Re-Entering the Arena: Restoring a Judicial Role for Enforcing Limits on Federal Mandates

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RE-ENTERING THE ARENA: RESTORING A JUDICIAL ROLE FOR ENFORCING LIMITS ON FEDERAL MANDATES

JOHN C. EASTMAN

I. INTRODUCTION

Originalists sometimes find it difficult to square the Framers’ Constitution with the minute details of statutes dealing with an administrative state that bears little or no relationship to the kind of government the Framers established. We can and should, nevertheless, keep in mind some guiding principles, and consider the effect of the Unfunded Mandates Reform Act of 19951 (“the UMRA” or “the Act”) on the enactment and implementation of modern administrative statutes.

One principle: under our Constitution, the lawmaking power is assigned to Congress exclusively. Although much ignored, this non-delegation doctrine is an important foundational principle that may partly explain the different levels of effectiveness that have been achieved by Title I of the Act, which is applicable to Congress, and Title II, which is applicable to executive agencies.

Further, there is the principle of enumerated powers. Overlooked for the better part of the last century, this principle has undergone a renaissance of sorts since the Supreme Court’s decision in United States v. Lopez,2 which was rendered shortly after Congress enacted the UMRA. Any assessment of the UMRA should, therefore, be done in light of renewed dedication to this core founding principle.

Finally, there is the federal system itself. Although much of the debate over the UMRA has centered on the need to protect

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state and local governments from an overreaching federal government, little attention has been paid to one of the Founders' key purposes for keeping States as separate sovereign entities in the constitutional system. The federal structure envisioned by the Framers, and in particular the maintenance of state governments as separate sovereign entities and not just federal administrative units, was designed to protect private liberty, not simply to protect the States qua States. The federal structure accomplished this, in part, by insuring accountability in government, as Justice Scalia noted in his opinion for the Court in Printz v. United States. 3

The mini-revolution in 1994 that gave Republicans control of Congress for the first time in forty years, and which led to the enactment of the Unfunded Mandate Reform Act of 1995 as part of the Contract with America, implicitly had these principles in mind. This Article considers how successful the UMRA has been in furthering these principles and how shortcomings of the UMRA that have become evident over the past seven years might be corrected to further these principles still further. Part II of the Article elaborates on the general federalism principles that are at issue. Part III briefly summarizes the key provisions of the UMRA and discusses recent testimony in Congress about the effectiveness of those provisions. Part IV addresses in greater detail how the Act has fared in the regulatory agencies and suggests some amendments that will increase its effectiveness. Finally, in Part V, the Article will conduct a similar analysis with respect to the Act's implementation in Congress itself.

II. SOME GENERAL PRINCIPLES ABOUT FEDERALISM

When the Framers of our Constitution met in Philadelphia in 1787, it was widely acknowledged that a stronger national government than existed under the Articles of Confederation was necessary if the new government of the United States was going to survive. The Continental Congress could not honor its commitments under the Treaty of Paris; it could not meet its financial obligations; it could not counteract the crippling trade barriers that were being enacted by the several States against

each other; and it could not even insure that its citizens, especially those living on the western frontier, were secure in their lives and property. But the Framers were equally aware that the deficiencies of the Articles of Confederation existed by design, due to a genuine and almost universal fear of a strong, centralized government. As the Supreme Court noted in *Bartkus v. People of State of Illinois*, “the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power.” Our forebears had not successfully prosecuted the war against the King’s tyranny merely to erect in its place another form of tyranny.

The central problem faced by the Convention delegates, therefore, was to create a government strong enough to meet threats to the safety and happiness of the people and yet not so strong as to itself become a threat to the people’s liberty. The Framers drew on the best political theorists of human history to craft a government that was most conducive to this end. The idea of separation of powers, for example, evident in the very structure of the Constitution, was drawn from Montesquieu out of recognition that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”

But the Framers added their own contribution to the science of politics, as well. In what can only be described as a radical break with past practice, the Founders rejected the idea that the government was sovereign and indivisible. Instead, the

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4. See, e.g., Letter from Tench Coxe to the Virginia Commissioners at Annapolis (Sept. 13, 1786), reprinted in 3 THE FOUNDERS’ CONSTITUTION 473-74 (P. Kurland & R. Lerner eds., 1987) (noting that duties imposed by the States upon each other were “as great in many instances as those imposed on foreign Articles”); THE FEDERALIST No. 22, at 112-13 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (referring to “[t]he interfering and unneighborly regulations in some States,” which were “serious sources of animosity and discord” between the States); New York v. United States, 505 U.S. 144, 158 (1992) (“The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience.”) (quoting THE FEDERALIST No. 42, at 235 (Clinton Rossiter ed., 1999)).


