

10-1997

Unfunded Mandates and Fiscal Federalism: A Critique

Robert W. Adler

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Government Contracts Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

Robert W. Adler, Unfunded Mandates and Fiscal Federalism: A Critique, 50 *Vanderbilt Law Review* 1135 (2019)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol50/iss5/2>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Unfunded Mandates and Fiscal Federalism: A Critique

Robert W. Adler

50 Vand. L. Rev. 1137 (1997)

*The term "unfunded federal mandates" is used to challenge federal obligations imposed on states and localities without accompanying funding. Unfunded mandates were alluded to by both the majority and dissenting opinions in *Printz v. United States*, in which provisions of the Brady Handgun Violence Protection Act were invalidated by the U.S. Supreme Court on Tenth Amendment grounds. In this Article, Professor Adler critiques the fiscal, legal, and policy arguments against unfunded federal mandates. This analysis, in turn, raises two broader issues. First, is the concept of unfunded mandates independently useful to the nation's ongoing debate about federalism? Second, does the mandate issue provide insight into the key legal question of whether judges or elected officials are best suited to decide the appropriate roles of the federal and state governments?*

Following a brief history of the debate over unfunded federal mandates, the Author analyzes the term and its component parts and concludes that the phrase has been used too broadly to challenge actions that are not properly "unfunded," "federal," or "mandates." Next, Professor Adler concludes that past efforts to assess the costs of unfunded federal mandates seriously overstated the costs of such mandates to states and cities. Moreover, he argues that the costs of federal mandates are more than offset by all forms of federal aid and that states and cities remain net beneficiaries in intergovernmental fiscal relations. The legal analysis concludes that, for most purposes, the degree of funding attached to federal programs is not relevant to their validity on Tenth Amendment grounds. Last, the Author challenges the presumption that unfunded federal mandates are "bad" on normative grounds, rather than legitimate, neutral policy choices about what level of government should decide and pay for various aspects of public policy.

Because the unfunded federal mandate terminology defies precise definition, because it is legally irrelevant to the validity of federal programs on constitutional grounds, and because such mandates can be supported as well as opposed on normative grounds, Professor Adler concludes that the mandate concept provides little independent utility to the ongoing debate about federalism. Moreover, since elected officials can properly weigh the costs and benefits of individual mandates in the context of overall federal tax, spending, and regulatory policy, while federal judges are limited to discrete challenges to individual federal programs, the analysis lends strong support to the view that the political branches are better equipped than the judiciary to decide important issues of federalism.

Unfunded Mandates and Fiscal Federalism: A Critique

*Robert W. Adler**

I.	INTRODUCTION.....	1139
II.	BACKGROUND AND HISTORY OF THE UNFUNDED MANDATE DEBATE	1144
A.	<i>The Evolution of the Mandates Issue</i>	1144
B.	<i>The Unfunded Mandates Reform Act of 1995 and the Future of the Debate over Unfunded Federal Mandates</i>	1151
III.	THE INTRACTABLE PROBLEM OF DEFINITION	1154
A.	<i>What is a Mandate?</i>	1155
1.	Direct Orders	1156
2.	Conditions of Aid	1157
3.	Full and Partial Preemption.....	1160
4.	Tax Policy Provisions	1162
5.	Incidental and Implied Federal Policy Impacts.....	1164
6.	Federal Statutory Liabilities	1165
7.	Conclusion.....	1167
B.	<i>What is a Federal Mandate?</i>	1167
1.	Constitutional Mandates	1167
2.	Compensation Liability Mandates	1170
C.	<i>What is an Unfunded Federal Mandate?</i>	1171
D.	<i>Conclusion</i>	1175

* Robert W. Adler, Associate Professor, University of Utah College of Law. I testified on the issue of unfunded federal mandates before the 103d Congress, see Hearings on S. 993 before the Senate Committee on Governmental Affairs, 103d Cong., 2d Sess. 201 (1994) (statement of Robert W. Adler, Senior Attorney, Natural Resources Defense Council), and served on a task force on unfunded mandates convened by the U.S. Advisory Commission on Intergovernmental Relations ("ACIR"). U.S. Advisory Commission on Intergovernmental Relations, *Federal Mandate Relief for State, Local, and Tribal Governments* 47 (U.S. G.P.O., 1995). I gratefully acknowledge the help of the University of Utah College of Law library research staff, especially John Bevan, Carolyn Vogen, and Linda Stephenson. I am also indebted to colleagues John Martinez, John Flynn, Bob Keiter, and John Dernbach for their insightful comments on an earlier draft, but I accept full responsibility for all flaws, errors, and omissions. This Article was funded in part by the University of Utah College of Law Excellence in Teaching and Research Fund.

IV.	FISCAL OPPOSITION TO UNFUNDED FEDERAL MANDATES .	1176
A.	<i>Existing Mandate Impact Estimates</i>	1176
1.	Qualitative Impact Studies.....	1176
2.	Quantitative Fiscal Impact Studies	1177
B.	<i>The Limitations of Mandate Impact Estimates</i>	1181
C.	<i>Mandate Impact Estimates in Context</i>	1187
D.	<i>Conclusion</i>	1191
V.	THE LEGALITY OF UNFUNDED FEDERAL MANDATES AND THE JUDICIAL ROLE	1193
A.	<i>Background Principles of Federalism</i>	1194
B.	<i>Direct Order Mandates</i>	1200
C.	<i>Conditions of Federal Assistance</i>	1204
1.	The Spending Clause.....	1204
2.	The Sixteenth Amendment	1209
D.	<i>Full and Partial Preemption</i>	1213
E.	<i>Tax Policy Provisions</i>	1214
1.	Direct Taxation.....	1214
2.	Indirect Effects of Tax Policy	1219
F.	<i>Incidental Federal Policy Impacts</i>	1221
1.	Increased Demands for State Services.....	1221
2.	Limits on State-Owned Commodities.....	1222
3.	Conclusion.....	1225
G.	<i>Federal Statutory Liability</i>	1225
H.	<i>Conclusion: The Legal Implications of Unfunded Federal Mandates</i>	1229
VI.	NORMATIVE OPPOSITION TO UNFUNDED FEDERAL MANDATES	1231
A.	<i>Political Autonomy and Accountability</i>	1232
1.	The Choice Value of Autonomy.....	1234
a.	<i>State and Local Fiscal Priorities</i>	1234
b.	<i>Political Accountability</i>	1236
2.	The Liberty Value of Autonomy	1244
B.	<i>Economic Efficiency and Equity</i>	1246
C.	<i>Conclusion: A Neutral Approach to Federal Mandates and the Flawed Policy of UMRA</i>	1254
VII.	CONCLUSION	1255

I. INTRODUCTION

Since the nation was created, courts, elected officials, scholars, and others have debated the appropriate balance between federal and state rights and obligations—the basic nature of federalism in the United States.¹ The most recent slogan used by state and local advocates in this ongoing debate is opposition to “unfunded federal mandates.”² The phrase refers to obligations imposed on states and localities by the federal government without federal funding,³ which many perceive as an abuse of power by the national government.⁴ Indeed, in

1. See generally David L. Shapiro, *Federalism, a Dialogue* 107-140 (Northwestern U., 1995) (discussing the importance of federalism and the bases of the federal system).

2. The terminology has been effective as political rhetoric. Rhetoric has been used frequently in debates over federalism, beginning with the Federalists' appropriation of the term “federalism.” See Shapiro, *Federalism* at 11 (cited in note 1) (stating that “[m]any battles have been won, at least in part, by the ability of one side or the other to march under the proper linguistic banner”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1426 n.9 (1987) (noting the use of rhetoric by Chief Justice Rehnquist in the federalism debate); Ronald D. Retunda, *Intergovernmental Tax Immunity and Tax Free Municipals After Garcia*, 57 U. Colo. L. Rev. 849, 854 (1986) (stating that “[s]logans are very important, not only for revolutions but for constitutional law”).

3. The more general term “unfunded mandates” can refer to mandates imposed by states on municipal forms of government. See generally Janet M. Kelly, *State Mandates, Fiscal Notes, Reimbursement, and Anti-Mandate Strategies* 1 (National League of Cities, 1992) (defining state mandates); U.S. General Accounting Office, *Legislative Mandates, State Experiences Offer Insights for Federal Action* 1-5 (U.S. G.P.O., 1988) (discussing state mandates); Susan A. MacManus, *“Mad” About Mandates: The Issue of Who Should Pay for What Resurfaces in the 1990s*, *Publius: The Journal of Federalism* 59 (Summer 1991) (discussing mandates imposed upon state and local governments); Robert M. Shaffer, Comment, *Unfunded State Mandates and Local Governments*, 64 U. Cinn. L. Rev. 1057, 1057-59 (1996) (discussing the effect of state mandates upon local government entities). This Article addresses principally the issue of federal mandates, with state mandates discussed selectively for purposes of comparison.

4. See Rena I. Steinzor, *Unfunded Environmental Mandates and the “New (New) Federalism”: Devolution, Revolution, or Reform?*, 81 Minn. L. Rev. 97, 103-06 (1996) (implying that unfunded mandates may be an abuse of federal power); David A. Dana, *The Case for Unfunded Environmental Mandates*, 69 S. Cal. L. Rev. 1, 3 (1995) (identifying the absence of political accountability as the strongest case against unfunded mandates); Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Service*, 46 Vand. L. Rev. 1355, 1356 (1993) (suggesting that unfunded mandates “infring[e] upon the scope of local consent” by creating fiscal constraints on local government); David L. Markell, *The Role of Local Governments in Environmental Regulation: Shoring Up Our Federal System*, 44 Syracuse L. Rev. 885, 904 (1993) (debating the balance between the federal government and local governments with regard to environmental legislation); Makram B. Jaber, Comment, *Unfunded Federal Mandates: An Issue of Federalism or a “Brilliant Sound Bite”?*, 45 Emory L. J. 281, 298 (1996) (discussing limits on federal power to impose unfunded mandates on state and local governments); Susan E. Leckrone, Note, *Turning Back the Clock: The Unfunded Mandates Reform Act of 1995 and Its Effective Repeal of Environmental Legislation*, 71 Ind. L. J. 1029, 1036 (1996) (discussing the burden of federal mandates upon the states); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial*

the last U.S. Supreme Court case decided during the 1996-97 Term, which invalidated parts of the Brady Handgun Violence Protection Act⁵ (the "Brady Bill") on federalism grounds, both the majority and dissenting opinions alluded to the issue of unfunded mandates in dicta.⁶

This Article assesses the fiscal, legal, and policy arguments advanced to challenge the validity of unfunded federal mandates. Fiscal opposition is based on the assertion that the cumulative impact of these mandates has grown dramatically over the past several decades as the costs of implementing mandates have increased while accompanying federal funding has declined. Legal opposition is based on the Tenth Amendment and other principles of federalism. Finally, policy or normative opposition is based on issues of autonomy, political accountability, economic efficiency, and equity.⁷

An evaluation of these three arguments raises two broader, cross-cutting questions. First, is the concept of unfunded federal mandates independently useful to the nation's ongoing debate about federalism?⁸ In other words, can federal mandates legitimately be challenged on legal, fiscal, or policy grounds *because* they are not funded as opposed to other legal or normative grounds? Second, does the unfunded federal mandates analysis offer useful insight into the principal legal debate over federalism in recent decades, namely the question of *who* should decide the appropriate role of the national government vis-à-vis the states? To some, federalism needs and de-

Role, 79 Colum. L. Rev. 847, 869 (1979) (describing related ideas without using the unfunded mandate terminology).

5. Pub. L. No. 103-159, 107 Stat. 1536 (1993), codified at 18 U.S.C. § 922 (1994).

6. *Printz v. United States*, 65 U.S.L.W. 4731, 4731 (1997). Some lower courts had held certain provisions of the Brady Bill to be unfunded mandates and, therefore, unconstitutional. See notes 289-94 and accompanying text. Given the possibility that these references will fuel additional judicial consideration of the issue, it is particularly appropriate to assess the validity of unfunded mandates as a basis for federalism jurisprudence.

7. Dana, 69 S. Cal. L. Rev. at 3 (cited in note 4).

8. This debate involves a journey through a mass of literature, see Shapiro, *Federalism* at 10 (cited in note 1) (discussing the large amount of primary and secondary sources concerning federalism), and a maze of hotly contested issues involving federalism. It is highly partisan, ideological, and nearly impossible to resolve. See Paul E. Peterson, *The Price of Federalism* xi (The Brookings Institution, 1995) (discussing the ideological differences that exist between parties on opposite ends of the federalism debate). David Shapiro has stated that:

The debate over the extent to which the Constitution itself protects the integrity and autonomy of the states in our federal system can perhaps never be fully resolved because there were so many conflicting forces at work at the time of the founding and because so much has happened politically and technologically since the adoption of the Constitution.

Shapiro, *Federalism* at 108-09 (cited in note 1). It is neither prudent nor possible to revisit these issues exhaustively here. Rather, the issue of unfunded federal mandates is weighed in the context of the nation's broader ongoing discussion of federalism.

serves judicial protection in the same way as other constitutional rights and values.⁹ For others, judicial intervention in matters of federalism is neither necessary nor appropriate: Such issues are best left to resolution by the political branches.¹⁰

The Article begins with a brief history of the unfunded federal mandate debate. After the idea was introduced with little political success in the 1980s,¹¹ opposition to these mandates resurfaced in the

9. See Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, in Philip B. Kurland, Gerhard Casper, and Dennis J. Hutchinson, eds., *1981 The Supreme Court Review* 81, 85-86 (U. of Chicago, 1982) (noting that judges and scholars tend to see constitutional values in terms of individual rights and tend to "undervalue judicial protection of principles that allocate decisionmaking responsibilities among governmental units"); Kaden, 79 Colum. L. Rev. at 858-68 (cited in note 4) (describing the growing need for judicial protection of federalism because of the reduced accountability between government and citizens and because of the states' lessened ability to protect their autonomy); Zelinsky, 46 Vand. L. Rev. at 1385 (cited in note 4) (discussing state and local governments' inability to control the growth of unfunded federal mandates); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 14-15 (1988) (proposing that the Framers of the Constitution designed the structure of the federal government to protect constitutional rights and values); William F. Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709, 1732 (1985) (stating that "[t]here is not the slightest suggestion that the Court was expected to take federalism questions more lightly than other questions").

10. This "structural protection" theory of federalism was advocated by Herbert Wechsler. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 543 (1954). Its origins, however, lie in the constitutional debates. See *Federalist No. 17 (Hamilton)* in Clinton Rossiter, ed., *The Federalist Papers* 118, 120-22 (Mentor, 1961) (arguing that the national government could not become more powerful than state governments since states possess a "greater degree of influence" over their citizens' daily lives). See also *Federalist No. 45 (Madison)* in Clinton Rossiter, ed., *The Federalist Papers* 288, 290 (Mentor, 1961) (stating that state governments "will have the advantage of the federal government"). See also Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 Yale L. J. 1552, 1560-77 (1977) (discussing how Congress and the President are best equipped to resolve issues of federalism); D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U. L. Rev. 577, 577 (1985) (stating that resolution of federalism issues should be left to the national political process); Dana, 69 S. Cal. L. Rev. at 22-24 (cited in note 4) (noting that state and local officials have a great deal of control over candidates for federal office). Others argue even further that federalism as a value—as distinct from managerial decentralization—serves no useful purpose deserving protection by either the political or judicial branches. Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 951-52 (1994). For purposes of this Article, I will accept the more traditional view that federalism remains an important value to be honored in some way in U.S. political discourse.

11. State and local politicians began to complain about unfunded federal mandates in the late 1970s and early 1980s. See Edward I. Koch, *The Mandate Millstone*, 61 Pub. Interest 42, 57 (Fall 1980) (coining the phrase "mandate millstone"). These complaints were fueled by a series of academic articles on the subject. See, for example, Catherine Levell and Charles Tobin, *The Mandate Issue*, 41 Pub. Admin. Rev. 318, 318-319 (1981) (discussing unfunded federal mandates on state and local governments); Max Neiman, et al., *The Definitional Challenge and Mandate Typology*, in Catherine Levell, et al., *Federal and State Mandating on Local Government—Issues and Impacts, Report to the National Science Foundation* 1 (1979) (discussing unfunded federal

1990s as part of the backlash against regulation by the national government.¹² Acceptance of this message by Congress and President Clinton led to the passage of the Unfunded Mandates Reform Act of 1995 ("UMRA"),¹³ which established procedural barriers to the future enactment of unfunded federal mandates.

Part III provides an essential foundation for the analysis by defining the term "unfunded federal mandate" as a whole and by reference to its component parts. This definitional analysis suggests that the term lacks sufficient clarity and precision to lend independent utility to the federalism debate. Moreover, the analysis reveals that the term has been used too broadly to challenge actions that are not appropriately labeled as "unfunded," "federal," or "mandates." This implies that if these programs pose a problem, it is one of much smaller dimension than opponents have suggested.

mandates); Martha Derthick, *Preserving Federalism: Congress, the States, and the Supreme Court*, *The Brookings Review* 32, 35-36 (Winter/Spring 1986) (discussing Congress's increasing dependence upon states to administer government programs); Timothy J. Conlan, *And the Beat Goes On: Intergovernmental Mandates and Preemption in an Era of Deregulation*, 21 *Publius: The Journal of Federalism* 43 (Summer 1991) ("Intergovernmental Mandates") (discussing unfunded federal regulations enacted during the 101st Congress). For an analysis of the response to this issue by the Reagan Administration and by Congress in the 1980s, see U.S. Advisory Commission on Intergovernmental Relations, *Federal Regulation of State and Local Governments: the Mixed Record of the 1980s* 1-5 (U.S. G.P.O., 1993) ("Federal Regulation") (recommending that the federal government institute a moratorium on unfunded mandates in order to review the balance between federal, state, and local governments). For a survey of the status of the debate by the end of the Reagan Administration, see Michael Fix and Daphne A. Kenyon, *Introduction*, in Michael Fix and Daphne A. Kenyon, eds., *Coping With Mandates: What Are the Alternatives* 4-7 (The Urban Institute, 1990).

12. Some have decried the abuse of the debate by groups opposed to all governmental activity. See, for example, Jeffrey Tryens, *Unfunded Mandates: Clarifying the Debate* 7 (Center for Policy Alternatives, 1994) (noting that while the unfunded mandate debate began as a dispute between state, local, and federal governments, it is "increasingly used to attack all governmental activity"); Thomas H. Stanton, *One Nation Indivisible: An Analysis of Legislation to Reduce the Impact of Federal Policies on State and Local Governments* 13 (1988) (issue paper prepared for the American Federation of State, County and Municipal Employees, on file with the author) (alleging that early anti-mandate bills in Congress were designed to relieve states and cities of regulatory burdens, not to obtain additional funds for compliance). The suggested linkage of federalism to anti-government regulation parallels similar connections during the late-19th and early 20th centuries. See Shapiro, *Federalism* at 30 (cited in note 1). Many opponents of unfunded mandates deny opposition to underlying programs, however, as opposed to the methods and unfunded nature of regulation:

Many of the new requirements addressed longstanding social problems. Most also enjoyed broad support from the general public and from state and local officials. As the number of requirements proliferated, however, questions began to be raised about the appropriateness, costs, complexity, effectiveness, and efficiency of intergovernmental relations.

Federal Regulation at iii (cited in note 11).

13. Pub. L. No. 104-4, 109 Stat. 48 (1995), codified at 2 U.S.C. §§ 602, 658 et seq., 1501 et seq. (1994, Supp. I).

The three principal arguments against unfunded federal mandates are addressed *seriatim* in Parts IV through VI in the order most useful to analysis of the two cross-cutting issues. Part IV examines the fiscal opposition to unfunded federal mandates. That section describes and critiques past efforts to estimate their cumulative fiscal effects on state and local governments and evaluates the results of these studies in the context of overall intergovernmental fiscal relations. It concludes that mandate impact studies conducted to date have been plagued by serious methodological flaws which have led to overestimates of the costs of compliance. At best, the fiscal case against unfunded federal mandates remains unproven. Moreover, even if existing cost estimates are accepted as true, when compared to all sources of federal aid, the data show that states and localities are overwhelmingly net fiscal beneficiaries in their relationship with the federal government. This section also reveals the complexity of intergovernmental fiscal relations and the futility of trying to assess the fiscal impact of discrete federal actions on state and local governments.

Part V addresses the legal opposition to unfunded federal mandates. This section concludes that the funding of a federal mandate is not relevant to its validity on Tenth Amendment or other constitutional grounds. This supports the conclusion that the idea of unfunded federal mandates is not a useful tool to assess the legality or wisdom of federal actions from the perspective of federalism. However, the analysis lends strong support to the view that, in general, the political branches are better equipped than the judiciary to decide the appropriate role of the national government relative to states and localities. While the elected branches can weigh the cumulative effects of diverse but related federal tax, spending, and regulatory policies, courts can assess only the validity of discrete federal actions or programs in isolation and in the context of party-defined litigation.¹⁴

Part VI reviews the normative opposition to unfunded federal mandates. It challenges the assumption that unfunded federal mandates are presumptively "bad" rather than legitimate policy choices concerning who should decide and pay for various aspects of public

14. In addition, analysis of recent cases through the unfunded federal mandates lens provides perspective on the viability of the Supreme Court's most recent explication of Tenth Amendment doctrine in *New York v. United States*, 505 U.S. 144, 144 (1992), and in *Printz*, 65 U.S.L.W. at 4731.

policy.¹⁵ While unfunded federal mandates raise legitimate policy concerns in some cases, competing issues and concerns support the use of federal mandates in others. The absence of conclusive normative arguments for or against unfunded federal mandates underscores the wisdom of leaving such policy judgments to the political branches. Moreover, it calls into question Congress's decision to enact procedural roadblocks to new federal mandates and urges a return to a neutral legislative approach to the validity of federal intervention in matters of social and economic policy.

II. BACKGROUND AND HISTORY OF THE UNFUNDED MANDATE DEBATE

A. *The Evolution of the Mandates Issue*

The debate over unfunded federal mandates is part of the cyclic evolution of intergovernmental relations in the United States.¹⁶ While

15. See Fix and Kenyon, *Introduction*, in Fix and Kenyon, eds., *Coping with Mandates* at 1, 35 (cited in note 11). Michael Fix and Daphne Kenyon have stated that:

While on the one hand, it is not appropriate for a fiscally strapped, deficit-plagued federal government to use its regulatory powers to accomplish objectives that should be achieved via the budget, on the other hand, the federal government should not be held hostage to the states whenever it attempts to accomplish goals of clear national importance.

Id. See also Tryens, *Unfunded Mandates* at 3 (cited in note 12) (quoting Ohio Governor George Voinovich as saying: "A mandate to one lawmaker is good public policy . . . to another"). See also Kelly, *State Mandates* at 4 (cited in note 3) (stating that "[a]ny time the mandated activity can clearly be shown to serve the greater interest of the state and its citizens and its cost can be equitably shared, it is probably justified").

