalism criteria have been implemented in theory, their actual impact has been minimal.’ Their study did not enquire into the role of legislatures in controlling the ‘where’ issue. This is understandable since the EWS was introduced only a few years ago and on the US side their focus is on the function of Congress under UMRA, as there is no formal role assigned to state legislatures.

This paper acknowledges that UMRA and EWS are different procedures with a different focus, however the main aim is to contribute to the comparative federalism discussion on the possible roles of (member) state legislatures in federal systems.

### **3.1. Reasons to Enact Unfunded Mandate Reform Act**

The aim of UMRA of 1995 was to limit the practice whereby a federal unfunded mandate is imposed on State and local governments, and raise awareness about the fiscal impact that federal legislation has on the States. Especially due to the shift in its approach in the 1970s and 1980s, the federal government was introducing more intrusive compulsory programs and regulations requiring compliance of States and smaller entities (localities).<sup>77</sup> Hence, the Act was supposed to prevent federal legislation and regulation from imposing costly obligations on States and localities.<sup>78</sup> More specifically, the objective was to reduce the number of unfunded mandates and provide Congress with information on the costs of the federal legislation.<sup>79</sup>

UMRA was seen as ‘an incremental change in the legislative process.’<sup>80</sup> The supporters of UMRA argued in Congress that it:

‘begins a fundamental shift in the basic attitude of the Congress toward our cities, counties and States. In doing so, it will help serve as a bulwark for our system of

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<sup>77</sup> Unfunded Mandates Reform Act: History, Impact and Issues at 2.

<sup>78</sup> Ibid.

<sup>79</sup> 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](http://www.law.harvard.edu/faculty/hjackson/UnfundedMandates_7.pdf).

<sup>80</sup> D. Lazer and V. Mayer-Schoenberger, ‘Blueprints for Change: Devolution and Subsidiarity in the United States and the European Union’ in K. Nicolaidis, R. Howse, *The federal vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP, 2001) at 119.

federalism. It ensures recognition that State and the local governments are not simply subunits of the Federal Government. Under this legislation, we are acknowledging for the first time, in a meaningful way, that there must be limits on the Federal Government's propensity to impose costly mandates on other levels of government. [...] First of all, it helps bring our system of federalism back to balance.'<sup>81</sup>

The central feature was to establish accountability in Congress by fostering 'informed decision-making' in this institution.<sup>82</sup> When signing UMRA, President Bill Clinton underlined that '[t]his bill is another acknowledgement that Washington doesn't necessarily have all the answers, that we have to continue to push decision-making down to the local level, and we shouldn't make the work of governing at the local level any harder than the circumstances of the time already ensure that it will be.'<sup>83</sup>

Some however argued against UMRA. The argument was that 'broad national issues' at stake such as environmental, economic, health, immigration and educational issues demand national solutions, which necessitate the adoption of unfunded mandates.<sup>84</sup> Moreover, in order to avoid '[S]tate shopping behavior', certain issues of interstate nature have to be addressed at the federal level.<sup>85</sup> Finally, it was underlined that federal mandates dictate the necessary minimum requirements ('floors') in some regulatory areas such as environment or workplace conditions.<sup>86</sup>

### **3.2. Content of Unfunded Mandate Reform Act**

UMRA deals with the problem that a State government may be required by the federal level to take action but no funds are allocated to cover the costs associated with these requirements. UMRA is hence supposed to 'make it harder' to enact unfunded

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<sup>81</sup> Congressional Record, Senate, Senator Roth, January 12, 1995, at 863.

<sup>82</sup> Congressional Record, Senate, Senator Roth, January 12, 1995, at 864.

<sup>83</sup> Public Papers of the Presidents of the United States: William J. Clinton, 1995 at 382.

<sup>84</sup> Congressional Record, Senate, Senator Lautenberg, January 12, 1995, at 862.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

mandates.<sup>87</sup> The Act proposes specific tools such as information requirements and the ‘point of order vote.’

