

Turning Back the Clock: The Unfunded Mandates Reform Act of 1995 and Its Effective Repeal of Environmental Legislation

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INTRODUCTION

What do workers' compensation, child support laws, the minimum wage, and the Clean Air Act all have in common? If your first inclination is a resounding "Nothing!," think again. In 1995, the 104th Congress attacked these and many more unrelated laws en masse and the Republican party sold their Waterloo to the American people in the highly publicized "Contract With America." For decades, state and local governments complained to Congress about having to implement federal laws without receiving federal funding and insisted on a reinstatement of their sovereignty. Finally, Congress listened.

The Unfunded Mandates Reform Act of 1995 ("UMRA" or "the Act")¹ is an important part of the Republicans' Contract With America. The Act attempts to address the problem of Congress' seemingly uncontrollable desire to pass unfunded mandates. In short, Congress passes laws requiring state and local governments to implement national policies without providing those governments with funding from the federal government. These unfunded mandates impose a serious financial burden on lower levels of government. Congress receives the credit for important legislation while local officials are forced to raise taxes or cut local initiatives to fund the national agenda. Clearly, lessening the burden on states and localities and returning power to them is a necessary and laudable goal. However, UMRA is far too broad in its application. UMRA sweeps within its ambit legislation ranging from gun control to environmental cleanup, from mandates between different levels of government to mandates affecting the private sector as well. UMRA attacks all unfunded federal legislation regardless of its subject matter, public support, or necessity. The Act attempts to rectify in one statute problems which took decades to create. The fallout is potentially disastrous. The most troublesome of the casualties will be our earth, as environmental legislation is sure to lose in its upcoming battle against UMRA.

Part I of this Note discusses briefly the purposes and provisions of UMRA. Though relatively straightforward, UMRA adds many procedural steps to the already burdened legislative process. As a result, both the cost and time required to enact a law will increase dramatically. Part II examines the definition of "unfunded mandate" in UMRA and the difficulties that surround a successful definition of the term. Unfortunately,

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1. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (to be codified in scattered sections of 2 U.S.C.). Environmentalists refer to UMRA as part of the "unholy trinity." The other parts of the trinity are the new push for risk assessment (requiring redundant cost benefit analyses of environmental regulations) and revised requirements for making a Fifth Amendment takings claim (requiring a claim of only 10% devaluation of property by a regulation to qualify for compensation, versus the previous 100% devaluation requirement). Together, they are expected to have disastrous effects on environmental legislation in coming years.

Congress has failed to formulate a complete definition and, as a result, Congress will face difficulties once it implements UMRA. Part III reviews the problems and costs associated with unfunded mandates generally and environmental mandates specifically. The costs of unfunded mandates to states and cities are so staggering that it is easy to understand why UMRA had little difficulty becoming law. Part IV explains why environmental regulations will lose the battle with UMRA and argues that UMRA should not apply to environmental regulations, not only because environmental laws require a national enforcement mechanism, but also because UMRA fails to address the problems that environmental laws address. UMRA is designed to reinstate a stronger federalism. However, because pollution is not a state-specific concern, states should not have the sole power to regulate the environment. Putting environmental policy into the hands of state governments invariably will reduce environmental protection across the board. Some states will have tough standards while others will choose to deregulate. Such a scenario will result in environmental protection becoming a matter of the lowest common denominator—those states that choose minimal protections will lower the air and water quality across the country. The problem with environmental regulations is that they are inefficient and inflexible. While revitalizing state sovereignty may be popular politics at the moment, it will do nothing to resolve the truly pressing issues in the environmental arena.

I. THE UNFUNDED MANDATES REFORM ACT: PURPOSES AND PROVISIONS

"The purpose of . . . [UMRA] is to strengthen the partnership between federal, state, local and tribal governments by ensuring that the impact of legislative and regulatory proposals on those governments are given full consideration in Congress and the Executive Branch before they are acted upon."² Thus, UMRA seeks to promote full and deliberate consideration of federal mandates before the federal government imposes them on state, local, and tribal governments. In pursuing this goal, UMRA includes the following provisions: the Congressional Budget Office ("CBO") must estimate the cost of federal mandates to state, local, and tribal governments and to the private sector;³ federal agencies must analyze the costs and benefits of federal mandates to state, local, and tribal governments and allow these governments greater input into the regulatory process;⁴ and a point of order⁵ will lie on the floor of either House against consideration of a federal mandate without authorized funding to state, local, and tribal governments.⁶

The processes of UMRA are relatively simple. When legislation that includes a federal mandate is introduced in either the House or the Senate, UMRA establishes requirements and procedures for committee reports that accompany the legislation. Committee reports must identify and describe all federal mandates included in a bill. If a mandate affects

2. S. REP. NO. 1, 104th Cong., 1st Sess. 2 (1995), *reprinted in* 1995 U.S.C.C.A.N. 4, 5.

3. Unfunded Mandates Reform Act § 101 (to be codified at 2 U.S.C. § 658d).

4. *Id.* §§ 203-204 (to be codified at 2 U.S.C. §§ 1534-1535).

5. A point of order is a claim from the floor by a member of either House of Congress that a pending action (in this case consideration of a bill containing an unfunded mandate) violates the rules of that House. The chair rules on a point of order without a vote. If the chair sustains a point of order, the proposed action is prohibited. Any member may appeal a ruling by the chair on a point of order. Such an appeal is debatable and is decided by a vote of the House. *THE ENCYCLOPEDIA OF THE UNITED STATES CONGRESS* 1548 (David C. Bacon et al. eds., 1995).

6. Unfunded Mandates Reform Act § 101 (to be codified at 2 U.S.C. § 658e).

both the public and private sectors, the report must state whether the federal government will pay the public sector costs and what effect this subsidy may have on the competitive balance between government and private businesses. The committee that has authored the bill must promptly provide the bill's report to the CBO so that the CBO may perform a cost estimate. The CBO must estimate the direct costs of the mandates to state and local governments and to the private sector. If the estimated cost of a mandate to state and local governments exceeds \$50 million annually, a point of order lies against the bill unless full funding is provided to these governments. A point of order would halt consideration of the bill until the committee specified how the full costs of the mandate were to be funded.⁷ If the estimated cost of a mandate to private industries exceeds \$100 million dollars annually, the CBO must so report and explain how it reached that conclusion. No point of order lies against private sector mandates which exceed the threshold.⁸ The CBO's cost estimate must be published in the Committee's report prior to the bill's consideration.

II. DEFINING UNFUNDED MANDATE

Defining "unfunded mandate" is a task in and of itself. Typically, "the term 'unfunded mandate' refers to a federal requirement imposed upon a state or local government by the Congress, or by a federal agency acting under statutory authority, without full federal funding."⁹ The term can also describe a state requirement that is imposed on local governments¹⁰ or may encompass any governmental requirement imposed on the private

7. Funding options include: (1) an increase in entitlement spending resulting in an increase in the federal budget deficit; (2) an increase in direct spending paid for by an increase in tax receipts; or (3) an increase in the authorization of appropriations. *Id.*

The point of order relies on the determination of the cost of the intergovernmental mandate which is based on the CBO's estimate. Such a procedure is troubling given the difficulty in accurately estimating the costs of mandates. Dr. Robert D. Reischauer, CBO Director, has stated that cost estimates for some bills' mandates would be "virtually impossible." S. REP. NO. 1, *supra* note 2, at 32, *reprinted in* 1995 U.S.C.C.A.N. at 34. "Moreover, CBO reports that the most important source for its cost estimates will be the state and local governments themselves. Yet, these are the very entities to whom the money will be going and who will benefit the most from high cost estimates." *Id.* at 34, *reprinted in* 1995 U.S.C.C.A.N. at 35. Therefore, inaccurate estimates may stem from artificially high estimates from the states. Furthermore, the CBO must estimate costs on an aggregate basis for all state and local jurisdictions in the country—a massive undertaking. An accurate estimate will be difficult to achieve for many reasons: (1) State and local governments' conditions will vary widely with respect to any mandate (e.g., one state may have more extreme air quality problems than another); (2) Choices for compliance vary greatly, and it will be difficult to know which course (and therefore corresponding costs) various states and localities will take; and (3) The CBO will not know when or how a mandate will be implemented by an agency until the agency decides, after the extensive public hearings required by the Administrative Procedure Act (and the agency cannot make this decision while the mandate is still a bill). *Id.* at 33, *reprinted in* 1995 U.S.C.C.A.N. at 35.

8. The dissimilar treatment for public and private sector mandates is discussed *infra* notes 101-04 and accompanying text. Dissimilar treatment will create a strikingly unfair advantage for the public sector in those areas where it competes with the private sector (e.g., compliance with minimum wage laws and environmental standards for landfills and municipal waste disposal). In essence, UMRA will void laws with mandates that exceed the \$50 million threshold for state and local governments when the federal government does not subsidize the extra costs, but it will still force private industries to comply with the laws and pay all their own costs. Unfunded Mandates Reform Act § 101 (to be codified at 2 U.S.C. § 658e) (limiting point of order to intergovernmental mandates and excluding private sector mandates).

