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**Unfunded Mandates**

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## Overview

Federal legislation enacted by the United States Congress and regulations promulgated by federal agencies often compel or prohibit certain activities by state, local, and tribal governments and by the private sector. To comply with or carry out these laws and regulations, subnational entities usually incur expenditures and sometimes suffer revenue losses. Enacted as an amendment to the Congressional Budget and Impoundment Control Act of 1974, the Unfunded Mandates Reform Act of 1995 (“UMRA”), aims to promote informed decision-making by focusing congressional and administrative deliberations on the costs incurred by intergovernmental entities and the private sector in order to comply with federal legislation and regulation. UMRA’s primary purpose is “to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding.”<sup>1</sup>

Consider the Internet Tax Nondiscrimination Act of 2004, which amended the Internet Tax Freedom Act (“ITFA”) and made permanent the moratorium on state and local taxation of Internet access and certain forms of electronic commerce. The amendment also eliminated the “grandfather clause” of the ITFA, which had enabled certain state and local governments to continue to collect taxes on Internet access. Although the Congressional Budget Office (“CBO”) did not expect the legislation to have any impact on the federal budget, the mandate was expected to result in annual revenue losses for state and local governments totaling between \$80 and \$120 million.

## Legal Basis

Title I of UMRA<sup>2</sup> – Legislative Accountability and Reform – defines federal mandates as provisions in legislation or statutes that would:

- impose enforceable duties on state, local, or tribal governments or the private sector, except as a condition of federal assistance or arising from participation in a voluntary federal program;
- reduce or eliminate the amount of authorization for appropriations for federal financial assistance that would otherwise be provided to intergovernmental entities for the purpose of ensuring compliance with previously imposed obligations; or

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<sup>1</sup> 2 U.S.C. § 1501(2).

<sup>2</sup> Title II – Regulatory Accountability and Reform – applies similar constraints to regulations promulgated by federal agencies. This briefing paper focuses primarily, although not exclusively, on Title I of UMRA.

- place caps upon, or otherwise decrease, the federal government's responsibility to provide funding under existing federal programs that provide to intergovernmental entities annual funding of \$500 million or more.

As of this writing, only nine federal entitlement programs provide \$500 million or more annually to state, local, and tribal governments<sup>3</sup>:

1. Medicaid;
2. Temporary Assistance for Needy Families;
3. Child Nutrition;
4. Food Stamps;
5. Social Services Block Grants;
6. Vocational Rehabilitation State Grants;
7. Foster Care, Adoption Assistance, and Independent Living;
8. Family Support Payments for Job Opportunities and Basic Skills; and
9. Child Support Enforcement.

## Enforcement Mechanisms

UMRA's procedural protections create a process that encourages the consideration of all costs associated with proposed legislation. UMRA requires CBO to prepare mandate statements, which identify and describe federal mandates included within proposed legislation.<sup>4</sup> CBO mandate statements also quantify, when feasible, the estimated costs to be borne by intergovernmental entities and the private sector in order to comply with such legislation.<sup>5</sup> Any bill or joint resolution – other than an appropriations bill – reported by a congressional committee is out of order unless the authorizing committee has published the CBO mandate statement in its reports or in Congressional Record before consideration on the floor. Enforcement of these rules requires a member to raise a point of order, which can be overridden by a simple majority.

In addition to UMRA's procedural provisions, its substantive requirements – most notably, the statutory cost thresholds – discourage (but do not prevent) the imposition of unfunded federal mandates upon state, local, and tribal governments and the private sector.

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<sup>3</sup> Congressional Budget Office, Identifying Intergovernmental Mandates 4 (2005).

<sup>4</sup> Title II of UMRA requires the Office of Management and Budget to assist the CBO in preparing mandate statements and estimating direct costs associated with regulations promulgated by federal agencies. 2 U.S.C. § 1536. OMB's Office of Information and Regulatory Affairs monitors agency compliance with the provisions of 2 U.S.C. § 1532.

<sup>5</sup> As required by the Congressional Budget and Impoundment Act of 1974, the CBO uses revenue estimates prepared by the Joint Committee on Taxation to assist with the production of mandate statements for legislation affecting the tax code. Congressional Budget Office, A Review of CBO's Activities in 2004 Under the Unfunded Mandates Reform Act 15 (2005).

Proposed legislation that contains federal intergovernmental mandates that equal or exceed \$50 million (in 1996 dollars<sup>6</sup>) in any of the first five fiscal years following the effective date of implementation is subject to a point of order in the Senate or the House of Representatives.<sup>7</sup>

Proposed legislation containing private-sector mandates that equal or exceed \$100 million (in 1996 dollars<sup>8</sup>) in any of the first five fiscal years following the effective date of implementation, although in violation of the statutory threshold, is *not* subject to a point of order.<sup>9</sup>

The statutory cost thresholds are not breached if the proposed legislation includes an authorization for appropriations (including specific dollar amounts that will be used to provide federal funding for up to 10 years) sufficient to cover estimated direct costs. Alternatively, the bill or resolution will be in order if it provides new budget or entitlement authority in the House, or direct spending authority in the Senate, in an amount that equals or exceeds the direct costs. Rules relating to cost thresholds for intergovernmental mandates are not self-enforcing, and thus “there is no fail-safe or automatic mechanism, such as the sequestration process under the Gramm-Rudman-Hollings Act . . . , for ensuring that the requirements of [UMRA] are enforced should legislation containing unfunded mandates be enacted into law.”<sup>10</sup> If appropriated funds are insufficient to cover the direct costs of a federal mandate, the authorizing committee can report back to Congress, which can continue to enforce the legislation, amend the legislation and make it less costly, or allow the legislation to expire.