First, Congress should be better informed about the cost of mandates. UMRA demands that the Congressional Budget Office (CBO) prepares information statements on the mandates and their costs.<sup>88</sup> It is argued that the obligation to provide the necessary information about the cost of mandates would make it easier to solve collective action and free-riding problems.<sup>89</sup>

Second, the Act establishes a ‘point of order vote’ in Congress on legislation containing significant federal governmental mandates that do not provide the funding necessary to comply with such mandates or on those bills that lack a CBO’s assessment.<sup>90</sup> The idea behind it is that the vote will be a ‘vehicle for those concerned about proposed mandates allowing them to force members to vote separately on the desirability of using [a] mandate to carry out the goals of the underlying legislation.’<sup>91</sup> The effect of a ‘point of order’ might be to stop the mandate, or the possibility that the ‘point of order’ will be raised at all may lead to softening or withdrawing the proposal.<sup>92</sup> It has been argued that UMRA entrenched a bias in favour of federalism and that the ‘point of order’ allows those Congress members who prefer giving States and localities strong powers to keep the balance between the two levels.<sup>93</sup> Finally, UMRA altered the balance of power within Congress, by shifting the decisions on unfunded mandates towards individual members and majorities, while taking it away from the committees which are much more willing

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<sup>87</sup> 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 are however not forbidden by UMRA.

<sup>88</sup> Some parallels could be drawn here to the EU’s impact assessments. The increased use of the impact assessments in the pre-legislative phase has been seen as a ‘move towards proceduralization’ in the 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).

<sup>89</sup> E. Garrett, ‘Enhancing the Political Safeguards of Federalism?: The Unfunded Mandates Reform Act of 1995’ (1997) 45 *University of Kansas L. Rev.* 1113.

<sup>90</sup> Section 1 (6).

<sup>91</sup> P. P. Posner, ‘The politics of Coercive Federalism’, in T. Conlan and P. Posner (eds.), *Intergovernmental Management for the 21<sup>st</sup> Century* (Washington 2008), at 297.

<sup>92</sup> *Ibid.*

<sup>93</sup> Garrett, ‘Enhancing the Political Safeguards of Federalism?’ at 1516.



to adopt unfunded mandates even if that would be inefficient or at the cost of federalism.<sup>94</sup>

However, ‘points of order’ can be overridden by a simple majority in the House of Representatives or in the Senate, which is seen as one of UMRA’s weaknesses and an issue in need of reform.<sup>95</sup> Other often-raised weak points of the Act concern its narrowness, as UMRA is not applicable to a situation where some obligations are imposed on the State as a condition to receive federal assistance,<sup>96</sup> nor to the list incorporated in UMRA that excludes the application of UMRA to provisions in certain bills, for example those that enforce constitutional rights of individuals.<sup>97</sup> Finally, some steps to revise UMRA have been taken shortly after its enactment aiming at strengthening the act, but only a few of the pieces of federalism legislation succeeded, among them the State Flexibility Clarification Act which broadened the definition of intergovernmental mandates introduced.<sup>98</sup>

Thus, the assessment of UMRA is not entirely positive. Some scholars argue that the problem of unfunded mandates was not resolved by the 1995 Act due to ‘information asymmetries, the difficulties of monitoring political agents; and the self-promoting behavior of mandate-dispensing officers.’<sup>99</sup> Specifically, it means that disorganized voters blame local authorities (instead of the State or federal one) for local tax raises caused by unfunded mandates, in contrast to the well-organized interest groups who influence the legislators and benefit from the mandated services.<sup>100</sup> The two-thirds majority requirement seems to be an insufficient response to this problem, since

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<sup>94</sup> Ibid at 1521.

<sup>95</sup> Anderson and Constantine, ‘Unfunded mandates’, at 19. See also Garrett, ‘Enhancing the Political Safeguards of Federalism?’ at 1502.

<sup>96</sup> Garrett, ‘Enhancing the Political Safeguards of Federalism?’ at 1499ff.

<sup>97</sup> 2 USC 658a. The issue of narrow scrutiny is also pertinent to the EWS. See for contrasting opinions 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 *Common Market Law Review* 115; M. Goldoni, ‘The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation’(2014) 9 *European Constitutional Law Review* 98;

<sup>98</sup> 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.

<sup>99</sup> E. A. Zelinsky, ‘*The Unsolved Problem of the Unfunded Mandate*’ (1997) 23 Ohio N.U.L. Rev. 741, 744.