9. Paul Gillmor & Fred Eames, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 HARV. J. ON LEGIS. 395, 395 n.1 (1994). In other words, "you gotta do this-and-such, but we ain't giving you any money to do it with." Molly Ivins, *At This Pace, 'What-ifs' Will Be 'Too Lates'*, DETROIT FREE PRESS, Jan. 18, 1995, at 9A.

10. Though UMRA focuses solely on lessening the burden of federal mandates, the unfunded mandate problem is not limited to the federal sphere. State governments encumber municipalities with their own unfunded mandates. See *MacNeil/Lehrer News Hour* (PBS television broadcast, Jan. 5, 1995) (statement of Rep. George Miller that governors put unfunded mandates on their localities and take away money all the time but "[t]he federal government happens to be the most attractive whipping boy in the process at the moment"); see also Edward A. Zelinsky, *Unfunded Mandates, Hidden*

sector. Thus, "unfunded mandate" can refer to any requirement (*i.e.*, law) imposed by a government (be it federal, state, or local) on a lower level of government or private citizen for which the mandating government does not provide funding or for which the mandating government does not fully reimburse incurred costs.

A. UMRA's Definition

The Act seeks to cure the problems surrounding unfunded mandates which include excessive cost burdens on states and localities and the weakened sovereignty of lower levels of government. However, since the term encompasses an exceedingly wide range of governmental action, Congress must clearly identify what successful implementation of UMRA means. If Congress' definition is imprecise or incomplete, UMRA will be ineffective because it will be applied inconsistently.

Congress began this undertaking by defining public sector and private sector mandates separately:

[A] "federal intergovernmental mandate" [is] (1) an enforceable duty on State, local or tribal governments, or a reduction in the authorization of appropriations for federal financial assistance provided to those governments for compliance with such duty, or (2) a provision which compels state and local spending for participation in an entitlement program under which at least \$500 million is provided to States and localities annually. . . . A "federal private sector mandate" is defined as an enforceable duty on the private sector, or a reduction in the authorization of appropriations for Federal financial assistance provided to the private sector for compliance with such duty.¹¹

Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services, 46 VAND. L. REV. 1355, 1356 (1993) ("Few contemporary issues concern state and local policymakers as intensely as unfunded mandates.").

States have tried various remedies to solve the problem of state-passed unfunded mandates including reimbursement requirements and supermajority rules. California was the forerunner in mandate reimbursement schemes, requiring the legislature to fund any new obligation it imposed on localities. CAL. CONST. art. XIII B, § 6. A statutorily established Commission on State Mandates adjudicates localities' claims for reimbursement. CAL. GOV'T CODE § 17525-17559 (West 1995). Other states have similar constitutional provisions prohibiting mandates unless financing is provided. *See, e.g.*, MICH. CONST. art. IX, § 29 ("A new activity or service . . . shall not be required by the legislature . . . unless a state appropriation is made."); TENN. CONST. art. II, § 24 ("No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the same state share in the cost."). Alternatively, states have enacted supermajority requirements for unfunded mandates. For example, the Florida and Louisiana state constitutions require a two-thirds majority in both houses of the legislature to impose an unfunded mandate. FLA. CONST. art. VII, § 18(a); LA. CONST. art. VI, § 14(B)(6). Also, Governor Pete Wilson of California is proposing a new California constitutional amendment that would make it much harder to pass new laws pertaining to the environment. The amendment would require a two-thirds vote of the state legislature to pass any bill that imposes new regulatory costs. Though this may seem "bad" for environmentalists, the amendment would provide much needed incentives for industries to devise proposals for protecting the environment. The amendment includes a provision that would waive the two-thirds requirement for enacting legislation that allows for the repeal of regulations of equal or greater cost. "It could trigger dramatic innovation in environmental regulation because it gives industry a reason to come up with new, cost-saving approaches to protecting the environment." Frank Clifford, *Wilson Plan Sets Tougher Attitude on Environment*, L.A. TIMES, Jan. 14, 1995, at A1, A21 (quoting James Strock, top official of the California Environmental Protection Agency). For a complete discussion of the above issues, see generally Zelinsky, *supra*.

Some argue, however, that mandates are inherent in the legislative process and that nothing short of a constitutional amendment prohibiting unfunded mandates will remedy the problem. *See, e.g.*, Gillmor & Eames, *supra* note 9, at 407-13; Zelinsky, *supra*, at 1369, 1396.

11. H.R. REP. NO. 1, 104th Cong., 1st Sess., pt. 2, at 2 (1995). The two separate definitions may be explained by the fact that some members of Congress consider the problems posed by intergovernmental mandates and private sector mandates to be distinct. "[W]e need to address the issue of Federal regulatory burdens on the private sector. But we should not do so on legislation dealing with intergovernmental mandates. . . . Inserting the words 'private sector' into an intergovernmental regulatory analysis requirement is not the way to go." S. REP. NO. 1, *supra* note 2, at 28-29 (remarks of Sen. John Glenn), reprinted in 1995 U.S.C.C.A.N. at 28-29.

UMRA also establishes different threshold costs for each type of mandate. The threshold cost levels trigger the added procedures of UMRA. *See infra* notes 101-04 and accompanying text (discussing the inequities the different levels will

The "intergovernmental mandate" definition includes regulations that reduce or eliminate federal financial assistance when state, local, or tribal governments do not comply with the regulations' requirements. It also includes regulations which seek to reduce or eliminate existing funding for laws which impose continuing duties.¹² Furthermore, federal entitlement programs that provide over \$50 million annually to state, local, or tribal governments are also part of the definition of intergovernmental mandates. This currently includes nine programs;¹³ any new entitlement program above the \$50 million threshold would also be subject to the Act's provisions.

Congress chose to exempt a number of regulations which otherwise would have been covered by the Act. These include regulations that enforce constitutional rights of individuals; establish or enforce statutory rights to prohibit discrimination on the basis of race, religion, gender, national origin, or disability status; require compliance with federal auditing and accounting procedures; provide emergency relief assistance or are designated as emergency legislation; or are necessary for national security or international treaties.¹⁴ Although Congress considered adding environmental regulations to this list, the proposed amendment failed.¹⁵

B. Definitional Issues and States' Solutions

Because Congress has set forth an extensive definition of intergovernmental mandate, it may appear that what is and what is not an unfunded mandate is clear. However, the definitional issues behind the mandate phenomenon are many,¹⁶ and UMRA does not address them all. Such gaps in the definition may erect difficult obstacles for Congress when it attempts to apply the Act in 1996. Many states have encountered the pitfalls that an incomplete definition of the term creates and have resolved the issues in different ways. Though UMRA's definition handles some of these problems, others are left unaddressed.

First, states have been forced to address whether generally applicable laws should be considered mandates. For example, workers' compensation laws that apply to municipalities as well as private employers may be classified as mandates because they

cause between public and private industries).

12. As noted in the Senate Report:

[I]f the Federal government imposes legally binding duties on State, local or tribal governments, and provides financial assistance to them to carry out or comply with those duties, then [the Act] should apply if the Federal government subsequently reduces the authorization of that aid, while continuing to keep the existing duties in place.

S. REP. NO. 1, *supra* note 2, at 10, *reprinted in* 1995 U.S.C.C.A.N. at 13.

13. The nine entitlement programs currently above the \$500 million threshold are: Medicaid; Aid to Families with Dependent Children ("AFDC"); Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. *Id.* Legislation which increases the requirements placed on the state, local, or tribal government under these programs, or which caps or decreases the amount of funding provided to one of these governments for these programs, is considered an intergovernmental mandate. Unfunded Mandates Reform Act § 101 (to be codified at 2 U.S.C. § 658a).

14. Unfunded Mandates Reform Act § 101 (to be codified at 2 U.S.C. § 658b). As the Senate report notes:

A number of these exemptions are standard in many pieces of legislation in order to recognize the domain of the President in foreign affairs and as Commander-in-Chief as well as to ensure that Congress's and the Executive Branch's hands are not tied with procedural requirements in times of national emergencies.

S. REP. NO. 1, *supra* note 2, at 11, *reprinted in* 1995 U.S.C.C.A.N. at 15.

15. 141 CONG. REC. H499-509 (daily ed. Jan. 23, 1995) (reporting the House of Representatives consideration and rejection of amendments excluding application of the Unfunded Mandates Reform Act to bills involving air pollution control or abatement).