### Cost Estimation Methodology

Direct costs, as defined by UMRA, are the aggregate estimated amounts that all state, local, and tribal governments, or the private sector, would be required to spend in order to comply with the proposed mandate. Intergovernmental mandates also include as direct costs the aggregate estimated amount that intergovernmental entities would be prohibited from raising in

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<sup>6</sup> The annual cost threshold applicable to federal intergovernmental mandates is adjusted annually for inflation and totals \$62 million for calendar year 2005.

<sup>7</sup> 2 U.S.C. § 658c(a)(1).

<sup>8</sup> The annual cost threshold applicable to federal private-sector mandates is adjusted annually for inflation and totals \$123 million for calendar year 2005.

<sup>9</sup> 2 U.S.C. § 658c(b)(1). Pursuant to UMRA Title II, regulations promulgated by federal agencies are subject to the statutory cost threshold of \$100 million (in 1996 dollars) for intergovernmental mandates and \$100 million (in 1996 dollars) for private-sector mandates. 2 U.S.C. § 1532(a). These amounts are adjusted annually with inflation and total \$123 million for calendar year 2005.

<sup>10</sup> H.R. Rep. No. 104-001, pt. 1, at 8 (1995).

revenues.<sup>11</sup> UMRA cost thresholds apply to net incremental costs; expenditures necessary to support existing activities and programs that predate adoption of the proposed legislation are not included in costs subject to the statutory limit. In addition, any direct savings expected to result from compliance with the new legislation reduces the estimated cost of the mandate. The cost estimation methodology is done on a per-mandate basis only; UMRA does not compel Congress to consider the aggregate impact (perhaps on an annual or biennial basis) of unfunded mandates on state, local, or tribal governments, or the private sector.

With respect to federal entitlement programs providing annual funding of \$500 million or more, direct costs include the amount of federal financial assistance eliminated or reduced under the proposed legislation. CBO must include in its mandate statement a description of whether and how state, local, and tribal governments can offset the proposed reductions, either under existing law or after enactment of the proposed legislation. UMRA requires CBO to compute direct savings on the assumption that state, local, and tribal governments will take all reasonable steps necessary to mitigate the costs resulting from the federal mandate.

In 1997, for example, upon reviewing the President's proposal for a cap on federal Medicaid spending per beneficiary, CBO determined that it did not contain a mandate as defined in UMRA. Although the main effect of that proposal was to cap the federal government's financial responsibility under Medicaid, CBO determined that the limit did not constitute a mandate because states had the flexibility to offset the loss of federal funds by making programmatic changes. For example, they could eliminate or reduce some optional services, such as prescription drugs or dental services, or choose not to serve some optional beneficiaries, such as the medically needy or children or pregnant women with family income above certain levels.<sup>12</sup>

In 1999, UMRA was amended by the State Flexibility Clarification Act, which directs authorizing committees and CBO to describe the ways in which state, local, and tribal governments can offset reductions in the amount of funding received in connection with large federal entitlement programs.

Although the statutory cost thresholds apply only to direct costs associated with federal mandates, indirect costs can be substantial. Such costs include broad effects on the economy, or

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<sup>11</sup> By contrast, UMRA Title II refers only to expenditures – as opposed to direct costs, as in Title I – when stating the cost threshold applicable to regulations promulgated by federal agencies. 2 U.S.C. § 1532(a).

<sup>12</sup> Congressional Budget Office, supra note 3, at 4.

wage and price changes that might result from a pass-through approach, whereby expenses borne by intergovernmental entities and the private sector are passed downstream, to consumers and employees. To this end, UMRA directs CBO to include in its mandate statements “a qualitative, and if practicable, a quantitative assessment of costs and benefits anticipated from the Federal mandates (including the effects on health and safety and the protection of the natural environment).”<sup>13</sup> However, only direct costs are considered in respect of the statutory cost thresholds.

## Exceptions

UMRA does not apply to any provision in a bill, joint resolution, amendment, motion, or conference report before Congress that<sup>14</sup> –

- (1) enforces constitutional rights of individuals;
- (2) establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability;
- (3) requires compliance with accounting and auditing procedures with respect to grants or other money or property provided by the Federal Government;
- (4) provides for emergency assistance or relief at the request of any State, local, or tribal government or any official of a State, local, or tribal government;
- (5) is necessary for the national security or the ratification or implementation of international treaty obligations;
- (6) the President designates as emergency legislation and that the Congress so designates in statute<sup>15</sup>; or
- (7) relates to the old-age, survivors, and disability insurance program under Title II of the Social Security Act (including taxes imposed by §3101(a) and §3111(a) of the Internal Revenue Code of 1986 (relating to old-age, survivors, and disability insurance)).

For example, certain provisions of the Martin Luther King, Jr. Equal Protection of Voting Rights Act of 2001 were determined by CBO to fall within UMRA’s exception for legislative provisions that enforce the constitutional rights of individuals: “CBO has determined that the provisions of [Title III] would fall within that exclusion because they would enforce an individual’s right to vote and to have that vote counted.”<sup>16</sup> Separately, about one year later, CBO completed an impact statement on the effects of the Act on state and local governments. The

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<sup>13</sup> 2 U.S.C. § 658b(c)(2).

<sup>14</sup> 2 U.S.C. § 1503.

<sup>15</sup> Elizabeth Garrett, Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995, 45 Kan. L. Rev. 1113, 1142 (1997) (stating that an emergency exists whenever two branches of government so think).