16. See Steinzor, 81 Minn. L. Rev. at 114-29 (cited in note 4) (reviewing the history of unfunded federal mandates); Daniel M. Kolkey, *The Constitutional Cycles of Federalism*, 32 Idaho L. Rev. 495, 495 (1996) (noting that the United States "has experienced a constitutional cycle every sixty-five to seventy years . . . which may be marked by a renewed appreciation for federalism"); Henry J. Friendly, *Federalism: A Foreword*, 86 Yale L. J. 1019, 1019-34 (1977) (reviewing the historical context of federalism). Federal/state relations in the United States are commonly divided into a series of periods: the era of "dual sovereignty" (through the Civil War) in which the federal and state governments each acted separately within their own spheres of authority with little or no interference from the other level; state assertions of authority to "nullify" federal laws in the pre-Civil War period; the dramatic constitutional expansion of the power of the national government through the Civil War amendments and others that followed in the early 20th century; the period of cooperative federalism during which the federal and state governments acted in concert often with the aid of federal funding and other incentives; the age of regulatory federalism, in which the federal government has passed laws and regulations with which state and local governments must comply; and President Reagan's "new federalism," characterized by devolution of authority back to state and local governments. See Peterson, *The Price of Federalism* at 6-14, 50-79 (cited in note 8) (discussing early federalism's reliance on dual sovereignty and the rise of modern federalism); David R. Beam, *On the Origins of the Mandate Issue*, in Michael Fix and Daphne A. Kenyon, eds., *Coping with Mandates: What Are the*

this round in the polemic is distinguished by its focus on fiscal issues, policy objections to unfunded mandates transcend fiscal concerns and raise issues of federalism that have resounded for over two centuries.¹⁷

From the New Deal through the Great Society, Congress enlisted states and cities in joint programs to address diverse social and economic issues, usually fueled by federal funding.¹⁸ While state and local discretion under these programs was constrained by regulatory conditions attached to federal funds,¹⁹ little intergovernmental tension

Alternatives? 23, 24-25 (The Urban Institute, 1990) (discussing modern regulatory federalism, which is characterized by state and local hostility to "sweeping, costly, and sometimes untested federal program requirements"); George Anastaplo, *The Amendments to the Constitution: A Commentary* 169-93 (Johns Hopkins U., 1995) (discussing the enactment of several amendments to the Constitution which have had the effect of increasing the power of the federal government at the expense of state and local governments). In reality, the past three decades have been characterized by a political mixture of, or periodic oscillation between, regulatory and "new" federalism. See notes 31-33 and accompanying text (explaining that the "new federalism" initiative was only partially successful and that regulatory federalism continued both during and after the Reagan administration).

17. This was recognized by the ACIR:

[I]ncreasing federal regulation of state and local governments, the lack of adequate constitutional protection for state and local authority in the decisions of the federal courts, and the increasingly crowded policy agenda of the federal government have contributed to a serious and growing imbalance in the federal system. This imbalance makes it difficult for the federal government to establish genuinely national priorities and to resolve major national problems. This imbalance also weakens the ability of state and local governments to respond to the needs of their citizens.

Federal Regulation at 4 (cited in note 11).

State and local mandate opposition stems not only from high fiscal costs, but from distortion of local priorities and erosion of state and local autonomy and initiative; unnecessary, ineffective, and inefficient use of scarce resources; and distortion of political accountability. *Id.* at iii; U.S. Advisory Commission on Intergovernmental Relations, *Federally Induced Costs Affecting State and Local Governments* 12-17 (U.S. G.P.O., 1994) ("Federally Induced Costs"). See Fix and Kenyon, *Introduction*, in Fix and Kenyon, eds., *Coping with Mandates* at 4-7 (cited in note 11) (identifying as the underlying concerns of unfunded mandates the distribution of intergovernmental resources; the distribution of responsibility; the effectiveness of regulation; and values and goals). See also Beam, *Origins*, in Fix and Kenyon, eds., *Coping with Mandates* at 23 (cited in note 16) (citing "coequal concerns about status" and a "lack of respect for the position of states and localities as constitutional entities within the federal system" as well as the effectiveness of federal programs).

18. See generally Peterson, *The Price of Federalism* at 52-56 (cited in note 8) (describing early efforts by the federal government to involve state and local governments in spending programs); Fix and Kenyon, *Introduction*, in Fix and Kenyon, eds., *Coping with Mandates* at 1-2 (cited in note 11) (noting the change in federal-state-local relations from one of cooperation, based on "well-established financial grants-in-aid programs" to one of "conflict and compulsion"). Federal grants-in-aid to state and local governments grew from \$8.5 billion in fiscal year ("FY") 1940 to \$165.9 billion in FY 1994 (in constant FY 1987 dollars). Executive Office of the President of the United States, Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1996 Historical Tables* 175-76 tbl. 12.1 (U.S. G.P.O., 1995) ("FY96 Historical Tables").

19. See Peterson, *The Price of Federalism* at 56 (cited in note 8) (discussing the number of regulations that accompany federal grants-in-aid to states). Grant conditions typically are categorized into several types, including direct programmatic conditions governing the manner in

resulted because recipients perceived that conditions were tied to fiscal and programmatic accountability²⁰ and because the programs enjoyed widespread public support.²¹ States and cities enjoyed additional benefits and increased flexibility beginning in 1972 via general revenue sharing, under which they received national funds with no programmatic and few general conditions,²² and through block grants that provided more state and local discretion in the use of programmatic federal funds.²³

By the late 1970s, state and local acceptance of this relationship began to change. Critics complained that the increased burdens of federal regulation, coupled with decreased federal aid, were crippling state and local governments.²⁴ Empirical studies of federal/state relations did indeed show a dramatic growth in the raw number of

which funds are spent on a specific program, matching grant requirements under which recipients must spend a specified amount of their own funds, crossover sanctions under which funds for one program (such as highways) are tied to compliance with another program (such as clean air), and cross-cutting requirements (such as minimum wage or equal opportunity) that apply to all or many federal aid programs. Federally Induced Costs at 21-22 (cited in note 17). Grant conditions are also characterized as vertical (program-specific) or horizontal (cross-cutting). Lovell and Tobin, 41 Pub. Admin. at 319 (cited in note 11).

20. Federal Regulation at 7 (cited in note 11).

21. *Id.* at 9.

22. State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (1972), codified as amended at 26 U.S.C. §§ 6017A, 6687 (1994). This reflected President Nixon's philosophy of devolution of authority from the national to state and local governments. Peterson, *The Price of Federalism* at 61 (cited in note 8).

23. These included the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974), codified as amended at 42 U.S.C. §§ 5301 et seq. (1994), and the Comprehensive Employment Training Act of 1973, Pub. L. No. 93-203, 87 Stat. 839 (1973), codified as amended at 29 U.S.C. §§ 801 et seq. (1994), both of which were accompanied by a large decrease in regulations and conditions attached to federal grant aid. Peterson, *The Price of Federalism* at 61 (cited in note 8). See generally U.S. General Accounting Office, Accounting and Information Management Division, *Block Grants: Issues in Designing Accountability Provisions* 1 (U.S. G.P.O., 1995) ("Block Grants") (stating that "[i]n contrast to categorical programs that are consolidated, block grants provide significant additional discretion for states and localities to define and implement federal programs in light of local needs and conditions."). The General Accounting Office noted that federal grants fall into three general categories:

Of the three kinds of grants-in-aid—categorical, block, and general purpose fiscal assistance—block grants lie in the grey, middle area. Categorical programs feature narrowly prescribed, federally-determined program objectives, processes, and administration. At the opposite end of the fiscal spectrum—general-purpose fiscal assistance—recipients are free to spend grant funds in the manner they choose with few, if any, federally imposed programmatic or administrative requirements.

Block Grants at 3 (cited in this note). See also U.S. Advisory Commission on Intergovernmental Relations, *Characteristics of Federal Grant-in-aid Programs to State and Local Governments: Grants Funded FY 1993* (U.S. G.P.O., 1994) ("Characteristics of Federal Grant-in-aid Programs").

24. Koch, 61 Pub. Int. at 42-44 (cited in note 11); Fix and Kenyon, *Introduction*, in Fix and Kenyon, eds., *Coping with Mandates* at 2 (cited in note 11); Beam, *Origins*, in Fix and Kenyon, eds., *Coping with Mandates* at 23, 25 (cited in note 16); Zelinsky, 46 Vand. L. Rev. at 60-61 (cited in note 4); Shapiro, *Federalism* at 5 (cited in note 1).

federal mandates applicable to state and local governments,²⁵ but were inconclusive on the connection to be drawn between the increases in these programs and federal spending.²⁶

The federal response to these complaints during the 1980s was schizophrenic. Changes in tax policy enacted in 1981 and 1986²⁷ and the growing federal debt that followed²⁸ put pressure on Congress and

25. A series of studies conducted by the ACIR and others documented the increase in regulatory federalism. See Federally Induced Costs at 1 (cited in note 17) (illustrating the growth of federal intergovernmental regulations); Federal Regulation at iii, 1-3 (cited in note 11) (discussing the expansion of federally mandated burdens on state and local governments); U.S. Advisory Commission on Intergovernmental Relations, *Regulatory Federalism: Policy, Process, Impact and Reform* (1984) ("Regulatory Federalism") (documenting the growth of federal mandates); Lovell and Tobin, 41 Pub. Admin. Rev. at 320 tbl. 2 (cited in note 11) (illustrating the increase in federal mandates). In particular, the ACIR studies found a significant increase in congressional use of direct orders, partial preemptions under which minimum federal requirements applied to federal programs undertaken voluntarily by states, and cross-cutting and crossover grant conditions. Federal Regulation at 7-9, 44-56 (cited in note 11). Virtually no such federal mandates were enacted from 1931-1960, compared with a dramatic rise in these methods from 1961-1990. Id. at 46 fig. 4-1.

As discussed in Part IV, however, counting the raw number of purported federal mandates is, at best, an imprecise undertaking. For example, does a federal regulation setting ton public drinking water standards establish one or ten new mandates? Does a new set of regulations consisting of ten sections and a hundred subsections constitute one, ten, or one hundred new mandates? Obviously, "counting" mandate numbers is less important than the nature of and the burdens imposed by the federal actions. This requires a detailed understanding of the details of each alleged mandate. See Federally Induced Costs at 3 (cited in note 17) (noting that the number of mandates depends heavily on the definition of mandate used and that mandate "counts" vary widely as a result). See also Part III.A.

26. In fact, the increased number of federal mandates identified by ACIR studies appears independent of trends in federal grants-in-aid to state and local governments. The phenomenon of increased federal regulation was identified *before* federal funding began to fall, Lovell and Tobin, 41 Pub. Admin. Rev. at 318 (cited in note 11), and continued through the period of decreased federal funding in the early-to-mid 1980s despite attempted reforms by the Reagan Administration. Federal Regulation at iii (cited in note 11). Increased federal regulation persisted during the late 1980s and early 1990s despite the subsequent renewal of federal funding increases. Intergovernmental Mandates at 44 (cited in note 11). This suggests that Congress has increasingly chosen to apply federal laws and regulations to state and local governments for policy reasons that are independent of funding trends, but that federal funding to help states and cities comply with these mandates has fluctuated as political winds have shifted. On the other hand, the continuing federal budget crisis, whether perceived or real, clearly limits Congress's ability to solve the issue with a major influx of new fiscal assistance to cities and states.

27. According to one commentator, the most significant change enacted during the 1980s was the implementation of tax indexing, under which individual income tax brackets were indexed to inflation, which in turn eliminated the large automatic growth in federal revenues that had occurred since World War II. Peterson, *The Price of Federalism* at 76-78 (cited in note 8). Now, in order to increase revenues, Congress and the President must take the politically difficult affirmative step of raising tax rates, rather than relying on "bracket creep" as they had in the past. Id. at 78-79.

28. The total federal debt, as distinguished from annual budget deficits, roughly tripled in nominal dollars from over \$290 billion in 1960 to over \$909 billion in 1980, more than tripled again from over \$909 billion in 1980 to over \$3.2 trillion in 1990, and continued to grow to over \$4.6 trillion by 1994. FY96 Historical Tables at 89 tbl. 7.1 (cited in note 18). This trend is even

the White House to reduce intergovernmental transfers. Federal grants to state and local governments declined during the 1980s, but recovered and rose to historic highs by the early 1990s.²⁹ However, Congress eliminated general revenue sharing, first for states and later for municipalities.³⁰ Thus, in some respects intergovernmental tension was exacerbated during the 1980s, both by declining federal aid and by reduced flexibility in the use of that aid.

At the same time, President Reagan promised with his "New Federalism" to devolve authority to state and local governments and to alleviate the burdens of federal regulation on both lower levels of government and the private sector.³¹ During the early 1980s, the

more evident when the federal debt is adjusted for inflation. In constant 1987 dollars, debt held by the public grew by just 10% from 1960 to 1980 from \$908 billion to just over \$1 trillion, but more than doubled during the 1980s. Executive Office of the President of the United States, Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1996 Analytical Perspectives* 187 tbl. 13-1 (U.S. G.P.O., 1995) ("FY96 Analytical Perspectives"). Thus, regardless of partisan debate over who is to blame, the rate of increase in the federal debt clearly has grown over the past decade and a half. Perhaps a more useful perspective is to measure the federal debt in relation to the economy at large. As a percentage of gross domestic product ("GDP"), the federal debt actually dropped from 57.6% in 1960 to 34.4% in 1980, then grew back to 58.5% in 1990, and continued its climb to 70% by 1994. FY96 Historical Tables at 89 tbl. 7.1 (cited in note 18).

29. In constant 1987 dollars, federal grants-in-aid dropped from \$127.6 billion in 1980 to \$113 billion in 1985, grew slightly to \$119.5 billion in 1990, and climbed to an all-time high of \$165.9 billion by 1994. FY96 Analytical Perspectives at 169 tbl. 11-2 (cited in note 28). See Lillian Rymarowicz and Dennis Zimmerman, *Federal Budget and Tax Policy and the State-Local Sector: Retrenchment in the 1980s* 1-5 (U.S. Cong. Research Service, 1988) (discussing the levels of federal grants-in-aid); Peterson, *The Price of Federalism* at 62-72 (cited in note 8) (discussing the growth of grants-in-aid); Characteristics of Federal Grant-in-aid Programs at 7 tbl. 2 and fig. 2 (cited in note 23) (illustrating this growth of grant programs). As discussed in Part IV, this trend cannot be understood fully on the basis of raw dollar figures since the amount of funds available to states and cities for services that benefit the public at large depends on the percentage of federal dollars tied to individual entitlements, which has grown dramatically in recent years.

30. General unrestricted funding to states was eliminated under President Carter in 1978, and similar funding to cities was terminated in 1986 under President Reagan. Rymarowicz and Zimmerman, *Federal Budget and Tax Policy* at 7-8 (cited in note 29).

31. While both President Nixon and President Reagan favored an enhanced state and local role relative to the national government, the contrast between their two approaches is striking. President Nixon promoted state and local autonomy over federal programs while providing increased funding for those efforts. President Reagan supported devolution of authority to state and local governments while drastically reducing federal support for those programs, reflecting either more general disapproval of the governmental programs themselves or a belief that transfer of fiscal responsibility should accompany devolution of authority. See generally Peterson, *The Price of Federalism* at 60-61, 68-69 (cited in note 8) (discussing the contrasting views of Nixon and Reagan); Federal Regulation at 17 (cited in note 11) (stating that "[u]nlike Nixon, who hoped to rationalize active government, Reagan has tried on the whole to restrain domestic government") (emphasis added) (quoting Timothy J. Conlan, *New Federalism: Intergovernmental Reform from Nixon to Reagan* 99 (The Brookings Institution, 1988)). In his 1981 Inaugural Address, President Reagan said: "Government is not the solution to our problem. Government is the Problem." Federal Regulation at 17 (cited in note 11).

President and Congress launched initiatives to redress state and local discontent with federal regulation.³² Despite the elimination of general revenue sharing, more flexibility in the use of federal funds was provided through new block grant programs, although many enjoyed short lives and others were rejected by Congress.³³

State and local advocates believed these reforms had only modest impacts, however, citing the steady and continuing growth of federal mandates even after the purported reforms.³⁴ Some bills designed to protect state and local governments did not pass;³⁵ and while state and local officials took solace that federal regulations were vulnerable to Tenth Amendment challenges under *National League of*

32. See Federal Regulation at 17-42 (cited in note 11) (discussing the Reagan Administration's attempts to relieve states from federal intrusion). Legislative reforms included the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980), codified as amended at 44 U.S.C. § 3501 et seq. (1994) (requiring efforts to reduce paperwork burdens on governmental and private targets of federal regulation); the Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (1980), codified at 5 U.S.C. §§ 601 et seq. (1994) (requiring federal agencies to adopt and publish regulatory agendas and regulatory flexibility analyses identifying the need for new regulations and efforts to minimize resulting economic impacts); and the State and Local Government Cost Estimate Act of 1981, Pub. L. No. 97-108, 95 Stat. 1510 (1981), codified at 2 U.S.C. § 653 (1994) (requiring estimates by the Congressional Budget Office ("CBO") of the costs of proposed congressional legislation on state and local governments before adoption). Administrative reforms included Executive Order 12291, 3 C.F.R. 127 (1981) (requiring review and clearance of federal regulations by the Office of Management and Budget based on a review of cost-effectiveness, cost-benefit, and other analyses), and Executive Order 12612 on Federalism, 3 C.F.R. 252 (1987) (establishing criteria for new proposed rules or legislation that would significantly affect state and local functions and responsibilities).

33. Federal Regulation at 11, 51-52 (cited in note 11); U.S. Advisory Commission on Intergovernmental Relations, *Federal Grant Programs in Fiscal Year 1992, Their Numbers, Sizes, and Fragmentation Indexes in Historical Perspective* 1-2 (U.S. G.P.O., 1993) ("Federal Grants 1992").

34. Federal Regulation at 1-3, 44-47 (cited in note 11) (finding an ongoing increase in federal regulatory burdens during the 1980s and concluding that "deregulatory initiatives were more than counterbalanced by the accumulation of new requirements"). See U.S. Advisory Commission on Intergovernmental Relations, *Federal Mandate Relief for State, Local, and Tribal Governments* 4-9 (U.S. G.P.O., 1995) ("Federal Mandate Relief") (concluding that pending mandate relief legislation would not adequately protect state and local governments from new unfunded mandates or other cost-inducing legislation); Federally Induced Costs at 1, 4 (cited in note 17) (discussing the growing number of federal mandates and early federal regulatory relief initiatives); Intergovernmental Mandates at 50-56 (cited in note 11) (discussing the increasing imposition of federal regulatory mandates upon state and local governments in the 1980s); Shapiro, *Federalism* at 5 (cited in note 1) (stating that during the Reagan administration, the much heralded philosophy of "new federalism" was seldom put into practice); Steinzor, 81 Minn. L. Rev. at 119-20 (cited in note 4) (noting that while the "Reagan revolution" was successful in "cutting grants and dismantling democracy," it was less successful in reducing the number of regulations imposed upon states).

35. See Stanton, *One Nation Indivisible* at 2-3, 13 (cited in note 12).

Cities v. Usery ("NLCs"),³⁶ the symbolic if not real impact³⁷ of this decision was eliminated when it was overruled in *Garcia v. San Antonio Metropolitan Transit Authority*,³⁸ to the dismay of state and local advocates.³⁹ These factors set the stage for a renewed debate in the early 1990s, when state and local officials identified unfunded federal mandates as among their top priorities.⁴⁰

To support their claims of abuse by the federal bureaucracy, states and localities commissioned reports to assess the costs of unfunded federal mandates to individual jurisdictions⁴¹ and to cities and counties in the aggregate.⁴² While the validity and significance of

36. 426 U.S. 833, 833 (1976) ("NLCs"), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 528 (1985). See notes 263-75 and accompanying text.

37. As noted by Professor La Pierre, the actual impact of NLCs on the validity of federal regulation of states and cities was minimal to nonexistent. La Pierre, 80 Nw. U. L. Rev. at 579-80 (cited in note 10).

38. 469 U.S. 528, 528 (1985). See notes 277-80 and accompanying text.

39. See Federal Regulation at iv, 74-82 (cited in note 11) (decrying *Garcia* and recommending that it be revisited by the Supreme Court); Derthick, *The Brookings Review* at 33 (cited in note 11) (stating that *Garcia* raised "fresh doubt about the value of federalism" within the Supreme Court).

40. In a survey conducted by the National League of Cities in 1994, unfunded mandates ranked among officials' greatest concerns, along with economic conditions and crime, and as the "most deteriorated" condition in the previous five years. National League of Cities, *The State of America's Cities: The Tenth Annual Opinion Survey of Municipal Elected Officials* 1-2, 7, 9, 11 (1994) ("State of America's Cities"). Twenty-two percent of respondents agreed with the statement: "If President Clinton were to convene a summit of municipal officials to discuss the future of cities and towns, he would most likely hear more about unfunded mandates than any other issue." *Id.* at 23. At the same time, state and local revenue collection declined due to a national recession and the state and local tax revolts of the late 1980s and early 1990s. See Peterson, *The Price of Federalism* at 1-5 (cited in note 8) (describing the fiscal crisis in California in 1991 and 1992); *Federally Induced Costs* at 1-2 (cited in note 17) (discussing state efforts to limit unfunded mandates). The fact that the mandates issue has persisted well after recovery from the recession, with state and local finances now generally quite sound, indicates that state and local dissatisfaction has roots in deeper, nonfiscal concerns. See *Federally Induced Costs* at 4 (cited in note 17) (discussing issues that have made unfunded mandates a top priority for state and local governments). See also Part VI.

41. See Janet M. Kelly, *A Comprehensive Guide to Studies on State and Federal Mandates to Localities* (National League of Cities, 1994) (providing a comprehensive annotated bibliography of state and local mandate cost-estimating studies). Among the most widely cited of these studies are: *Paying for Federal Environmental Mandates: A Looming Crisis for Cities and Counties* (Municipality of Anchorage, 1992) ("Anchorage Study"); *Cumulative Burden of Environmental Regulation* (City of Phoenix, 1992) ("Phoenix Study"); *Putting Federalism to Work for America: Tackling the Problem of Unfunded Mandates and Burdensome Regulations* (City of Chicago and Roosevelt U., 1992) ("Chicago Study"); *Environmental Legislation: The Increasing Costs of Regulatory Compliance to the City of Columbus* (City of Columbus, 1992) ("Columbus Study"); *Ohio Metropolitan Area Cost Report for Environmental Compliance* (Ohio Municipal League, 1992) ("Ohio Study").

42. Price Waterhouse, *Impact of Unfunded Federal Mandates on U.S. Cities: A 314-City Survey* (U.S. Conference of Mayors, 1993) ("Price Waterhouse City Report"); Price Waterhouse, *Unfunded Federal Mandates Survey, Executive Summary* (National Association of Counties, 1993) ("Price Waterhouse County Report"). The reports were unveiled on "NUMDAY" ("No more unfunded mandates day"), October 27, 1993. See Jaber, 45 *Emory L. J.* at 281-82 (cited in note 4)

these reports remain hotly debated,⁴³ they were used to great political effect by state and local advocates.⁴⁴ During the 103d Congress alone, a total of thirty-nine mandate relief bills were introduced. Some would have prohibited federal mandates absent full funding⁴⁵ or made compliance with such mandates optional,⁴⁶ while other bills suggested less drastic approaches.⁴⁷ At least one bill proposed a constitutional amendment to prohibit unfunded mandates.⁴⁸ While no such bill passed during the 103d Congress, political opposition to mandates mounted, which led President Clinton to sign two less ambitious Executive Orders.⁴⁹

B. The Unfunded Mandates Reform Act of 1995 and the Future of the Debate Over Unfunded Federal Mandates

When Republicans gained control of Congress in the November 1994 elections, many renewed their calls for devolution of authority from the national to state and local governments and introduced drastic proposals to cut federal programs.⁵⁰ Not surprisingly, therefore,

(discussing the background of NUMDAY). No similar nationwide survey has been attempted for states.