16. For a thorough discussion of these definitional issues, see Zelinsky, *supra* note 10, at 1364-66.

impose costs on local governments and private citizens.¹⁷ The Supreme Court of California refused to accept such an all-encompassing definition in *County of Los Angeles v. State*.¹⁸ The court held that California's constitutional definition of a mandate does not include "[l]aws of general application" but rather is limited to "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."¹⁹ Congress hoped to solve this definitional issue by making clear that both intergovernmental mandates and private sector mandates fall under UMRA's provisions.²⁰

Another definitional issue is whether the term "mandate" should apply exclusively to statutorily imposed obligations or whether it should include administrative rules as well. Though most state mandate statutes have taken the broader approach,²¹ federal legislation has tended to define mandate in more limited terms. For example, the State and Local Government Cost Estimate Act of 1981²² defined mandates in terms of statutorily imposed obligations, and required the CBO to project only the impact of proposed federal legislation on states and municipalities. UMRA follows the definitional approach taken by earlier federal legislation by not explicitly including administrative rules in the definition of mandate. However, UMRA does seek to limit the burdens administrative rules place on state and local governments. Title II of the Act requires federal agencies to assess the effects of their regulations on both the public and private sectors and to minimize those burdens where possible.²³ Federal agencies also must accept input from state and local governments in developing regulatory proposals.²⁴ The Act pays special attention to small governments²⁵ by requiring agencies to establish plans to inform and involve small-government officials before implementing regulations that may uniquely affect those governments.²⁶ Furthermore, before promulgating any rule that may require state, local, or tribal governments, or the private sector to expend over \$100 million, the

17. *Id.*

18. 729 P.2d 202, 209 (Cal. 1987). The court held that workers' compensation requirements were not mandates for the purpose of the California reimbursement scheme because the requirements applied to both public and private employers. *Id.*

19. *Id.* at 208.

20. *But see supra* note 11. Apparently, some members of Congress agree with the California court and wanted UMRA to apply only to intergovernmental mandates.

21. *See, e.g.*, CONN. GEN. STAT. ANN. § 2-32b(a)(2) (West Supp. 1995); ILL. ANN. STAT. ch. 30, para. 805/3(a) (Smith-Hurd 1993); MASS. ANN. LAWS ch. 29, § 27C(c) (Law. Co-op. 1995).

22. 2 U.S.C. § 653c (1994).

23. Unfunded Mandates Reform Act §§ 201, 205 (to be codified at 2 U.S.C. §§ 1532, 1536).

24. *Id.* § 204 (to be codified at 2 U.S.C. § 1535). This provision is similar to section 1(b) of President Clinton's Executive Order, *Enhancing the Intergovernmental Partnership*, which attempts to establish a closer partnership between federal agencies and state, local, and tribal officials in the regulatory process. Exec. Order No. 12,875, 58 Fed. Reg. 435,908 (1993).

25. "The term 'small government' means any small governmental jurisdictions defined in section 601(5) of title 5, United States Code, and any tribal government." Unfunded Mandates Reform Act § 101 (to be codified at 2 U.S.C. § 658a). "The term 'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts or special districts with a population of less than fifty thousand." 5 U.S.C. § 601(5) (1994).

26. Unfunded Mandates Reform Act § 203(a) (to be codified at 2 U.S.C. § 1534). In order to achieve the goals set forth by this subsection and the Executive Order directing intergovernmental partnership, *see supra* note 24, the Environmental Protection Agency recommends that the agency convene a series of town meetings across the United States to discuss more flexible ways to achieve environmental protection. U.S. ENVTL. PROTECTION AGENCY, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 7 (1993) (accompanying report of the National Performance Review).

agency must prepare written statements assessing the costs, benefits, and effects of those regulations.²⁷

A third issue is how to determine whether a mandate is funded. Some states consider them funded if the legislature authorizes the lower level of government to levy new taxes to pay for the costs of the mandate.²⁸ However, other states regard any mandate that is not completely funded by the state (*i.e.*, through state-levied taxes) as "unfunded."²⁹ Though UMRA considers various funding options as sufficient to overcome a point of order, it does not specifically address the threshold issue of whether a proposed mandate is funded. As shown by the different approaches taken by states, whether a mandate is funded is not always a straightforward question. For example, if Congress fails to approve a direct appropriation for a law but instead approves a block grant to the state for an amount sufficient to fund a number of unfunded mandates, should the law be deemed unfunded? The answer to this question is important because block grants are a significant source of federal funds for the states. They provide states with money to implement federal programs while giving states the flexibility to choose the most efficient enforcement mechanisms. UMRA lacks a complete definition of unfunded mandate because Congress failed to consider what constitutes "funded." While the Act extensively defines the term "mandate," the omission of a definition of "unfunded" will cause Congress difficulties when it begins to implement UMRA.

One last issue is whether a mandate should be defined in terms of a "de minimis rule."³⁰ A de minimis rule excludes from the definition of mandate any statutory requirement that merely generates de minimis costs for the lower tier of government. For example, Iowa's mandate law does not cover any "statutory requirement" creating less than \$100,000 in costs annually and less than \$500,000 in costs over five years.³¹ However, many state laws define mandate more broadly as "any" law or regulation imposing costs on local governments.³² Congress embraced the de minimis approach in UMRA by requiring a regulation's anticipated aggregate costs to exceed certain threshold levels before the Act's provisions will apply.³³

III. THE BURDEN OF UNFUNDED MANDATES

Though the Contract With America has brought unfunded mandates to the forefront of political debate,³⁴ the rhetoric of the Republican Congress is far from merely a political rallying cry. The massive burden unfunded mandates place on states and localities indicates how out of touch Washington has become with the economic realities around the country.³⁵ For years, Congress has enacted and taken credit for legislation for which

27. Unfunded Mandates Reform Act § 202 (to be codified at 2 U.S.C. § 1533).

28. *See, e.g.*, FLA. CONST. art. VII, § 18(a); LA. CONST. art. VI, § 14(A).

29. *See, e.g.*, MICH. CONST. art. IX, § 29; MASS. ANN. LAWS ch. 29, § 27C(c).

30. Zelinsky, *supra* note 10, at 1364 n.33.

31. IOWA CODE ANN. § 25B.3 (West 1995).

32. *See, e.g.*, CONN. GEN. STAT. ANN. § 2-32b(a)(2).

33. The threshold levels are \$50 million for intergovernmental mandates and \$100 million for private sector mandates. Unfunded Mandates Reform Act § 101 (to be codified at 2 U.S.C. § 658d); *see infra* notes 101-04 and accompanying text (discussing the inequities presented by the disparity in threshold amounts between the public and private sector).

34. "Debate" is used loosely here: "The prevailing anti-mandate rhetoric is nearly universal in character, bipartisan in nature, and embraced by officials from suburban and rural areas as well as big city policymakers and governors." Zelinsky, *supra* note 10, at 1362 (footnotes omitted).

35. *Slaying the Mandate Monster*, WALL ST. J., Jan. 9, 1995, at A14.

it does not pay the bill. Whether it is because members of Congress do not give enough consideration to the impact of mandates,³⁶ or simply that Congress enjoys reaping the benefits of social projects for which it does not have to pay, unfunded mandating has created significant economic difficulties for states and localities for decades.

A. The Burdens of Federal Mandates in General

Since the mid-1960's, the federal government has played an increasingly active role in regulating the states. While historically Congress implemented federal regulations primarily by providing grants to the states, it has changed to enforcing national policies by means of mandates. The grant system provided federal money to states as incentives to comply with federal regulations enacted to implement the goals of Congress. Unfortunately, the current mandate system is more punitive in nature, requiring states to follow Congress' lead or accept strict penalties.

Over the past two decades, Congress has relied heavily on unfunded mandates as a way to achieve national policy goals.³⁷ Congress has taken full advantage of the Tenth Amendment's weakening protection of state sovereignty³⁸ by passing more and more federal mandates.³⁹ The cost of implementing these regulations is borne largely by state and local governments.⁴⁰ Though estimates vary,⁴¹ the important conclusion is that the

36. Gillmor & Eames, *supra* note 9, at 396.

Since environmental compliance costs are largely borne by corporations and lower levels of government, Congress can regulate without raising federal taxes or cutting other spending programs. For this reason, it has paid relatively little attention to the annual cost of regulatory programs. There is, for example, no regular review by our legislators of the resources being devoted to environmental, safety and health regulation, much less the annual scrutiny devoted to on-budget spending.

Paul Portney, *Chain-Saw Surgery: The Killer Clauses Inside the 'Contract'*, WASH. POST, Jan. 15, 1995, at C3.

37. H.R. REP. NO. 1, *supra* note 11, at 4.

38. See *infra* notes 93-95 and accompanying text.

39. According to the National Association of Counties, over 200 federal programs are considered unfunded mandates. Memorandum from Jay D. Hair, National Wildlife Federation, to Affiliate Presidents (Dec. 29, 1994) (on file with the *Indiana Law Journal*) [hereinafter Memorandum]. According to the CBO, the financial burden on local governments for the programs has risen sharply, from \$225 million in 1986 to \$2.8 billion in 1991. Richard A. Serrano, *Lawmakers Vow Quick Attack on 'Unfunded Mandates'*, L.A. TIMES, Jan. 6, 1995, at A18.