Founders contended that the people themselves were the ultimate sovereign and could delegate all or part of their sovereign powers to a single government or to multiple governments as, in their view, was "most likely to effect their Safety and Happiness." The importance of the division of sovereign powers was highlighted by James Wilson in the Pennsylvania ratifying convention:

I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects.

Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the States as made for the people as well as by them, and not the people as made for the States. The people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another, and by this means preserve them all. This, I say, is the inherent and unalienable right of the people.

It remains one of the most fundamental tenets of our constitutional system of government that the sovereign people delegated to the national government only certain, enumerated powers, leaving the residuum of power to be exercised by the state governments or by the people themselves.

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9. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).


11. See, e.g., THE FEDERALIST NO. 39, at 213 (James Madison) (Clinton Rossiter ed., 1999) (noting that the jurisdiction of the federal government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); THE FEDERALIST NO. 45, at 260 (James Madison) (Clinton Rossiter eds., 1999) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) ("We admit, as all must admit, that the powers of the government are limited and that its limits are not to be transcended."); Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("The Constitution created a Federal Government of limited powers.").
This division of sovereign powers between the two great levels of government was not simply a constitutional add-on by way of the Tenth Amendment. Rather, it is inherent in the doctrine of enumerated powers embodied in the text of the main body of the Constitution itself—in Article I's provision that "All legislative Powers herein granted shall be vested in a Congress of the United States," for example, and in the specific, limited list of enumerated powers granted in Article I, Section 8. This view of the Constitution was so well accepted that even the great nationalist Chief Justice John Marshall conceded in *McCulloch v. Maryland* that the federal government was "acknowledged by all, to be one of enumerated powers" and that as a result it was "universally admitted" that the federal government could "exercise only the powers granted to it." The Supreme Court forcefully reiterated this view in *United States v. Lopez*, referring to the doctrine of enumerated powers as a "first principle."

Perhaps most important for present purposes, though, was the purpose underlying the enumerated powers doctrine. Contrary to the belief of some avid states' rights advocates, the constitutionally-mandated division of the people's sovereign powers between federal and state governments was not designed to protect state governments as an end in itself, but rather "was adopted by the Framers to ensure protection of our fundamental liberties." As the Supreme Court noted in *Lopez*: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy

12. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). As a result, the Court's reasoning (though not the outcome) in *National League of Cities v. Usery*, 426 U.S. 833 (1976), is a bit of a non sequitur.
balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." 17 When Congress (or a federal agency, in supposed reliance on an act of Congress) acts beyond the scope of its enumerated powers, therefore, it does more than simply intrude upon the sovereign powers of the States; it acts without constitutional authority, that is, tyrannically, and places individual liberties at risk. 18

Foremost among the powers not delegated to the federal government was the power to regulate the health, safety, and morals of the people—the so-called police power. As James Madison noted in Federalist No. 45: "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." 19 "No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation," noted the Supreme Court in Gibbons v. Ogden. 20 That view continued to prevail at the end of the nineteenth century. In United States v. E. C. Knight Co., for example, the Court stated: "It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the

17. Lopez, 514 U.S. at 552 (quoting Gregory, 501 U.S. at 458); Gregory, 501 U.S. at 459 (quoting THE FEDERALIST NO. 28, at 180-81 (Alexander Hamilton) (J. Cooke ed. 1961). See also Garcia, 469 U.S. at 581 (O'Connor, J., dissenting) (citing FERC v. Mississippi, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting)) ("[The Framers] envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States."); Garcia, 469 U.S. at 571 (Powell, J., dissenting) ("The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective 'counterpoise' to the power of the Federal Government."). The focus of unfunded mandates on state and local governments, to the exclusion of the private sector, is therefore somewhat misplaced, and may actually be counterproductive. But more about that later.

18. See, e.g., THE FEDERALIST NO. 33, at 172 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (noting that laws enacted by the Federal Government "which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies . . . will be merely acts of usurpation, and will deserve to be treated as such.").


States, not surrendered by them to the general government . . . ." 21 And even after the New Deal worked its radical transformation on constitutional law, the Court has continued to give at least lip service to this principle.