<sup>16</sup> Congressional Budget Office, Cost Estimate: S. 565 – Equal Protection of Voting Rights Act of 2001 (2001).

report stated that voting technology costs – including systems hardware, software, and development costs – could be “significant” depending on grant appropriations and the magnitude of additional costs, such as training, storage, and technical support.<sup>17</sup>

Neither legislative provisions imposing enforceable duties as a condition of federal assistance nor obligations arising from participation in a voluntary federal program are considered federal mandates. In addition, UMRA’s cost thresholds do not apply to mandates contained within appropriations bills. Thus, CBO did not review provisions within the Energy and Water Development Appropriations Act of 2002 that limited the ability of states to issue permits for oil and gas exploration in the Great Lakes.<sup>18</sup>

After completion of its initial mandate statement, CBO is not required by UMRA to review changes or additions to legislative provisions. While in practice CBO conducts as many reviews as are “practicable” under the circumstances, provisions sometimes manage to escape review prior to enactment.<sup>19</sup> For example, a provision requiring certain insurers to offer terrorism insurance was added to the Terrorism Risk Insurance Act of 2002 after CBO had delivered its mandate statement. Thus, the provision was not identified as a federal private-sector mandate before enactment.

## **History**

From 1982 through 1995, under the State and Local Government Cost Estimates Act of 1981, CBO provided to Congress over 7,000 estimates of intergovernmental compliance costs associated with federal mandates.<sup>20</sup> Rising concern about the erosion of federalism, and the perceived irresponsibility of forcing subnational entities to bear the costs – and political repercussions – associated with the pursuit of national priorities, culminated in “National Unfunded Mandates Day in October 1993, and Unfunded Mandates Week in 1994, and ‘Stop the Mandate Madness’ rallies on the Capitol Steps.”<sup>21</sup> These and other sentiments permeated the midterm elections of 1994, and UMRA was one of the first pieces of legislation enacted by the

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<sup>17</sup> Id.

<sup>18</sup> General Accounting Office, Unfunded Mandates: Analysis of Reform Act Coverage 12 (2004).

<sup>19</sup> 2 U.S.C. § 658b(c)(2).

<sup>20</sup> Theresa Gullo, History and Evaluation of the Unfunded Mandates Reform Act, National Tax Journal Vol. LVII, No. 3, 559, 561 n.3 (2004).

<sup>21</sup> H.R. Rep. No. 104-001, pt. 1, at 4.

104th Congress. As stated in its preamble, UMRA seeks “to end the imposition ... of Federal mandates on States and local governments without adequate Federal funding.”<sup>22</sup>

UMRA repealed the State and Local Government Cost Estimates Act, and the two statutes differ in at least four important ways. First, UMRA aims to identify private-sector mandates in addition to intergovernmental mandates. Second, UMRA’s statutory cost thresholds for intergovernmental mandates are lower – \$50 million as opposed to \$200 million. Third, UMRA requires more in-depth analysis of the impacts associated with federal legislation – in addition to an estimate of direct costs required for compliance with federal mandates, CBO statements must contain, when feasible, an estimate of anticipated indirect costs and secondary effects. Fourth, while the State and Local Government Cost Estimates Act suffered from a lack of enforcement, UMRA enables points of order to be raised as enforcement mechanisms.

State experiences with unfunded mandates offer useful comparisons and highlight best practices. In 1988, in the midst of Reagan’s renewed focus on federalism, GAO delivered to Congress a report describing the ways in which states had addressed the imposition of unfunded mandates upon local governments.<sup>23</sup> At the time, 14 states had adopted reimbursement requirements and other measures more stringent than cost estimation to curb the imposition of unfunded mandates. Legislative awareness was cited by GAO as the trigger for reducing mandates, and the method of implementation was found to be an important determinant of legislative attention and concern.<sup>24</sup> Reimbursement requirements enacted as constitutional amendments or through voter referenda were most effective in curbing the imposition of unfunded mandates. By contrast, statutory mechanisms were often circumvented and therefore less effective.<sup>25</sup> Cost estimates alone, notwithstanding their informational benefit, were thought to have little impact on the imposition of unfunded mandates.<sup>26</sup>

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<sup>22</sup> 2 U.S.C. § 1501(2).

<sup>23</sup> General Accounting Office, Legislative Mandates: State Experiences Offer Insights for Federal Action (1988).

<sup>24</sup> Id. at 30.

<sup>25</sup> Other interesting features of state systems included provisions for optional compliance with legislation containing unfunded mandates. In some cases, local governments could file court petitions and thereby defer compliance with unfunded state legislation until the matter was resolved by the judiciary. GAO found that states with stronger financial positions were more willing to adopt reimbursement requirements. See id.

<sup>26</sup> Nevertheless, GAO recommendations with respect to the cost estimation process included: (1) the cost estimation report should be completed early in the legislative process; (2) cost estimates should be prepared for legislation within appropriations bills; and (3) include annual or biennial aggregates of unfunded mandates. See id.



## Actual Practice

### Statistics

As displayed in **Table 1**, since UMRA's enactment, CBO has reviewed over 5,200 bills, resolutions, and legislative proposals, approximately 12% of which included intergovernmental mandates and approximately 14% of which included private-sector mandates.<sup>27</sup> Approximately 1% of bills reviewed contained intergovernmental mandates whose costs could not be determined, while approximately 2% of bills contained private-sector mandates whose costs could not be determined. Although UMRA's procedural rules discourage the passage of unfunded federal mandates, the rules do not make it impossible. Five pieces of legislation with intergovernmental mandates exceeding the statutory cost threshold have been enacted<sup>28</sup>, and 26 pieces of legislation with private-sector mandates exceeding the statutory cost threshold have been enacted.