40. In 1994, the cost of complying with federal law in Colorado consumed about 25% of the state's general fund (almost \$8 million). *MacNeil/Lehrer News Hour*, *supra* note 10 (statement of Tom Norton, President, Colorado State Senate). The CBO estimated that federal regulations cost states and localities up to \$12.7 billion between 1983 and 1990. See *Slaying the Mandate Monster*, *supra* note 35, at A14. Ohio estimates that its bill for unfunded mandates could run to \$1.74 billion from 1992 through 1995. David Rogers, *Republicans' Move to Curb "Unfunded Mandates" for States, Localities Has Its Own Complications*, WALL ST. J., Jan. 10, 1995, at A22. Unfunded federal mandates account for 9% to 10% of Philadelphia's capital and operating budgets. Vanessa Williams, *Rendell Testifies for Bill to Limit Unfunded Mandates*, PHILA. INQUIRER, Jan. 6, 1995, at A15. In 1982, about 16% of Ohio's budget went to unfunded mandates; today the fraction has increased to almost one-third of the budget. *MacNeil/Lehrer News Hour*, *supra* note 10 (statement of George Voinovich, Governor of Ohio). In California, unfunded mandates are eating up as much as a third of local budgets. Serrano, *supra* note 39, at A18. While these figures are telling, the accuracy of the estimates is unclear because there has never been a comprehensive and reliable study of cities' costs.

41. There is considerable difficulty in estimating the actual cost of mandates. The CBO is charged with the duty of estimating the cost of legislation. "From 1983 to 1990, the best the [CBO] can estimate is that the total cost [of federal mandates] was somewhere between \$8.9 billion and \$12.7 billion." Albert R. Hunt, *Politics & People: Federalism Debate Is As Much About Power As About Principle*, WALL ST. J., Jan. 19, 1995, at A19. Furthermore, the CBO is presently unable to inform Congress of the cost of its legislation with much accuracy. For example, a CBO memorandum estimated the cost of nationwide compliance with the National Voter Registration Act of 1993 at \$20 million while the State of Ohio alone estimates its compliance costs at close to that figure. H.R. REP. NO. 243, 101st Cong., 1st Sess. 28 (1989), *reprinted in* 1995 U.S.C.C.A.N. 7, 9. The CBO readily admits that its estimates are inaccurate: "We really do not know the full extent and magnitude of the situation." Serrano, *supra* note 39, at A18 (quoting Senator J. James Exon (D-Neb.)).

There has been substantial debate on the actual costs of Federal mandates as well as on their indirect costs and benefits. Suffice it to say that almost all participants in the debate would conclude that there is not complete data on the aggregate cost of Federal mandates to State and local governments.

numbers are substantial and the problem is significant.⁴² The CBO reports that from ten to twenty bills each year impose annual costs exceeding \$200 million on state and local governments.⁴³ In 1991, the CBO estimated that five bills would cost state and local governments over \$100 million annually and eight others would place "significant" costs on states and localities.⁴⁴

At the local level, from twenty-five to thirty percent of cities' annual budgets is spent implementing unfunded federal mandates⁴⁵ and the costs of these unfunded mandates on local taxpayers can be as high as \$850 per household.⁴⁶ One 1993 survey estimated the cost to counties at \$4.8 billion for only twelve federal mandates.⁴⁷ Estimated costs for those mandates from 1994 through 1998 total \$33.7 billion.⁴⁸ The survey reported that unfunded federal mandate costs account for an average of 12.3% of counties' locally raised revenues.⁴⁹ Mayors nationwide have difficulty balancing their cities' budgets when the implementation of federal mandates consumes such a large portion of their annual revenue.⁵⁰ Because of the large number of federal mandates, state and local officials are becoming agents of the inefficient federal bureaucracy rather than partners with the federal government in providing effective services to the American people.⁵¹ Extensive

S. REP. NO. 1, *supra* note 2, at 4, reprinted in 1995 U.S.C.C.A.N. at 7.

42. National League of Cities, a bipartisan organization with a combined membership of 16,000 cities that represents state municipal leagues, conducted an annual survey which found that unfunded mandates are the issue local governments find most problematic. "The adverse impact of these mandates on cities with shrinking municipal financial resources was cited by 74.2% of respondents as a steadily worsening situation that Congress must address urgently." John M. Goshko, *Unfunded Mandates Top Cities' List of Problems*, WASH. POST, Jan. 19, 1995, at A13.

43. S. REP. NO. 1, *supra* note 2, at 5, reprinted in 1995 U.S.C.C.A.N. at 8.

44. *Id.*

45. See Jim Wooten, *DeKalb Commission Leads a Valiant Charge*, ATLANTA J. CONST., Aug. 18, 1993, at A14.

46. Robert H. Freilich & David G. Richardson, *Returning to a General Theory of Federalism: Framing a New Tenth Amendment United States Supreme Court Case*, 26 URB. LAW. 215, 222 (1994) (citing William Tucker, *Cities Aim to Stop Federal Buck-Passing*, INSIGHT, Sept. 6, 1993, at 21).

47. H.R. REP. NO. 1, *supra* note 11, at 8 (citing an October, 1993 survey by Price Waterhouse and commissioned by the National Association of Counties).

48. *Id.*

49. *Id.*

50. For example, at a hearing conducted by the Senate Committee on Governmental Affairs, Mayor Greg Lashutka of Columbus, Ohio, stated:

Across this country, mayors and city councils and county commissioners have no vote on whether these mandated spending programs are appropriate for our cities. Yet, we are forced to cut other budget items or raise taxes or utility bills to pay for them because we must balance our budget at our level.

Federal Mandates on State and Local Governments: Hearing Before the Comm. on Governmental Affairs, 103d Cong., 1st Sess. 27 (1994) [hereinafter *Federal Mandates Hearing*].

A nationwide survey of mayors listed five practical difficulties in battling intrusive federal legislation: (1) mayors are too busy with local priorities to devote time to federal policies; (2) mayors might not be aware that other communities are having the same problems; (3) mayors often have difficulty isolating costs associated with mandates within municipal budgets; (4) mayors have inadequate budgets and staffs to effectively lobby Congress; (5) mayors lack public support for lobbying Congress. PAULA P. EASLEY, *PAYING FOR FEDERAL ENVIRONMENTAL MANDATES: A LOOMING CRISIS FOR CITIES AND COUNTIES* 2 (1992).

51. See generally *Federal Mandates Hearing*, *supra* note 50 (statements from various state and local officials).

It is no surprise that Congress is losing legitimacy due to its extensive legislating. States are simply disregarding current federal regulations by refusing to implement them. Both Montana and Arizona are rejecting the Brady Law, which requires state and local law enforcement authorities to use their own resources to conduct background checks on purchasers of handguns during a five-day waiting period. See Jerome L. Wilson, *State Sovereignty Case Shoots at Brady Law*, NAT'L L.J., July 11, 1994, at A21; see also *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994) (holding provisions of the Brady Bill that require local law enforcement officers to conduct background searches on handgun transferees unconstitutional and severable from the remainder of the Act). Also, some state officials are challenging the constitutionality of mandates in court. On December 21, 1994, Governor Wilson of California filed suit in order to bar the enforcement of the National Voter Registration Act, arguing the law violates the Tenth Amendment. Wilson estimates the program would cost California more than \$35 million a year. See Serrano, *supra* note 39, at A18. In *New York v. United States*, the Supreme Court acknowledged this loss of accountability:

[W]here the Federal Government compels States to regulate, the accountability of both state and federal

federal mandating takes away the power and authority of local governments to make decisions and to formulate policies for themselves.⁵² Local governments must allocate funds toward federal projects instead of their own community projects. Thus, these lower levels of government become less responsive to their citizens' needs.⁵³ This seems particularly unfair because, of all the tax money collected in this country, the federal government receives sixty-six percent while only twenty percent goes to state governments and fourteen percent to local governments.⁵⁴ Furthermore, the federal government replaces local programs which are designed to meet local needs. "A federal program designed to serve the entire country cannot possibly anticipate local conditions that might make the program ill-suited to efficiently serving a particular community's needs."⁵⁵

B. Unfunded Mandates in Environmental Regulation

Environmental mandates are perhaps the most burdensome to states and localities.⁵⁶ Complying with Environmental Protection Agency ("EPA") rules cost the nation \$140 billion in 1994, about 2.2% of our Gross Domestic Product.⁵⁷ This compliance cost is

officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

New York v. United States, 505 U.S. 144, 168-69 (1992).

52. Freilich & Richardson, *supra* note 46, at 222.

53. *Id.*

54. *Id.* at 223. In response to this inequity, the National League of Cities, the U.S. Conference on Mayors, and the International City/County Management Association established "Unfunded Mandates Day" on October 27, 1993. The day was intended to draw attention to the extent to which unfunded federal mandates affect local government operations and budgets. *Id.*

Local governments' complaints may be seriously exaggerated since a significant portion of local government funds come from the federal government. Cities and states, by nature, will always want less regulation and more money. This sets up a catch-22 in that the more money that goes into state programs from the federal government, the less autonomy the state will have with regard to that program.