<sup>100</sup> Ibid 744-745.

political actors in Congress will seek coalitions that will mutually support each other's mandates and hence may increase their number.<sup>101</sup> Indeed an empirical study has shown that UMRA did not substantively decrease the number of coercive policies imposed by the federal government.<sup>102</sup>

### **3.3. 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 continuing oversight.<sup>103</sup> The state legislatures' control of this type of mandates is primarily exercised by NCSL. The aim of this section is to analyze the involvement of state legislatures with respect to UMRA in order to draw some insights for the EU.

#### **3.3.1. Status and Structure of NCSL**

One of the ways for state government to influence national policy making is through intergovernmental lobbying in the national legislative process.<sup>104</sup> NCSL and similar organizations such as the National League of Cities or the National Governors Association are 'generally organized not by an interest (such as climate control or women's rights) but by the political units of this [US] federation - by the level of jurisdiction (federal, State, county, city) or the kind of office (governor, attorney general, legislator, mayor).'<sup>105</sup> They are organizations of government officials and their legitimacy stems from the fact that, in a way, they represent governmental institutions.<sup>106</sup> Resnik labels such organizations as TOGAs (translocal organizations of

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<sup>101</sup> Ibid 747.

<sup>102</sup> S. Nicholson-Crotty, 'National Election Cycles and the Intermittent Political Safeguards of Federalism' (2008) 38 *Publius: The Journal of Federalism* 295, 304.

<sup>103</sup> For examples see Anderson and Constantine, 'Unfunded Mandates', at 9.

<sup>104</sup> J. Dinan, 'Relations between State and National Governments' in D. P. Haider-Markel, *The Oxford Handbook of State and Local Government* (OUP 2014) at 16.

<sup>105</sup> J. Resnik, 'New Federalism(s): Translocal Organizations of Government Actors (TOGAs) Reshaping Boundaries, Policies and Laws in Why the Local Matters: Federalism, Localism, and Public Interest Advocacy' (published by the Liman Public Interest Program at Yale Law School, and the National State Attorneys General Program at Columbia Law School 2010) available at <http://www.law.yale.edu/resnik.pdf>, 83, 94.

<sup>106</sup> Ibid.

government actors) since they are neither governmental organizations because of their voluntary character (they do not bind the organization to which the officials belong), nor NGOs as there is a connection between their members and the government unit to which they are connected.<sup>107</sup> NCLS 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.’<sup>108</sup> 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 NCLS and composed of legislators and legislative staff, chosen to be ‘broadly representative of the leadership and top management of the nation’s legislatures’.<sup>109</sup> Each State has a *liaison* at NCSL so that state legislators and their staff receive necessary information.<sup>110</sup>

The Standing Committees, which are the main institutional feature of NCSL are composed of state legislators and legislative staff appointed by the state legislatures and, ‘advance policy directives and take resolutions on State-federal issues.’<sup>111</sup> The committees only explore issues faced by the States without recommending any specific policy directions if the question at stake is internal to the States.<sup>112</sup> However, the committees advance ‘directives and resolutions on state-federal issues to guide NCSL’s lobbying efforts in Washington, D.C.’<sup>113</sup> The aim of the D.C. office is ‘to lobby the Congress, White House and federal agencies for the benefit of state legislatures in

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<sup>107</sup> Ibid.

<sup>108</sup> See: <http://www.ncsl.org/aboutus.aspx>.

<sup>109</sup> See: <http://www.ncsl.org/aboutus/executive-committee/members.aspx>. See that the legislators do not represent every State. <http://www.ncsl.org/aboutus/executive-committee/nominating-procedures-officers.aspx>.

<sup>110</sup> See: <http://www.ncsl.org/aboutus/ncslservice/ncsl-State-liaisons-map.aspx>. Liaisons are not members of State legislatures but of the NCSL and hold a directorial or managing position within the conference. However, in many cases they have experience with working for a State legislature for which they are a liaison.

<sup>111</sup> Standing committees are composed of the legislators and meet twice a year. See <http://www.ncsl.org/ncsl-in-dc/standing-committees.aspx>.