**Table 1**

#### Number of CBO's Mandate Statements for Proposed Legislation, 1996 – 2004

	1996 <sup>a</sup>	1997	1998	1999	2000	2001	2002	2003	2004	1996 – 2004
<b>Intergovernmental Mandates</b>										
Statements transmitted	718	521	541	573	706	389	649	615	557	5,269
Statements that identified mandates	69	64	64	81	77	50	60	86	66	617
Mandates whose costs would exceed the threshold	11	8	6	4	3	4	6	7	9	58
Mandates whose costs could not be determined	6	7	7	0	1	3	5	5	2	36
Mandates enacted with costs exceeding the threshold										5
<b>Private-Sector Mandates</b>										
Statements transmitted	673	498	525	556	697	389	645	613	555	5,151
Statements that identified mandates	91	65	75	105	86	66	73	100	71	732
Mandates whose costs would exceed the threshold	38	18	18	20	6	18	19	24	14	175
Mandates whose costs could not be determined	2	5	9	13	7	8	14	18	10	175
Mandates enacted with costs exceeding the threshold										26

Source: Congressional Budget Office

<sup>a</sup> In 1996, the thresholds, which are adjusted annually for inflation, were \$50 million for intergovernmental mandates and \$100 million for private-sector mandates. They rose to \$60 million and \$120 million, respectively, in 2004.

<sup>27</sup> See Congressional Budget Office, *supra* note 3.

<sup>28</sup> The five bills were: (1) an increase in the minimum wage (1996), (2) a reduction in federal funding to administer the Food Stamp program (1998), (3) a preemption of state taxes on premiums for certain prescription drug plans (2003), (4) a temporary preemption of states' authority to tax certain Internet services and transactions (2004), and (5) a requirement that state and local governments meet federal standards for issuing driver's licenses and identification cards (2004). *Id.* at 2-3.

Title III of UMRA – Review of Federal Mandates – instructs the Advisory Commission on Intergovernmental Relations (“ACIR”) to investigate and review the role of federal mandates and their impact on the objectives and responsibilities of state, local, and tribal governments, and the private sector. The preliminary report completed by ACIR<sup>29</sup> noted the existence of over 200 intergovernmental mandates, of which 14 were selected for detailed analysis, including the Fair Labor Standards Act, the Americans with Disabilities Act, and the Clean Air Act. ACIR identified 27 statutes that were enacted during the 1980s and contained intergovernmental mandates.<sup>30</sup> During the 1970s, 22 intergovernmental mandates were imposed.<sup>31</sup> Although the reports are unclear, the criteria and thresholds used by ACIR might have differed from the methodology outlined in UMRA. The intergovernmental mandates identified by ACIR included new laws and “major amendments” (UMRA does not specifically address how to deal with amendments to existing legislation) that “imposed significant additional regulatory burdens on state or local governments.”<sup>32</sup> The mandates found by ACIR were identified by state and local governments.

### Cost Estimation Process

To facilitate the preparation of accurate mandate statements, CBO representatives meet regularly with intergovernmental bodies and other parties as necessary. Throughout the legislative process, CBO analysts collaborate with congressional committees. In addition, third parties – including OMB, in the case of regulations issued by federal agencies, and the Joint Committee for Taxation, in the case of legislation affecting the tax code – often provide CBO with substantive information to assist in the preparation of detailed mandate statements. CBO also has available an extensive library of complex and comprehensive working and technical papers, which discuss strategies for modeling long-run economic growth, projecting longitudinal earnings patterns for long-run policy analysis, and simulating U.S. tax reform.<sup>33</sup>

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<sup>29</sup> U.S. Advisory Commission on Intergovernmental Relations, The Role of Federal Mandates in Intergovernmental Relations (1996). ACIR was unfunded and disbanded in 1996.

<sup>30</sup> General Accounting Office, Federal Mandates: Unfunded Requirements Concern State and Local Officials 7 (1994).

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> As posted by CBO at <http://www.cbo.gov/Tech.cfm>: “Working papers and technical papers are preliminary and are circulated to stimulate discussion and critical comment. These papers are not subject to CBO's formal review and editing processes. The analysis and conclusions expressed are those of the authors and should not be interpreted as

CBO cannot always estimate the net incremental direct costs associated with proposed legislation. For example, CBO could not measure the impact upon state, local, and tribal governments of the Indian Gaming Regulatory Act Amendments of 2004, in part because of the uncertainty associated with the new legislation: “The bill would impose new requirements for compacts between tribes and states, which must be approved by the Department of the Interior (DOI) before tribes can open casinos. CBO has no basis for estimating the impact of this mandate on state, local, and tribal governments.”<sup>34</sup> According to CBO, other factors that have precluded the determination of mandate costs include uncertainty about the mandate’s scope and lack of guidance about how to measure costs associated with the extension of existing mandates.

## Enforcement

Since UMRA was enacted, a point of order has been raised 12 times in the House<sup>35</sup>, and never in the Senate. One such invocation, in opposition to minimum wage legislation included within the Contract of America Advancement Act of 1996, was successful, although technically impermissible.<sup>36</sup> As of January 22, 2004, the enforcement mechanisms that become available in response to insufficient appropriations had never been invoked.<sup>37</sup> Reports of the House Committee on Government Oversight and Reform raise the question whether UMRA’s principle aim was substantive (i.e., to prevent unfunded mandates) or political: “During the course of Committee consideration, the Chair and many Members of the majority stated that the intent of the authors of the bill was not to ban unfunded mandates, but to force a special vote on the issue, so that Members would have to go on record as supporting a provision despite the cost estimates available that indicated that the mandate was unfunded.”<sup>38</sup> Although UMRA’s enforcement machinery has not often been invoked, few unfunded mandates have been enacted since 1995,

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those of the Congressional Budget Office. Any reference to these papers in other publications should be cleared with the authors. Later versions of the papers may have been published in a professional journal or elsewhere.”