55. Gillmor & Eames, *supra* note 9, at 398. For example, localities all over the country must test their water for a pesticide that is used only on pineapples. *Federal Mandates Hearing*, *supra* note 50, at 27 (statement of Gregory Lashutka, Mayor, Columbus, Ohio).

56. S. REP. NO. 1, *supra* note 2, at 4, reprinted in 1995 U.S.C.C.A.N. at 7. The major environmental regulations that affect states are: the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1994) (regulating the discharge from sewage treatment plants into lakes, rivers, and other navigable water); the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (1988) (creating a program to ensure that public water supply systems meet minimum national standards for the protection of public health); the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k (1988) (establishing a program for manifesting and disposing of hazardous materials); and the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988 & Supp. IV 1992) (setting air quality standards and emission requirements). The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1988), establishes a program, commonly known as "Superfund," to clean up abandoned hazardous waste sites. CERCLA is site specific and is concerned primarily with where the liability for the waste lay, whereas the Endangered Species Act, 16 U.S.C. §§ 1531-1544 affects private property rights (another issue targeted for reform by the "Contract").

This Note will focus on the cost of environmental regulation generally; however, the Clean Water Act and the Safe Drinking Water Act are the most costly. See Laurence J. Aurbach, *Federalism in the Global Millennium*, 26 URB. LAW. 235 (1994). Additionally, some of these regulations are intended to be case specific (*i.e.*, CERCLA) while others mainly affect only the public sector (*i.e.*, the Safe Drinking Water Act). Though the rest are similar in that they regulate both the public and private sectors, the Clean Air Act and the Clean Water Act are the most commonly known.

57. Portney, *supra* note 36, at C3.

about as much as the federal government spent on Medicare in 1994 which triggered a massive two-year congressional undertaking to reform our nation's health care system. Unlike Medicare, however, the federal government pays only a small portion of the cost of environmental mandates.⁵⁸ Corporations and state and local governments carry most of the burden (about sixty percent and twenty-five percent, respectively).⁵⁹ The EPA estimates that by the year 2000 thirty percent of state and local government revenues will go towards environmental activities alone.⁶⁰ The total cost of environmental mandates to state and local governments will rise from \$22.2 billion in 1987 to almost \$44 billion by the year 2000.⁶¹ The most expensive federal mandate for local governments is the Clean Water Act with the Safe Drinking Water Act a close second.⁶²

Environmental regulation is expensive. However, one reason our country spends as much as it does for environmental protection is the antiquated nature of our environmental laws.⁶³ For example, the EPA administrator is not allowed to consider cost as a factor in regulation analysis. This prohibition is explicit or implicit in the Clean Air Act and the Safe Drinking Water Act. Furthermore, these laws frequently still require regulated industries or local governments to install specific types of control equipment rather than allowing them some discretion in meeting pollution limits as efficiently as they can. Such inflexible regulations often lead to ridiculous results. For example, because the Clean Water Act⁶⁴ requires a certain percentage of reduction in solid material from sewage water, the city of Anchorage, Alaska, had to dump fish entrails into its sewer system to have enough solid material to remove so that the city would be in compliance

58. It is possible that the reason for the different treatment of a program like Medicare is the source of the funding (i.e., the federal government). While getting the federal budget in order may require some changes in Medicare, it does not require revamping environmental legislation. State governments and private industry bear the costs of the environmental regulations. Because these regulations are not part of the federal budget, not enough attention has been paid to their cost. See *Regulating Regulation*, WASH. POST, Jan. 23, 1995, at A18.

59. Portney, *supra* note 36, at C3.

60. *Slaying the Mandate Monster*, *supra* note 35, at A14.

61. The \$44 billion figure is adjusted for inflation. OFFICE OF THE VICE PRESIDENT, ENVIRONMENTAL PROTECTION AGENCY NATIONAL PERFORMANCE REVIEW 5 (1993); U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL INVESTMENTS: THE COST OF A CLEAN ENVIRONMENT § 3.1.3, at 3-4 (1990) [hereinafter INVESTMENTS].

62. See Freilich & Richardson, *supra* note 46, at 222 (citing William L. Steude, Address at the National Institute of Municipal Law Officers 58th Annual Conference Work Session on Federalism: Issues and Options (Sept. 21, 1993)).

The Safe Drinking Water Act and its 1986 amendments require the EPA to control disease-causing organisms in drinking water and requires public water-supply systems that use surface water sources to filter and disinfect their water." U.S. ENVTL. PROTECTION AGENCY, PROTECTING OUR DRINKING WATER FROM MICROBES 1 (1989). The EPA has estimated the cost of compliance with the 1986 amendments will be between \$3 and \$5 billion. Allan R. Gold, *The Nation: Drinking Water Will Be Purer, But at What Price?*, N.Y. TIMES, Oct. 7, 1990, § 4, at 4.

The Clean Air Act is not out of the running for expensive mandates. Since the passage of the Clean Air Act in 1970, over \$400 billion has been spent on air pollution control efforts. U.S. ENVTL. PROTECTION AGENCY, OFFICE OF POLICY ANALYSIS, THE COST OF CLEAN AIR AND WATER: REPORT TO CONGRESS 11-12 (1984), cited in Joseph M. Feller, *Non-Threshold Pollutants and Air Quality Standards*, 24 ENVTL. L. 821, 822 n.2 (1994). Spending continues at a rate of over \$25 billion dollars annually. INVESTMENTS, *supra* note 61, § 3.1.3, at 3-4 (estimating air pollution control costs of approximately \$44 billion by the year 2000).

63. A brief review of the history of the Clean Air Act reveals, however, that it has frequently been subject to consideration by Congress. The first federal air pollution legislation was the Act of July 14, 1955, Pub. L. No. 84-159, 69 Stat. 322, which provided federal funding for research. The first substantive federal clean air legislation was the Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1964), which was amended by the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1968), and by the 1970 amendments, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-7671q (1988 & Supp. IV 1992)). The Act was subsequently amended by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1980), and by the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1991). Such a history would seem to show that the law is not antiquated—it has been amended time and time again. Perhaps the real problem, then, is that Congress is not capable of drafting such science-oriented legislation. See e.g., Feller, *supra* note 62.

64. 33 U.S.C. §§ 1251-1376.

with the law.⁶⁵ Another example is from Yorktown, Virginia where an EPA study of a petroleum refinery showed that the same amount of carcinogenic air pollutant could be removed for one-quarter of the current annual cost were it not for inflexible regulations.⁶⁶

Perhaps UMRA strikes a chord in the environmental area because so many absurdities and inefficiencies are built into the current rules.⁶⁷ Not even the most impassioned environmentalists dispute that environmental regulations are in dire need of major reform.⁶⁸ However, UMRA does little to provide that reform. UMRA's solution is to disregard the antiquated regulations altogether rather than to spend the necessary time revising them.

IV. ENVIRONMENTAL LEGISLATION AND UMRA

Obviously, the problem of expensive and inefficient environmental regulation requires a solution. However, UMRA is not the proper vehicle to remedy the multitude of problems that presently exist in environmental regulations.⁶⁹ Rather than solve any problems in the environmental arena, UMRA will merely fuel the conundrum that lies before us.⁷⁰ In reality, UMRA amounts to a back-door attack on the very existence of environmental laws.⁷¹ Though the Act will leave all current environmental legislation intact,⁷² it creates tremendous hurdles for reauthorizing existing regulations.⁷³ Under

65. Hunt, *supra* note 41, at A17.

66. Portney, *supra* note 36, at C3. Furthermore, the Safe Drinking Water Act has been criticized widely for its requirement that communities nationwide test their water supply for a pesticide that is primarily used on pineapples. See *supra* note 55.

67. Portney, *supra* note 36, at C3.

68. For a discussion of the current inefficiencies in the Clean Air Act and the difficulties the Environmental Protection Agency faces in enforcing the Act's standards, see generally Feller, *supra* note 62.