Congress does retain some measure of discretion to choose the means necessary for giving effect to its enumerated powers, but it cannot use its discretionary power over means in furtherance of ends not granted to it. As Chief Justice Marshall noted in McCulloch v. Maryland: "[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the [national] government[,] it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." 22 Chief Justice Hughes reiterated Marshall's point on the eve of the New Deal revolution in his separate opinion in Carter v. Carter Coal Co.: "Congress may not use this protective [commerce] authority as a pretext for the exertion of power to regulate activities and relations within the States which affect interstate commerce only indirectly." 23 It is important to bear these fundamental principles in mind as we consider the effectiveness of the UMRA and ways that the Act might be improved in order to further these principles.

III. REVIEW OF KEY PROVISIONS OF THE ACT

Last year, the Subcommittee on Technology of the House Rules Committee and the Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs of the House Government Reform Committee held a joint hearing to address the effectiveness of the Unfunded Mandates Reform Act of 1995. What follows is a brief summary of the testimony that was provided at that hearing and some additional views in light of the principles described above.

Everyone generally agreed that Title I of the Act has been immensely successful. Title I requires the Congressional Budget Office ("CBO") to identify mandates in pending legislation and to prepare detailed cost estimates of any

21. 156 U.S. 1, 11 (1895).
23. 298 U.S. 238, 317 (1936) (Hughes, C.J., separate opinion).
intergovernmental mandate exceeding $50 million\textsuperscript{24} or private sector mandate exceeding $100 million.\textsuperscript{25} It also provides that any unfunded intergovernmental mandate is subject to a point of order, tabling the legislation unless, after a recorded vote, a majority of the House decides to proceed.\textsuperscript{26} The mere threat of an "unfunded mandate" designation being attached to legislation has, in the opinion of several of the witnesses, caused a decline in the number of such mandates being enacted into law. According to the CBO's own reports, only twenty-nine bills introduced between 1996 and 1999 had intergovernmental mandates over the UMRA threshold, and only two of those were enacted.\textsuperscript{27}

The consensus on Title II was not nearly as praiseworthy, however. Title II requires federal agencies to undertake the same kind of cost analysis of mandates imposed in their regulations that the CBO undertakes in Congress.\textsuperscript{28} But in a 1998 report, the General Accounting Office found that during the first two years after UMRA's effective date there were no UMRA-required fiscal impact statements for 80 of the 110 economically significant rules issued. As Chairman Ose noted in his opening statement at the House hearing last year, "the title of the GAO report pretty well sums it up: 'Unfunded Mandates—Reform Act Has Had Little Effect on Agencies' Rulemaking Actions.'\textsuperscript{29}

There are several possible reasons for this variation in effectiveness. Proponents of the doctrine of political process

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federalism, first expounded by Professor Herbert Weschler and adopted by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority,* will undoubtedly point out that the Act has worked in the legislature, where political pressures can most easily be brought to bear, but has not worked in the administrative agencies that are largely insulated from political accountability. Behavioral scientists might be just as quick to note that the Act has worked in the arena where there was a neutral assessment being performed by a largely independent Congressional Budget Office but not in the arena where agencies performed their own assessments. At least part of the answer is likely more political in nature—in the partisan meaning of that term—than either of these explanations acknowledges: until last year, both houses of Congress were under the control of the same party that enacted the Unfunded Mandates Reform Act, largely in response to what it perceived to be the excesses of the prior fifty years of control by the other party, while the agencies were answerable to a chief executive of that other party.

But whatever the cause, we can suggest alterations to the Act that should advance the Act’s purposes and, at the same time, move us toward those timeless principles advanced by the Founders. Because the consensus seems to be that Title II is more problematic than Title I, the Article will address Title II first.

IV. SHORTCOMINGS OF TITLE II AND PROPOSED ALTERATIONS

Foremost among the criticisms of Title II of the Act was the lack of compliance by regulatory agencies in the last administration. Section 201 of Title II requires each executive agency, “unless otherwise prohibited by law, [to] assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector.” And before promulgating any notice of proposed rulemaking that is likely to result in a federal mandate greater than $100 million to either state, local, and tribal governments or to the private

sector, § 202 of the Act requires an agency to prepare a written statement assessing the costs and benefits of the proposed rule and any disproportionate regional effects of the rule, as well as describing the extent of the agency’s prior consultation with state, local, and tribal governmental officials. 33 Moreover, for regulations that impose a mandate above this statutory threshold, agencies are required to consider and select the least costly, most cost-effective or least burdensome alternative that achieves the rule’s objections, unless the head of the agency publishes an explanation as to why the less costly option was not adopted. 34