43. See Part IV.

44. See U.S. General Accounting Office, Human Resources Division, *Report to Edolphus Towns, Chairman, Subcommittee on Human Resources and Intergovernmental Relations of the House Committee on Government Operations* 21 app. V (U.S. G.P.O., 1994) ("Towns Report") (identifying and characterizing federal mandate relief bills). The ACIR has identified 34 mandate relief bills, perhaps reflecting a narrower definition of relevant bills. Federally Induced Costs at 2 (cited in note 17).

45. H.R. 140, 103d Cong., 1st Sess. (January 6, 1993); S. 993, 103d Cong., 1st Sess. (May 20, 1993).

46. H.R. 3429, 103d Cong., 1st Sess. (November 11, 1993).

47. See Towns Report at 21 app. V (cited in note 44) (outlining various federal mandate relief proposals). According to the ACIR, twelve bills would have revised the fiscal note (cost-estimating) process; seven would have linked funding to enforceability; two would have required supermajority votes to enact new mandates; and three would have reimbursed state and local governments for the costs of compliance with federal mandates. Federally Induced Costs at 5 (cited in note 17).

48. H.J.R. 282, 103d Cong., 1st Sess. (October 26, 1993). See Paul Gillmor and Fred Eames, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 Harv. J. Leg. 395, 410-13 (1994) (calling for a constitutional amendment addressing the "unfunded mandate problem"); Zelinsky, 46 Vand. L. Rev. at 1356-58 (cited in note 4) (suggesting a constitutional solution rather than "palliative remedies").

49. See Executive Order 12866, 3 C.F.R. 638 (1993) (requiring additional consultation with state and local officials); Executive Order 12875, 3 C.F.R. 669 (1993) (seeking to limit new intergovernmental mandates in federal regulations).

50. See Peterson, *The Price of Federalism* at xi (cited in note 8) (discussing House Republicans' calls for reduced federal government involvement in "education, transportation, manpower training, housing, energy, and crime control"); Steinzor, 81 Minn. L. Rev. at 123-24

one of the first laws to pass the 104th Congress was the Unfunded Mandates Reform Act of 1995 ("UMRA").⁵¹

The Act has been mischaracterized by some as a prohibition on the enactment of additional unfunded federal mandates.⁵² Rather, UMRA "establishes procedural roadblocks to the enactment of [these programs]."⁵³ It expands the cost-estimating duties imposed on the Congressional Budget Office ("CBO") by the State and Local Cost Estimate Act of 1981,⁵⁴ which in turn provides more information to Congress when it acts to impose costs on states and cities.⁵⁵ More pointedly, the Act creates procedures in both the House and the Senate whereby bills that would impose unfunded mandates on states and cities are subject to a point of order, which may be waived by majority vote.⁵⁶ This process demands a deliberate vote acknowledg-

(cited in note 4) (describing the Republican "Contract with America"). This coupling of devolution with reduced federal funding is more consistent with President Reagan's devolution of authority and fiscal responsibility than with President Nixon's earlier efforts to transfer responsibility while maintaining federal financial aid. See note 31 and accompanying text.

51. Pub. L. No. 104-4, 109 Stat. 48 (1995), codified at scattered sections of 2 U.S.C. (1994, Supp. I).

52. See Peterson, *The Price of Federalism* at xi (cited in note 8) (stating that "Congress has passed a law forbidding the imposition of additional unfunded mandates on state and local government").

53. Jaber, 45 Emory L. J. at 282 (cited in note 4). See *Printz*, 65 U.S.L.W. at 4748-49 (Stevens, J., dissenting) (discussing the "roadblocks" UMRA places upon legislation imposing unfunded mandates).

54. See note 32 and accompanying text. Under UMRA, the CBO must determine whether the "direct cost" of all "Federal intergovernmental mandates" in a bill will exceed \$50 million (adjusted annually for inflation) in any of the five years following the effective date of any such mandate, and if so, prepare estimates of the total amount of the "direct cost" of compliance as well as budgetary and appropriations authority included to fund such costs, unless the CBO determines that such cost estimates are not feasible. 2 U.S.C. § 658c(a) (1994, Supp. I). Obviously, the definitions of "direct costs" and "Federal intergovernmental mandates" are critical. See Part III. Similar requirements are imposed with respect to private sector mandates. 2 U.S.C. § 658c(b). These requirements are not relevant here, however.

Supplemental statements are also required "to the greatest extent practicable" when bills are amended in committee or on the floor of one House of Congress in a manner that adds to or alters the costs of proposed mandates. *Id.* § 658c(d).

Previously, the threshold for CBO analysis was \$200 million under the 1981 law. Hearings on S. 563, S. 648, S. 993, S. 1592, and S. 1606 before the Senate Committee on Governmental Affairs, 103d Cong., 2d Sess. 1-3 (1994) (statement of Robert D. Reischauer, Director, Congressional Budget Office) ("Reischauer Testimony").

55. For a discussion of the immense difficulties in deriving accurate and meaningful cost estimates, see Part IV.

56. No bill may be considered unless the requisite CBO cost estimate has been published and either the direct costs are below the \$50 million threshold or specific funding for the mandate is assured. 2 U.S.C. § 658d(a) (1994, Supp. I). The House may defeat such a point of order, but debate is limited to ten minutes per side. 2 U.S.C. § 658e(b)(4) (1994, Supp. I). According to some, the practical effect of the Act is to give the Speaker of the House broad power to block unfunded mandate bills, because points of order ruled on by the Chair are rarely appealed to the full House. Jaber, 45 Emory L. J. at 282 n.8 (cited in note 4).

ing that a bill constitutes an unfunded mandate before the merits of the bill are debated.⁵⁷ Thus, although the Act does not prohibit new unfunded mandates,⁵⁸ its procedural roadblocks are formidable and may succeed in restricting future federal regulations affecting state and local governments.⁵⁹ On the other hand, UMRA is far less potent than some of the absolute prohibitions proposed in the 103d Congress.⁶⁰

Because of its compromise nature and uncertain impact, UMRA likely will not end the debate over unfunded federal mandates any more than the reforms instituted in the 1980s.⁶¹ Either state and

57. UMRA also imposes procedural requirements on federal agencies that impose new mandates on state and local governments via regulation. 2 U.S.C. §§ 1531-1538 (1994, Supp. I). These duties include cost estimates, cost-benefit analyses, evaluation of the availability of federal funds, consultation with state and local representatives, and an express command to choose the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule," consistent with the statute under which the rule is enacted. *Id.* § 1535.

58. Ironically, the procedural safeguards included in UMRA are consistent with the notion that states are afforded structural protection in the national government via state representation in Congress and other means, as advocated by the majority in *Garcia*, 469 U.S. at 550-52, rather than the availability of substantive judicial review under the Tenth Amendment as suggested by the *Garcia* dissent, *id.* at 557-75, 580-88 (Powell, O'Connor, JJ., dissenting), and the majority in *NLCs*, 426 U.S. at 833. In essence, UMRA requires a more deliberate and informed choice by Congress when it passes a mandate that affects state and local government function and fiscal policy. See Zelinsky, 46 Vand. L. Rev. at 1356-59 (cited in note 4) (calling for constitutional rather than "palliative" remedies to unfunded mandates, which he views as more consistent with the structural protection theory).

59. See Denise D. Fort, *The Unfunded Mandates Reform Act of 1995: Where Will the New Federalism Take Environmental Policy?*, 35 Nat. Resources J. 727, 727 (1995) (stating that the "ultimate effect will presumably be fewer federal requirements, with states and tribes left to determine for themselves whether or not to regulate activities"). Apparently, during the first year in which UMRA was in effect, the number of new congressional mandates with significant fiscal impacts on state and local governments was small. *Printz*, 65 U.S.L.W. at 4749 n.20 (Stevens, J., dissenting) (citing Congressional Budget Office, *The Experience of the Congressional Budget Office During the First Year of the Unfunded Mandates Reform Act* 13-15 (U.S. G.P.O., 1997) ("CBO Experience with UMRA")). Although the dissent in *Printz* cited this study as proof that "the Act will play an important role in curbing the behavior about which the majority expresses concern," *id.* at 4749, this conclusion may be premature. During this first year, Congress was comprised of the same members who enacted the law and who logically continued to question federal intrusion into state and local domains. It is not clear that future Congresses will be so restrained. In fact, the CBO concluded: "Whether UMRA can be credited with these outcomes is an open question." CBO Experience with UMRA at 15 (cited in this note).

60. See notes 45-48 and accompanying text.

61. See Steinzor, 81 Minn. L. Rev. at 99, 130-31 (cited in note 4) (stating that "[t]here is every reason to expect that the UMRA will prove a disappointment... and the quest [for unfunded mandate reform] will continue"); Dana, 69 S. Cal. L. Rev. at 2 (cited in note 4) (noting that despite the passage of UMRA, the "campaign against unfunded mandates will continue"); Jaber, 45 Emory L. J. at 282-83 (cited in note 4) (predicting that unfunded mandate reform proposals will "continue to be debated"); Peterson, *The Price of Federalism* at 47 (cited in note 8) (noting that "[d]espite the passage of the unfunded mandate law, legislative theory expects the

local advocates will be dissatisfied with procedural remedies and push for stronger relief or UMRA will succeed in blocking new federal mandates, thereby provoking a dissent from the would-be beneficiaries of those programs.

III. THE INTRACTABLE PROBLEM OF DEFINITION

Definitions are critical to a proper understanding of the unfunded mandate issue. Most legal and nonlegal evaluations of unfunded mandates, however, recognize serious definitional difficulties that impede accurate and consistent analysis.⁶² Available cost estimates and other data and analyses are based on inconsistent definitions, or worse still, no definitions at all.⁶³ This raises serious questions about whether unfunded federal mandates can be defined with sufficient precision to be useful to the discourse about federalism.

To obtain a useful understanding of unfunded federal mandates, the phrase should be dissected into its component parts, *i.e.*, "*mandates*," "*federal mandates*," and "*unfunded federal mandates*." A precise definition of each component, however, and hence the term as a whole, turns out to be surprisingly elusive.

mandate issue to continue"). But see Leckrone, 71 Ind. L. J. at 1040-44 (cited in note 4) (predicting that UMRA will "effectively repeal" environmental requirements).

62. See Steinzor, 81 Minn. L. Rev. 103-11 (cited in note 4) (attempting to define unfunded mandates); Zelinsky, 46 Vand. L. Rev. at 1364-67 (cited in note 4) (discussing the difficulties faced in attempting to define an "unfunded mandate"); Jaber, 45 Emory L. J. at 85-92 (cited in note 4) (setting forth a definition of "unfunded federal mandates"); Dana, 69 S. Cal. Rev. at 5-10 (cited in note 4) (discussing the legal status of unfunded environmental mandates); Fix and Kenyon, *Introduction*, in Fix and Kenyon, eds., *Coping With Mandates* at 1, 3-4 (cited in note 11) (discussing various types of unfunded mandates and distinguishing them from mere conditions of assistance); Federally Induced Costs at 2-3 (cited in note 17) (noting that federal efforts to estimate the total number of mandates are difficult because there is no generally accepted definition of a "federal mandate"); Levell and Tobin, 41 Pub. Admin. Rev. at 319-20 (cited in note 11) (distinguishing among various types of mandates that fall within the broad definition of "unfunded mandates"); Leckrone, 71 Ind. L. J. at 1031-35 (cited in note 4) (defining "unfunded mandates"). Many problems in defining unfunded federal mandates are similar to those in defining unfunded state mandates. Thus, state mandate definitions will be considered here as well. See Janet M. Kelly, *Estimating Mandate Costs, Processes and Outcomes* 1-8 (National League of Cities, 1993) (developing an operating definition of state mandates).

63. In the National League of Cities Survey, for example, city officials were asked to provide opinions regarding unfunded federal mandates without offering a definition of the term. National League of Cities, *The State of America's Cities* at 38-41, 44-46 (cited in note 40) (incorporating the phrase "unfunded federal mandates" in survey questions with no definition or explanation of the term). Using one set of definitions, the ACIR counted 36 existing federal mandates on state and local governments, while the National League of Cities counted 185. See Federally Induced Costs at 3 (cited in note 17) (discussing the number of existing unfunded federal mandates).

A. What is a Mandate?

The strict legal meaning of a "mandate" is limited to a judicial decree. Black's Law Dictionary defines it as a "command, order, or direction, written or oral, which [a] court is authorized to give and [a] person is bound to obey."⁶⁴ Clearly, the unfunded mandate debate also includes legislative and administrative mandates. Even beyond the judicial context, however, a strict definition of "mandate" retains the idea that the issuer has legal authority to impose, and the recipient bears a legal duty to obey, the dictates of the mandate, presumably under the compulsion of formal legal enforcement.⁶⁵ Suggestions, inducements, indirect impacts, and other actions that leave the recipient with some choice of whether to comply do not fit this definition.

In their seminal description of the issue, Lovell and Tobin define mandates as "responsibilities, procedures, or activities that are imposed by one sphere of government on another by constitutional, legislative, administrative, executive, or judicial action."⁶⁶ Assuming that "imposed" bears the same idea of legal compulsion as "order or command," this definition is consistent with the idea that a mandate requires compliance on threat of legal sanction. However, Lovell and Tobin interpret their definition to include conditions of aid⁶⁷ and constraints as well as affirmative duties, for example, including constraints on revenue generation and expenditures.⁶⁸

64. Black's Law Dictionary 962 (West, 6th ed. 1990).

65. The dictionary definition of mandate is "any authoritative order or command." The Random House Dictionary of the English Language (Random House, College ed. 1969). This definition retains the notion of authority to issue and duty to obey. See Kelly, *Estimating Mandate Costs* at 7 (cited in note 62) (suggesting that the proper test of a mandate is whether the recipient can resist or whether the recipient is subject to noncompliance penalties); Steinzor, 81 Minn. L. Rev. at 105 (cited in note 4) (suggesting that a mandate is an enforceable duty, not a voluntary undertaking).

66. Lovell and Tobin, 41 Pub. Admin. Rev. at 319 (cited in note 11). Similarly, Professor Zelinsky defines an intergovernmental mandate as "a requirement imposed on a subordinate level of government to provide a public service that otherwise would not be furnished or to provide a public service in a more costly fashion." Zelinsky, 46 Vand. L. Rev. at 1366 (cited in note 4).

67. Lovell and Tobin, 41 Pub. Admin. Rev. at 319 (cited in note 11). The only justification given for this apparent contradiction is that the impacts of such grant conditions had not been studied. *Id.*

68. *Id.* Lovell and Tobin's typology also distinguishes between "programmatic" mandates, which direct lower levels of government "what to do," and "procedural" mandates, which dictate "how to do it." *Id.* A procedural "how to" mandate (so long as it bears the requisite criteria of authority to issue and duty to comply) is no less of a mandate than a programmatic "what to do" command. *Id.* See Zelinsky, 46 Vand. L. Rev. at 1365 (cited in note 4) (categorizing mandates as either requiring new services or increasing existing services at a higher cost). In contrast,

The ACIR, in an effort to shun the "pejorative" term "mandates," recently proposed to use the purportedly more neutral term "federally induced costs."⁶⁹ This effort, however, resulted in a definition even broader than that suggested by Lovell and Tobin:

According to common usage, mandates encompass any federal statutory, regulatory, or judicial instruction that (1) directs state or local governments to undertake a specific action or to perform an existing function in a particular way, (2) imposes additional financial burdens on states and localities, or (3) reduces state and local revenue sources.⁷⁰

This language is broader than Lovell and Tobin's definition through its vague inclusion of federal actions that "impose[] additional financial burdens on states and localities."⁷¹ From this expanded concept, ACIR derives the following list of federal policies that impose fiscal impacts on state and local governments: (1) direct mandates; (2) grant conditions; (3) full and partial preemptions; (4) tax policy provisions; (5) incidental and implied federal policy impacts; and (6) federal exposure of states and localities to legal and financial liabilities.⁷² The extent to which each category properly qualifies as a mandate will be examined in turn.⁷³

1. Direct Orders

Direct orders include legally enforceable requirements imposed by the Constitution,⁷⁴ statutes, regulations, or judicial orders. Direct orders come in a variety of forms and have a diversity of impacts. Some apply the same rules of conduct to state and local governments

Professor Caminker distinguishes between "ministerial mandates" in which Congress prescribes fully the applicable rules of conduct and "bounded discretion mandates" in which state officials are afforded "some degree of discretion." Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1011 (1995).

69. Federally Induced Costs at 3 (cited in note 17). While more jargonistic than rhetorical, I am not sure that the proposed new term is less pejorative than the old.

70. *Id.* at 2.

71. In addition, the ACIR language more expressly includes procedural "how to" and programmatic "what to do" mandates, as well as federal actions that reduce state and local revenue sources.

72. *Id.* at 3.

73. There is no magic to the use of this particular list of "mandates," but it is useful for purposes of analysis because it is recent and highly inclusive.

74. As discussed in Part III.B, however, it is questionable whether constitutional mandates properly can be assailed as "federal" mandates, that is, mandates imposed by the national government on state and local governments.

that are applied to private parties engaged in similar conduct.⁷⁵ Other orders might apply differently to state and local governments, such as requirements governing municipal sewage or solid waste disposal. Still others require states or cities to take regulatory actions vis-à-vis private parties, *i.e.*, to act in a governmental capacity.⁷⁶

Direct orders most clearly meet the definition of a mandate. They include requirements that are compulsory and enforceable and are issued by institutions, including legislatures, courts, and agencies, with the legal authority to do so.⁷⁷

2. Conditions of Aid

Conditions of federal aid, although issued under proper authority, are not compulsory because receipt of the aid itself, and hence compliance with the accompanying conditions or regulations, is voluntary.⁷⁸ Nevertheless, anti-mandate advocates suggest that at least some grant conditions should be considered unfunded federal mandates. The validity of these arguments is significant because “a closer examination of intergovernmental regulations reveals the great ma-

75. See note 286 and accompanying text. The California Supreme Court found that laws of general applicability do not constitute “mandates” under the applicable reimbursement provision of the California Constitution. *County of Los Angeles v. State of California*, 43 Cal. 3d 46, 729 P.2d 202, 212 (1987). See Zelinsky, 46 Vand. L. Rev. at 1365 (cited in note 4) (discussing the holding and reasoning of the California Supreme Court in *County of Los Angeles*). This conclusion, however, was based on the court’s reading of the intent of the voters who adopted the provision. *County of Los Angeles*, 729 P.2d at 212.

76. See *New York*, 505 U.S. at 177-80 (discussing the power of Congress to require states to regulate the actions of private citizens). These variations result in different treatment under the Tenth Amendment. See *Printz*, 65 U.S.L.W. at 4739-41 (distinguishing between constitutional and unconstitutional direct orders upon state and local governments). See also Part V.B.

77. Classification of a federal action as a “direct order mandate,” however, does not necessarily answer questions about the mandate’s validity on either legal or policy grounds. Valid public policies may be served by federal mandates, and federal reimbursement may be unnecessary or unwise on economic or other policy grounds. See Part VI.

78. Jaber, 45 Emory L. J. at 290 (cited in note 4). Largely for this reason, a wide range of grant conditions have been upheld under the Spending Clause. U.S. Const., Art. I, § 8, cl. 1. See Part V.C. See generally Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911, 1924-32 (1995) (discussing the Supreme Court’s Spending Clause decisions); David E. Engdahl, *The Spending Power*, 44 Duke L. J. 1, 54-109 (1994) (discussing recent Spending Clause decisions by the Supreme Court); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 Stan. L. Rev. 1103, 1125-55 (1987) (discussing limits on the power of the federal government to attach conditions to grants).

jority of them to be *conditions of assistance* and not unfunded mandates."⁷⁹

State and local officials claim that some federal grant programs are so large and so entrenched that it is fiscally and politically impossible to turn them down⁸⁰ and, therefore, that some grant conditions should be considered mandates. Undoubtedly it is difficult for a state to withdraw from massive federal programs such as Medicaid. This argument, however, proves too much. If the funds provided by a federal program are so substantial that states or cities find them irresistible, these governments still make a rational but voluntary choice to accept the funds and participate in the program. If compliance costs were too high relative to the aid received, the program would no longer seem irresistible. Potential recipients would decline the grants and spend the funds which would otherwise be used to comply with grant conditions as the state or locality saw fit. Thus, from a definitional perspective, aid conditions remain voluntary, not mandatory.

States and cities also complain about the "bait and switch" nature of some federal programs. Congress "baits" states into participation in a cooperative program, causing them to spend funds on activities in which they were not previously involved, to incur start-up costs, to abandon similar state programs in favor of the federal model, and to create public reliance on the federal program.⁸¹ Congress then "switches" by either increasing state and local compliance costs or

79. Fix and Kenyon, *Introduction*, in Fix and Kenyon, eds., *Coping with Mandates* at 3 (cited in note 11) (emphasis in original). See CBO Experience with UMRA at 7 (cited in note 59) (stating that most costs in bills analyzed under UMRA have involved aid conditions).

80. This concept was first expressed by the ACIR: Although this legalistic approach [of excluding voluntary aid conditions] seemed plausible when federal aid constituted a small and highly compartmentalized part of state and local revenues, it overlooks current realities. Many grant conditions have become far more integral to state and local activities—and far less subject to voluntary forbearance—than originally suggested by the contractual model. Federally Induced Costs at 20 (cited in note 17). See also Resenthal, 39 Stan. L. Rev. at 1104, 1135 (cited in note 78) (suggesting that duress may be the main reason state and local governments consent to conditional grants). However, other ACIR reports appear inconsistent on this issue. See U.S. Advisory Commission on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues* 11 (U.S. G.P.O., 1993) ("Federal Statutory Preemption") (noting that "[t]he term *mandate* is used often without precise definition and is mistakenly applied to restraints and conditions of aid") (emphasis in original). As Janet Kelly has explained, sometimes officials find the program to include an "irresistible condition," especially once a state or local constituency for the program is created. Kelly, *Estimating Mandate Costs* at 3 (cited in note 62). See Gillmor and Eames, 31 Harv. J. Leg. at 399 (cited in note 48) (noting that spending conditions are coercive, especially where unrelated to purposes of the grant). Nevertheless, Dr. Kelly believes that aid conditions should not be considered mandates. Kelly, *Estimating Mandate Costs* at 3 (cited in note 62).