<sup>112</sup> See: <http://www.ncsl.org/ncsl-in-dc/task-forces/introduced-policy-directives-and-resolutions.aspx>.

<sup>113</sup> Ibid.

accord [sic] with the policy directives and resolutions recommended by the Standing Committees and adopted at the NCSL Legislative Summit Business Meeting.’<sup>114</sup>

NCSL meets twice a year at the Forum and at the Legislative Summit. The first meeting involves Standing Committees, which debate policy and set the agenda for the States.<sup>115</sup> The Legislative Summit is an event that connects legislators and staff nationally to discuss of critical concern for the States.<sup>116</sup>

### ***3.3.2. Examples of NCSL’s Involvement in Unfunded Mandates***

With regard to UMRA, NCSL opposes the imposition of unfunded federal mandates and unjustified preemption of State authority and strives to provide state legislatures with some flexibility for innovation and responsiveness to their citizen’s needs.<sup>117</sup> In particular, for this purpose NCSL uses the Mandate Monitor<sup>118</sup> with a Catalog of Cost Shifts to States.<sup>119</sup> Prepared within the NCSL Standing Committee on Budgets and Revenue, it traces the costs imposed by the federal government on the States in proposed and adopted legislation in which the Congressional Budget Office identified a federal intergovernmental mandate (mandate imposed by the federal government upon the State government). In doing this NCSL adopts a definition of unfunded mandates that is broader than the one provided by UMRA, including other types of laws that shift costs on to the States.<sup>120</sup>

Within its primary aim of monitoring the mandates, NCSL encourages Congress to avoid imposing new federal unfunded mandates on State and local governments. Specifically, NCSL communicates with Congress by pointing out cases where the

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<sup>114</sup> Ibid.

<sup>115</sup> See <http://www.ncsl.org/meetings-training/forum.aspx>. In 2014 the discussions concerned such issue as ‘The Federal Impact on Teacher Preparation’ or ‘Human Trafficking: Federal Strategic Plan’ See at <http://www.ncsl.org/meetings-training/2014-forum-online-resources.aspx>.

<sup>116</sup> See <http://www.ncsl.org/meetings-training/legislative-summit.aspx>.

<sup>117</sup> See <http://www.ncsl.org/ncsl-in-dc.aspx>.

<sup>118</sup> See <http://www.ncsl.org/ncsl-in-dc/standing-committees/budgets-and-revenue/mandate-monitor-overview.aspx>.

<sup>119</sup> See <http://www.ncsl.org/print/standcomm/scbudg/catalog.pdf>.

<sup>120</sup> See <http://www.ncsl.org/ncsl-in-dc/standing-committees/budgets-and-revenue/mandate-monitor-overview.aspx>.

legislation at stake should not be adopted because it will place a burden on the States. Some examples are in order to illustrate this.

First, NCSL acted concerning the federal Prison Rape Elimination Act (PREA) of 2003. This Act dealt with sexual assault of prisoners by setting standards for physical space for the prisoners and for training staff in detention facilities. If these standards were not fulfilled, the prisons would lose 5 percent of their funding from any federal grant used for ‘prison purposes,’ including also funds for the reintegration of prisoners. In this respect Senator Cornyn proposed an amendment limiting the notion of ‘prison purpose’ in a way that it will limit only the funding for the administration and operation of the correctional institution. In its letter of September 2014 to Senator Cornyn, the NCSL supported the proposed amendment as ‘placing the incentive with the policymakers and administrators directly responsible for compliance with the PREA standards’.<sup>121</sup> The amendment was picked up by Chairman Leahy making it a Leahy/Cornyn amendment and passed the Senate Judiciary Committee on Thursday, by a vote of 13-5. However, the Congress adjourned before the amendment could have been voted on in the House.

Second, the Digital Accountability and Transparency Act (DATA Act), passed in the House of Representatives in 2012, required that the recipients of federal funds (including State and local governments) report quarterly to a newly created Federal Accountability and Spending Transparency Board on how they used the awarded funds. NCSL opposed the reporting requirement since there were no funds for establishing such a procedure and perceived the reporting requirement as yet another unfunded federal mandate during a period when States were still recovering from recession.<sup>122</sup> Thus, NCLS again underlined the financial burden that federal level would impose on the States.