Unfortunately, each agency makes its own determination of whether a proposed regulatory action rises above the statutory threshold, and the only judicial review of the agency’s action permitted under the Act is an action to compel the agency to prepare a written statement. 35 The courts are specifically barred from “staying, enjoining, invalidating or otherwise affecting” an agency rule based on the inadequacy or failure to prepare the required fiscal impact statement. 36 Indeed, the UMRA specifically provides that “any estimate, analysis, statement, description or report prepared under [the Act], and any compliance or noncompliance with the provisions of [the Act], and any determination concerning the applicability of the provisions of [the Act] shall not be subject to judicial review.” 37

Talk about leaving the fox to guard the hen house! A couple of examples that were brought to light in the recent House testimony by Scott Holman, Chairman of the U.S. Chamber of Commerce Regulatory Affairs Committee, demonstrate just how effectively some agencies have avoided the clear import of their statutory obligations. In the summer of 2000, the U.S. Environmental Protection Agency finalized its Total Maximum Daily Load (“TMDL”) surface water quality regulation. 38

38. See Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586 (July 13, 2000) (to be codified at 40 C.F.R. pt. 130), cited in
Although the regulations require States to prepare approximately 40,000 TMDL waterbody restoration plans over the next ten to fifteen years, at an estimated cost of between $300,000 and $1 million per plan, and although overall implementation of the plans has been estimated as high as $1.2 billion per year, the EPA determined that the TMDL regulation "would impose costs of less than $25 million per year on state and local governments, and zero [on] the private sector."39

"Thus," according to the EPA, the "proposal [was] not subject to the requirements of §§ 202 and 205 of UMRA."40

GAO and various committees in Congress questioned the EPA’s analysis, and Congress even took the extraordinary step of adding a provision to the Military Construction appropriation barring EPA from implementing the TMDL rule. President Clinton held off signing the bill into law just long enough for EPA Administrator Carol Browner to finalize the TMDL earlier the same day in a move that the Chamber of Commerce termed a "willful contempt of Congress."41

Moreover, EPA’s self-analysis also took the regulation outside the parameters of the Congressional Review Act, which provides an expedited process for Congress to void regulations that exceeded the statutory thresholds of the UMRA.

Even more costly is the EPA’s proposed rule setting new national ambient air quality standards for ozone and fine particulates.42 By EPA’s own estimates, the annual cost of compliance with the rule will be in the $45 billion range43—well above the $100 million UMRA statutory threshold—but EPA refused to prepare a UMRA statement, contending that one


43. Reason Foundation estimates the annual compliance costs at $150 billion. Holman Statement, supra note 38, at 11 n.12.
was not required because the Clean Air Act itself prohibits the EPA from taking economic costs into account when setting air quality standards.\textsuperscript{44}

More fundamentally, the limited judicial review provided for in the Act only applies to mandates where the notice of proposed rulemaking was published after October 1, 1995.\textsuperscript{45} All previous mandates—and there are scores of them that easily meet the statutory threshold—are immune from the provisions of the Act. As a result, the very mandates that were the motivating force for the Act remain outside of its proscriptions.

Understanding the problem, Congress directed the Advisory Commission on Intergovernmental Relations to study existing mandates and make recommendations regarding whether some existing mandates should be terminated or temporarily suspended.\textsuperscript{46} The Commission took its mission seriously and in its draft report\textsuperscript{47} recommended termination of several unfunded \textit{intergovernmental} mandates, including the Fair Labor Standards Act,\textsuperscript{48} the Occupational Safety and Health Act,\textsuperscript{49} the Family Medical Leave Act,\textsuperscript{50} and the Metric Conversion for Plans and Specifications provisions of the Omnibus Trade and Competitiveness Act of 1988.\textsuperscript{51}

Alas, the draft report never made its way to a final report. Instead, the Commission itself was unceremoniously closed, with a line in the annual appropriations bill providing the agency $784,000 for the 1996 fiscal year, "of which $450,000 shall be available only for the purposes of the prompt and orderly termination of the Advisory Commission on Intergovernmental Relations."\textsuperscript{52}