81. See Federally Induced Costs at 20-21 (cited in note 17) (discussing the use of "bait and switch" techniques by Congress).

conditions while maintaining federal funding levels constant or reducing federal funding while maintaining program requirements.⁸² It is difficult not to sympathize with this complaint. It does not, however, alter the voluntary nature of the federal program. A state remains free to withdraw from the program if the increased or altered conditions are not acceptable from a cost-benefit or policy perspective.⁸³

Finally, states and cities complain that some types of aid conditions are inherently more coercive and less justified than others and are therefore more like mandates than aid conditions. In particular, they cite the congressional increase in use of crossover sanctions and cross-cutting regulations,⁸⁴ which are arguably more coercive than conditions tied directly to the funded program.⁸⁵ Again, however,

82. *Id.*

83. Moreover, at least some of the examples cited in support of the "bait and switch" complaint are disingenuous. For example, the ACIR identified the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (1986), codified as amended at 33 U.S.C. §§ 2201-2329 (1994), as imposing unfunded federal mandates because it reduced the federal share of joint water projects. Federally Induced Costs at 15 (cited in note 17). Reforms in federal water legislation, however, replaced a program of massive federal subsidies for water projects with one based on mandatory cost-sharing tied to state and local benefits, and beneficiaries remain free to decline participation on a project-by-project basis. See Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 *Envir. L.* 973, 1036-37 (1995) (discussing the Water Resources Development Act of 1986). These changes in federal water policy constituted reductions in federal subsidies rather than increases in federal mandates. Similarly, states complain that Congress expanded Medicaid costs by mandating coverage for poor children between ages 7 and 19, for low-income elderly individuals, and for persons with mental disabilities. Federally Induced Costs at 21 (cited in note 17). These program expansions, however, did not change the federal share of total Medicaid costs from 55%. *Id.* Thus, for every 45 cents spent by states on new coverage, the federal government contributed 55 cents. Again, states remain free to withdraw from the program. In none of the examples of "bait and switch" cited by state and local advocates did a voluntary program later become mandatory.

84. Federal Regulation at 3, 46-47 (cited in note 11); Federally Induced Costs at 21-22 (cited in note 17). For a description of the different types of federal grant conditions, see note 19 and accompanying text.

85. Federally Induced Costs at 21 (cited in note 17) (noting that "[o]ver the last two decades, the Congress has used this mechanism to require state and local governments to take actions that the federal government lacked the constitutional authority to order directly"). The ACIR cites in particular highway fund conditions, such as speed limits and minimum drinking ages, similar to those challenged unsuccessfully in *South Dakota v. Dole*, 483 U.S. 203, 203 (1987); the Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939), codified as amended at 18 U.S.C. § 595 (1994) (prohibiting political activities by state officials); the National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 853 (1970), codified as amended at 42 U.S.C. §§ 4321 et seq. (1994) (requiring environmental impact statements for major federal actions, including federal funding of state and local projects that may have a significant impact on the environment); the Davis-Bacon Act, ch. 411, 46 Stat. 1494 (1931), codified as amended at 40 U.S.C. §§ 276a et seq. (1994) (requiring aid recipients to pay workers prevailing wages); and the Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973), codified as amended at 16 U.S.C. §§ 1531 et seq. (1994) (requiring protection of threatened and endangered species and their habitats).

these requirements remain conditions of aid voluntarily received, rather than legally enforceable mandates. While the propriety of such conditions can be debated,⁸⁶ from a definitional perspective they cannot be treated as mandates.

3. Full and Partial Preemption

Congress may preempt state and local authority under the Supremacy Clause,⁸⁷ so long as it has authority to act in the field.⁸⁸ While the increasing use of federal preemption has been a major source of intergovernmental tensions⁸⁹ and clearly impairs state and local autonomy, it is difficult to see how preemption can be viewed as a compulsory mandate. Yet federal preemptions are counted along with direct orders in a number of mandate studies.⁹⁰ State and local advocates suggest two ways in which preemption statutes should be viewed as mandates. First, some researchers suggest that preemption is a form of negative mandate, *i.e.*, one that dictates what states and cities cannot do rather than what they must do.⁹¹ To the extent that preemptions "alter the balance of power in the federal system"⁹² but

86. See Part VI. Some commentators note that Congress's ability to induce state conduct under the spending power effectively swallows any limits on Congress's power to regulate directly under the Commerce Clause. See, for example, Baker, 95 Colum. L. Rev. at 1913-16, 1933 (cited in note 78) (arguing that the Supreme Court should adopt a test imposing a stricter limit on the spending power).

87. U.S. Const., Art. VI.

88. See Part IV.D.

89. See Federally Induced Costs at 3-4 (cited in note 17) (describing the tensions created by the increased use of unfunded mandates). The ACIR found that more than half of all federal preemption statutes enacted since 1789 have been passed since 1969. Federal Statutory Preemption at iii (cited in note 80). For more detailed data on the numbers and purposes of federal preemption statutes, see *id.* at 7-9.

90. See Federal Regulation at 52-53 (cited in note 11) (counting federal preemption statutes as "instruments of regulatory federalism"); Federally Induced Costs at 22-23 (cited in note 17) (discussing the effects of federal preemption on state and local governments). The ACIR notes that "[f]ederal preemptions limit the discretion of state and local voters and sometimes impose additional costs on state and local governments." Federal Statutory Preemption at 6 (cited in note 80).

91. Dr. Kelly suggests in the state-local context that the broadest definition of a mandate would be "any action on the part of any unit of state government that inhibits the decision making ability of any unit of local government." Kelly, *Estimating Mandate Costs* at 1 (cited in note 62). Dr. Kelly acknowledges that this notion would be so broad that it could be applied to almost any action by the larger level of government. *Id.* See Federally Induced Costs at 22-23 (cited in note 17) (noting that even preemptions that impose no direct costs may be objectionable because they are intrusive); Federal Statutory Preemption at 9 (cited in note 80) (noting that many federal mandates are a subset of preemptions "although preemptions and mandates are often not clearly distinguished in discussions of federal action").

92. Federal Statutory Preemption at 6 (cited in note 80).

impose no fiscal costs on lower levels of government,⁹³ they may raise the same or similar issues of state and local autonomy, efficiency, and political accountability as affirmative mandates. However, viewing the definition of mandate this broadly would merge the mandate issue with all issues of federalism, thus rendering it useless as a new analytical tool. Moreover, a mandate that prohibits state or local action but imposes no direct costs is not relevant to the debate over *unfunded* mandates.⁹⁴

Second, it is argued that direct costs are imposed on states and cities through partial or conditional preemption under which the federal government establishes minimum standards for programs that are delegated to state or local governments.⁹⁵ Such programs constrain decision making and impose direct compliance costs. However, defining partial preemptions as mandates either is of no use to the debate or is inaccurate. If adoption of a regulatory program is mandatory, definitionally it becomes a direct order.⁹⁶ The majority of partial preemptions are optional, however, because they confer discretion to adopt the program or leave it to the federal government.⁹⁷ Compliance is voluntary rather than mandatory, as with conditions of aid.⁹⁸ While a state or city loses some autonomy if it declines to implement a federal program, or if the federal government reassumes a program due

93. Some preemptions do affect state and local finances by reducing or prohibiting funding sources. See *Federally Induced Costs* at 22-23 (cited in note 17) (discussing preemptions which increase costs for state and local governments). These types of actions are discussed in Part III.A.4.

94. Stated differently, calling all federal actions that "affect" state and local power mandates, even in the absence of any fiscal impact, would add absolutely nothing to the legal and policy debate about federalism.

95. *Federally Induced Costs* at 23 (cited in note 17) (citing as examples several federal health and environmental programs); *Federal Statutory Preemption* at 23-23 (cited in note 80) (discussing the effects of total and partial preemption upon state and local governments).

96. See *New York*, 505 U.S. at 161-66 (prohibiting such direct commandeering of state regulatory resources); *Printz*, 65 U.S.L.W. at 4741 (concluding "categorically" that the federal government cannot compel states to "enact or administer" federal regulatory programs).

97. See *Federally Induced Costs* at 23 (cited in note 17) (noting that, legally, such programs are voluntary and states often opt out of the programs).

98. See *Steinzor*, 81 Minn. L. Rev. at 102 n.5 (cited in note 4) (noting that the "alternative to accepting a voluntary delegation is federal preemption of state law"). Indeed, in many cases the only "penalty" a state faces for violation of program conditions is withdrawal of federal grant funding. Thus, partial preemptions are identical to conditions of aid. For example, the only sanction for state noncompliance with the nonpoint source pollution provisions of the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972), codified as amended at 33 U.S.C. §§ 1251 et seq. (1994), is withdrawal of EPA grant funding. *Id.* § 1329(h). Even the more draconian sanction of program withdrawal, see *id.* § 1342(c) (providing for withdrawal from a permitting program upon state noncompliance with program requirements), would constitute full preemption rather than a federal mandate.

to violation of program conditions, definitionally this is no different from full preemption.⁹⁹

4. Tax Policy Provisions

Federal tax policy can adversely affect state and local finances in ways that are considered by some to constitute unfunded mandates.¹⁰⁰ Congress can impair state and local revenue generation by preempting a particular source of taxation¹⁰¹ or through other aspects of federal tax, policy such as rules regarding the deductibility of state and local taxes from federal income taxes and taxation of interest on state and local debt.¹⁰²

While federal tax policy can affect state and local finances substantially, it often has reciprocal impacts on federal finances as well.¹⁰³ For example, state and local use of tax-exempt bonds ("TEBs") grew rapidly from the mid-1960s to the mid-1980s.¹⁰⁴ While lowering the cost of state and local borrowing,¹⁰⁵ TEBs caused large federal revenue losses.¹⁰⁶ Congress increased restrictions on TEB use to slow

99. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268 (1981) (upholding a partial preemption program against Tenth Amendment challenge).

100. See Federally Induced Costs at 22-24 (cited in note 17) (including federal tax policy in discussions of unfunded mandates).

101. *Id.* at 22-23 (citing, for example, federal preemption of taxes on air travel and prohibitions against discriminatory taxes on railroad property). Some areas of revenue collection are reserved to the national government by the Constitution. See, for example, U.S. Const., Art. I, § 10, cl. 2 (prohibiting state imposts or duties on exports absent consent of Congress).

102. See, for example, *South Carolina v. Baker*, 485 U.S. 505, 527 (1988) (upholding a federal tax measure eliminating the deductibility of unregistered state and local bearer bonds). See Public Finance Network, *Tax-exempt Financing: A Primer* 1-10 (1994) ("Tax-exempt Financing") (discussing federal tax rules regarding state and local debt).

103. The reciprocal impacts of state and federal tax authority have been debated since the Constitutional Convention. See, for example, *Federalist Nos. 31, 32 (Hamilton)*, in Clinton Rossiter, ed., *The Federalist Papers* 193-201 (Mentor, 1961); *New York v. United States*, 326 U.S. 572, 574-78 (1946) ("New York (Tax)") (dismissing the notion that states are absolutely immune from all types of federal taxation); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431-35 (1819) (stating that "the power to tax is the power to destroy" and holding that Maryland could not impose a tax upon the Bank of the United States).

104. Rymarowicz and Zimmerman, *Federal Budget and Tax Policy* at 18 (cited in note 29) (listing an annual growth rate of 14.6%).

105. TEBs reduce borrowing costs because investors can receive higher net returns at a given interest rate if they do not have to pay federal income taxes on the proceeds. Hence, states and cities can raise capital at lower interest rates than if the bond income were subject to federal taxes. As a result, TEBs lower state and local borrowing costs by approximately 25%. *Tax-exempt Financing* at 1 (cited in note 102).

106. *Id.* at 18 (noting that federal revenue losses from the use of TEBs grew from \$10.7 billion in fiscal year 1980 to \$21 billion by fiscal year 1988).

these losses and to curtail the use of TEBs to subsidize private activities.¹⁰⁷

State and local governments view restrictions on tax-exempt borrowing as "an unwarranted infringement on their right to conduct their financial affairs free from federal interference. This is not surprising since these revenue bonds generate benefits to the issuing jurisdiction and entail almost no cost to State and local taxpayers."¹⁰⁸ It is inappropriate, however, to define these restrictions, or changes in the deductibility of state and local taxes, as unfunded mandates. The Sixteenth Amendment gave the federal government authority to tax income regardless of the impact on individual states or on states at large.¹⁰⁹ As such, Congress never had any obligation to provide for tax-exempt bonds or the deductibility of state and local taxes. Instead, as a matter of policy, Congress elected to adopt tax provisions to subsidize state and local revenue generation. Withdrawal of such favors, while undoubtedly affecting state and local revenues, constitutes the reduction or elimination of federal subsidies rather than the imposition of federal mandates.¹¹⁰

It is more debatable whether the national government impairs state and local finances through preemption of revenue sources. Although a preemptive tax prevents lower levels of government from taxing that same revenue source, the state or city is free to impose new or increased taxes on other sources with no resulting revenue loss.¹¹¹ Even if a real fiscal impact does result, however, the assertion of valid taxing authority to raise revenues for national use cannot be defined as a mandate any more than other forms of federal preemp-

107. The use of TEBs was curtailed during the mid-1980s. Rymarowicz and Zimmerman, *Federal Budget and Tax Policy* at 21-22 (cited in note 29). This trend, however, reversed in the late 1980s and early 1990s. Tax-exempt Financing at 11 (cited in note 102). Part of this reversal stemmed from lower interest rates and state and local desire to retire high-interest bonds early in order to replace them with lower-interest instruments. *Id.* For a comprehensive analysis of the change in federal laws governing TEBs, see *id.* at 11 app. A (outlining a chronology of federal tax laws affecting TEBs).

108. Rymarewicz and Zimmerman, *Federal Budget and Tax Policy* at 22 (cited in note 29).

109. The Sixteenth Amendment provides that: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const., Amend. XVI.

110. This is not to say that federal tax policy is irrelevant to the unfunded mandate debate. As discussed in Part IV, a proper evaluation of the unfunded federal mandate issue requires a comparison of the overall fiscal relationship between the federal, state, and local governments.

111. The same is not true in the context of state mandates on municipal governments, which at times involve overall revenue caps. See Kelly, *State Mandates* at 16-17 (cited in note 3) (discussing financial restrictions on many municipalities imposed by states that limit the ability of municipalities to raise revenue).

tion. Federal taxes do not require lower levels of government to do anything; they merely prevent them from taxing certain revenue sources or from taxing them fully. If a state wants to tax that particular revenue source for policy—as opposed to revenue—purposes, federal tax preemption will have some effect on state autonomy. As with other forms of preemption, however, defining the federal tax as a “mandate” is disingenuous.

5. Incidental and Implied Federal Policy Impacts

Including any federal action that “imposes additional financial burdens on states and localities”¹¹² in the definition of unfunded mandates encompasses a potentially wide range of federal actions. For example, the ACIR includes governmental costs that states and cities incur due to the location of federal installations¹¹³ as well as the effects of federal immigration policies that create fiscal impacts on communities.¹¹⁴ In one study of federal mandate costs, Tennessee even included lost sales tax revenues resulting from the use of federal food stamps.¹¹⁵ This concept of mandates has even been expanded to include

112. Federally Induced Costs at 2 (cited in note 17).

113. *Id.* at 3. For example, the location of a military base might result in increased state and local expenditures on roads, schools, and other services. This is ironic because, as shown by the recent nationwide debate over military base closures, states fight to retain large federal installations because they provide jobs and other economic benefits. This is just one example, discussed further below, of how the net “costs” or “benefits” of a federal action cannot be captured simply by identifying direct fiscal costs. Similarly, a bill recently considered by Congress and analyzed by the CBO pursuant to UMRA, which would have required the establishment of a temporary nuclear waste facility in Nevada, might have increased the state’s emergency planning costs. CBO Experience with UMRA at 11 (cited in note 59).

114. Federally Induced Costs at 3 (cited in note 17). See also *Padavan v. United States*, 82 F.3d 23, 27 (2d Cir. 1996) (rejecting a claim, as nonjusticiable, that the federal government must reimburse state and local governments for costs imposed by immigration policy); *Chiles v. United States*, 69 F.3d 1094, 1096-97 (11th Cir. 1995), cert. denied, *Chiles v. United States*, 116 S. Ct. 1674, 1674, 134 L. Ed. 2d 777, 777 (1996) (holding there could be no judicial review of congressional actions unless a “specific constitutional limit on the spending power has been exceeded”).

Liberal federal immigration policies, or incomplete enforcement of immigration prohibitions, can increase the numbers of legal and illegal immigrants in a state. When states and cities must provide these new residents with police, fire, education, or health services, the resulting costs are attributed to unfunded federal mandates. Because almost any federal policy can have some impact on national population or population distribution among states, however, defining demand-inducing federal policy decisions as mandates would be almost universally inclusive. Ironically, states and cities often crave federal spending or other policies that will induce growth in their regions. Implicitly, however, such impacts are favored locally only when they generate more economic and tax benefits than the service costs they incur. Thus, even if these impacts can be properly considered federal mandates, they raise difficult accounting and policy issues.

115. John Kincaid, *The Financial Effects of Federal Mandates* 9 (1994) (memorandum to members of the Advisory Commission on Intergovernmental Relations, on file with author) (“Kincaid Memorandum”).

“[a]dministrative failures to act, including delays in regulations and the issuance of orders . . . when they significantly impede the ability of state and local governments to implement direct orders or affirmative requirements.”¹¹⁶ The increased costs of some basic state and local services, such as police protection and public education, even if not truly voluntary, cannot be considered federally imposed mandates because they are conducted as part of the basic responsibilities of state and local government.¹¹⁷

If a service is provided voluntarily, it cannot categorically be labeled a mandate. In some cases, however, the obligation to provide public services derives from Fourteenth Amendment principles of equal protection, because a state or city may be precluded from discriminating in its provision of benefits or services.¹¹⁸ A judicially enforced constitutional requirement that services be provided to additional persons does constitute a mandate. However, as discussed in Part III.B, to the extent that equal service is required by the Constitution, the mandate is imposed directly by the people, not by the federal government. But such mandates already would be included in the definition of direct orders. Thus, the idea of indirect impacts complicates but adds nothing useful to the mandate definition.

6. Federal Statutory Liabilities

Finally, federal statutory liabilities sometimes are identified as unfunded federal mandates. The most common examples are the Comprehensive Environmental Response, Compensation and Liability

116. Steinzor, 81 Minn. L. Rev. at 110-11 (cited in note 4). It is hard to see how a failure to act can be a mandate. Moreover, regulatory delays can benefit as well as impede state and local implementation of environmental requirements.

117. Indeed, it is federal interference with the exercise of such duties that gives rise to many debates about federalism. A state or city could choose to eliminate such services and face the wrath of its citizens. However, it is direct accountability to the state or local electorate, not a federal mandate, that gives rise to such services.

Indirect impacts do flow from state and local activities that are mandated by direct order such as the requirement that cities provide a minimum of secondary treatment for all sewage effluent, the demand for which will increase due to growth-inducing or population-enlarging federal actions. However, provision of such services constitutes a direct order mandate whether or not demand is increased due to independent federal policies.

118. See, for example, *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969), overruled in part by *Edelman v. Jordan*, 45 U.S. 651, 651 (1974) (invalidating a one-year residency requirement for welfare benefits on equal protection grounds).

Act ("CERCLA")¹¹⁹ and citizen suits under other environmental statutes.¹²⁰ Federally imposed or federally defined statutory liability poses special problems for defining mandates.

Liability for civil penalties and other noncompliance sanctions can readily be dismissed as an independent category of mandates. Citizen suits under federal environmental laws, for example, allow citizens to sue governmental as well as private parties for noncompliance with federal statutory and regulatory requirements.¹²¹ The "liability" provisions of these statutes are really civil sanctions available to remedy noncompliance with underlying regulatory requirements; the compliance costs themselves were dictated by direct order mandates. To the extent that a state or city incurs additional costs in the form of civil penalties necessary to remedy noncompliance, those costs should not be viewed as federal mandates, as they could have been avoided through compliance with the statute and regulations.

As a separate category, then, liability mandates should be limited to statutory requirements to compensate a third party, including the federal government, for costs or damages incurred as a result of the defendant's conduct. Such compensation liability is distinguishable from direct order mandates in many ways. Direct order mandates require parties to engage in affirmative conduct and thereby to incur implementation costs which they would otherwise avoid. The primary purpose of the mandate is to promote a public good or to prevent a public or private harm, with the effect of imposing compliance costs on the recipient of the mandate. A liability requirement, on the other hand, typically requires Party A to compensate Party B for some affirmative act already conducted by A or for some legal duty avoided or neglected by A. While courts and legislatures often consider related public policy issues in deciding the degree to which such liability is imposed, the primary purpose of liability is to compensate B for the harm caused by A's act or omission.

Nevertheless, statutory liability schemes appear to meet the twin criteria of authority to issue and legal duty to comply that are the marks of a mandate. While the duty involved is to compensate a third

119. Pub. L. No. 96-510, 94 Stat. 2767 (1980), codified as amended at 42 U.S.C. §§ 9601 et seq. (1994). Superfund liability was also included in the cost surveys conducted for the U.S. Conference of Mayors and the National Association of Counties. See Price Waterhouse City Report at B-1 (cited in note 42) (discussing the effect of Superfund liability on municipal governments).

120. See *Federally Induced Costs* at 25 (cited in note 17) (including citizen suits as unfunded mandates).

121. See, for example, 33 U.S.C. § 1365(a) (1994) (outlining citizen suit procedures under the Clean Water Act). Under these provisions, citizens may sue federal, state, or local governments.

party, rather than to spend money to conduct a specified activity, the obligation is compulsory rather than voluntary and is subject to legal sanctions for noncompliance. Therefore, they properly qualify as mandates.¹²²

7. Conclusion

Of the six categories of federal action proffered by the ACIR, only direct orders and compensation liability are properly defined as mandates. Grant conditions are accepted voluntarily, not mandated. Preemption and elements of tax policy constitute the exercise of federal authority, not mandated exercises of state or local power. Indirect impacts either involve activities undertaken voluntarily by states and cities or result from actions that already would be defined as direct order mandates.

B. What is a Federal Mandate?

For the two categories of action properly defined as mandates, the next issue is whether those requirements are “federal” for purposes of the unfunded federal mandate debate. Some dictates do not meet this criterion. Thus no legitimate issues of federalism are raised.

1. Constitutional Mandates

First, state and local governments include constitutional mandates among their complaints.¹²³ Because the Constitution was adopted directly by the people and not by the states or the federal government,¹²⁴ constitutional requirements are not “imposed by” the

122. As with direct orders, meeting the definition of mandate does not necessarily mean that statutory liability schemes are illegitimate or require federal compensation. These policy issues will be explored in Part VI.

123. For example, the ACIR cited judicially-imposed conditions designed to enforce constitutional requirements, such as school desegregation and minimum standards for state prisons and mental institutions, as unfunded federal mandates. *Federally Induced Costs* at 24 (cited in note 17).