<sup>34</sup> Congressional Budget Office, Cost Estimate: S. 1529 – Indian Gaming Regulatory Act Amendments of 2004 (2004).

<sup>35</sup> According to GAO, 13 points of order have been raised in the House. General Accounting Office, supra note 18, at 7.

<sup>36</sup> The minimum wage provision at issue did not constitute a federal mandate as defined by UMRA because the provision strongly encouraged, but did not require, states and localities to pay their employees a higher minimum wage. Garrett, supra note 15, at 1145.

<sup>37</sup> Government Accountability Office, Federal Mandates: Identification Process Is Complex and Federal Agency Roles Vary 8 (2005).

<sup>38</sup> H.R. Rep. No. 104-001, pt. 2, at 59 (1995).

perhaps because members of Congress operate in the shadow of UMRA, under the threat of a point of order.

Title IV of UMRA permits limited judicial review of compliance by federal agencies with the provisions for preparing mandate statements associated with proposed regulations: “If an agency fails to prepare the written statement (including the preparation of the estimates, analyses, statements, or descriptions) ... a court may compel the agency to prepare such written statement.”<sup>39</sup> No other estimate or compliance or noncompliance with UMRA’s provisions is subject to judicial review. As a result, no substantive judicial opinions concerned UMRA have been issued.

## **Critiques<sup>40</sup>**

Critiques of unfunded mandates generally fall into two categories: empirical critiques suggesting UMRA does not go far enough, and theoretical critiques that question the value of limiting unfunded mandates – suggesting any mandate reform should be cabined to ensure it does not go too far.

Before evaluating the critiques of mandate reform, it is necessary to understand why unfunded mandates have been attacked. At the federal level, pressure for unfunded mandate reform peaked in the mid-1990’s, when UMRA was passed as part of the ‘Contract with America’.<sup>41</sup> State and local government interest groups and proponents of federalism argued that unfunded mandates undermine political accountability. By separating regulations from the funding source, these groups argue, unfunded mandates reduce accountability by confusing citizens about which level of government is responsible<sup>42</sup>. Proponents of UMRA also contended that unfunded mandates distort policy making because federal legislators who lack information do not consider the costs of a regulation to other levels of government, resulting in laws that are not cost beneficial in the aggregate.

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<sup>39</sup> 2 U.S.C. § 1571(a)(2)(B).

<sup>40</sup> The critique and reform sections of this paper focus on legislative mandates. As a result, the effectiveness and possible reforms of Title II UMRA (focusing on unfunded agency regulations) are not included.

<sup>41</sup> See Steinzor, Rena I. Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform? 81 Minn. L. Rev. 97, 132 (1996).

<sup>42</sup> Garrett, supra note 15, at 1134.

The result of these forces, UMRA has two primary objectives for reforms<sup>43</sup> – one objective is to reduce the instance of unjustifiable unfunded mandates, while another is to ensure that the legislature considers the full costs of proposed legislation.<sup>44</sup>

### Theoretical critiques suggesting mandate reform must remain flexible

While the accountability justification for unfunded mandate regulation has dominated the media and public accounts of reform, some suggest that focusing solely on accountability distorts the debate. These critiques do not necessarily oppose UMRA's provisions, but counsel against reform that goes much farther than UMRA in prohibiting unfunded mandates. For example, in arguing that UMRA contains important and critical devices to ensure flexibility, Professor Elizabeth Garrett contends that accountability does not justify complete elimination of unfunded mandates. She argues that because federalism is not an absolute value for most, concerns about accountability must yield to other values in situations such as civil rights or environmental issues where externalities prevent adequate action by subnational governments<sup>45</sup>. Second, not all mandates raise accountability concerns, nor are the concerns always raised in the same manner. Garrett argues that not all unfunded mandates will burden states or require increased taxes. The burden of some unfunded mandates can be shifted to the private sector through privatization<sup>46</sup>. In addition, Garrett argues that not all mandates damage citizen participation in government, as some are simply directing ministerial duties of subnational officials<sup>47</sup> (although this argument remains vulnerable to the criticism that unfunded mandates, by imposing costs on state and local governments, inevitably shift the priorities of the representative government).

Not only is there disagreement over whether the accountability critique universally applies, but some critics argue that unfunded mandates can be a positive force in policymaking. Unfunded mandates can represent a compromise between the pull for local control and the push for national regulation where there are externalities or danger of a 'race to the bottom'<sup>48</sup>. Some argue that advantages to centralized action (such as the ability to internalize externalities, realize

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<sup>43</sup> Garrett posits a third objective – to establish political safeguards by allowing state and local interest groups to participate in lobbying efforts earlier in the process of consideration of a bill. *See id.* at 1153. For purposes of this analysis, this objective is considered along with other aspects of framing the debate.

<sup>44</sup> Both possible objectives are captured in the language of the Act, although the thrust seems to be on the provision of information. *See* 2 U.S.C. § 1501 (2005).

<sup>45</sup> *See* Garrett, *supra* note 15, at 1173.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Dana, David. *The Case for Unfunded Environmental Mandates*, 69 S. Cal. L. Rev. 1, 26 (1995)

economies of scale, and reduce interjurisdictional competition) justify federal regulation even where federal funding is not provided<sup>49</sup>. In addition, fully funding mandates can reduce cost-effectiveness, as subnationals then have no incentive to minimize costs in implementation<sup>50</sup>.