This left existing mandates in place without any of the cost-benefit analysis that Congress sought to elicit. It also provided

\begin{itemize}
\item \textsuperscript{44} 62 Fed. Reg. at 38,892, \textit{cited in} Holman Statement, \textit{supra} note 38, at 11 n.13.
\item \textsuperscript{45} 2 U.S.C. § 1571(a)(6) (2000).
\item \textsuperscript{46} 2 U.S.C. § 1552 (2000).
\item \textsuperscript{47} U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF FEDERAL MANDATES IN INTERGOVERNMENTAL RELATIONS: A PRELIMINARY ACIR REPORT 5-8 (1996).
\item \textsuperscript{48} 29 U.S.C. §§ 201-19 (2000).
\item \textsuperscript{49} 29 U.S.C. §§ 651-78 (2000).
\item \textsuperscript{50} Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified in scattered sections of 29 U.S.C.)
\item \textsuperscript{51} Pub. L. No. 100-418, § 5164, 102 Stat. 1107, 1451-52.
\end{itemize}
recalcitrant federal agencies with another arrow in their quiver of UMRA-avoidance tactics. In a final rule promulgated in February 2001, for example, the Fish and Wildlife Service ("FWS") designated nearly 200,000 acres of land in southern California as "critical habitat" for the arroyo toad, which had been listed as an endangered species in 1993, before the UMRA was enacted.\(^53\) Discounting economic studies demonstrating economic impacts of between $300 million and $5.5 billion for the comparable critical habitat designation for the California gnatcatcher, FWS claimed that the arroyo toad designation "would result in an economic impact of less than $1 million, significantly below the $100 million threshold in Executive Order 12866."\(^54\) This, according to the Service, because any costs incurred as a result of the critical habitat designation were actually attributable to the pre-UMRA listing of the arroyo toad as an endangered species.\(^55\) Yet in final endangered species listings that have been made subsequent to the effective date of UMRA, the Service has simply declined to address the economic impact of the listing at all.\(^56\)

Much of this agency recalcitrance might be altered in response to a clear order from the President, by way of an Executive Order. But compliance with the Unfunded Mandates Reform Act should not turn on how vigorous any particular President is in ensuring that the law is faithfully executed. Accordingly, it is appropriate to consider other mechanisms.

First, the task of completing the UMRA assessment should be assigned somewhere other than the agency taking the regulatory action at issue. Much as legislative proposals working their way through congressional committees are, under Title I, assessed by the Congressional Budget Office, regulatory proposals working their way through the various agencies should be assessed by an entity at least somewhat removed from the regulatory process. The General Accounting Office and the Office of Management and Budget would

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55. Id.
appear to be the most likely contenders; indeed, both agencies already have reporting responsibilities under the Act.\(^{57}\)

Second, there has to be meaningful judicial review of the regulatory impact assessments required under the Act, whether those assessments are conducted by the regulatory agency itself or by an outside agency such as GAO or OMB. The current judicial review, which is limited to consideration of whether the agency has supplied the requisite written fiscal impact statement and the ability to order what the statute already requires, namely, the furnishing of such a statement,\(^{58}\) does nothing to address the provision of sham regulatory impact statements such as those described above. Although, after lengthy debate, Congress in 1995 rejected this broader provision for judicial review, experience with the Act, and in particular with Title II, demonstrates that a much more thorough review is necessary. The courts have to be able to assess the quality of the regulatory impact statements, not just their mere existence, if the UMRA is going to be successful at curtailing unfunded mandates or at least ensuring that regulatory agencies both take account of the costs of regulation and search for less-costly methods to accomplish their regulatory purposes.

Finally (though I concede this suggestion is idealistic, some might even say naïve), it is worth considering whether changes to the UMRA mechanisms could further the restoration of the idea of limited, enumerated powers, which was resurrected by the Supreme Court in \textit{Lopez} shortly after the enactment of the UMRA and reiterated recently in \textit{Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers}.\(^{59}\) Because many of the mandates that have proved so troubling to state and local governments, on the one hand, and the private sector, on the other, are grounded in a very expansive, New Deal-era reading of the Commerce Clause that has now been called into question, Congress should take this opportunity to reconsider the limits of its own power (as the Oath Clause\(^{60}\) suggests it should) and of the derivative power of the executive and

\(^{57}\) See, e.g., 2 U.S.C. §§ 1535(c), 1536, 1538 (2000).