124. Shapiro, *Federalism* at 14-17 (cited in note 1). This is a corollary of the fact that all political authority in the United States ultimately is derived from the people, rather than either the federal or state governments. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1863, 131 L. Ed. 2d 881, 911 (1995) (observing that “the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people”). See Amar, 96 *Yale L. J.* at 1427, 1441 (cited in note 2) (noting that “true sovereignty” lies in the people of the United States); Anastaplo, *The Amendments to the Constitution* at 10, 100 (cited in note 16) (observing

federal government. To the extent that the Constitution imposes "responsibilities, procedures, or activities,"¹²⁵ they were mandated by the people, not by the federal government which was itself created by the same collective act of constitutional adoption.¹²⁶

However, because constitutional dictates are stated in basic if not vague terms and are subject to judicial interpretation and sometimes legislative implementation,¹²⁷ the "source" of a particular mandate is open to debate. While the legal authority of Congress and federal judges to implement and enforce constitutional rights no longer is open to serious debate,¹²⁸ requirements that go beyond the text of the Constitution itself are arguably, at least in part, definable as mandates imposed by Congress and the courts.¹²⁹ This poses difficult questions in light of the basic argument that mandates are presumptively invalid, invalid absent funding, or bad policy. On the one hand, why should the national public pay a state or local government to obey the requirements of the Constitution, and why should Congress and the courts not have adequate authority to ensure compliance with these most basic national requirements?¹³⁰ On the other hand, is there a point beyond which such mandates, whether imposed by Congress or by federal judges, lose legal sanction or demand federal funding for compliance? If so, should this stretching point be based on the magnitude of implementation costs as suggested by the unfunded

that the Constitution, unlike the Articles of Confederation, identifies the power of the federal government as coming from the people of the United States, not the states). Constitutional amendments, in turn, are adopted either directly by the people in Convention or by the state legislatures. U.S. Const., Art. V.

125. Federally Induced Costs at 2 (cited in note 17).

126. Similarly, except when "making" common law, which is relatively inapplicable in the unfunded mandates context, judges are not independent sources of mandates. Rather, federal judges typically interpret, implement, and enforce underlying constitutional requirements.

To the extent that judges implement and enforce federal statutes other than those that implement and enforce constitutional duties, the source of the mandate remains "federal," whether judicial, legislative, or both.

127. The greatest example of congressional authority is contained in the Civil War amendments. See, for example, U.S. Const., Amend. XIII, § 2 (providing that Congress may enforce the Thirteenth Amendment by enacting "appropriate legislation"); U.S. Const., Amend. XIV, § 5 (providing that Congress may enforce the Fourteenth Amendment by "appropriate legislation"); U.S. Const., Amend. XV, § 2 (stating that Congress may enforce the Fifteenth Amendment by "appropriate legislation").

128. See notes 306-07 and accompanying text.

129. This is not to say that such requirements necessarily lack legal validity or require federal funding. It merely indicates that such requirements may qualify as federal mandates, the legality and wisdom of which will be assessed in Parts V and VI.

130. See Ray D. Whitman and Roger H. Bezdek, *Federal Reimbursement for Mandates on State and Local Governments*, Pub. Budgeting & Finance 47, 55 (Spring 1989) (arguing that state and local compliance with constitutional obligations should not require reimbursement).

federal mandate debate or on the degree to which the mandate strays substantively beyond the constitutional text?

Furthermore, because the federal government is one of enumerated powers,¹³¹ all federal legislation must be derived from some source of constitutional authority. As a result, every law Congress passes could in one sense be classified as an act necessary to implement and enforce a constitutional dictate. But Congress's authority under the Commerce Clause¹³² and the Necessary and Proper Clause¹³³ is so broad¹³⁴ that this argument would encompass virtually the full range of federal legislation. At the other extreme, Section 2 of the Thirteenth and Fifteenth Amendments and Section 5 of the Fourteenth Amendment give Congress express legislative implementing authority, conferring special status on actions taken under those authorities.

Thus, some dividing line is needed between constitutional mandates imposed on states and cities *by the people* through ratification of the Constitution or a constitutional amendment and extraconstitutional requirements imposed by Congress—hence *federal* mandates—through the exercise of discretionary power.¹³⁵ The former should include constitutional provisions that directly define duties and responsibilities of states and their subdivisions, whether via affirmative mandate or by prohibition,¹³⁶ and provisions that guarantee indi-

131. *United States v. Lopez*, 115 S. Ct. 1624, 1626, 131 L. Ed. 2d 626, 633 (1995); Shapiro, *Federalism* at 58 (cited in note 1).

132. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

133. "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., Art. I, § 8, cl. 18.

134. See *United States v. Darby*, 312 U.S. 100, 112 (1941) (holding that Congress's power to regulate commerce extends to regulation of all goods within the "stream of commerce").

135. Of course, because the people elect senators and representatives, one could justify legislative mandates as an exercise of the people's direct control over government. See Anastaplo, *The Amendments to the Constitution* at 100 (cited in note 16) (arguing that citizens of the United States "may determine the powers and limitations upon the States, no matter what the people of any particular state may prefer"). This argument proves too much, however, as it would exclude from the mandate definition any law passed by Congress.

136. Examples would include U.S. Const., Art. I, § 4 (requiring states to prescribe the time, place, and manner of congressional elections, although subject to congressional regulation); U.S. Const., Art. I, § 10 (prohibiting states from entering treaties or alliances; granting letters of marque and reprisal; coining or printing money; passing bills of attainder, ex post facto laws, or laws impairing contracts; granting titles of nobility; laying imposts or duties; etc.); U.S. Const., Art. IV § 1 (requiring states to give "Full Faith and Credit" to acts, proceedings, and judicial decisions of other states); U.S. Const., Art. IV, § 2 (granting to citizens of each state all privileges

vidual rights against governmental power. The latter should include legislation which is passed as a legitimate exercise of congressional authority under Article I, section 8, but that goes beyond directly defined constitutional rights and responsibilities.

2. Compensation Liability Mandates

The second category of mandates that may or may not be defined as "federal" are compensation liability mandates.¹³⁷ To the extent that Congress imposes *entirely new or significantly expanded* principles or levels of compensation liability applicable to states and cities, the requirement can be defined as a federal mandate. In many cases, however, Congress merely codifies liability requirements otherwise dictated by common law.¹³⁸ Thus, it is difficult to extend the notion of federal mandates to those statutes where liability already existed.

A similar problem is raised by federal mandates that parallel state or local requirements. If a federal statute imposes entirely new requirements beyond those existing in any smaller jurisdiction, they should be defined as federal mandates. In many cases, however, federal law is patterned after similar, but not necessarily consistent, state laws.¹³⁹ In others, federal law addresses problems already cov-

and immunities available in other states); and U.S. Const., Art. VI, cl. 2 (recognizing the supremacy of federal law).

137. The ACIR limits its definition to federal *statutory* liability mandates. It may be even more difficult to define the source of liability imposed by federal judges. This issue, for example, may turn on whether a federal judge in a diversity case applies state common law or federal common law. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that except in "matters governed by the Constitution or by Acts of Congress," courts should apply state substantive law); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 365-68 (1943) (recognizing that federal common law applied in a dispute relating to commercial paper issued by the federal government).

138. CERCLA, for example, the most frequently cited example of an unfunded statutory mandate, see note 119 and accompanying text, does not establish entirely new principles of liability for the release of hazardous substances. Rather, under CERCLA, federal judges apply common law principles of strict, joint, and several liability, although the magnitude of liability under the statute undoubtedly is greater than at common law. See *O'Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989) (applying the Restatement (Second) of Torts). While Congress, in enacting CERCLA, intended federal judges to establish a uniform approach to existing principles of liability, *id.*, similar or identical liability may have resulted under the common law. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1049, 1051 (2d Cir. 1985) (finding liability alternatively under CERCLA and under common law nuisance). This raises serious problems in defining the extent to which the liability imposed by the statute is federal, codification of existing common law, or a combination of the two.

139. The Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (1977), codified as amended at 30 U.S.C. §§ 1201 et seq. (1994), for example, was patterned after similar preexisting requirements in Pennsylvania and other states. John C. Dernbach, *Pennsylvania's Implementation of the Surface Mining Control and Reclamation Act: An*

ered by state laws, but in different ways.¹⁴⁰ Sometimes state law is stricter than federal law and therefore is the real source of mandates on local government.¹⁴¹ Thus, defining requirements as federal, state, or mixed mandates may be extremely difficult.

C. What is an Unfunded Federal Mandate?

The debate over unfunded federal mandates focuses on the absence of federal funding to comply with federal mandates. Defining the degree to which a mandate is “unfunded,” however, is surprisingly difficult and plagues researchers who attempt to calculate the “costs” of state and federal mandates.¹⁴²

First, while federal mandates are identified categorically as “unfunded,” the degree of funding attached to federal programs can range from none to full funding to overfunding such as when the costs of compliance with the condition are smaller than the aid itself.¹⁴³

Assessment of How “Cooperative Federalism” Can Make State Regulatory Programs More Effective, 19 U. Mich. J.L. Ref. 903, 906 (1986).

140. For example, state laws may require cities to treat their sewage, but different or incremental requirements are imposed by the federal Clean Water Act. See 33 U.S.C. §§ 1251 et seq. (1994) (discussing these requirements).

141. For example, Columbus, Ohio’s mandate cost study, discussed in note 41, attributed solid waste disposal costs to federal mandates, but the ACIR found that the state appears to be the major source of the mandate because state solid waste requirements are stricter than minimum federal standards. Kincaid Memorandum at 5 (cited in note 115).

142. See Reischauer Testimony at 1-3 (cited in note 54) (describing CBO’s problems in implementing the State and Local Government Cost Estimating Act of 1981); Kim Cawley and Teri Gullo, Congressional Budget Office, *Comments on Draft Report on ACIR Federal Mandates Financial Task Force 1-2* (1994) (memorandum to Phillip Dearborn, on file with author) (“CBO Memorandum”) (commenting on the draft report of the ACIR regarding cost estimating procedures); Kincaid Memorandum at 1-9 (cited in note 115) (discussing recent studies of mandate costs and listing issues concerning the methodology and results of these studies); Senate Committee on Environment and Public Works, *Analysis of the Unfunded Mandates Surveys Conducted by the U.S. Conference of Mayors and the National Association of Counties 8-18* (1994) (staff report to members of the Senate Committee on Environment and Public Works) (“Senate EPW Report”) (critiquing the Price Waterhouse studies); Kelly, *Estimating Mandate Costs* at 35-42 (cited in note 62) (providing a detailed evaluation of cost estimating methods and problems); Federal Mandate Relief at 39-43 (cited in note 34) (analyzing the difficulties of estimating compliance costs); Steinzor, 81 Minn. L. Rev. at 108-09 (cited in note 4) (discussing when a mandate is considered “unfunded”).

143. See, for example, Zelinsky, 46 Vand. L. Rev. at 1366 (cited in note 4) (noting that a “mandate is unfunded if the higher level of government fails to reimburse *fully* the lower level for the costs imposed on it”) (emphasis added). For example, Clean Water Act requirements are identified as one of the largest sources of unfunded federal mandates. Price Waterhouse City Report at 4 (cited in note 42). Yet, federal sewage treatment mandates have ranged, depending on the community and the years in which the project was built, from unfunded to almost entirely funded. Because states were given package grants to finance needed sewage treatment improvements in their states, 33 U.S.C. § 1285 (1994), with discretion to decide which communities

Thus, a mandate cannot simply be defined as "unfunded" without a careful analysis of the degree of funding provided to a particular mandate recipient or to the category of recipients collectively.

Moreover, the federal government provides fiscal assistance to states and cities in ways other than funding for individual mandates. The fiscal impact of unfunded mandates can be evaluated at the level of single regulatory or statutory provisions, entire statutes and regulatory programs, related statutes or programs, or the full fiscal relationship between the federal government and the mandate recipient. The results depend on the breadth of the analysis. Individual mandates may be separately funded. However, compliance may also be funded through a broader grant covering compliance with the whole statute,¹⁴⁴ through grants for related programs or other aspects of the same program, or through other sources of federal funding,¹⁴⁵ includ-

were eligible for grants, id. § 1284(a)(3) (providing that grants issued by the Environmental Protection Agency can only be provided to projects listed on a state priority list), historically some communities received federal funding to comply with the treatment mandate, while others did not. Depending on the year in which a grant was issued, the percentage of federal funding varied from 55% to 85%. Id. § 1282(a). Currently, municipal sewage financing is subsidized through federally capitalized state revolving loan funds. 33 U.S.C. §§ 1381 et seq. (1994). The revolving loan fund program was added in 1987 in an effort to defederalize sewage treatment financing. Robert W. Adler, Jessica C. Landman, and Diane M. Cameron, *The Clean Water Act: Twenty Years Later* 14, 112 (Island, 1993) (stating that "the federal government invested \$56 billion in municipal sewage treatment from 1972 to 1989").

144. Returning to the Clean Water Act example, specific obligations of state agencies may not be funded separately, but states are eligible to receive a number of programmatic grants to implement the Act. See, for example, 33 U.S.C. § 1255 (1994) (providing research and development grants to participating states); id. § 1256 (creating pollution control program grants); id. § 1285(g) (providing for management assistance grants); id. § 1285(j) (creating a water quality management grant program); id. § 1329(h) (providing nonpoint source pollution program grants); id. § 1329(i) (providing groundwater protection grants); id. § 1381 (creating state revolving loan program grants). In addition, the Act provides for a number of more specific regional or subprogrammatic grant programs for which individual states may be eligible. See id. § 1257 (providing for mine pollution demonstration grants); § 1257a (abandoned mine demonstration grants); id. §§ 1258, 1268 (creating a grant program for the Great Lakes area); id. § 1263 (creating a grant program for native villages in Alaska); id. § 1266 (providing for a demonstration project involving the Hudson River); id. § 1267 (creating a grant program to improve pollution levels in the Chesapeake Bay); id. § 1269 (creating a pollution prevention program for the Long Island Sound); id. § 1270 (establishing a comprehensive pollution prevention plan for Lake Champlain); id. § 1324 (establishing a grant program to prevent pollution in publicly owned lakes in all states); id. § 1330 (creating the National Estuary program); id. § 1345(g) (creating a grant program to promote the safe and beneficial management or use of sewage sludge); id. § 1377(c) (creating a grant program for the construction of sewage treatment plants by Indian Tribes). Given this diversity of potential and sometimes fungible federal funding sources, it is difficult to determine the extent to which a particular mandate in a particular state is funded or unfunded.

145. In the sewage treatment example, additional funding is available from sources such as the Farmers Home Administration. Id. § 1281b. Project financing may be subsidized further through federal loan guarantees. Id. § 1293. For water quality programs as a whole, the GAO counted over 72 federal programs under which roughly \$5 billion in federal aid is offered to support water quality programs nationally. Much of this support is provided by agencies other

ing block grants.¹⁴⁶ Indeed, the fungibility of federal and state dollars has been identified as one major problem with the use of block grants.¹⁴⁷ Even more broadly, because the federal government provides fiscal assistance to states and cities through such undesignated means as federal tax subsidies, the use of which may be less restricted and therefore fungible,¹⁴⁸ it is difficult, if not impossible, to determine precisely whether any particular federal mandate is funded.

Second, the full costs of mandates should not be attributed to the mandating government when the underlying activity may have been required or conducted anyway, but in a possibly different way with possibly different costs. An appropriate measure of unfunded mandates would count only incremental costs imposed on a jurisdiction by the higher level of government.¹⁴⁹ However, often it can be extremely difficult to identify which costs would be incurred in the absence of intergovernmental regulation.¹⁵⁰

than the EPA and under statutes other than the Clean Water Act. U.S. General Accounting Office, Resources, Community, and Economic Development Division, *Water Quality: A Catalog of Related Federal Programs* 1 (U.S. G.P.O., 1996).

146. See generally Block Grants at 2-3 (cited in note 23) (discussing proposed accountability provisions to be included in future federal block grants to states). Indeed, ironically, mandate recipients often prefer broad block grant funding to categorical grants because it increases flexibility in the use of available federal funds. See Shapiro, *Federalism* at 60 (cited in note 1) (noting that block grants “were a local politician’s dream—‘free’ money to be spent on whatever legal purpose one wanted without having to tax the local voters”). It is somewhat inconsistent to request that funding be provided in flexible block form and later to complain that individual mandates are unfunded.

147. Shapiro, *Federalism* at 17 (cited in note 1).

148. See Peterson, *The Price of Federalism* at 132-33 (cited in note 8) (observing that funds to states and cities may be fungible even if restricted since restricted funds free up other state and local dollars for other purposes).

149. See Congressional Budget Office, *A Preliminary Analysis of Unfunded Federal Mandates and the Cost of the Safe Drinking Water Act* 16 (U.S. G.P.O., 1994) (“CBO SDWA Analysis”) (noting that the “true cost of a federal mandate is the additional expenditures that it requires municipalities to make”). The CBO criticized both the Environmental Protection Agency and others whose estimated costs of compliance with the Safe Drinking Water Act included total rather than incremental costs. *Id.* at 18. Obviously, most communities would have some form of drinking water treatment absent any federal or state mandates.

150. See *id.* at 16 (stating that “[u]nfortunately, the data to estimate what municipalities would have done in the absence of federal mandates do not exist”). See also *id.* at 26 (noting that communities face rising drinking water costs for many reasons, including aging systems and rising populations); Kincaid Memorandum at 5-6 (cited in note 115) (contrasting costs imposed by states with costs imposed by federal requirements); Senate EPW Report at 4-5, 16 (cited in note 142) (criticizing the Price Waterhouse survey for failing to identify costs that would be incurred absent federal mandates); Kelly, *Estimating Mandate Costs* at 5 (cited in note 62) (observing that it is difficult to sort out federal and state roles in costs imposed on local governments); Kelly, *State Mandates* at 67 (cited in note 3) (stating that total cost figures overestimate mandate costs, but marginal cost estimates are imprecise); Towns Report at 9 app. I (cited in note 44) (noting that some estimates combine costs of federal and state requirements); Reischauer Testimony at

Third, calculation of the degree to which existing and proposed mandates are unfunded¹⁵¹ raises a series of detailed definitional and accounting issues which combine to make estimates of mandate costs uncertain and highly variable.¹⁵² For example, one must decide whether to include only direct implementation costs or indirect and structural costs as well;¹⁵³ whether and how to deduct cost savings or revenue gains;¹⁵⁴ how to account for benefits that are difficult to put in

20 (cited in note 54) (stating that "even for existing costs, there is often no clear and consistent basis for identifying how much of a locality's spending is the result of a specific federal mandate rather than a cost it would have incurred in any event").

An early survey by Lovell and Tobin found that less than half of all federal and state mandates introduced entirely new activities to the jurisdiction, meaning that the rest were implemented at least in part before adoption of the mandate. Lovell and Tobin, 41 Pub. Admin. Rev. at 322-23 (cited in note 11). Moreover, the study found that more than half of all mandates would be continued even after the mandate was withdrawn, because the "values behind some of the mandates apparently have become internalized and organization structures, support systems, and budget lines have been developed around the mandated activities." *Id.*

151. These methodological problems, already perplexing in estimating existing mandate costs, are exacerbated when state and federal fiscal analysts are asked to predict the costs of proposed mandates to inform the legislature before it decides whether to act. A proposed bill usually changes throughout the legislative process, resulting in a moving target for cost estimators. Fix and Kenyon, *Introduction*, in Fix and Kenyon, eds., *Coping with Mandates* at 17 (cited in note 11); Federal Mandate Relief at 41 (cited in note 34) (discussing the need for cost estimates at various legislative stages); Federally Induced Costs at 8 (cited in note 17). Moreover, legislation is often stated in vague terms, with ultimate implementation costs depending on detailed agency regulations and other actions. Reischauer Testimony at 5, 7 (cited in note 54) (describing the uncertainty surrounding "estimates or educated guesses" and noting that estimations are difficult when the implementation of legislative programs is left to administrative discretion); Fix and Kenyon, *Introduction*, in Fix and Kenyon, eds., *Coping with Mandates* at 17 (cited in note 11).

152. These issues are explored in more detail in Part IV.

153. Direct costs would include new capital or operating costs and new or incremental personnel costs. Indirect costs might include lost revenues, such as Tennessee's claim that the use of federal food stamps resulted in lost sales tax income, see Kincaid Memorandum at 9 (cited in note 115) (discussing this claim), job losses, or structural changes such as the creation of new governmental institutions to implement new programs. See U.S. Advisory Commission on Intergovernmental Relations Federal Mandates Financial Task Force, *Study Guide 2-3* (1994) (provided to Task Force members, on file with author) ("Study Guide") (defining several categories of costs that could be included in an analysis of unfunded federal mandates); Reischauer Testimony at 2 (cited in note 54) (observing that the CBO does not address secondary effects such as job losses); Kelly, *Estimating Mandate Costs* at 27 (cited in note 62) (distinguishing between marginal costs, opportunity costs (revenue losses), total costs, and cumulative costs); Federal Mandate Relief at 40 (cited in note 34) (noting the difficulty of estimating indirect effects).

154. For example, a new health care prevention program might create implementation costs that are offset by remedial health care savings. Funding spent on new or improved local infrastructure might stimulate economic development or enhance property values, and therefore increase state and local revenues. See Study Guide at 3 (cited in note 153) (stating that it would be "reasonable" to offset cost savings against mandate costs); Federal Mandate Relief at 40 (cited in note 34) (stating that identified savings should be subtracted from the costs of mandates); Federally Induced Costs at 8 (cited in note 17) (proposing that the public and private benefits of federal requirements could be used to offset the costs imposed by these requirements). The CBO had difficulty aggregating costs and savings in the first year of UMRA. CBO Experience with UMRA at 12 (cited in note 59).

monetary terms;¹⁵⁵ how to set the time period for which mandate costs are determined, the assumed interest rate for financing, and the discount rate for calculating present value;¹⁵⁶ and how to address large differences in costs between jurisdictions.¹⁵⁷

Thus, it is extremely difficult to calculate the extent to which a federal mandate is “unfunded,” partially funded, fully funded, or overfunded. Even assuming that it is possible to estimate fairly and accurately the degree to which individual federal mandates are unfunded, this calculus may belie the overall fiscal relationship between the federal, state, and local governments. This relationship is defined not only by individual mandates and mandate-specific grants, but by broader program grants, block grants, and general fiscal assistance via loans, loan guarantees, tax-exempt bonds, and other elements of federal tax policy.

D. Conclusion

Because it is extremely difficult to construct a precise, consistent definition of the phrase “unfunded federal mandates” or even any of its component words, the concept has dubious utility as a tool to resolve important issues of federalism. Even if these terms can be defined with sufficient precision to be useful, the number of federal actions that legitimately should be considered unfunded federal mandates is considerably smaller than many suggest. Finally, as explored in more detail in Part IV, the fiscal impacts of individual mandates, even if amenable to precise determination, cannot be assessed in isolation from overall intergovernmental relationships.

155. Examples include enhanced environmental quality or increased quality of life due to health care improvements. See Federal Mandate Relief at 40 (cited in note 34) (stating that it is not feasible to net out benefits); Federally Induced Costs at 7-8 (cited in note 17) (noting that present cost estimates are inadequate because they often do not take into account offsetting benefits and cost-recovery mechanisms); Whitman and Bezdek, Pub. Budgeting & Finance at 52 (cited in note 130) (observing that it is very difficult to estimate spillover costs, i.e., benefits avoided by the mandates); CBO Memorandum at 4 (cited in note 142) (stating that estimating costs but not benefits “misses the point” and provides “a very skewed view of the impact of the federal actions on state and local governments”).

156. See CBO SDWA Analysis at 19 n.20 (cited in note 149) (discussing the effect of choosing different interest rates); Federal Mandate Relief at 40-41 (cited in note 34) (discussing the choice of time periods and the need to address financing and amortization costs).