In addition, it is likely that requiring full funding of mandates would make regulation more difficult to pass. Because pressure to reduce the budget deficit increases incentives for unfunded mandates<sup>51</sup>, it is probable that requirements to fully fund mandates would make those laws more difficult to pass. In addition, Professor David Dana argues that the threat of unfunded mandates can lead subnational governments to act earlier in the process to stave off national action; he argues that prohibiting unfunded mandates would often result in state and local inaction on important issues.<sup>52</sup> These arguments address what seems to underlie much of the debate on unfunded mandates – a sense by opponents of unfunded mandates that government regulation as a whole should be minimized juxtaposed by arguments of proponents of unfunded mandates that barriers to regulation should not be erected.<sup>53</sup>

### Theoretical critiques challenging the idea that UMRA enhances transparency

While it seems an unassailable idea that legislation should be considered in light of its full costs and benefits (wherever they are borne), difficulties in estimating those costs and benefits lead some to suggest that cost estimates can distort the debate, rather than informing it. For example, many state and local government interest groups argue that CBO underestimates local government costs (for example, CBO does not consider indirect costs in determining whether legislation would exceed mandate thresholds)<sup>54</sup>. As a result, they argue that UMRA allows Congress to argue that legislation has considered the effects of legislation on subnationals without a true understanding of those effects.

Given the narrow scope of the Act (see the empirical section of this paper for further discussion of the numerous limitations of the Act), some contend that UMRA allows Congress to

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<sup>49</sup> Miceli, Thomas J. and Segerson, Kathleen, Threshold Rules for Funding Environmental Mandates: Accountability and the Unfunded Mandate Reform Act 75 (3) *Land Economics* 375, 377 - 78 (August 1999).

<sup>50</sup> Nivola, Pietro, Tense Commandments: Federal Prescriptions and City Problems, Brookings Institution Press (2002) at 148.

<sup>51</sup> See Garrett, supra note 15, at 1138.

<sup>52</sup> See Dana, supra note 48, at 39.

<sup>53</sup> Id at 3.

<sup>54</sup> See General Accounting Office, Unfunded Mandates: Analysis of Reform Act Coverage, May 2004.

frame the debate as though it considers relevant costs to lower levels of government, while limiting consideration of those costs to a narrow band of legislation<sup>55</sup>.

Because UMRA sets a dollar threshold for individual bills, it does not allow for consideration of the costs imposed in the aggregate. To the extent that state and local governments are concerned about the net effect of all federal mandates on their budgets, UMRA's narrow focus and analysis by individual bill do not address the net effect of mandates on lower levels of government.

In contrast to those concerned about underestimating costs, some argue that CBO overestimates subnational costs through its inability to properly segregate only the incremental costs of legislation, thereby distorting the debate by making legislation appear more costly to subnational governments<sup>56</sup>. In addition, it is possible that information required under UMRA can distort the debate in instances where benefits are hard to quantify, such as some environmental policies. By adding subnational costs to the analysis, UMRA makes it more difficult to pass regulation with less quantifiable benefits, even though it may be perceived important by interest groups.

### Empirical critiques

Recent Congressional testimony on the ten-year anniversary of UMRA captures the competing assessments of the Act's effectiveness which dominate the debate. Senator Kempthorne declared the act a success, arguing that it 'fundamentally changed the relationship between Washington and other levels of government' and citing a CBO report that only 5 new mandates had passed in the past decade<sup>57</sup>. On the other hand, the National Conference of State Legislatures identified \$29 billion in federal cost shifting; and the CBO report cited by Senator Kempthorne also identified exemptions in the Act that excluded from its coverage some

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<sup>55</sup> Gullo, Theresa and Kelly, Janet M, Federal Unfunded Mandate Reform: A First-Year Retrospective 58 (5) Public Administration Review 379, 387 (Sep/Oct 1998).

<sup>56</sup> See Adler, Robert W, Unfunded Mandates and Fiscal Federalism: A Critique, 50 Vand. L. Rev. 1137, 1173 (1997).

<sup>57</sup> Broder, David, Those Unfunded Mandates, Washington Post, March 17, 2005, p. A25.

requirements considered burdensome by state and local governments (such as No Child Left Behind Act, changes to Medicaid, and a major election reform law)<sup>58</sup>.

### *'Toothless tiger'*

Disagreement over the success of the Act in preventing mandates stems in large part from the narrow scope of the Act. If judged solely based on passage of mandates as defined by the Act, UMRA has been successful in reducing the number of mandates. However, many argue that this fact is misleading given the narrow scope of the act.

The number of exclusions and limitations on the definition of a mandate has led some observers to dub UMRA 'toothless'<sup>59</sup>. In a recent assessment of the coverage of the Act, GAO identified several limitations on the scope of the act. First, some provisions can evade CBO review. For example, provisions not contained in authorizing bills or not reported by an authorizing committee are not subject to CBO review before going to the floor. As a result, appropriations bills are not automatically subject to CBO review, nor are bills that are discharged by the committee without a vote (seven bills that became law which contained federal mandates were not reviewed because they fell into this category)<sup>60</sup>. In addition, the Act does not require automatic review of provisions added after CBO's initial review<sup>61</sup>.