\(^{60}\) U.S. CONST. art. IV, cl. 3.
independent agencies. Most of these mandates do not implicate either the channels or instrumentalities of interstate commerce; they are constitutionally permissible under current doctrine, therefore, only if they are "economic in nature" and "substantially affect" interstate commerce. As even the New Deal Court recognized, the power to regulate commerce among the States "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

The Supreme Court has never attempted to quantify how great a purely intrastate activity's effect on interstate commerce must be before Congress has authority to regulate under the Commerce Clause, but that should not stop Congress from initially drawing that line for itself and the regulatory agencies, which act only pursuant to authority delegated from Congress. A regulation purportedly authorized under Congress's power to regulate interstate commerce that has so insignificant an effect on interstate commerce as to fall below the UMRA's statutory threshold might well be deemed outside the Commerce Clause authority itself, and therefore impermissible. The courts could find as such, but Congress could easily express its own sense of the matter by defining the threshold in such a fashion.

Alternatively, Congress should consider using the UMRA as a means to resurrect an important component of the Founders' vision of the separation of powers that has all but been forgotten since Schechter Poultry Corp. v. United States, namely, the non-delegation doctrine. The fact that the Supreme Court has recently demonstrated its reticence in re-entering the non-delegation arena does not mean that the door is closed to Congress. Despite the massive growth of the administrative

63. Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); see also Lopez, 514 U.S. at 557.
64. 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).
state, the fact remains that the Constitution assigns the lawmaking power to Congress alone, not to executive or independent agencies.\textsuperscript{66} The truly tough choices, such as balancing significant costs of regulation against its benefits, must be made by Congress, not by an un-elected agency.

Especially in situations where Congress has enacted legislation based on a finding by the CBO pursuant to Title I of the UMRA that the legislation does not impose mandates in excess of the statutory minimum, any implementing regulation that exceeds the statutory cost threshold should be deemed to be an exercise of lawmaking, void unless adopted by Congress, utilizing the constitutionally proscribed method of bicameralism and presentment. Indeed, the UMRA already envisions such a role for Congress. Section 103(a) provides: "It is the sense of the Congress that Federal agencies should review and evaluate planned regulations to ensure that the cost estimates provided by the Congressional Budget Office will be carefully considered as regulations are promulgated."\textsuperscript{67} All that is lacking is an explicit statement in the Act providing that agency regulations exceeding the statutory threshold (when CBO's estimates fell below the threshold), or exceeding CBO's own estimates by a statutorily-defined amount, shall not take effect unless enacted by Congress. With a change in the default rule, the Congressional Review Act already provides a mechanism for implementing such a proposal.

V. THE UNFUNDED MANDATES REFORM ACT IN CONGRESS

Despite the much-lauded successes of Title I, it too can be made a more effective tool in the fight against unfunded mandates and in the effort to restore the original limits on federal power contained in the Constitution. As noted above, a principal provision of Title I requires the Congressional Budget Office to identify new federal mandates in pending legislation and to prepare detailed cost estimates of any intergovernmental mandate exceeding $50 million\textsuperscript{68} or private sector mandate exceeding $100 million.\textsuperscript{69} Title I also provides

\begin{footnotes}
\footnote{66. U.S. CONST. art. I, § 1.}
\footnote{67. 2 U.S.C. § 1511(a) (2000).}
\footnote{68. 2 U.S.C. § 658c(a)(1) (2000).}
\footnote{69. 2 U.S.C. § 658c(b)(1) (2000).}
\end{footnotes}
that all new unfunded intergovernmental mandates (but not private sector mandates) are subject to a point of order, tabling the legislation unless, after a recorded vote, a majority of the House decides to proceed.\textsuperscript{70} The Act does not apply to any bill that, among other things, enforces constitutional rights of individuals or establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.\textsuperscript{71} Nor does it apply to mandates imposed as conditions on federal grants.\textsuperscript{72}

Several theoretically possible (though perhaps politically impractical) improvements to Title I are readily apparent. First, the rules relating to an override of a point of order could be rewritten to require more than a simple majority. While the Act itself recognizes that restraining a future Congress by means of a supermajority rule codified in the statute itself would be constitutionally problematic,\textsuperscript{73} there would nevertheless be some utility in forcing a two-step process before permitting a mere majority to override the point of order mechanism.