157. Reischauer Testimony at 6 (cited in note 54) (noting as an example that the costs of handicapped voter access requirements range from zero to large amounts depending on the locale); Federal Mandate Relief at 3 (cited in note 34) (concluding that information on differential effects is not readily available); CBO Memorandum at 4 (cited in note 142) (finding that it is almost never possible for the CBO to provide city-specific costs).

IV. FISCAL OPPOSITION TO UNFUNDED FEDERAL MANDATES

Many commentators agree that the goals of individual federal mandates are laudable and independently justifiable.¹⁵⁸ However, the same sources claim that the cumulative impact of mandates, coupled with declines in federal funding, impose a substantial and unjustified fiscal burden on state and local governments.¹⁵⁹ A key problem is whether such impacts can be measured accurately, and if so, what the results mean.

A. *Existing Mandate Impact Estimates*

1. Qualitative Impact Studies

Some studies try to assess the burden of unfunded federal mandates by counting the increase in the raw number of federal mandates passed in recent years. The ACIR concluded that efforts by the Reagan Administration to curtail federal regulation of states and cities failed because the number of federal regulatory statutes passed during the 1980s actually rose when compared with earlier decades.¹⁶⁰ While such statistics do prove that the federal government increasingly has regulated states and cities, they do little to estimate the fiscal impact of federal regulations on states and cities.

158. See, for example, Michael Fix, *Observations on Mandating*, in Michael Fix and Daphne A. Kenyon, eds., *Coping with Mandates, What are the Alternatives?* 35 (The Urban Institute, 1990) (noting that without mandates, less progress would have been made on important national goals); Federal Mandate Relief at 4 (cited in note 34) (arguing that while federal mandates have provided several "important benefits to the nation," they have become too burdensome and expensive); Kelly, *State Mandates* at 4 (cited in note 3) (observing that mandates are justified if the activity mandated can be shown to serve the interests of a state and if the cost of the activity mandated can be shared equitably); Federally Induced Costs at 3 (cited in note 17) (stating that "[f]ew citizens disagree" with the policy objectives behind many mandate programs).

159. Kelly, *Estimating Mandate Costs* at 11 (cited in note 62); Kelly, *State Mandates*, at 1-2 (cited in note 3); Towns Report at 8 app. I (cited in note 44). The degree of impacts is "the heart of the issue. If the impact is negligible, it is not worth a lot of political attention and energy. If it is a fifth or more of a state or local government budget, it is a serious challenge to federalism." Federally Induced Costs at 7 (cited in note 17).

160. Federal Regulation at iii, 1-3, 46 (cited in note 11) (quantifying the growth in the raw number of federal regulatory statutes from 1931-1990). This report also found qualitatively that the newer federal regulatory statutes employed more coercive techniques than in the past. *Id.* at 3, 47 (characterizing the composition of federal regulatory statutes by method). Other ACIR reports present similar statistics. See, for example, Federal Mandate Relief at 4 (cited in note 34) (finding that the "number and cost of federal mandates has increased substantially" over the last 20 years).

The number of mandates "counted" in some studies varies depending on how researchers defined "mandate."¹⁶¹ Largely subjective or semantic judgments are involved in identifying how many mandates are included in a single statute or regulation.¹⁶² In addition, the number of mandates enacted is a poor indicator of fiscal impact. One mandate may require expensive new nationwide requirements, while ten others may impose only small incremental costs to a few jurisdictions. One mandate may impose new costs, while another may simply codify the existing practices of most jurisdictions. One mandate may be unfunded, while another may be accompanied by partial or full funding. Thus, studies that simply count the number of federal mandates do not gauge the cumulative fiscal impact of federal mandates.

2. Quantitative Fiscal Impact Studies

State and local officials complain that the federal government should, but does not, calculate the incremental and cumulative costs imposed by federal mandates.¹⁶³ Some predictive estimates are provided by the fiscal notes prepared by the CBO, first under the State and Local Government Cost Estimate Act of 1981¹⁶⁴ and now under the UMRA of 1995.¹⁶⁵ However, the CBO estimates are prepared when a bill is introduced, and real compliance costs vary depending on implementation methods and differences among jurisdictions.¹⁶⁶ As a result, estimates of the total costs imposed by unfunded federal mandates vary dramatically.¹⁶⁷ Moreover, cost estimates can be dominated by single programs.¹⁶⁸

161. For example, the National Conference of State Legislators ("NCSL") identified a much larger number of federal mandates than the U.S. Advisory Commission on Intergovernmental Relations by using a more inclusive definition of mandate. *Federally Induced Costs at 1* (cited in note 17).

162. See note 25 and accompanying text.

163. See, for example, *Federally Induced Costs at 7* (cited in note 17) (discussing the debate surrounding incremental costs imposed by unfunded federal mandates); *Federal Regulation at iii, 4* (cited in note 11) (concluding that the "cumulative financial costs" of unfunded federal mandates have not been accurately measured).

164. See note 32 and accompanying text.

165. See Part II.B.

166. *Id.* See *Reischauer Testimony at 3-8* (cited in note 54) (observing that CBO cost estimates are subject to considerable uncertainties); *CBO Memorandum at 1-6* (cited in note 142) (indicating the views of CBO officials that CBO cost estimates are difficult and uncertain). See also Part IV.

167. Tryens, *Unfunded Mandates* at 16 (cited in note 12) (listing varying estimates of the total costs imposed by unfunded mandates ranging from \$8.9 to 12.7 billion using CBO figures to

A large number of studies have attempted to identify the actual costs of state and local compliance with federal mandates.¹⁶⁹ Some address only certain types of federal programs. Others cover all federal mandates within one jurisdiction. Only two purport to be nationwide in scope.

In 1979 the Urban Institute conducted the first limited analysis of mandate costs.¹⁷⁰ Based on a survey of local officials and financial records, the study measured the incremental costs of complying with six regulatory programs¹⁷¹ compared with expenditures before the federal requirements were imposed¹⁷² in six municipalities and one county around the country.¹⁷³ Average incremental costs¹⁷⁴ were estimated at twenty-five dollars per capita, with a low of six dollars in Burlington, Vermont, to a high of over fifty-one dollars per person in Newark, New Jersey.¹⁷⁵ Whether this level of costs is burdensome relative to the benefits received¹⁷⁶ is somewhat subjective, and the study did not evaluate the full extent to which requirements were

an estimate of \$100 billion per year by the Cato Institute); Federally Induced Costs at 7 (cited in note 17).

168. For example, increased Social Security payments accounted for over half of the post-1983 costs identified by the CBO. Federal Regulation at 65 (cited in note 11).

169. For the most complete list of such studies, see Janet M. Kelly, *A Comprehensive Guide to Studies on State and Federal Mandates to Localities* 1 (National League of Cities, 1994) (listing studies attempting to identify the actual cost of compliance).

170. The results of the study are described by one of its authors in Fix, *Observations*, in Fix and Kenyon, eds., *Coping with Mandates* at 35-38 (cited in note 158) (citing Thomas Muller, Michael Fix, and Daphne A. Kenyon, *The Impact of Selected Federal Actions on Municipal Outlays*, in U.S. Congress, Joint Economic Committee, *Special Study on Economic Change, Vol. 5, Government Regulation: Achieving Social and Economic Balance* 368 (U.S. G.P.O., 1980)).

171. The study addressed requirements of the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972), codified as amended at 33 U.S.C. §§ 1251 et seq. (1994); the Unemployment Compensation Act, Pub. L. No. 94-566, 90 Stat. 2667 (1976), codified as amended at 5 U.S.C. §§ 850 et seq. (1994); the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 774 (1975), codified as amended at 20 U.S.C. §§ 1400 et seq. (1994); transit accessibility requirements; and the minimum wage requirements of the Davis-Bacon Act, ch. 411, 46 Stat. 1494 (1931), codified as amended at 40 U.S.C. § 276a (1994). These programs were cited by municipal officials as particularly costly. Fix, *Observations*, in Fix and Kenyon, eds., *Coping with Mandates* at 35 (cited in note 158).

172. The baseline for incremental costs was calculated based on the existing level of service deemed appropriate in each jurisdiction. Thus, City A and City B could have equal total compliance costs but very different incremental costs. Fix, *Observations*, in Fix and Kenyon, eds., *Coping with Mandates* at 35 (cited in note 158).

173. The cities studied, chosen for geographic diversity and differences in per-capita income and tax burdens, were: Burlington, Vermont; Alexandria, Virginia; Cincinnati, Ohio; Dallas, Texas; Seattle, Washington; and Newark, New Jersey. The urban county studied was Fairfax County, Virginia. *Id.*

174. Incremental costs of compliance with specific programs varied dramatically based on the level of existing services, demographic conditions, and other factors. *Id.*

175. *Id.* at 35-36.

176. The study did not calculate the economic benefits of complying with these programs. *Id.* at 36.

funded through federal grants, loans, and other sources.¹⁷⁷ However, at least one later review judged these costs to be "substantial."¹⁷⁸

A study by the Environmental Protection Agency ("EPA") in 1988 estimated the total municipal costs of compliance with twenty-two of the most significant federal environmental requirements based on a sample of 270 local governments.¹⁷⁹ According to this study, total capital compliance costs for all U.S. cities¹⁸⁰ exceeded \$22 billion, with estimated annual operating costs of almost \$2.8 billion.¹⁸¹ The EPA's survey provided some objective indicia of the burden imposed by these requirements. For example, about 15% of all jurisdictions, all with populations below 2,500, were expected to double environmental service fees to comply with the federal laws; another 29% were expected to increase fees by 50% to 100%; and many jurisdictions were expected to find it difficult to finance the requirements through bonds or loans.¹⁸² As with the Urban Institute Study, however, the EPA study made no effort to quantify fiscal or other economic benefits of compliance.

Impelled by the desire to identify and publicize the full costs of compliance with unfunded mandates and by the absence of estimates from other sources, many states and cities conducted their own cost surveys during the late 1980s and early 1990s.¹⁸³ Some of these studies identified significant costs, which in turn were used to great political effect during the public debate that preceded passage of the UMRA. In perhaps the most publicized of the surveys, the city of Columbus, Ohio, estimated that its cost of compliance with federal environmental mandates would exceed one billion dollars in ten years.¹⁸⁴ Other studies produced similarly dramatic figures. For

177. The study noted that the costs incurred were "roughly comparable" to the average federal revenue-sharing given to these cities in 1978. *Id.* at 36. However, the study does not appear to have accounted, for example, for federal sewage treatment grants to subsidize local Clean Water Act compliance.

178. Federal Regulation at 60 (cited in note 11). Total capital and operating costs for the six cities was \$61.6 million. *Id.* at 60 tbl. 5-2.

179. *Id.* at 60-61 (citing Jashinder Singh, et al., *Municipal Sector Study: Impacts of Environmental Regulations on Municipalities* iii (United States Environmental Protection Agency, 1988) (prepared for the Sector Study Steering Committee of the EPA)).

180. Although 270 jurisdictions were used in the survey, nationwide costs were estimated by extrapolation. *Id.*

181. Both figures are presented in 1986 dollars. *Id.* at 61 tbl. 5-3.

182. *Id.* at 61.

183. Kelly, *State Mandates* at 16 (cited in note 3). Some of these studies addressed unfunded state mandates, others unfunded federal mandates, and others both. *Id.*

184. Columbus Study at 1 (cited in note 41).

example, a study conducted in Anchorage, Alaska estimated the costs of compliance with federal environmental mandates at \$430 million between 1991 and 2000.¹⁸⁵

The only two nationwide studies of federal mandate costs were conducted by Price Waterhouse for the U.S. Conference of Mayors¹⁸⁶ and the National Association of Counties.¹⁸⁷ These studies estimated total compliance costs for what were perceived to be the most costly federal mandates to the nation's cities and counties. Based on un-audited survey responses from 314 cities, extrapolated to all U.S. cities, the city report estimated national compliance costs of \$6.5 billion for 1993 and \$54 billion for the five years 1994 through 1998 for the ten federal mandates considered.¹⁸⁸ Price Waterhouse estimated that these costs comprise an average of 11.7% of locally raised city revenues.¹⁸⁹ Based on unaudited survey responses from 128 counties, extrapolated to all U.S. counties, the county report estimated national compliance costs of \$4.8 billion for 1993 and \$33.7 billion for the five years 1994 through 1998, for the twelve federal mandates considered.¹⁹⁰ Price Waterhouse estimated that these costs comprise an average of 12.3% of locally raised county revenues.¹⁹¹

Taken at face value, these data present a compelling case that federal mandates impose significant burdens on state and local governments. Unfortunately, too many readers did take these data at face value with little critical analysis of their credibility and with little

185. Anchorage Study at 1 (cited in note 41). See note 192 and accompanying text for criticisms of the Anchorage study.

186. Price Waterhouse City Report at 1 (cited in note 42).

187. Price Waterhouse County Report at 1 (cited in note 42).

188. Price Waterhouse City Report at 1-2 (cited in note 42). The mandates assessed included those relating to underground storage tanks, the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972), codified as amended at 33 U.S.C. §§ 1251 et seq. (1994); the Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1960), codified as amended at 42 U.S.C. §§ 7401 et seq. (1994); the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-530, 90 Stat. 2795 (1976), codified as amended at 42 U.S.C. §§ 6901 et seq. (1994); the Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660 (1974), codified as amended at 42 U.S.C. §§ 300f et seq. (1994); asbestos abatement; lead paint abatement; the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973), codified as amended at scattered sections of 16 U.S.C. (1994); the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990), codified as amended at 42 U.S.C. §§ 12101 et seq. (1994); and the Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938), codified as amended at 29 U.S.C. §§ 201 et seq. (1994). Price Waterhouse City Report at 1 (cited in note 42). Program-specific costs are presented in Table 1, and city-specific costs in Table 2. *Id.* at 2.

189. Price Waterhouse City Report at 2 (cited in note 42).

190. Price Waterhouse County Report at 1-2 (cited in note 42). The mandates assessed included the same as those used for the cities plus requirements relating to arbitration and immigration laws. *Id.* at 1. Program-specific costs are presented in Table 1; county-specific costs are included in Table 2. *Id.*

191. *Id.* at 2.

understanding of their significance in terms of overall intergovernmental fiscal relationships.¹⁹² Analysis of these two critical issues is presented below.

B. The Limitations of Mandate Impact Estimates

As discussed in Part III.C, accurate estimates of existing mandate compliance costs¹⁹³ are difficult to obtain and subject to considerable uncertainty, even using the best available methods.¹⁹⁴ In addition, because many of the studies identified above have been heavily

192. The General Accounting Office, for example, prepared a report for a congressional committee in which it made no attempt to verify the accuracy of state and local mandate data or the validity of specific examples in which states and cities claimed that specific federal regulations were unreasonable. Towns Report at 1 (cited in note 44). The ACIR continues to cite the Price Waterhouse surveys as if they were accurate despite acknowledging serious flaws in methodology. See *Federally Induced Costs at 12-14* (cited in note 17) (discussing criticisms of the Price Waterhouse City and County Reports but also quoting statistics from these studies). Many legal and other scholarly articles also cite these studies with no critical evaluation of their accuracy. See, for example, Markell, 44 *Syracuse L. Rev.* at 885-91 nn. 5 & 16 (cited in note 4) (acknowledging a few of the many potential problems with existing mandate impact studies in footnotes, but otherwise appearing to accept their validity at face value); Steinzor, 81 *Minn. L. Rev.* at 103 (cited in note 4) (assuming without analysis that unfunded federal mandates raise "legitimate problems"); Leckrone, 71 *Ind. L. J.* at 1035-38 (cited in note 4) (citing impact studies without critical evaluation).

193. Some mandate cost estimates, such as the fiscal notes prepared by the CBO, are prospective in nature and are designed to inform the legislative process as bills are considered. The predictive nature of such estimates raises special problems given that raw legislation can be implemented in various ways with divergent cost implications. Because the purpose of this section is to assess the actual cumulative fiscal burdens imposed by existing federal mandates, only those methods and studies addressing existing costs will be addressed.

194. See generally CBO SDWA Analysis at 16-20 (cited in note 149) (noting that the "true cost of a federal mandate" is measured by the additional expenditures that it requires municipalities to make and that these additional costs are difficult to measure); Reischauer Testimony at 3-8 (cited in note 54) (noting the uncertainties of mandate compliance cost estimation); Kincaid Memorandum at 2-3 (cited in note 115) (discussing the potential issues that arise in attempting to measure the cost of unfunded mandates); Senate EPW Report at 5-6 (cited in note 142) (discussing the difficulty of determining the costs of unfunded mandates); Kelly, *Estimating Mandate Costs* at 27-30 (cited in note 62) (outlining different cost measures used in assessing federal mandate costs); Fix and Kenyon, *Introduction*, in Fix and Kenyon, eds., *Coping with Mandates* at 8-10 (cited in note 11) (discussing the technical difficulties of cost estimation); Federal Mandate Relief at 7-8 (cited in note 34) (noting that accurate measures of the costs and benefits of federal mandates do not exist); Kelly, *State Mandates* at 1-4 (cited in note 3) (discussing the inadequacy of current mandate definitions); Towns Report at 3 (cited in note 44) (observing that precise estimates of the costs of federal mandates are "difficult to sort out"); Tryens, *Unfunded Mandates* at 13-16 (cited in note 12) (noting that "very little effort" has been made to obtain accurate estimates of the cost of unfunded federal mandates); *Federally Induced Costs* at 7 (cited in note 17) (observing that there are no accurate estimates of the total annual cost of unfunded mandates); Federal Regulation at 1-5 (cited in note 11) (discussing the need for more accurate measures of federal mandate costs).

criticized for using inappropriate—and in some cases biased—methods, they should be viewed with serious caution.

Existing mandate compliance costs are difficult to calculate for several reasons. Costs should be attributed to a mandate only to the extent that the mandate results in net incremental costs. Thus, actual costs imposed by a mandate must be net of funding provided by the mandating source.¹⁹⁵ Moreover, some mandate expenditures result in direct cost savings to the jurisdiction¹⁹⁶ and indirect economic or other benefits as well. At least the former should be subtracted from mandate cost estimates.¹⁹⁷ Further, studies should count only costs beyond those that would be incurred absent the mandate.¹⁹⁸ Other potentially significant uncertainties result from the use of different assumptions, such as interest rates and financing costs for capital expenditures.¹⁹⁹

Studies seeking to assess regional or nationwide costs must rely on survey methods because it is not feasible to collect cost data from every affected jurisdiction. Survey data, however, pose serious

195. Senate EPW Report at 11 (cited in note 142) (noting that Price Waterhouse did not net out federal funding). This calculation may be extremely difficult because funding for any given program may derive from multiple sources.

196. For example, expenditures on a health prevention program may reduce overall Medicaid or Medicare expenses. Potentially, the direct savings from a mandate may exceed program costs.

197. Tryens, *Unfunded Mandates* at 5 (cited in note 12). Subtracting indirect benefits, such as the nonquantifiable benefits of clean air, may be less justified. Part of the unfunded federal mandate debate involves issues of autonomy, that is, who should decide whether it is good public policy to spend more public and private funds to receive a given level of benefits. See Part VI.

198. CBO SDWA Analysis at 16 (cited in note 149) (observing that the “true cost of a federal mandate is the additional expenditures that it requires municipalities to make”); Reischauer Testimony at 20 (cited in note 54) (noting that the aggregate cost of a particular federal mandate to states and localities is the most important consideration in measuring mandates); Kelly, *Estimating Mandate Costs* at 27 (cited in note 62) (distinguishing between marginal or incremental costs and opportunity costs (revenue losses where taxing sources are precluded), total costs for entirely new programs, and cumulative costs); Kelly, *State Mandates* at 67 (cited in note 3) (stating that total costs overestimate impacts when existing resources can be used). This presents several problems. Unless the program is entirely new, data on how much would have been spent absent the mandate often are inadequate or nonexistent. CBO SDWA Analysis at 16 (cited in note 149) (stating that “[u]nfortunately, the data to estimate what municipalities would have done in the absence of federal mandates do not exist”); Reischauer Testimony at 20 (cited in note 54) (observing that “[t]here is often no clear and consistent basis for identifying how much of a locality’s spending is the result of a specific federal mandate rather than a cost it would have incurred in any event”); Senate EPW Report at 16 (cited in note 142) (noting that many studies do not take into account the cost of any activities that would be undertaken even if a federal mandate did not exist). Often, it is difficult to discern which costs result from mandates imposed by multiple levels of government. Kincaid Memorandum at 1 (cited in note 115); Senate EPW Report at 4-6 (cited in note 142); Towns Report at 9 app. I (cited in note 44).

199. CBO SDWA Analysis at 19 n.20 (cited in note 149); Towns Report at 9 app. I (cited in note 44).

problems of bias and extrapolation.²⁰⁰ Because compliance costs can vary considerably, it is difficult to extrapolate results regionally or nationally from case studies of one or a small number of jurisdictions.²⁰¹ Concern about bias is elevated when surveys are sent to all jurisdictions but responses are received selectively, because those cities which elected to respond may have characteristics that differ from the norm.²⁰²

Unintentional bias is also injected into surveys when questions are imprecise or subject to variable interpretation or when researchers fail to establish clear, uniform methods for data collection and cost estimates.²⁰³ More deliberate bias may occur for political reasons, especially when respondents are told that the results will be used to promote a particular agenda.²⁰⁴ One way to identify response bias is to require that respondents provide supporting data along with survey

200. CBO SDWA Analysis at 26 (cited in note 149); Senate EPW Report at 12-14, 20 (cited in note 142); Kelly, *Estimating Mandate Costs* at 28, 41 (cited in note 62); Kelly, *State Mandates* at 27, 68 (cited in note 3).

201. Some cost differences are based on determinate variables such as size or geography which can be addressed through sound methods of extrapolation. Others are based on less predictable variables. For example, federal legislation requiring access for handicapped voters imposed little or no new cost to some cities where access already existed, but significant costs to others. Reischauer Testimony at 6 (cited in note 54). Moreover, the level of costs imposed depends significantly on the manner in which a locality chooses to comply with the mandate. Some locales allowed handicapped voters to change their place of registration to polling places that were already accessible, while others assumed that ramps must be installed at all locations. *Id.* Similarly, air pollution control costs can vary based on existing levels of pollution. Senate EPW Report at 13-14 (cited in note 142); CBO SDWA Analysis at 26 (cited in note 149).

202. Senate EPW Report at 20 (cited in note 142) (listing the need to avoid self-selection bias as one of the three basic rules of reliable surveys). Mandate survey expert Dr. Janet Kelly noted: "When nonrandom sampling techniques are employed, the results are suspect Asking localities to volunteer their cost estimates is better than nothing, but these volunteers are different from those who did not volunteer, and the results are not generally descriptive of actual mandate costs." Kelly, *Estimating Mandate Costs* at 35 (cited in note 62). See also Kelly, *State Mandates* at 27, 68 (cited in note 3) (discussing survey techniques). Logically, survey recipients are more likely to devote scarce time in responding if they are adversely affected by the subject of the questions).