Even provisions that are reviewed by CBO are subject to definitional requirements and exclusions<sup>62</sup>. Most legislation did not contain mandates as defined by the Act, and few statutes were enacted that met the definition of mandates and exceeded the threshold<sup>63</sup>. However, Congress passed costly mandates that fell outside the definition (for example, the No Child Left Behind Act relates to a condition on aid and thus falls outside the scope of the Act's coverage of intergovernmental mandates; Sarbanes-Oxley legislation fell outside the scope of private sector mandates because total costs were uncertain).<sup>64</sup>

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<sup>58</sup> *Id.*, quoting Holtz-Eakin, Douglas, A Review of CBO's Activities under the Unfunded Mandates Reform Act. Testimony before the Committee on Government Reform, March 8, 2005 p. 8, available at <http://reform.house.gov/GovReform/Hearings/EventSingle.aspx?EventID=1613>.

<sup>59</sup> Cole, Daniel H. and Comer, Carol S, Rhetoric Reality and the Law of Unfunded Mandates, 8 Stan. L. & Pol'y Review 103, 113 (1997), quoting Nelson Lund, The Mandate Hoax of 1995: Unfunded Mandate Reform Act of 1995, Nat'l Rev., Nov. 27, 1995, at 52

<sup>60</sup> General Accounting Office, supra note 54, at 12.

<sup>61</sup> *Id.*

<sup>62</sup> See supra at 2, 5, and 6.

<sup>63</sup> Gullo, Theresa, History and Evaluation of the Unfunded Mandates Reform Act, 57 (3) National Tax Journal 559 (September 2004).

<sup>64</sup> *Id.*



## *Framing the Debate – Empirical assessments*

It seems incontestable that UMRA has increased the information available about the costs of mandates to lower levels of government. As a result, regardless of UMRA's effect on actual mandates, some argue that the Act has influenced the bills that are introduced. For example, Paul Posner (Director of Federal Budget Issues at GAO) argues that the point of order may deter sponsors from introducing mandates for committee or floor presentation<sup>65</sup>. Theresa Gullo of CBO points to several pieces of legislation that were amended to avoid the effects of UMRA, including the Internet Tax Freedom Act<sup>66</sup>. GAO supports this contention, reporting that of 59 mandates proposed between 1996 and 2000 with costs above applicable thresholds, nine were amended before enactment to reduce their costs below thresholds<sup>67</sup>.

In recent testimony before Congress, CBO Director Doug Holtz-Eakin testified that mandate information 'has played a role in Congressional debate about several important issues over the past nine years', and that in some of those cases (such as requirements for Social Security numbers of driver's licenses and moratorium on internet taxes), the information provided under UMRA played a role in decisions to reduce costs.<sup>68</sup>

Finally, UMRA has allowed state and local interest groups to access information for lobbying earlier in the process. As Professor Garrett notes, if state interest groups lack adequate power, early disclosure can allow these group to more effectively lobby for their interests<sup>69</sup>. In testimony before a House Subcommittee, National Governors Association Director Raymond C. Scheppach indicated that UMRA has influenced the ability of state and local interest groups to influence the process. He stated that the "...very threat of a CBO report has engendered efforts to reach out to state and local leaders before the fact – instead of after. It has changed the nature of our intergovernmental discussion in a very positive way"<sup>70</sup>.

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<sup>65</sup> Posner, Paul L, The Political of Unfunded Mandates: Whither Federalism, George Washington University Press (1998) at 207.

<sup>66</sup> See Gullo, Theresa, History and Evaluation of the Unfunded Mandates Reform Act, 57 (3) National Tax Journal 559, 567 (September 2004).

<sup>67</sup> General Accounting Office, supra note 54, at 19.

<sup>68</sup> See Holtz-Eakin, Douglas, A Review of CBO's Activities under the Unfunded Mandates Reform Act, Testimony before the Committee on Government Reform, March 8, 2005 p. 8, available at <http://reform.house.gov/GovReform/Hearings/EventSingle.aspx?EventID=1613>.

<sup>69</sup> See Garrett, supra note 15, at 1148.

<sup>70</sup> See Scheppach, Raymond, Testimony before the House Government Reform Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs and the House Rules Subcommittee on Technology on Unfunded

## ***Effect of State Unfunded Mandate Acts***

While UMRA does not prohibit unfunded mandates, some states have enacted such legislation. Experience in these states suggests the difficulty of ensuring that legislatures adhere to full prohibitions of unfunded mandates. Sixteen states passed constitutional amendments or statutes attempting to ensure that state mandates on municipalities are adequately funded<sup>71</sup>. According to the Brookings Institution, these attempts have largely failed<sup>72</sup>. For example, 15 years after Michigan approved a constitutional amendment requiring local reimbursement for state mandates, the legislature had not made any reimbursements<sup>73</sup>. A 1994 study indicated that in Illinois, the legislature had exempted itself from its mandate funding requirement on 25 occasions, resulting in estimated costs to local governments of \$107 million<sup>74</sup>. While some states have made progress, this progress has been attributed to the relationship between the legislature and local governments, rather than a specific provision. Kelly concludes that legislatures who wish to do so can circumvent reimbursement provisions<sup>75</sup>. In addition, even where states such as California have made serious attempts to honor legislative commitments to avoiding unfunded mandates, local officials continue to allege that they are ‘shortchanged’<sup>76</sup>.

## ***Reforms***

### **Broadening the definition of mandates subject to the act**

At the federal level, most reform proposals focus on closing existing loopholes in UMRA coverage and broadening the definition of mandates, subjecting more legislation to CBO reports and a potential point of order. For example, some reformists have suggested that the threshold for private sector mandates should be reduced from \$120 million to closer number to the \$60 million threshold for intergovernmental mandates. These reformists contend that mandates pose

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Mandates: A Five-Year Review and Recommendations for Change (May 24, 2001) available at [www.ngo.org/nga/legislativeupdate/1,1169,c\\_testimony%5ed\\_2090,00.html](http://www.ngo.org/nga/legislativeupdate/1,1169,c_testimony%5ed_2090,00.html).