69. Appropriate vehicles for environmental management are outside the scope of this Note. However, various solutions which address the concerns presented by current environmental regulations are promoted by all interested parties—industry, state and local governments, and environmental groups. Creating a system with, or driven by, economic incentives is a theme throughout the proposals. Daniel P. Selmi, *Experimentation and the "New" Environmental Law*, 27 LOY. L.A. L. REV. 1061 (1994). One proposal would replace the current regulations with a block grant approach wherein the federal government sets goals and provides money while allowing states to decide how to meet the goals. Another popular solution is to set up a system of marketable permit schemes. Under this approach, a ceiling level of pollution is set. Permits for a certain percentage under that ceiling are issued to businesses. Each individual business is given flexibility to meet its allocated percentage in the manner it deems most appropriate. As it increases its efficiency, it may not need its entire allotment and can sell it to another business. Environmental groups support such a proposal because it is likely to increase efficiency in implementation, increasing the likelihood of environmental improvement. *Id.* at 1063. Businesses like the fact that the system gives them increased flexibility and the possibility of cost savings. *Id.* Furthermore, "[p]ermit trading encourages the development of least-cost controls, which sometimes may be achieved by increasing the efficiency of resource use." C. Boyden Gray, *Public Versus Private Environmental Regulation*, 21 ECOLOGY L.Q. 434, 435 (1994). Finally, privatization of facilities can help curb costs. Indianapolis Mayor Stephen Goldsmith successfully privatized his city's wastewater treatment plants and brought down the costs by 44%. Indianapolis has one of the most advanced waste water systems in the country, but by bidding out the management of the facilities to a private company, the city realized an \$11 million per year savings. As Mayor Goldsmith explains, "[private companies] have technologies we don't have, research we don't have, scale we don't have." WILLIAM D. EGGERS & JOHN O'LEARY, *REVOLUTION AT THE ROOTS: MAKING OUR GOVERNMENT SMALLER, BETTER, AND CLOSER TO HOME* 112 (1995).

70. "[UMRA] has the potential of causing havoc in the legislative process and aiding in the very gridlock we are all so desperate to avoid." S. REP. NO. 1, *supra* note 2, at 35 (statement of Sens. Carl Levin (D-Mich.) & Joe Lieberman (D-Conn.)), reprinted in 1995 U.S.C.C.A.N. at 37.

71. "The Republicans have included in this bill a variety of measures designed to incapacitate federal protection of the environment." Memorandum, *supra* note 39, at 1.

72. UMRA will not apply retroactively. Unfunded Mandates Reform Act § 110.

73. A mandate will become ineffective or proportionately cut back should a future appropriation not meet the level of the CBO cost estimate for each year of reauthorization. The CBO admits that these cost estimates may be impossible to obtain. S. REP. NO. 1, *supra* note 2, at 32, reprinted in 1995 U.S.C.C.A.N. at 34.

[UMRA] takes a CBO estimate of the cost of legislation to state, local and tribal governments . . . and says that if we don't appropriate money at the level of the CBO estimate then the legislation that we passed requiring radon

UMRA, reauthorization of any regulation requires the same process as the passage of new laws.⁷⁴ Since all environmental laws require periodic reauthorization, they will have to cost less than the threshold levels in order to remain intact without meeting the extra procedural requirements imposed by UMRA. Such a back-door attack on environmental laws is much easier to accomplish than attacking the regulations head-on.⁷⁵ UMRA received immense public support because no one discussed its extensive repercussions; had the Republican-controlled Congress said to the American people that they were disregarding twenty-five years of environmental progress and repealing environmental protections, UMRA might have met a different fate.⁷⁶ Rather than fueling an honest national debate on funding and budget priorities, UMRA was sold to the public through media hype.

Over the past twenty-five years, the benefits of environmental regulation have been irrefutable.⁷⁷ In spite of the problems the current legislation creates, we encounter its positive results every time we walk outside. The United States is a cleaner, better place to live because of environmental legislation passed in the 1970's. That fact alone should be enough reason to maintain environmental regulations. Clearly, however, the 104th Congress did not agree, since it refused to adopt a proposed amendment to UMRA exempting environmental regulation from its provisions.⁷⁸ Nevertheless, the very nature of environmental regulations provides additional support excluding those laws from UMRA.

A. Environmental Regulation Requires a National Enforcement Mechanism

The purpose of the federal system is to establish an effective central government to manage national issues.⁷⁹ The federal government must have the power to mandate in order to achieve national policy objectives.⁸⁰ UMRA will "negate all federal regulatory control over states and localities unless these programs are fully funded, and would effectively end the federal government's ability to pass regulations aimed at protecting

abatement or an increase in the minimum wage or tougher sewage treatment standards or reductions in dioxin, will be ineffective.

Id. at 30-31 (statement of Sens. Levin & Lieberman), *reprinted in* 1995 U.S.C.C.A.N. at 32.

74. Unfunded Mandates Reform Act § 428 (to be codified at 2 U.S.C. § 658g).

75. President Ronald Reagan effected the same outcome by cutting the budget. In his 1982 State of the Union address, Reagan criticized federal interference in local financing and proposed cutting the budget for federal mandates. See Carl Stenberg, *The State's Role in the New Federalism*, in *THE NEWEST FEDERALISM: A NEW FRAMEWORK FOR COASTAL ISSUES*, 41, 42 (Thomas D. Galloway ed., 1982).

76. According to findings of a recent poll conducted by Peter D. Hart Research Associates for the National Wildlife Federation, the vast majority of Americans—Republicans and Democrats alike—continue to support strong environmental protections. Ann O'Hanlon, *Nov. 8 Had a Green Tint, Wildlife Federation Finds*, NAT'L L.J., Dec. 24, 1994, at A4.

77. "Today swimmers and water skiers enjoy the Potomac [River] without fear. At least some form of water-based recreation has returned to most of America's other large urban areas . . . Urban air quality has improved even more broadly and substantially around the country." Portney, *supra* note 36, at C3.

78. 141 CONG. REC. H499-509 (daily ed. Jan. 23, 1995).

79. Aurbach, *supra* note 56, at 235.

80. *Id.* But see Gillmor & Eames, *supra* note 9, at 399-400 ("It is an illegitimate use of congressional power and contrary to federalist purposes for Congress to require a local government to implement and pay for national policy, regardless of cost, regardless of reimbursement[.] . . . regardless of the effect on essential local services." (emphasis in original)).

citizens."⁸¹ The ability of the federal government to set minimum standards for the health and safety of its citizens will be reduced greatly.⁸²

Environmental problems are national issues and, therefore, require national solutions. Environmental regulations address concerns which are not state specific and will never be state specific. Problems that cross state lines require federal involvement. Unless all states are subject to uniform regulations, undoubtedly some states will fail to pass and enforce sufficiently strict laws. One state's air and water pollution is not simply a local concern. That pollution will affect neighboring states which cannot react like neighboring countries by imposing embargoes and tariffs.⁸³ They are left with no remedy. If one state elects not to manage its landfills effectively and toxic chemicals seep into the next state's groundwater supply, major conflicts arise between the states. Under UMRA, those difficulties are likely to fester as the federal government will be powerless to police the situation.

One reason Congress has the responsibility of enacting comprehensive pollution control laws is that states cannot fairly solve pollution problems that cross state lines.⁸⁴ Without uniform standards throughout the country, environmental protection becomes only as important as the least concerned state deems it to be. Thus, the lowest common denominator is the standard by which the entire country must live. Such a proposal is simply unfair to states in the Union that want breathable air and drinkable water.⁸⁵ UMRA attacks an entire group of laws which provided immense social progress in many areas, including the environment. The environmental legislation passed in the 1970's has

81. See Gillmor & Eames, *supra* note 9, at 400 n.20 (quoting Letter from John Adams, Executive Director, National Resources Defense Council, to Member of Congress 1 (Nov. 10, 1993)).

The unfunded mandate provision of the Contract would erode the federal government's ability to enforce the Fourteenth Amendment. If [the Unfunded Mandates Reform Act] had been the law in the 1950s and 1960s, Southern governors could have turned back civil rights legislation by claiming it would cost them too much money to desegregate public facilities or keep order around demonstrations. . . . [T]he provision would transform the Bill of Rights into a bill of costs. In the Federalist Papers[,] . . . John Jay said that one advantage of the Constitution would be to impose on border states more fair and impartial treatment of Native Americans. He did not say that states should be allowed to evade such an imposition by claiming that it would cost too much to be fair and impartial. The rights of American citizens to health and safety are to be debated by Congress and the courts without a de facto veto being given to the states.

Gary Wills, *Newing the Constitution*, WASH. POST, Jan. 8, 1995, at C2.

82. However, some commentators argue that the ability of the federal government to regulate for the benefit of its citizenry is not the issue. See, e.g., Gillmor & Eames, *supra* note 9, at 400 ("The question is whether one government should be able to design a program to serve the objective and require another government to pay for it.")

83. For example, in southern California, the New River runs through the \$1 billion-a-year agricultural land of the Imperial Valley. Across the border, the river runs through Mexicali, which has a rapid annual population growth of 1.7%; its sewage lines continually rupture and drain into the New River. Additionally, some 200 Mexicali factories, for printing, pesticides, foods, petroleum, rubber, metal, and mining, dump waste into the river which then flows into the United States and through the Imperial Valley. The pollution is so bad that when Mexican officials pulled a murder victim from the river, they initially thought the man had been burned to death; later they discovered the chemicals in the New River had simply eaten the flesh from his bones. Marianne Lavelle, *Poisoned Waters Provide Early Test for NAFTA*, NAT'L L.J., Mar. 21, 1994, at A1. In 1986, *Time* called the New River "the most contaminated river in the world." Marianne Lavelle, *EPA Probes Cross-Border Contamination*, NAT'L L.J., Oct. 10, 1994, at B1. The United States has the power to place an embargo or tariff on Mexico until it cleans up the New River. California cannot take such an action, so it is left at the mercy of the Mexicali industries. The extensive agricultural exports from the Imperial Valley suffer if the federal government cannot put forth a national environmental policy.