203. Kelly, *Estimating Mandate Costs* at 41 (cited in note 62); Senate EPW Report at 20 (cited in note 142).

204. CBO Director Dr. Rebert Reischauer explained: "The estimates also depend largely on information from state and local officials, who usually have a strong interest in having costs appear as high as possible." Reischauer Testimony at 20 (cited in note 54). See Senate EPW Report at 9 (cited in note 142) (suggesting "tremendous incentives existed for cities and counties to inflate or exaggerate costs"). Dr. Kelly observed:

[I]n New York, when local leaders were assured confidentiality in their survey responses, they reported that mandates were not a significant issue for them and did not impose a fiscal burden on their localities. But since the issue of mandates was a 'hot' topic of the day, they complained about them on the hope that the state might boost its level of state-shared revenue.

Kelly, *State Mandates* at 8 (cited in note 3).

responses and to audit or otherwise verify independently the accuracy of the calculations and accompanying raw data.²⁰⁵

As a result of all of these uncertainties and sources of potential bias, Dr. Kelly has noted that past mandate cost estimates, especially those that focused on multiple mandates, produced poor, unreliable results.²⁰⁶ To minimize bias, extrapolation, and other uncertainties, she recommends the use of (1) stratified, nonrandom sampling methods guided by expertise to ensure a representative sampling of affected jurisdictions, and (2) carefully crafted survey questions that narrowly define programs (rather than simply identifying the law), give a precise interpretation of the mandate, and employ a single, detailed methodology to ensure consistent cost estimates.²⁰⁷

Unfortunately, most of the studies identified above failed to comply with many of these key indicators of reliability.²⁰⁸ For example, the study of federal environmental compliance costs in Columbus, Ohio, reported extremely high costs for solid waste disposal facilities, but according to the ACIR, most or all of these costs resulted from state mandates, which are stricter than those imposed by federal law.²⁰⁹ A study of the costs of federal mandates in Virginia included a number of large but discretionary programs such as Medicaid and AFDC.²¹⁰

Most pertinent to the overall debate is the credibility of the two Price Waterhouse Reports, which provide the only nationwide estimates of federal mandate impacts on cities and counties²¹¹ and which were so instrumental in the passage of UMRA. These studies have

205. Senate EPW Report at 9-10, 20 (cited in note 142).

206. Kelly, *Estimating Mandate Costs* at 40-41 (cited in note 62). It is notable in this regard that Dr. Kelly's three reports on mandate impacts cited in this Article, including the two cited as criticizing random survey methodology, all were prepared for the National League of Cities. Dr. Kelly appears to be an eminently objective researcher, and her client, if anything, would be expected to have an incentive to uphold the credibility of existing cost impact surveys.

207. *Id.* at 36, 40-41. See Kelly, *State Mandates* at 27, 68 (cited in note 3) (discussing several recommendations intended to decrease the risk of uncertainty in mandate cost estimations). Dr. Kelly's recommendations are consistent with those of the Senate Committee on Environment and Public Works staff, who cited other survey experts as recommending survey questions designed to avoid bias and techniques to avoid self-selection bias. Senate EPW Report at 20 (cited in note 142).

208. See Tryens, *Unfunded Mandates* at 18 (cited in note 12) (identifying the inaccurate and misleading use of information in the city of Anchorage study).

209. Kincaid Memorandum at 5 (cited in note 115). See Tryens, *Unfunded Mandates* at 12 (cited in note 12) (discussing the more stringent requirements of Ohio's solid and hazardous waste laws).

210. Tryens, *Unfunded Mandates* at 8 (cited in note 12).

211. No similar nationwide studies have been conducted to estimate state costs of compliance with federal mandates.

been the target of pointed criticism by evaluators at the CBO,²¹² the ACIR,²¹³ the Senate Environment and Public Works Committee,²¹⁴ and the Center for Policy Alternatives.²¹⁵

Reviewers have found that the Price Waterhouse studies suffered from a number of specific flaws. First, several factors may have led to inflated cost estimates. Case studies were extrapolated uncritically to produce national figures.²¹⁶ The cost figures provided by local officials were not audited or otherwise verified.²¹⁷ Most responses provided no supporting data²¹⁸ and included large, unidentified "other" costs.²¹⁹ The surveys provided no precise definitions of the mandates nor instructions on what costs to report.²²⁰ The studies reported capital expenditures incorrectly, resulting in overstated compliance costs.²²¹ Finally, survey respondents were told about the overt politi-

212. According to the CBO staff, the Price Waterhouse data "suffer from many limitations that could result in misleading conclusions." CBO SDWA Analysis at 27 (cited in note 149).

213. The ACIR has concluded that the "level of confidence that can be placed on these [Price Waterhouse] estimates is unknown." Federally Induced Costs at 12 (cited in note 17) (noting that survey estimates in general "are by nature preliminary and sometimes highly inaccurate").

214. Senate EPW Report at 142 (cited in note 142).

215. Perhaps the most scathing critique came from the Senate staff:

Given all its flaws, the Price Waterhouse survey is an ineffective tool for measuring the cost of unfunded mandates. Its estimate of \$11.3 billion in unfunded federal mandates lacks credence. It overestimates the problem by billions of dollars and provides inaccurate and misleading cost figures for specific federal programs. It also does not consider the enormous benefits of federal mandates.

Senate EPW Report at 21 (cited in note 142).

216. CBO SDWA Analysis at 26, 28 (cited in note 149). For example, the studies extrapolated Clean Air Act compliance costs from New York and Los Angeles, where air quality is poor and compliance costs are therefore high, to cleaner air cities such as Honolulu. Senate EPW Report at 13-14 (cited in note 142).

217. The researchers only tested the resulting database for potential anomalies, such as arithmetical errors. Price Waterhouse City Report at 1-2 (cited in note 42); Price Waterhouse County Report at 1-2 (cited in note 42).

218. Senate EPW Report at 9-10 (cited in note 142). In an effort to verify independently the cost data in the reports, the Senate EPW staff requested copies of the raw survey results. Only 20% of the respondents interviewed could describe the specific activities identified, and only 22% could provide documentation to justify cost estimates. *Id.* at 12. The Senate staff noted that the Census Bureau in its surveys refuses to accept any unverified cost estimates. *Id.* at 10.

219. CBO SDWA Analysis at 27 (cited in note 149).

220. *Id.* at 28; Senate EPW Report at 20 (cited in note 142). As one example of the danger created by this omission, one city reported the costs of eliminating Canada Geese to prevent damage to a municipal golf course as a cost of complying with the Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973), codified as amended at scattered sections of 16 U.S.C. (1994). Canada Geese are not listed as a threatened or endangered species, and killing them to protect municipal property certainly would not constitute an Endangered Species Act compliance expense. Tryens, *Unfunded Mandates* at 11 (cited in note 12).

221. The CBO staff properly annualized and deflated capital costs into present dollars and indicated that this was a "particular problem" with the Price Waterhouse figures that could

cal purposes for which the data would be used, leading to bias in favor of overstating costs.²²²

Second, the survey did not measure net costs. No effort was made to identify or subtract offsetting federal funds, either related or unrelated to the specific programs.²²³ No attempt was made to measure incremental, as opposed to total, mandate compliance costs. Instead, the surveys assumed that no state or local funds would have been spent in the studied areas absent the federal mandates.²²⁴ No cost savings were considered, much less other benefits of complying with the subject federal programs.²²⁵

In sum, because so few mandate impact studies have been conducted and because these studies are either limited, unreliable, or both, very little good information is available to gauge the actual incremental costs imposed on state and local governments through unfunded federal mandates. Those few studies conducted using appropriate methodology were limited in scope, and it is difficult to extrapolate their results nationally. The two surveys that purported to measure nationwide compliance costs to cities and counties were guilty of serious methodological flaws and sources of potential bias, leaving the resulting estimates highly suspect. No similar studies have even been attempted with respect to state compliance costs. While the available studies provide some perspective on the fiscal burdens imposed by unfunded federal mandates, they do not provide an adequate basis on which to make national policy decisions.

result in "large differences in the cost of compliance for individual cities and counties." CBO SDWA Analysis at 27 (cited in note 149).

222. *Id.* at 28; Senate EPW Report at 9 (cited in note 142) (noting that "tremendous incentives existed for cities and counties to inflate or exaggerate costs").

223. Senate EPW Report at 11 (cited in note 142). According to the Senate staff, only 12% of survey respondents offset costs using available federal funds. *Id.* at 12. See Tryens, *Unfunded Mandates* at 11 (cited in note 12) (identifying sources of federal funds available to comply with the ADA and the Brady Bill).

224. Senate EPW Report at 16 (cited in note 142); Tryens, *Unfunded Mandates* at 11 (cited in note 12); CBO SDWA Analysis at 26 (cited in note 149). The CBO, for example, noted that local drinking water costs are climbing for several reasons not related to federal mandates. CBO SDWA Analysis at 26 (cited in note 149). Phoenix reported as a Clean Water Act requirement the cost of building new sewer lines necessary to support new growth. Tryens, *Unfunded Mandates* at 15 (cited in note 12) (stating that the Price Waterhouse study did not consider the benefits of compliance with federal mandates).

225. See *Federally Induced Costs* at 26-27 (cited in note 17).

C. Mandate Impact Estimates in Context

Even assuming that existing mandate impact studies are accurate, raw cost figures provide very little perspective on the resulting fiscal burdens imposed on state and local governments. For example, the Price Waterhouse reports estimate that cities spent \$6.5 billion and counties spent \$4.8 billion in 1993 to comply with the federal mandates covered by those surveys.²²⁶ What does this mean, however, in terms of fiscal burdens? What percentage of local budgets does this consume? How much does it cost per household? Are those costs justified as matters of national policy, and do the local benefits of compliance exceed the incremental costs imposed?

Price Waterhouse attempted to provide some context by estimating that its identified compliance costs represented 11.7% and 12.3% of locally generated revenues for cities and counties, respectively.²²⁷ However, even these figures appear seriously overstated. Because cities raise only about 78% of their revenues,²²⁸ unfunded mandates consume at most about 8% of total local revenues. Moreover, apparently using a more inclusive definition of local revenues, the ACIR calculated that the percentage was less than half (5.5%) of what Price Waterhouse claimed.²²⁹ According to data in another ACIR source, the compliance costs identified by Price Waterhouse comprise just 2.5% of local own-source revenues and about 1.7% of total local revenues.²³⁰

226. See notes 188-90 and accompanying text.

227. See notes 189, 191 and accompanying text.

228. Executive Office of the President, Office of Management and Budget, *Budget of the United States, Fiscal Year 1995, Analytical Perspectives* 169 tbl. 11-2 (U.S. G.P.O., 1994) ("FY95 Analytical Perspectives").

229. Kincaid Memorandum at 2 (cited in note 115); Federally Induced Costs at 13 (cited in note 17). The ACIR based its calculation on Census Bureau data on local revenues and hypothesized that the differences might be explained by the sizes of jurisdictions included in the survey or by the revenue base considered. Federally Induced Costs at 13 (cited in note 17) (considering only general funds as opposed to all revenues).

230. In 1992, local own-source revenue exceeded \$431.5 billion, while total local revenue including federal and state aid was almost \$648 billion. U.S. Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism* 44 tbl. 18 (U.S. G.P.O., 1994) ("Fiscal Federalism"). The \$11.3 billion in costs identified by Price Waterhouse constitute about 2.5% and 1.7% of these revenues, respectively. These local revenues include such sources as user charges, utility revenue, etc., in addition to taxes. However, it is not clear why such revenues should be excluded from an analysis of the impact of unfunded federal mandates on overall local finances. Because Price Waterhouse included the costs of local utility operations such as sewage treatment on the cost side of the balance sheet, it seems particularly inappropriate to exclude utility revenues such as sewer fees from the offsetting local revenues.

Even these data are misleading, however, because they focus on only part of the fiscal relationship between the federal, state, and local governments. In particular, they ignore sources of federal funds flowing to states and cities for which no mandates are attached or for which funding exceeds mandate costs. Total federal grants to states and cities are at an all-time high. In 1993, the year for which Price Waterhouse calculated costs to cities and counties, the federal government gave states and localities over \$214 billion in grants, about 14% of the federal budget.²³¹ In inflation-adjusted 1987 dollars, total federal grants to states and localities have grown steadily and significantly since 1960.²³²

Despite this steady increase in federal grants, mayors and governors complain that federal mandates have grown as well and, therefore, that federal funding has declined as a percentage of their total budgets. This claim is true only for certain years. Federal contributions to state budgets declined slightly from 21% in 1980 to 18% in 1990; while the combined federal and state share of city revenues fell from 30% in 1980 to 22% in 1990. However, as a percentage of total state and local spending, federal contributions were higher in 1993 than in 1960 or 1970.²³³ The only years between 1955 and 1993 in which the real value of federal aid to states and cities, measured in constant 1987 dollars, declined were 1974, 1979-1982, and 1987; in all other years aid increased, often substantially.²³⁴

These data show that states and cities remain net beneficiaries of intergovernmental transfers. The federal government still contributes nearly one-fifth of all state revenues, and the federal and state governments combined contribute 22% of all local revenues.²³⁵ Depending on which estimates are used, in 1993 local governments received intergovernmental transfers worth between two and over ten

231. FY95 Analytical Perspectives at 169-70 tbls. 11-2, 11-3 (cited in note 228). By 1996, the OMB estimates that federal grants will reach nearly \$240 billion. FY96 Analytical Perspectives at 169 tbl. 11-2 (cited in note 28). Ironically, of course, some commentators cite the same data and the accompanying coercive effects of such massive federal funding in their arguments to curtail Congress's power under the Spending Clause. Baker, 95 Colum. L. Rev. at 1918-20 (cited in note 78).

232. FY96 Analytical Perspectives at 169 tbl. 11-2 (cited in note 28).

233. Federal grants constituted 15% of state and local expenditures in 1960 and 20% in 1970. *Id.* The federal share rose dramatically in the 1970s to a record of 28% in 1980, was reduced again to 20% by 1990, and climbed back to 22% in 1993. *Id.*

234. Fiscal Federalism at 9 tbl. C, 30 tbl. 10 (cited in note 230).

235. In 1992, the federal government provided localities over \$20 billion in direct aid. *Id.* at 44 tbl. 18. That same year states provided over \$201 billion in aid to local governments. *Id.* at 10 tbl. D, 35 tbl. 14. It is hard to identify what portion of state-local aid was in the form of pass-throughs from the federal government, which provided states with over \$159 billion in aid in 1992. *Id.* at 44 tbl. 18.

times²³⁶ the cost of the unfunded federal mandates estimated by Price Waterhouse, even assuming those numbers to be accurate. When all revenue transfers are considered on a nationwide basis,²³⁷ Uncle Sam is still a cash cow for states and localities, not an unreasonable burden.

These overall figures, of course, convey little about the distribution of federal dollars among programs. The percentage of federal grants to states and localities earmarked for payments to individuals (Medicaid, food assistance, family support, housing subsidies, etc.) grew from 35% in 1960 to 62% in 1994²³⁸ while the percentage of these grants devoted to physical capital declined from 47% in 1960 to 17% in 1994.²³⁹ However, the percentage of federal grants devoted to capital spending declined relative to entitlement programs largely because entitlement spending increased and not because capital grants declined in real terms.²⁴⁰

This shift in the emphasis of federal funding provides perhaps the best empirical argument that unfunded federal mandates, as a whole, burden state and local finances. While the entitlement programs for which federal funding has increased are voluntary from a strict legal perspective, states have little practical choice but to participate. At the same time, states are obligated to comply with regula-

236. If the Price Waterhouse percentages are used, localities received about twice as much in intergovernmental aid as they spent to comply with the unfunded federal mandates measured in the studies. Corrected for total revenues (8%), localities received almost three times as much in aid as they spent to comply with the unfunded federal mandates measured in the studies. Using the ACIR figures (5.5%), localities received approximately four times as much in aid as they spent to comply with the unfunded federal mandates measured in the studies. Using my calculations (1.7% of all local revenues or 2.5% of all local-source revenues), localities received approximately nine to ten times as much in aid as they spent to comply with the unfunded federal mandates measured in the studies.

237. Individual jurisdictions may be winners or losers in the game of intergovernmental transfers depending on the distribution of the costs of federal requirements and the benefits of federal funding. The distributional impacts of federal policy were discussed above in the context of the Sixteenth Amendment and are discussed further in Part V.C.

238. The OMB estimated that the percentage of federal funding devoted to individuals would decline slightly to 61% by 1996, but would climb to 68% by 2000. FY96 Analytical Perspectives at 167, 169 tbl. 11-2 (cited in note 28).

239. *Id.* at 169 tbl. 11-2. This decline is expected to continue to 12% by 2000. *Id.* As a percent of state and local capital spending, the federal share was 23% in 1990 compared to 25% in 1960, showing that states and cities typically spend less overall on capital improvements absent federal dollars. *Id.*

240. Measured in constant 1987 dollars, federal capital investment grants rose from \$13.7 billion in 1960 to \$21.9 billion in 1970 and \$27.7 billion in 1980. FY96 Historical Tables at 175 tbl. 12.1 (cited in note 18). Capital grants dropped slightly to \$22.5 billion in 1982, but have climbed steadily since, returning to \$27.5 billion in 1993 and reaching an all-time high of \$30.3 billion in 1994. *Id.* at 123 tbl. 9.2.

tory mandates for which the percentage of federal funding has declined. Thus, a smaller percentage of federal dollars is available to meet the capital and other expenses of compliance with federal regulations.

This argument, however, fails for several reasons. Even subtracting federal funding for entitlements, total direct federal grants to states and cities in 1993 still far exceeded the potentially inflated costs of unfunded federal mandates estimated by Price Waterhouse.²⁴¹ Second, this analysis is limited because it does not include all benefits that states and cities receive through federal tax and spending policies. For example, the above figures do not include the fiscal benefits that states and cities enjoy through the deductibility of many state and local taxes and tax-exempt bond authority, which provide cost savings to these governments in the range of \$70 billion each year.²⁴² If these benefits were added to direct federal grants, the total dollar value of federal assistance provided to states and cities each year would be approximately \$284 billion.

Moreover, the federal government spends even greater amounts on direct domestic welfare programs, that is public services provided directly by federal agencies rather than through state and local grants or other cooperative programs. In 1993, while the federal government provided nearly \$125 billion to states and localities to subsidize entitlement programs, it paid out more than \$658 billion, over five times more, in direct benefits.²⁴³ Also in 1993, the federal government spent over \$19 billion on direct nondefense capital investment, in addition to \$31 billion in capital grants to states and localities.²⁴⁴

Direct federal expenditures provide indirect but real fiscal benefits to states and cities. Federal, state, and local expenditures on

241. In 1993, federal grants to states and localities for purposes other than entitlements exceeded \$69 billion. *Id.* at 88 tbl. 6.1. At a minimum, in 1992 over \$20 billion were in the form of direct grants to local, as opposed to state, governments. *Fiscal Federalism* at 44 tbl.18 (cited in note 230). This is almost double the \$11.3 billion in costs allegedly incurred by cities and counties in 1993 to comply with the most expensive federal mandates, but does not count any federal funds that were passed through from the states to their subdivisions.

242. FY96 Analytical Perspectives at 167 (cited in note 28). The specific sources of these benefits are broken down in Table 5-4. *Id.* at 50-51 tbl. 5.4. States and cities also benefit from subsidized federal loans or loan guarantees. However, from an economic perspective the value of those subsidies is a relatively trivial amount, roughly \$100 million in 1995 and 1996. *Id.* at 167. For a discussion on the value of bond subsidies, see Retunda, 57 *U. Colo. L. Rev.* at 867 (cited in note 2) (noting that proponents argue TEBs provide a "form of revenue sharing" not subject to congressional scrutiny).

243. FY96 Historical Tables at 88 tbl. 6.1 (cited in note 18).

244. *Id.* at 123 tbl. 9.2.

public goods and services are largely fungible.²⁴⁵ To the extent that the federal government meets the demand for public goods and services in some areas, states and cities are free to spend local revenues on their own priorities.²⁴⁶ While incurring high cost shares, states participate in entitlement programs because they would otherwise incur the full economic costs of addressing, or the full social costs of not addressing, those needs. In this sense, direct federal spending enhances rather than impairs state and local fiscal autonomy.

A related distributional argument is that, while states and cities collectively may be net beneficiaries in intergovernmental relations, individual communities may face disproportionately high compliance costs and receive disproportionately small amounts of federal aid.²⁴⁷ Given that total federal assistance exceeds total national mandate compliance costs, however, this problem could be addressed through better need-based targeting of federal funds rather than broad-based assaults on federal regulatory programs.

D. Conclusion

It is extremely difficult to measure the impact of individual mandates on single jurisdictions and even harder to assess the cumulative fiscal impacts of all unfunded federal mandates on all states and localities. Thus far, efforts to estimate such impacts have been plagued by serious methodological problems. This buttresses the conclusion reached in the definitional analysis that the idea of unfunded federal mandates has little value in deciding key issues of federalism.

While available data remain limited and unreliable, the urgent rhetoric that states and cities are crippled by the costs of unfunded federal mandates remains, at best, unproven. Moreover, viewed in light of overall intergovernmental fiscal relations and even using data that overestimate costs to states and underestimate benefits provided

245. Stanton, *One Nation Indivisible* at 18 (cited in note 12) (quoting economist Adam Rose, who noted that there are not really two groups of taxpaying citizens, but the same taxpayers who belong to both federal and state and local taxpaying subgroups); Peterson, *The Price of Federalism* at 132-33 (cited in note 8).

246. This, of course, is true only to the extent that the state or city would have provided the same public good or service absent a federal program. Thus, the exact percentage of federal spending that can be considered to provide indirect fiscal benefits to states and cities is uncertain.

247. See note 179 and accompanying text (discussing an EPA study showing disproportionate fiscal impacts on the smallest and largest communities).

by the national government, the opposite appears to be true. Federal tax and spending policies in 1993 that resulted in direct or indirect benefits to states and localities approached one trillion dollars.²⁴⁸ The \$11.3 billion cited by Price Waterhouse as the local cost of compliance with unfunded federal mandates, even if accurate, is trivial by comparison, amounting to just over one percent. Fueled by its authority to generate and redistribute revenues through income taxes and other sources,²⁴⁹ to borrow on the credit of the United States,²⁵⁰ and to print money,²⁵¹ the federal government serves as an essential, constitutionally sanctioned banker to state and local governments.²⁵²

It is ironic in this regard that state and local officials complain that they, but not the federal government, are bound by balanced budget requirements and other spending limitations.²⁵³ States are able to meet balanced budget requirements, in part, because so many of the costs of meeting their citizens' needs are subsidized or provided directly by the federal government. While state and municipal elected officials criticize the massive federal debt,²⁵⁴ that debt has been incurred in part to pay for state and local needs.

These findings suggest that judges cannot properly resolve issues of federalism based on the impact of discrete programs challenged in individual lawsuits. It is extremely difficult to calculate the individual and cumulative fiscal impacts of federal mandates, and

248. This included \$214 billion in grants, \$70 billion in tax policy benefits, \$658 billion in direct payments to individuals, and \$19 billion in direct domestic capital expenditures, for a total of \$961 billion. See notes 231, 242-44 and accompanying text.

249. See Part V.C.

250. U.S. Const., Art. I, § 8, cl. 2.

251. U.S. Const., Art. I, § 8, cl. 5. See Peterson, *The Price of Federalism* at 3 (cited in note 8) (noting that the federal government can print money, while states risk bankruptcy if they incur too much debt).