#### **4. Insights for EU National Parliaments**

Although the EWS has led to the production of a relatively large number of reasoned opinions on the part of national parliaments, the ways in which their role in the EU can

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<sup>121</sup> See [http://www.ncsl.org/documents/Statefed/Cornyn\\_PREA\\_penalty\\_amendment\\_Ltr.pdf](http://www.ncsl.org/documents/Statefed/Cornyn_PREA_penalty_amendment_Ltr.pdf).

<sup>122</sup> See <http://www.ncsl.org/press-room/digital-accountability-and-transparency-act.aspx>.

be reformed to improve the functioning and effectiveness of mechanisms introduced by the Lisbon Treaty are currently under discussion by national parliaments and EU scholars alike.<sup>123</sup> The way in which the NCSL allows state legislatures to act as ‘informal safeguards of federalism’ under UMRA provides helpful cues for discussing possible roles of national parliaments as safeguards of federalism. The following section will deal with the plurality of forums of interparliamentary cooperation, the involvement of the EP and Congress in such forums, the representation of interests of national legislatures in the EU, and the use of personal liaisons between different forums.

#### **4.1. Plurality of Forums**

While the sole forum for cooperation between US state legislatures is the NCSL, in contrast a plurality of forums for interparliamentary cooperation are found in the EU; the Conference of Speakers of EU Parliaments; Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC); Interparliamentary Conference for the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP); and the Inter-Parliamentary Conference on the Economic and Financial Governance of the EU, established under Article 13 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.<sup>124</sup> This section highlights the main differences between the EU and US conferences and discusses them in the broader institutional context of each of the conferences.

First, the plurality of parliamentary forums leads to greater *specialization* and directs their focus towards specific policies in the EU. Heffler and Gattermann explain the shift from thematically more general conferences to more focused ones, such as the ‘Article 13 conference,’ through a ‘mainstreaming’ trend and Europeanization process within national parliaments, meaning that the distinction between national and European

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<sup>123</sup> See fn. 2 above.

<sup>124</sup> See B. Crum and J. E. Fossum (eds.), *Practices of interparliamentary coordination in international politics* (ECPR 2013).

policies is being blurred and a larger number of MPs are getting involved.<sup>125</sup> In contrast, beyond the unfunded mandates NCSL tackles issues such as education, health, infrastructure and budgetary issues within one body. However, as the developments in the EU show, a general model of a parliamentary conference seems to be insufficient in the EU. Specifically, COSAC could be seen to play a comparable role to NCSL through its discussion of general policies, such as energy, trade or EU's democratic legitimacy with a focus on the role of national parliaments in these areas. Moreover, the Lisbon Treaty created the opportunity for further specialized conferences. In fact, the launch of additional conferences proved problematic due to the discussions on the establishment of their rules of procedure and membership.<sup>126</sup>

The significance of different types of inter-parliamentary forums is the *visibility* that it gives to national parliaments. It might be argued on the one hand that a number of forums increase the visibility of parliaments within a polity, while on the other hand the lack of one larger parliamentary forum disperses the attention given to the voice of national parliaments.

#### **4.2. Cooperation with the European Parliament**

The EU national parliaments under the EWS participate in a dialogue with the Commission, while in the inter-parliamentary conferences they often involve the members of the EP. In contrast, NCSL does not incorporate members of Congress in its structure and it is the Congress together with the administration that is the main interlocutor with NCSL.<sup>127</sup>

Article 9 of Protocol No. 1 to the Lisbon Treaty points out that the EP and national parliaments 'shall together determine the organization and promotion of effective and

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<sup>125</sup> C. Heffler and K. Gattermann, 'Interparliamentary Cooperation in the European Union: Patterns, Problems and Potential', in *The Palgrave Handbook of National Parliaments and the European Union* at 108.

<sup>126</sup> I. Cooper, 'Parliamentary Oversight of the EU After the Crisis: on the Creation of the 'Article 13' Interparliamentary Conference', *LUISS Working Papers Series* 21/2014.