84. Memorandum, *supra* note 39.

85. In 1995, a Wall Street Journal/NBC News national poll (conducted from January 14 to January 17, 1995) showed that the public believes the federal government should bear more responsibility than the states for regulating in certain areas, including environmental protection. The poll asked the question: Which do you think should have more responsibility for achieving the following goal, federal or state government? "Protecting the environment" was one category, and results were: federal government 50%, state governments 38%. Hunt, *supra* note 41, at A17. Perhaps the American people are more sophisticated than the politicians give them credit for on the appropriate role of different levels of government.

cleaned up our air and our rivers and has made our country a better place.⁸⁶ Furthermore, because neighboring countries have the power to react with embargoes and tariffs, the importance of a national enforcement mechanism is paramount. If states are allowed to form their own environmental policies, one maverick state has the potential of ruining relations with neighboring countries. The result may be harmful embargoes and tariffs which would affect all the states. Such a scenario emphasizes that environmental issues are international issues as well. Moreover, the United States must have a national policy to ensure that environmental benefits inure to the global community, as well as the national community. Centralizing environmental issues in the federal government may cause difficulties in state and local management, but the federal government must be able to require all states to comply with certain standards to ensure that there will be a beneficial impact on the environment as a whole. As a world leader, the United States is in a unique position to mold suitable and desirable standards for the future. Some matters are fundamental to a stable world. "Preservation of the global commons, the atmosphere and oceans, endangered species, unique ecosystems, [and] world . . . resources is . . . the legacy of all mankind."⁸⁷ Our ability to manage and solve environmental problems on such a massive scale is unprecedented in history. State and local governments must be able to do their jobs within the framework of essential national and international policies.

UMRA gives power back to states and localities to craft their own legislation. However, often in the environmental area, states and localities are not nearly as well equipped in resources and knowledge as the federal government. The federal government brings a vast amount of expertise and experience to environmental problems, not to mention research capabilities that few local governments can equal.⁸⁸ In 1995, forty-five people died in Milwaukee from drinking polluted water because there was not a strict enough drinking water act passed at the federal level and Wisconsin had not passed legislation of its own.⁸⁹ The EPA is specially trained in finding and solving environmental problems. Furthermore, states only have the power to legislate within their own borders. California cannot pass laws that directly affect Oregon residents, nor does California wish to be responsible for the welfare of Oregonians. The federal government, on the other hand, has both the unique power and the unique motivation to regulate for the entire public's welfare.⁹⁰ If a clean environment is a public good, its attainment should not be left to the discretion of individual states. The proper mechanism for achieving a clean environment is the federal government, not individual state governments.

UMRA should not apply to environmental regulation because providing a national policy for the environment ensures that the entire country will take proactive measures toward environmental clean-up. Industries across the country did not volunteer to clean up the rivers or the air; they attacked the problems only when required to do so by the Clean Water and Clean Air Acts. Similarly, states have not assumed voluntarily any

86. *MacNeil/Lehrer News Hour*, *supra* note 10 (statement of Rep. George Miller).

87. Aurbach, *supra* note 56, at 235.

88. Portney, *supra* note 36, at C3.

89. *MacNeil/Lehrer News Hour*, *supra* note 10.

90. A recent study of seven municipalities showed that economic development was the leading criterion used by local government leaders in evaluating environmental and public health issues. In two of the municipalities studied, higher levels of government assessed public health and environmental issues as more pressing than did lower levels of government. Carole J. Cimitile et al., *Balancing Risk and Finance: The Challenge of Implementing Unfunded Environmental Mandates*, PUB. ADMIN. REV. (forthcoming 1996) (manuscript on file with the *Indiana Law Journal*).

responsibility for passing environmental legislation or even for cleaning up the pollution they created.

For example, U. S. Steel Corporation failed to rid the San Francisco Bay of the sewage it created there because it did not want to pay to clean it up. The city of San Francisco did nothing either to stop U.S. Steel or to clean the water in the Bay. Residents and visitors had to swim in sewage and eat fish from polluted water because no one would pay to clean it. The federal government passed the Clean Water Act to force municipalities and industries to pay for the mess and pollution they create.

States, localities, and industries complain that the federal government does not subsidize the cost of the environmental regulations. However, the federal government is not the responsible polluter in most instances. The federal government did not pollute the San Francisco Bay or many of the rivers, lakes, and bays in the country. Those who *create* the pollution should bear the costs of clean-up. However, if those who created the pollution are given the sole power to draft the laws intended to regulate their activities, there will be little incentive for them to pass strict laws. The federal government took responsibility for environmental legislation because states and localities did not. UMRA gives the states and localities the power to self-regulate in an area where their main concern is their fisc, not the environment.⁹¹

Protection of the environment requires a national policy and national enforcement. Ensuring adequate standards for clean air and water should not be left to state and local governments whose economic interests run counter to that goal. If Missouri were to dump waste into the Mississippi River, who would stop them if not the federal government? If Detroit fails to implement acceptable air quality standards for its factories, what recourse would Indiana have? UMRA robs Congress of its authority to set environmental protection standards unless the federal government funds the programs. Such a plan is ludicrous. Congress will be paying to clean up air, water, and waste dumps it had no part in polluting. States, localities, and industries will have no incentive to decrease their waste production because the federal government will subsidize clean-up costs. UMRA will take environmental issues away from Congress and leave pollution control to the polluters. Effective pollution control requires a national consensus and, therefore, federal mandates. Thus, environmental laws should be exempt from UMRA's provisions.

B. UMRA Does Not Solve the Problems of Environmental Regulation

The legislative history indicates that Congress passed UMRA

to curb the practice of imposing unfunded mandates on States and local governments; to strengthen the partnership between the Federal Government and State, local and tribal governments; [and] to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate funding, in a manner that may displace other essential priorities⁹²

This statement of purposes indicates that Congress deems the problem with unfunded mandates to be one of federalism—the federal government has chiseled away at states' power by legislating for them, rather than allowing states to legislate as they believe

91. Cf. *id.* (describing economic development pressures local governments must face when implementing environmental mandates).

92. S. REP. NO. 1, *supra* note 2, at 1, reprinted in 1995 U.S.C.C.A.N. at 4.

necessary. UMRA indirectly restores power to the states by directly limiting the mandating powers of Congress. Thus, UMRA revitalizes federalism and the Tenth Amendment.⁹³ Until recently, Congress had virtually unchecked power to bury state and local governments with the costs of implementing federal programs.⁹⁴ The separation between the federal government and the state governments has become blurred by federal mandates.⁹⁵

UMRA is drafted to fix this lack of separation. If a lack of separation between the federal and state governments were the problem with environmental regulations, UMRA would be an appropriate solution. However, the problem with environmental regulations is not that they take power away from the states, but rather that they are inefficient and poorly drafted.⁹⁶ In order to resolve the issues presented by current environmental regulations, Congress must draft different legislation. Newer, more flexible regulations are the appropriate solution in the environmental arena. Rather than tackling this more difficult task, Congress focused on gaining popular support for a quick-fix solution that will effectively abort environmental clean-up altogether.

The Act calls for formal risk assessments and cost-benefit analyses for virtually every federal regulation.⁹⁷ This will increase such analyses by thirty times—from about eighty performed now to over 2400. Requiring such a procedure will swamp regulatory agencies and require them to spend already scarce time and money following procedures that may prove unnecessary. "To be sure we want to eliminate 'unfunded mandates' . . . but

93. The Tenth Amendment grants to the States powers not delegated to Congress. "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." U.S. CONST. amend. X. Our Union was based on the premise that it would be a country of sovereign states; the Constitution was intended to protect that sovereignty. "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (1 Wall.) 700 (1869). As James Madison explained, "The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former." *THE FEDERALIST* NO. 45 (James Madison); see also *THE FEDERALIST* NO. 51 (James Madison) ("The different governments will control each other, at the same time that each will be controlled by itself.").

94. See Gillmor & Eames, *supra* note 9, at 395 (commenting that "[c]onditions are ripe for a catastrophic shift in American federalism"). Congress' power under the Commerce Clause seemed limitless with the overturning of *National League of Cities v. Usery*, 426 U.S. 833 (1976), by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In holding that the Fair Labor Standards Act's minimum wage and overtime requirements applied to employees of a city-owned mass transit system in *Garcia*, the Supreme Court destroyed any hopes the states had for Tenth Amendment restraints on Congress' Commerce Clause power. The Court left the states looking to the national political process for relief from burdensome congressional mandates.