Second, lest the very mandates that gave rise to the "unfunded mandates" movement in the first place be perpetually immune from the UMRA, the exception of existing mandates should be reconsidered. The Medicaid program, for example, was enacted in 1965 and is therefore exempt from UMRA. Congress has already laid the groundwork for addressing such existing mandates in Title III of the Act, in which it directed the Advisory Commission on Intergovernmental Relations (ACIR) to prepare a report assessing whether any existing mandates should be terminated or temporarily suspended. As noted above, ACIR recommended in its Draft Report to terminate several costly intergovernmental mandates, including the Fair Labor Standards Act, the Occupational Safety and Health Act, the Family Medical Leave Act, and the Metric Conversion for Plans and Specifications provisions of the Omnibus Trade and Competitiveness Act of 1988.\textsuperscript{74} It also recommended significant alterations in other

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\textsuperscript{73} See 2 U.S.C. § 1515(2) (2000).
\textsuperscript{74} See supra notes 47-51.
costly intergovernmental mandates, including the Safe Drinking Water Act, the Individuals with Disabilities Education Act, the Water Pollution Control Act Amendments of 1972, and the Endangered Species Act.

The termination recommendations of ACIR's Draft Report should be implemented. Alternatively, all existing mandates identified in the ACIR Draft Report should be sunsetted after a specified period of years unless Congress acts in the meantime to reauthorize them in accordance with the rules now set forth in the UMRA.

Third, an entire class of mandates exempted from the Act as written needs to be reassessed in light of subsequent Supreme Court precedent. In City of Boerne v. Flores, the Court held that, under Section Five of the Fourteenth Amendment, Congress only has power to enforce the constitutional requirements of the Fourteenth Amendment, not to enlarge upon those requirements by the creation of new statutory rights. Thus, mandates that "establish or enforce any statutory rights that prohibit discrimination" and that are not already "enfor[ing] constitutional rights of individuals" would appear, after Boerne and Garrett, to be a null set.

The significance of this issue cannot be overstated. One of the more significant unfunded mandates currently exempted from UMRA because of this section is the Americans with Disabilities Act and its implementing regulations. As noted by Professor Tracy Kaye, Philadelphia Mayor Ed Rendell reportedly complained that ADA regulations required the city to make 320,000 curb cuts for wheelchairs at 80,000 intersections at a cost of $180 million over two years when the City's entire capital budget was only $125 million.

75. U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, supra note 47, at 11-14.
The ACIR Draft Report noted that the ADA was “creating problems for state and local governments because of expensive retrofitting and service delivery requirements, confusing and ambiguous statutory language, and insufficient technical assistance provided by the federal government.”84 It also noted that “the use of the terms ‘reasonable accommodation,’ ‘undue hardship,’ ‘readily achievable,’ and ... other broad expressions in the law has subjected state ... governments to numerous lawsuits over ... interpretations of the ADA,” with substantial legal costs and severe penalties for noncompliance.85

Fourth, the different treatment that the UMRA provides for intergovernmental mandates and private sector mandates needs to be revisited. As Senator Lieberman noted during Senate debate, the Act disadvantages the private sector and therefore needs to be amended to eliminate the disparate treatment between the two kinds of mandates.86 Before revisiting this statutory disparity, however, it is important to note that there are three different kinds of intergovernmental mandates, only one of which is comparable to private sector mandates. A different resolution of the disparity may therefore be required.

One kind of intergovernmental mandate compels state and local governments to enforce federal regulatory programs. Such mandates are now largely, if not entirely, barred by the Supreme Court’s decisions in Printz v. United States87 and New York v. United States,88 except to the extent they are enacted as conditions on federal grants (discussed below), and so are not addressed further here except to note that certain mandates contained in the Clean Water Act and the Safe Water Drinking Act may suffer infirmities similar to those found to exist in the provisions of the Brady Bill struck down in Printz.89

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85. Id.
89. With respect to the latter, the ACIR Draft Report recommended a “long-term goal of returning to the States full responsibility for safe drinking water standards.” U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, supra
A second category of intergovernmental mandates includes those where the federal government regulates in areas in which only governments typically operate. The Individuals with Disabilities Education Act ("IDEA"), for example, requires local school systems to provide a free appropriate education for children with disabilities as a condition of receiving federal education funds. Because the law applies only to intergovernmental mandates, treating it separately from private sector mandates does not pose the kind of disparity problem addressed by Senator Lieberman above.