<sup>127</sup> For example the members of Congress are not members of the NCSL Committees (See however that the representatives of government, academia and business may participate in the forum or legislative summit: <http://www.ncsl.org/ncsl-in-dc/standing-committees/budgets-and-revenue/budgets-and-revenue-committee-members.aspx>).

regular interparliamentary cooperation within the Union'. However, the involvement of the EP has in the past led to a conflict since 'the EP's preferred mode of interparliamentary cooperation is the kind that it can control, such as Interparliamentary Committee Meetings.'<sup>128</sup> The cooperation in NCSL has a more vertical character (state legislators and legislative staff), which is visible in the committee structure. In addition, some exchange with the members of the Congress and the government takes place during two major meetings, the Forum and Legislative Summit, in addition to the meetings of the committees which debate on substantive issues.

Hence, the possibility of EU inter-parliamentary cooperation without the EP and without creating a new conference may merit consideration. If for example the CFSP/CSDP or 'Article 13' Conference would follow the US model, pertinent issues could be discussed in committees and later at a plenary session with MEPs.<sup>129</sup> Such a system could shield members of national parliaments from possible power struggles with the EP. However, the downside of the exclusion of MEPs would be the limitation of channels of communication between national parliaments and the EP, as well as further antagonism between the MPs and MEPs.

### **4.3. Aggregation of Interests**

NCSL seems to aggregate various US State interests at stake and to speak with one voice on behalf of States, as is shown by the contributions of NCSL cited above. In the EWS however, each national parliament may prepare its own reasoned opinion, which often reflects the specific political, social or geographical concern of the given parliament. Moreover, the EU national parliaments were not unanimous on the question of coordination of the EWS submissions by COSAC, and COSAC itself did not see that as a

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<sup>128</sup> I. Cooper, 'Parliamentary Oversight of the EU After the Crisis: on the Creation of the 'Article 13' Interparliamentary Conference', *LUISS Working Papers Series* 21/2014 at 2.

<sup>129</sup> Note that the CFSP/CSDP Conference meetings foresee workshops with MEPs as well as specialists on the topic.



priority for the Conference. Accordingly, the collection of reasoned opinions by COSAC under the EWS stopped with the entry into force of the Lisbon Treaty.<sup>130</sup>

The difference between the role of NCSL and of the EU conferences might be related to the fact that in their reasoned opinions, or opinions under ‘the political dialogue’, national parliaments are much more affected by the idiosyncratic interest of the member state at stake. In comparison, NCSL coordinates the position of state legislatures on issues that concern each State, at least when it comes to the unfunded mandates. Specifically, lack of federal funding will affect all States equally.

#### **4.4. Parliamentary Liaisons**

Finally, it should be noted that the engagement of liaison officers enables the exchange of information between different participants of parliamentary conferences. In the US, staff members of NCSL are assigned to a specific State and ensure communication between NCSL and state legislatures. In the EU, national parliamentary representatives in Brussels (NPRs) have become an important link between national parliaments and EU institutions.<sup>131</sup> The difference lies in the forums that the liaison officers link, in the US it is the conference and the state legislatures, while in the EU the link is between the EP and national parliaments.<sup>132</sup>

At this point, establishing a liaison between a national parliament and COSAC or any other of the EU conferences would be superfluous: MEPs participate in the conferences, the NPRs are an additional avenue of information on EU affairs for national parliaments and no extra network seems necessary to establish contact with the EP. In contrast, the concept of an NPR network might find some use in the US, since only some state

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

<sup>131</sup> See especially their positive role in I. Cooper, ‘A Yellow Card for the Striker: How National Parliaments Defeated EU Strikes Regulation’ (2015) *Journal of European Public Policy* and A.-L. Högenauer & Ch. Neuhold (2015) ‘National Parliaments after Lisbon: Administrations on the Rise?’, 38 *West European Politics* 335.

<sup>132</sup> See however that not all NPRs are affiliated to the EP. One could argue that their representation could be seen as understood in broader terms of ‘Brussels’.

legislatures keep a Washington office.<sup>133</sup> In addition, the D.C. Office of NCSL might be seen as fulfilling such a role on behalf of state legislatures collectively.