However, recent Supreme Court decisions show some promise for a revival of the Tenth Amendment and state power, and a return to a more evenly balanced system of power between the federal government and state and local governments. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding that Congress exceeded Commerce Clause authority in enacting law prohibiting possession of a gun in a local school zone); *New York v. United States*, 505 U.S. 144, 161 (1992) ("Congress may not simply commandeer the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program."); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991). For a thorough discussion of this trend, see Freilich & Richardson, *supra* note 46. "New York [*v. United States*] marked the apogee of a new regard for federalism." Wilson, *supra* note 51, at A21. National regulatory programs are now subject to a new scrutiny under the Tenth Amendment if they command states to implement federal policy and impose significant duties and costs on state governments. "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162. Recently, provisions of the Brady Handgun Violence Prevention Act were held to violate the Tenth Amendment by a Montana federal district court in *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994), because the Act substantially commandeered state executive officers to administer the federal program.

95. See Wilson, *supra* note 51, at A22 ("However, the fact remains that this country simply cannot contend that it has a system of sovereign states, if the states as states cannot accept or reject a role in enacting or administering federal regulatory programs.").

96. See *supra* notes 63-68 and accompanying text.

97. See *supra* note 7. According to the CBO, "estimates of private sector impacts of reported bills would be expensive and time-consuming and frequently would produce information of limited usefulness to Congress." OMB WATCH, EYE OF THE NEWT: AN ANALYSIS OF THE JOB CREATION AND WAGE ENHANCEMENT ACT 13 (1994).

paralysis by analysis serves no useful purpose but delay."⁹⁸ UMRA requires that Congress spend more time considering whether to pass costly unfunded mandates. Such a procedure does absolutely nothing to cure the ills posed by current environmental laws. Congress *knows* its environmental mandates are expensive. It does not need more time to think about the costs it imposes on the states when it reauthorizes these laws. It needs time to draft flexible, efficient environmental legislation which states can implement effectively. UMRA fails to address the problems posed by environmental regulations; problems that were a major impetus for the regulations in the first place.⁹⁹

Congress has already appropriated an additional \$4.5 million to the CBO's budget so that it can handle the expense of producing all the new cost-benefit analyses UMRA requires.¹⁰⁰ Since UMRA is not retroactive and will only apply to legislation which comes to the floor of Congress after January 1, 1996, this \$4.5 million will be spent to generate cost analyses only for new legislation. However, problems with *current* unfunded mandates brought about the need for UMRA. As it stands, the millions of dollars appropriated for UMRA will not be spent on analyses of these mandates which created the need for the Act. In short, Congress passed a law that fails to address the problems it was intended to remedy.

One definite indication that UMRA is inappropriate for application to environmental laws is its deferential treatment of governmental entities engaged in familiar private functions. Under UMRA, intergovernmental mandates must exceed an estimated annual cost of \$50 million while private sector mandates must exceed an estimated annual cost of \$100 million to trigger the procedural obstacles. Though intergovernmental mandate and private sector mandate are separately defined and have different threshold costs, a law can contain both types of mandates simultaneously. For example, the Clean Air Act is both an intergovernmental mandate and a private sector mandate.

Under UMRA, proposed legislation which falls into both categories is treated differently after it is categorized. Thus, legislation which is both an intergovernmental mandate and a private sector mandate will be subject to separate analyses to determine both its public sector and its private sector impacts. A proposed intergovernmental mandate with costs exceeding \$50 million will trigger the procedural safeguards of UMRA and will be void for state and local governments if Congress fails to meet its commitment of funding. In order for a private sector mandate to receive the procedural safeguards, its costs must exceed \$100 million. For mandates that affect both state and local governments and the private sector, the state and local governments will be exempt should Congress not provide them with funding while the private sector still must comply with the law. This disparate treatment is troubling, particularly when the state or local government is acting in the same capacity as a private company. The Act amounts to an exemption for state and local governments from the same health, safety, and

98. Portney, *supra* note 36, at C3.

99. See S. REP. NO. 1, *supra* note 2, at 3, reprinted in 1995 U.S.C.C.A.N. at 6.

100. Unfunded Mandates Reform Act § 109 (to be codified at 2 U.S.C. § 1516.109).

environmental rules that apply to private industry.¹⁰¹ Such deferential treatment results in a significant competitive disadvantage for the private sector.¹⁰²

For example, unlike any private facility, city-run garbage dumps may be exempt from requirements to use liners to limit water contamination and city-run garbage incinerators may be exempt from requirements to install equipment to limit toxic air pollution.¹⁰³ Unlike private water companies, city and county water utilities may not have to comply with water disinfection standards. When a government is engaged in such functions, it should meet the same pollution standards as private companies engaged in the same activity. Applying UMRA to environmental regulations completely undermines the reasons for passing environmental protection laws. "If a regulation makes sense from society's standpoint—if it provides safety and health protection or other 'goodies' deemed more than commensurate with its costs—we should impose it without having to shell out federal dollars, whether the costs fall on public or private parties."¹⁰⁴ The Clean Air Act and the Clean Water Act do not make sense in a system where only half the polluters must comply with their standards. It is absurd to legislate to clean the air and the water and then statutorily exempt state and local government polluters from the regulations.

UMRA does not resolve the difficulties presented by current environmental regulations. Rather, UMRA allows state and local governments to abandon the regulations altogether if the federal government does not fund the necessary clean-up activity. Congress has addressed the problems with the environmental laws by providing a means for circumventing them. UMRA promotes noncompliance rather than newer, more efficient ways to maintain air and water quality. Since UMRA undermines the purposes of environmental regulations and is ill suited to address the problems associated with them, these regulations should be exempt from its provisions.

CONCLUSION

UMRA is a well-intentioned piece of federal legislation. After decades of burdening states and localities with an increasing number of mandates and a decreasing amount of appropriate funding, Congress has finally done something to reverse the harsh consequences of excessive unfunded mandating. Undoubtedly, the difficulties brought about by unfunded mandates required a solution. Unfortunately, UMRA's quick-fix solution will leave environmental legislation unenforceable. Congress should exempt environmental laws from UMRA's provisions because pollution control cannot be

101. "Unfunded Mandates" Reforms Threaten Basic Health and Safety Laws; State and Local Governments Exempted From Laws Applying to Industry, Dec. 27, 1994, available in WESTLAW, BUSWIRE database [hereinafter *Unfunded Mandates Reforms*].

102. Private sector concerns over inequitable treatment are reflected in the Senate report on UMRA:

"The results [of UMRA] would severely skew the marketplace in favor of government rather than the private sector services because the private sector would have to add in prices to its customers for compliance with these various federal rules that customers . . . of the public sector would not have to pay."

S. REP. NO. 1, *supra* note 2, at 32 (quoting a letter dated December 16, 1994, from Browning-Ferris Industries, a waste management company, to Senator Kempthorne), reprinted in 1995 U.S.C.C.A.N. at 33. UMRA will lead to bigger government "[b]ecause exemptions from federal standards could give government services a competitive advantage over private industry." *Unfunded Mandates Reforms*, *supra* note 101 (quoting David Roe, Senior Attorney, Environmental Defense Fund). The official position of the Environmental Defense Fund ("EDF") is that UMRA should not apply to federal rules that merely impose the same standards on state and local governments as they do on private industry. *Id.*

103. *Unfunded Mandates Reforms*, *supra* note 101.

104. Portney, *supra* note 36, at C3.

implemented effectively by individual states. Without a national enforcement mechanism, states and localities have little incentive to draft strict environmental laws and, as a result, the air and water quality of this country will be a matter of the lowest common denominator. UMRA turns back the clock for environmental regulations, taking this country back to a time when it lacked any national policy on the environment—back to a time when raw sewage flowed directly into every accessible river in this country and emission control did not exist. The federal government was forced to intervene and enact tough pollution control standards because states were not doing it themselves, and nobody was cleaning up their own pollution. It makes little sense, politically or environmentally, to repeat these mistakes.

Furthermore, UMRA's purposes are unrelated to the problems afflicting environmental regulations. UMRA was drafted to reinstate state sovereignty, whereas antiquated, inflexible, and inefficient regulations, not a lack of state sovereignty, cause problems with environmental regulations. UMRA allows states and localities to disregard environmental laws if they cost too much and the federal government does not provide the funding. Where the environment is concerned, avoidance will not work. Moreover, requiring private companies to comply with laws from which state and local governments are exempt is nonsensical and unfair. The problems UMRA was enacted to eradicate are not the problems that exist with environmental regulations. UMRA will merely allow states to avoid pollution control altogether.

Congress has side-stepped the issue of whether the American public *wants* this type of deregulation in the environmental arena. Of course the states want to have the power to spend their money the way they choose—they always will. However, our nation is more than an agreement between individual states; it is an entity in and of itself, with responsibilities to its citizens. In the 1970's, the public demanded that Congress pass environmental protection legislation. The public does not care which part of every tax dollar pays for clean air and safe water, they care only that these objectives are achieved. UMRA will dismantle twenty-five years of governmental commitment to environmental issues. Unfortunately, the 104th Congress passed UMRA without fully disclosing its consequences to the American people. Without an exemption for environmental laws, UMRA will make effective, equitable pollution control a thing of the past.