The third category of intergovernmental mandates consists of those that treat state and local governments just like private sector regulated entities. Here, the disparity of treatment between the two becomes significant. In the Water Pollution Control Act Amendments of 1972,90 for example, Congress established national minimum standards for control of pollutants from both industrial and municipal water sources. Similarly, the Endangered Species Act precludes development activities by both state and local governments, on the one hand, and private entities, on the other. Allowing a point of order with respect only to the intergovernmental mandate may well result in a state and local government exemption that leaves the private sector at a competitive disadvantage. More importantly, the state and local government exemption would undermine one of the most basic purposes for federalism envisioned by the Founders, namely, that the States serve as a counterbalance to the federal government’s power over private individuals. With federal regulations that apply equally to state governments and to the private sector, the States can bring their significant political power to bear, effectively serving the interests of private citizens.91 Exempt the States, and the private sector is left to fend for itself.92 Because the point of order mechanism of the UMRA applies to this last class of intergovernmental mandates as well as to the earlier classes, it

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91. This may well be one place where Professor Weschler’s political process arguments have substantial merit.

92. Ironically, this aspect of federalism suggests that the Eleventh Amendment decisions of the staunchly pro-federalism Rehnquist Court may be misguided, a topic I take up at greater length in John C. Eastman, A Seminole Dissent?, 1 GEO. J. L. & PUB. POL’Y (forthcoming 2002).
is imperative that the mechanism be extended to private sector mandates as well.

Finally, the UMRA excludes mandates that are imposed as conditions on federal spending. Here, too, the exemption is overbroad, but the overbreadth arises more from shortcomings in current Spending Clause jurisprudence than in the mandates itself. There should be little dispute about the propriety of imposing conditions, even mandates, on recipients of properly-authorized federal funds when those conditions are designed to insure that the federal funds are spent for the purposes for which Congress intended them. But it has become increasingly clear that many federal spending programs and their conditional mandates fail one or both components of this Spending Clause formula. The federal grants are in many instances themselves not authorized under the Constitution's Spending Clause, properly understood, and the conditions imposed are not designed to insure that the funds are spent as intended but instead are affixed to spending grants as a way to enact police power regulations outside of Congress's proper constitutional authority. To repeat the passage from Gibbons v. Ogden quoted above: "No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation." Removing the UMRA exemption for mandates imposed as conditions on federal spending would force Congress to confront these issues, a confrontation that will become increasingly important as some in Congress seek to reinstate various police power regulations that have been struck down by the Supreme Court's recent Commerce Clause decisions.

But even apart from this structural rationale, eliminating the exemption for spending condition mandates can have a salutary effect. Although allowing a point of order to require federal funding of the mandate would be nonsensical in this context, the point of order claiming that legislation contains a mandate whose cost ought to be assessed by the Congressional Budget Office would insure that state and local governments

94. I take up this subject at length in John C. Eastman, Restoring the "General" to the General Welfare Clause, 4 Chap. L. Rev. 63 (2001).
95. 22 U.S. (9 Wheat.) 1, 203 (1824).
have better information on which to base their decision whether to participate in any given federal grant program. The IDEA, for example, imposes significant costs and administrative burdens on state and local governments (not to mention huge litigation costs), and although the law "includes a provision authorizing the federal government to pay up to 40 percent of services to be provided under the law, only about 8 percent is currently appropriated."96 If the CBO were required to prepare cost estimates of the mandates that are imposed as conditions on federal education spending, some States might choose to forego the federal aid, leading to an entirely different and better-informed debate about education funding.

VI. CONCLUSION

The Unfunded Mandates Reform Act of 1995 appears to have been very effective in imposing some much-needed discipline on Congress, but the exemptions crafted onto the original Act hamper its ability to achieve the kind of far-reaching reform that was its motivating purpose. A reconsideration of those exemptions with a view toward their elimination is therefore in order, building on the success of the original Act and making it even stronger and more consistent with some core constitutional principles.

Title II of the Act, which applies to the mandates of federal agencies, has not fared as well. The statutory exemptions, compounded by a lack of meaningful judicial review, have allowed recalcitrant regulatory agencies to all but ignore the dictates of the Act. Assessment of pending regulations by a neutral agency, much like the Congressional Budget Office assesses proposed legislation, would help to eliminate the self-serving assessments now being provided by the regulatory agencies themselves. Ultimately, however, a more vigorous judicial review is needed to insure not only that the regulatory impact statements dictated by the Act are completed, but that they are completed using sound methodology and economic analysis. Only with such review can the Act's mandate that agencies consider and in most cases adopt the least-costly method of achieving their regulatory purpose be fulfilled.

96. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, supra note 47, at 11.