## **Conclusion**

The objective of this paper was to search for insights that could be drawn from American practice relevant to the role of national parliaments in EU affairs. The Lisbon Treaty established a ‘political safeguard of federalism’ by granting national parliaments a formal role in the policing of the subsidiarity principle. In the US other ‘political safeguards’ have instead been chosen in the federal system. Specifically, Wechsler originally described the US ‘political safeguards of federalism’ as anchored in the role of States in the composition and selection of the central government. The US federal system incorporated additional political safeguards such as political parties, as well as informal ones through which State officials apprise federal policymakers of the interests of State governments via organizations such as NCSL.

To start with, the paper acknowledged the difference between the role of national parliaments under the EWS (dealing with the ‘where’ question of policy making) and the role of NCSL under UMRA (dealing with the ‘who pays’ question of policy making which, in contrast in the EU due to the limited EU budget presupposes that the EU member States will pay). It then studied the functioning of NCSL, which took a leading role in protecting States from the costly mandates imposed by federal legislation. Although the rationale for the participation of legislatures is different on both sides of the Atlantic, the similarity lies in how the legislatures deal with federalism problems relevant for each of the systems and analyzed in this paper. Specifically, despite the fact that the US Constitution grants the state legislatures powers only with regard to the composition and selection of federal institutions, formation of new States and by constitutional amendment, NCSL took an important role in relation to the pertinent issues of fiscal federalism and beyond. In the same vein, EU national parliaments deal with the question of better exercise of competence between the EU and member state

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<sup>133</sup> Dinan, ‘Relations between State and National Governments’ at 16.

levels. In sum, in both polities legislatures assumed roles depending on the federalism problems at stake. Specifically, while in the EU the Union level is perceived as suffering from the democratic deficit and ‘creeping competence’, the Lisbon Treaty drafters chose national parliaments to kill these two birds with one stone. In the US, the financing of federal policies was the factor that prompted the involvement of state legislatures, though in a more centralized way than in the EU – via the conference.

Although the legislatures in the EU and in the US face different federalism issues, this inquiry considered the implications of the US experience for the EU national parliaments and interparliamentary cooperation under the EWS, as well as more general issues related to organizational factors. The paper dealt with issues such as the plurality of forums of interparliamentary cooperation, the participation of the EP in parliamentary conferences, aggregation of interests, and the use of liaisons. They were considered in light of the US experience in order to bring some insights to the EU debates on the role of national parliaments in EU affairs. Starting with the plurality of forums of cooperation for parliaments in the EU, this paper indicated that the EU did not favor the US model of one parliamentary conference. In fact, in the EU specific profiles were given to new conferences, which often faced procedural problems in their first days of functioning. Moreover the plurality of forums raised the question of visibility of parliaments. Next, the cooperation of national parliaments with the EP was assessed in the light of the US experience with the relationship between state legislatures and the Congress. Specifically, Congressmen are not members of NCSL or its committees. However, two major annual meetings, the Forum and Legislative Summit, provide for exchange between federal and state legislators. The main advantage of such a system is that state legislators are shielded from the power struggles with federal institutions that are typical for the EU conferences. As one possible drawback of such a solution the paper indicated the potential alienation of national MPs. The third issue considered was the aggregation of interests of state legislatures by NCSL, which does not occur within EU conferences. This might be due to the idiosyncratic interests of member states evident under the EWS, in comparison with unfunded mandates, which would impact on the financing for all States. Finally, liaisons are a successful component of parliamentary cooperation on the both sides of the Atlantic. The D.C. Office of NCSL

and the State liaisons connect NCSL with the state legislatures, and the NPRs in Brussels perform a similar function on behalf of national parliaments.

In sum, US federalism, which offers some constitutional functions for state legislatures and additional political safeguards of federalism, did not lead to an establishment of a formalized procedure whereby state legislatures would control State-federation issues. In contrast, the lack of alternative political mechanisms necessitated the establishment of the EWS in the EU. Assessing the European experience in the light of the US practice, this paper indicated that with regard to a number of issues the EU national parliaments and the US state legislatures may follow the solutions developed by their counterparts, while in some cases the structural and institutional dissimilarities discourage cross-application.