<sup>71</sup> Brookings Institution, Fiscal Millstones on the Cities: Revisiting the Problem of Federal Mandates: Policy Brief #122 4 (August 2003), available at <http://www.brook.edu/comm/policybriefs/pb122.htm>.

<sup>72</sup> Id.

<sup>73</sup> Ehrenhalt, Alan, Mandating From Above: The Irresistible Impulse, *Governing Magazine*, September 1995, p. 7

<sup>74</sup> Kelly, Janet, Mandate Reimbursement Measures in the States, 24 (4) *American Review of Public Administration* 354, 364. (1994).

<sup>75</sup> Id. at 367.

<sup>76</sup> See Nivola, Pietro, Tense Commandments: Federal Prescriptions and City Problems, Brookings Institution Press (2002) at 147.

concerns regardless of regulated party, and the same information should be available regardless of regulated party. Of the 5,151 statements transmitted by CBO from 1996 to 2004 for private sector mandates, 732 identified mandates, of which 175 would have exceeded the threshold, and of which 86 included costs that could not be determined<sup>77</sup>.

A more drastic step suggested by some reformists is elimination of minimum thresholds so that any mandate can trigger a point of order<sup>78</sup>. This reform is premised in part on an attempt to mitigate the cumulative effect of mandates that impose burdens on subnational governments, with the rationale that it is due to these cumulative effects that mandates pose a significant problem for lower levels of government. This reform would significantly increase the number of bills subject to points of order (617 intergovernmental from 1996 – 2004 (vs. 58 exceeding the threshold) and 732 private sector (vs. 175 exceeding the threshold)<sup>79</sup>.

In addition, some reformists contend that existing exclusions should be eliminated. For example, some argue that conditions on grants function as mandates to the same extent as more explicit requirements<sup>80</sup>. These reformists contend that programs such as Individual with Disabilities Education Act, which has large budgetary implications, should be “accorded the same reasonably systematic and transparent examination that UMRA can trigger for ‘enforceable duties’”<sup>81</sup>. The rationale behind eliminating this exclusion is that UMRA information could lead to better informed decisions by lower levels of government about whether to participate in grant programs.

### UMRA enforcement mechanisms

Some reform proposals are aimed at strengthening the enforcement mechanisms of UMRA. UMRA’s provisions are self-enforcing, and rely upon a member to raise a point of order in response to legislation. Unlike PAYGO and other budget process points of order, the UMRA point of order can be overridden by a simple majority. Some argue that reform should require a supermajority vote to override a point of order<sup>82</sup>. For example, the fiscal year 2006 budget

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<sup>77</sup> Congressional Budget Office, *supra* note 5, at 21.

<sup>78</sup> See Holtz-Eakin, *supra* note 68, at 6.

<sup>79</sup> Congressional Budget Office, *supra* note 5, at 21.

<sup>80</sup> Brookings Institution, *supra* note 71, at 6.

<sup>81</sup> *Id.*

<sup>82</sup> See Eastman, John C, *Re-Entering the Arena: Restoring a Judicial Role for Enforcing Limits on Federal Mandates*, 25 Harv. J. L. & Pub. Pol’y 931, 947 (2002). For an argument that the simple majority point of order can influence significantly the process, see Garrett, *supra* note 15, at 1165-66 (arguing that the point of order creates a

resolution passed in March 2005 by the Senate included a provision that would require sixty votes to waive a UMRA point of order. This supermajority would make passing unfunded mandates more difficult. Under the current law, overriding a point of order acts as a public recognition by Congress that it believes a bill merits consideration despite the fact that the bill constitutes an unfunded mandate. Requiring a supermajority would change the calculus, by raising the bar of support required to pass regulation with unfunded mandates.

Another enforcement reform proposal would extend the point of order to apply to bills that contain private sector mandates above the threshold (the Act's current point of order provision applies only to intergovernmental mandates, although information on private sector mandates is included with CBO's report)<sup>83</sup>. This provision was included in the Mandates Information Act, which Congress considered in 1998 and 1999 but failed to pass.<sup>84</sup>

### Require full funding

Some proponents of reform argue that legislation should be enacted to require full funding of intergovernmental mandates<sup>85</sup>. An extreme example of one Congress binding future Congresses, this proposal would require that mandates be fully funded. While this proposal has been lofted by interest groups, it is not generally widespread in the literature, perhaps for the reason that few parties are willing to contend that unfunded mandates are universally bad policy (see theoretical critique above for further discussion of the justification for unfunded mandates).

## **Conclusions**

Like other aspects of the federal legislative process, unfunded mandate regulation demonstrates the limitations of procedural mechanisms of enforcement. Without political consensus to achieve the objectives of those mechanisms, their practical effect will be limited. Given the complexity of federal policy-making, competing objectives of interest groups, and trade-offs between harnessing the deficit and ensuring accountability, unfunded mandates are likely to remain a point of contention.

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significant weapon because it can be used to disaggregate an omnibus bill and force a separate vote on the unfunded mandate).

<sup>83</sup> Gullo, *supra* note 66, at 563-64.

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g. Hurson, John, Testimony on behalf of the National Conference of State Legislatures, regarding the Unfunded Mandate Reform Act before the Government Reform Committee, March 8, 2005, available at <http://reform.house.gov/GovReform/Hearings/EventSingle.aspx?EventID=1613>.

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