252. See Lovell and Tobin, 41 *Pub. Admin. Rev.* at 326 (cited in note 11) (quoting Edward K. Hamilton, *Non-Constitutional Management of Constitutional Problems*, *Daedalus* 111, 122 (Winter 1978), who noted the emergence of "federal and state governments as bankers who raise revenue which is distributed to local governments to deliver services designed by the federal governments"); David Frohnmayer, *A New Look at Federalism: The Theory and Implications of "Dual Sovereignty"*, 12 *Envir. L.* 903, 910 (1982) (concluding that the Sixteenth Amendment enhancement of federal tax power, along with existing federal authority to incur debt, "lent an enormous impetus to national efforts in problem areas which formerly had received only state attention, or had not been addressed by government at all").

253. Most states have balanced budget requirements. Thus, the costs of unfunded federal mandates must be met either by increasing taxes or by reducing expenditures in other areas. *Federally Induced Costs* at 16 (cited in note 17). See *Fiscal Federalism* at 6-7, 14-19 (cited in note 230) (itemizing state balanced budget and other spending limitations).

254. By 1994 the total federal debt exceeded \$4.6 trillion. FY96 Historical Tables at 89 tbl. 7.1 (cited in note 18). By comparison, state and local debt is much smaller. *Fiscal Federalism* at 12 tbl. F (cited in note 230).

misleading conclusions are reached by considering such impacts in isolation from the full intergovernmental fiscal relationship.

V. THE LEGALITY OF UNFUNDED FEDERAL MANDATES AND THE JUDICIAL ROLE

Implicit in the debate over unfunded federal mandates is the argument that some mandates are unconstitutional²⁵⁵ because they violate the Tenth Amendment²⁵⁶ and related principles of federalism embodied in the structure of the Constitution.²⁵⁷ Such arguments were boosted temporarily by the Supreme Court's 1976 decision in *NLCs*;²⁵⁸ suppressed equally temporarily when that decision was overruled in *Garcia v. San Antonio Metropolitan Transit Authority*;²⁵⁹ and rejuvenated again by *New York v. United States*²⁶⁰ and most recently by *Printz v. United States*.²⁶¹

As one purpose of this Article is to explore whether the concept of unfunded federal mandates brings independent utility to the federalism debate, it is necessary to discuss the degree to which federal actions are vulnerable to Tenth Amendment scrutiny *because they are unfunded*, as distinct from other grounds.²⁶² In addition, as suggested above, the unfunded federal mandates analysis will lend support to those who argue for a limited judicial role in issues of federalism.

255. Other unfunded federal mandates may be conceded to be constitutional even by the most strident of anti-mandate advocates, but nevertheless are opposed on fiscal and policy grounds, discussed in Part VI.

256. "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.

257. See *Printz*, 65 U.S.L.W. at 4737-38 (discussing the principles of federalism embodied in the "structure of the Constitution"). Professor Merritt has argued that additional, if not superior, protection is afforded to states through the Republican Guarantee Clause, U.S. Const., Art. IV., § 4, which provides that "[t]he United States shall guarantee to every state in this Union a Republican Form of Government." See Merritt, 88 Colum. L. Rev. at 2 (cited in note 9) (observing that the Republican Guarantee Clause "implies a modest restraint on federal power to interfere with state autonomy"). Because courts have rejected this argument on justiciability grounds, see *City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980) (holding that the Guarantee Clause issue is not justiciable); *Baker v. Carr*, 369 U.S. 186, 218-29 (1962) (finding that Guarantee Clause claims are nonjusticiable political questions), I will not consider Republican Guarantee Clause arguments separate from the Tenth Amendment.

258. 426 U.S. at 833.

259. 469 U.S. at 528.

260. 505 U.S. 144 (1992).

261. 65 U.S.L.W. at 4731.

262. Some actions may be unlawful because they violate the Tenth Amendment and related principles of federalism. This does not necessarily mean, however, that they are unlawful because they are unfunded federal mandates.

A. Background Principles of Federalism

The Supreme Court in *NLCs* rejuvenated the quiescent Tenth Amendment²⁶³ by expressly overruling *Maryland v. Wirtz*,²⁶⁴ which invalidated the applicability of the Fair Labor Standards Act of 1938 ("FLSA")²⁶⁵ to state and local governments.²⁶⁶ *NLCs* was significant to the nascent debate over unfunded federal mandates in two ways. First, it coincided with state and local dissatisfaction with the fiscal impacts of federal regulations and was cited as a high point of the anti-mandate movement.²⁶⁷ After *NLCs*, states and cities mounted a flurry of largely unsuccessful Tenth Amendment challenges to federal mandates.²⁶⁸

Second, the reasoning of *NLCs* was consistent with the anti-mandate philosophy. Writing for a 5-4 majority, Justice Rehnquist invalidated the applicability of the FLSA because it applied "directly

263. A sedative was administered to the Tenth Amendment during the New Deal, when the Supreme Court ruled:

The amendment states but a truism that all is retained which has not been surrendered.

There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

Darby, 312 U.S. at 124 (upholding the validity of the Fair Labor Standards Act against Tenth Amendment, Commerce Clause, and other challenges). See *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534-35 (1941) (upholding a federal law authorizing the construction of a dam and reservoir against claims that the law violated the Tenth Amendment); *United States v. Sprague*, 282 U.S. 716, 733-34 (1931) (concluding that the Tenth Amendment "added nothing to the [Constitution] as originally ratified"). See also Anastaplo, *The Amendments to the Constitution* at 9-10, 92-98 (cited in note 16) (finding that the Tenth Amendment should not constrain the federal government). Between *Darby* and *NLCs*, only a single federal statute was invalidated by the court on federalism grounds. See Van Alstyne, 83 Mich. L. Rev. at 1713 (cited in note 9) (noting that the *NLCs* decision was only the second decision "striking down an act of Congress on pure federalism grounds in four decades"); *Oregon v. Mitchell*, 400 U.S. 112, 118, 125-31 (1970) (striking federal voting age requirements applied to states). *Mitchell* was later superseded by the Twenty-sixth Amendment. Van Alstyne, 83 Mich. L. Rev. at 1713 n.19 (cited in note 9).

264. 392 U.S. 183, 183 (1968), overruled in part by *NLCs*, 426 U.S. at 833.

265. 52 Stat. 1060 (1938), codified as amended at 29 U.S.C. §§ 201 et seq. (1994).

266. *NLCs*, 426 U.S. at 852-55. In *Wirtz*, just six years earlier, the Supreme Court had upheld the validity of the Act as applied to state-run schools and hospitals. *Wirtz*, 392 U.S. at 188, 192-93, 199.

267. See, for example, Beam, *Origins*, in Fix and Kenyon, eds., *Coping with Mandates* at 27 (cited in note 16) (stating that, during the time *NLCs* was decided, new legal, political, fiscal, and administrative concerns about mandates were surfacing); Fix, *Observations*, in Fix and Kenyon, eds., *Coping with Mandates* at 33 (cited in note 158) (noting that *NLCs* embraced state sovereignty arguments put forward by proponents).

268. See La Pierre, 80 Nw. U. L. Rev. at 580-85 (cited in note 10) (discussing the line of cases following the *NLCs* decision).

to the States *qua* States²⁶⁹ and because the *effect* of the amendments would be to “impermissibly interfere with the integral governmental functions of these bodies.”²⁷⁰ The opinion cited the fiscal impact of the Act on states and cities,²⁷¹ but focused as well on displacement of state and local decision-making prerogatives.²⁷² Recognizing the difficulty of calculating the fiscal impacts of the Act on states and cities, Justice Rehnquist denied that “particularized assessments of actual impact are crucial to resolution of the issue presented”²⁷³ Instead, he distinguished *Fry v. United States*²⁷⁴ not because the wage controls in that case differed qualitatively from the FLSA, but because the “degree of intrusion upon the protected area of state sovereignty” was smaller.²⁷⁵ Thus, while the case stopped short of invalidating the Act because it constituted an unfunded federal mandate, the “impermissible interference” identified by Justice Rehnquist clearly had a significant fiscal component.

In subsequent cases, the Court attempted to clarify the assertion in *NLCs* that some, but not all, federal intrusions on state sovereignty violated the Tenth Amendment:

First, there must be a showing that the challenged statute regulates the “States as States.” Second, the federal regulation must address matters that are indisputably “attribute[s] of state sovereignty.” And third, it must be apparent that the States’ compliance with the federal law would directly impair their ability “to structure integral operations in areas of traditional governmental functions.”²⁷⁶

269. *NLCs*, 426 U.S. at 847.

270. *Id.* at 851.

271. *Id.* at 846.

272. *Id.* at 846-49.

273. *Id.* at 851.

274. 421 U.S. 542, 542 (1975) (upholding the applicability of temporary, emergency wage controls to state employees).

275. In his concurring opinion, Justice Blackmun, who changed his position and penned the majority decision overruling *NLCs* in *Garcia*, interpreted Justice Rehnquist’s *NLCs* opinion as establishing a balancing approach in which federal intrusion on state interests would be upheld, presumably regardless of impacts on state fiscal or decisional integrity, “where the federal interest is demonstrably greater.” *NLCs*, 426 U.S. at 856 (Blackmun, J., concurring).

276. *Hodel v. Virginia Surface Mining and Reclamation Ass’n*, 452 U.S. 264, 287-88 (1981) (citations omitted). See also *EEOC v. Wyoming*, 460 U.S. 226, 237 (1983) (quoting the test from *Hodel* that sets forth the requirements for a successful claim that congressional exercise of the commerce power is invalid); *FERC v. Mississippi*, 456 U.S. 742, 778 (1982) (O’Connor, J., dissenting) (reiterating the *NLCs* requirements); *United Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678, 684 (1982), overruled in part by *Garcia*, 455 U.S. at 678 (applying the three-prong test of *NLCs*).

Again, the extent to which such impairment included fiscal burdens was not clear. Ultimately, however, the Court in *Garcia v. San Antonio Metropolitan Transit Authority* found the test to be unworkable, based primarily on the difficulty of discerning what state and local governmental functions are "traditional" or "integral."²⁷⁷ Instead, the Court largely rejected any judicial role regarding issues of federalism because states and their subdivisions receive structural protection against undue federal intrusion through representation in the national political process.²⁷⁸

Notably for the debate over unfunded federal mandates, Justice Blackmun in *Garcia* recognized that the burdens imposed by individual federal mandates cannot be viewed in fiscal isolation:

... Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area.²⁷⁹

Justice Blackmun's view appreciates the complexity of federal-state fiscal relations and the futility of gauging the fiscal impacts of individual federal mandates in isolation.²⁸⁰ Because the combined effects of overall federal tax, spending, and regulatory policy reflect a balance between a range of competing considerations, the Court concluded that such judgments were more appropriately left to the political rather than the judicial process.

Congress, itself composed of representatives from individual states and their subdivisions, may decide, after weighing arguments presented by those entities directly, to impose a new mandate in one bill, but to increase fiscal aid in a separate act. In so doing, it can consider the combined impacts of related tax, spending, and regulatory decisions. By contrast, it is impossible for a federal judge, constrained by the narrow focus of a particular case, to consider the fiscal impacts of a single mandate in an appropriately broad context.²⁸¹

277. *Garcia*, 469 U.S. at 530-31, 546-47.

278. *Id.* at 550-54. See note 10 and accompanying text.

279. *Garcia*, 469 U.S. at 555. Justice Blackmun was quick to note, however, that federal funding was not required to justify otherwise valid regulation under the Commerce Clause. *Id.* at 555 n.21.

280. See Part IV.

281. See Choper, 86 Yale L. J. at 1556, 1592-93 (cited in note 10) (noting that courts are no more capable, and may be less capable, than the political branches in deciding issues of federalism and objecting to the propriety of federalism decisions in the context of individual litigation).

Without overruling *Garcia*, however, the Supreme Court adopted a different reason to invalidate some types of federal regulation of states in *New York v. United States*.²⁸² The Court struck provisions of the Low-Level Radioactive Waste Policy Act ("LLRWPA")²⁸³ that "commandeer" the state's regulatory apparatus by compelling the state to regulate according to federal requirements.²⁸⁴ Justice O'Connor judged the validity of federal intergovernmental mandates in a way that at least avoids two of the problems with *NLCs*.²⁸⁵ First, by distinguishing federal mandates that commandeer the state regulatory structure from mandates that regulate states in the same way as private parties ("generally applicable" requirements),²⁸⁶ Justice O'Connor avoided the difficult distinction between "traditional" and "nontraditional" functions. Second, by prohibiting all federal mandates that commandeer the state regulatory apparatus, Justice O'Connor found no need to evaluate the fiscal or other burdens created

282. 505 U.S. at 144.

283. Pub. L. No. 99-240, 99 Stat. 1842 (1986), codified at 42 U.S.C. §§ 2021b et seq. (1994).

284. *New York*, 505 U.S. at 175-76. See Kaden, 79 Colum. L. Rev. at 870, 890 (cited in note 4) (arguing that courts should intervene when a federal program "coopts the state's political process by interfering with legislative and executive direction in a significant way"). This case is distinguishable from those in which Congress regulates states and cities in the same manner as private parties and from those in which Congress conditionally preempts state action. Provisions of the Act that provided financial and other incentives for state compliance, as opposed to coercive mandates, were upheld. *New York*, 505 U.S. at 168-75.

285. Justice O'Connor's opinion in *New York* has been criticized on several plausible grounds. See, for example, Caminker, 95 Colum. L. Rev. at 1030-50 (cited in note 68). Professor Caminker finds no textual basis to prohibit commandeering of state judicial as opposed to executive or administrative functions. *Id.* at 1034-42. Professor Caminker also rebuts Justice O'Connor's assertion that the Framers intended to replace, rather than to supplement, national power over states with national power over individuals. *Id.* at 1042-50, 1030-40 & n.12. See Friendly, 86 Yale L. J. at 1019 (cited in note 16) (noting that the Constitution "authorized the national government to act directly on the people . . . rather than solely on the states").

286. Compare *South Carolina v. Baker*, 485 U.S. 505, 510-14 (1988) (upholding bond registration requirements applicable to both governmental and private bond issuers); *Garcia*, 469 U.S. at 553-54 (concluding that the FLSA was applicable to both private and governmental parties); *Massachusetts v. United States*, 435 U.S. 444, 453, 460-63 (1978) (upholding airport fees that were equally applicable to public and private parties); *Parden v. Terminal Railway of the Alabama State Docks Dept.*, 377 U.S. 184, 197-98 (1964) (holding that public and private railroads were both subject to the Federal Employers' Liability Act, ch. 685, 53 Stat. 1404 (1939), codified as amended at 45 U.S.C. §§ 51 et seq. (1994)); *Case v. Bowles*, 327 U.S. 92, 101-02 (1946) (upholding emergency price controls for state as well as private timber sales); *United States v. California*, 297 U.S. 175, 185 (1936), overruled in part by *NLCs*, 426 U.S. at 833 (holding that the Safety Appliance Act, ch. 196, 27 Stat. 531 (1893), codified as amended at 45 U.S.C. § 1 et seq. (1994), applies to state as well as to private railroads).

by the mandate²⁸⁷ or to balance those burdens against the federal interest served.²⁸⁸

Most recently, in *Printz v. United States*, the Supreme Court applied the principles established in *New York* to provisions of the Brady Bill that temporarily required local law enforcement officials to conduct background checks as a condition of handgun sales, pending development and implementation of a federal system for such checks.²⁸⁹ While some lower courts upheld the statute and others invalidated it without reference to unfunded mandates, some suggested that the "unfunded" nature of the Brady Bill mandate contributed to its illegality.²⁹⁰ Writing for the majority in *Printz*, Justice

287. Instead of relying on the burdens imposed by the mandate, Justice O'Connor justified her decision on the basis of political accountability, discussed further in Part VI. By requiring states to enforce federal regulatory decisions, Congress insulates itself from political accountability that assures representative government. *New York*, 505 U.S. at 168-69. Justice O'Connor concluded that where Congress preempts under the Supremacy Clause:

[I]t 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.

Id. See Kaden, 79 Colum. L. Rev. at 890 (cited in note 4) (noting that direct commands from the federal government to local governmental officials reduce accountability of both federal and local officials); La Pierre, 80 Nw. L. Rev. at 633 (cited in note 10) (finding that courts should protect state interests in political decision making where Congress is not politically accountable).

288. *New York*, 505 U.S. at 178 (observing that "[n]o matter how powerful the federal interest involved, the Constitution does not give Congress the authority to require the States to regulate").

289. *Printz*, 65 U.S.L.W. at 4732-33; 18 U.S.C. § 922(s) (1994). See generally Dyan Figuerra, Note, *The Tenth Amendment Shoots Down the Brady Act*, 3 J.L. & Pol'y 637, 637 (1995) (arguing that the Brady Act infringes upon state sovereignty guaranteed by the Tenth Amendment); Jonathan Duncan, Comment, *Looks Like a Waiting Period for the Brady Bill: Tenth Amendment Challenges to a Controversial Unfunded Mandate*, 43 U. Kan. L. Rev. 835, 835-40 (1995) (discussing the history of the Tenth Amendment and challenges to the Brady Act); U.S. General Accounting Office, *Gun Control: Implementation of the Brady Handgun Violence Prevention Act 2-5* (U.S. G.P.O., 1996) (outlining the early constitutional challenges to the Brady Act).

290. One of the district court opinions overtly addressed the Brady Bill issue as "the constitutionality of federally imposed, unfunded mandates to the states" and ruled that Congress violated the Tenth Amendment by "requiring the states to carry out an unfunded federal mandate." *Printz v. United States*, 854 F. Supp. 1503, 1507, 1519 (D. Mont. 1994), affirmed and reversed in part by *Mack v. United States*, 66 F.3d 1025, 1025 (9th Cir. 1995). But see *McGee v. United States*, 863 F. Supp. 321, 327 (S.D. Miss. 1994) (declaring the Act "an unconstitutional mandate" without referring to the unfunded nature of the Act). The Fifth Circuit, in turn, suggested the absence of funding as one reason to strike the Brady Bill: "The Brady Act gives the States no means by which they can assist in the implementation of federal policy while leaving unchanged the duties of the CLEOs [chief law enforcement officers] as prescribed in the States' criminal codes." *J.R. Koog v. United States*, 79 F.3d 452, 459 (5th Cir. 1996), cert. denied, *United States v. Gonzalez*, 117 S. Ct. 2507, 2507 (1997). See also *In re Brentwood Outpatient, Ltd. v. Williamson County, Tennessee*, 43 F.3d 256, 263-64 (6th Cir. 1994), cert. denied, *Williamson County v. Bondholder Comm.*, 115 S. Ct. 1824, 1824 (1995) (upholding federal

Scalia also alluded twice to the unfunded mandate issue.²⁹¹ These references are dicta, however, because as in *New York*, the *Printz* decision “categorically” prohibits the federal government from compelling states to enact or to administer a federal regulatory program, whether or not the mandate is accompanied by federal funding.²⁹² Rather than changing the focus of the analysis from the nature of the mandate to the source or extent of funding, *Printz* simply clarified the scope of the *New York* doctrine by ruling that the federal government may not commandeer state or local officials acting in their official capacities or

disallowance of county’s statutory tax additions in bankruptcy proceeding against a Tenth Amendment challenge, but suggesting that a federal requirement with greater fiscal impact would raise a constitutional question). The Fifth Circuit, however, invalidated the background check provisions not only because they were unfunded, but also because it believed that the provisions commandeered state legislative policy prerogatives and therefore implicated issues of political accountability, in the same manner as in *New York*, 505 U.S. at 160-80. *Koog*, 79 F.3d at 457-61. The Second and Ninth Circuits, by contrast, found the Brady Bill provisions more analogous to the statute upheld in *FERC*, 456 U.S. at 742, in which state officials were merely required to “consider” provisions of federal law as an exercise of their ministerial duties and not to adopt federal regulatory requirements as an exercise of legislative or quasi-legislative power. *Frank v. United States*, 78 F.3d 815, 826-30 (2d Cir. 1996), vacated and remanded by *Frank v. United States*, 117 S. Ct. 2501, 2501 (1997); *Mack v. United States*, 66 F.3d 1025, 1030-31 (9th Cir. 1995), reversed by *Printz*, 65 U.S.L.W. at 4731. See also *New York*, 505 U.S. at 160-64 (distinguishing *FERC* on these grounds); *Testa v. Katt*, 330 U.S. 386, 394 (1947) (requiring a state court to enforce a federal statute).

291. First, Justice Scalia noted that “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.” *Printz*, 65 U.S.L.W. at 4738 (emphasis added). Second, in responding to the government’s argument that the Brady Bill provisions do not pose the same problems of political accountability as in *New York*, Justice Scalia wrote: “By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes.” *Id.* at 4740. This, of course, is one of the basic tenets of the case against unfunded mandates. Notably, however, Justice Scalia was inconsistent in his views of the propriety of weighing the fiscal impacts of federal legislation in determining its constitutionality. In response to the Government’s argument that the Brady Bill should be upheld because it serves important public purposes while imposing only small burdens on local officials, Justice Scalia rejected the notion that a “balancing” analysis is relevant to the validity of this type of mandate. *Id.* at 4741 (noting that where “it is the whole object of the law to direct the functioning of the state executive . . . such a ‘balancing’ analysis is inappropriate”) (emphasis omitted). In an ominous reference back to Chief Justice Rehnquist’s impact analysis approach in *NLCs*, however, and even while acknowledging that it was overruled in *Garcia*, Justice Scalia noted that an assessment of impacts “might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments.” *Id.*

292. Instead, the Court focused most of its analysis properly on whether the challenged Brady Bill provision was more like the mandate to adopt and implement a federal program that was struck down in *New York* or more like the provision for state agencies to “consider” federal law as a condition of continued state regulation in an otherwise preempted federal area that was upheld in *FERC*. *Id.* at 4739-41.

the State itself,²⁹³ and that the federal government may not commandeer state or local administrative or legislative process.²⁹⁴

Under *New York* and *Printz*, therefore, it is irrelevant whether a mandate is funded or not. A compulsory mandate that commandeers a state or local legislative or regulatory apparatus is invalid whether funded or unfunded. This supports the conclusion that the unfunded federal mandate terminology adds little or nothing to the legal discourse on federalism. With this background, it is appropriate to evaluate the legal status and the unfunded federal mandate implications of each of the ACIR's six categories of federally induced costs.²⁹⁵

B. Direct Order Mandates

Under *New York*, only a small category of direct order mandates are unlawful on federalism grounds. Mandates that compel states and presumably localities to take regulatory action violate principles of federalism. However, it is not the *unfunded* nature of the mandate that renders it constitutionally infirm. Thus, under *New York*, the concept of unfunded federal mandates provides no independent legal basis for the curtailment of national power.²⁹⁶

Lower federal courts have honored the distinction between federal mandates that regulate states directly and those that "commandeer the state regulatory apparatus." To date, aside from the Brady Bill cases, only two federal courts have invalidated federal statutes based on the reasoning of *New York*.²⁹⁷ By contrast, many

293. The *Printz* majority rejected the dissent's suggestion that the Brady Bill was distinguishable from the LLRWPA because the former commandeered only individual local officials, while the latter was directed at the states themselves. *Id.* at 4739-40.

294. *Id.* at 4739-41 (rejecting the distinction that the statute at issue in *New York* compelled legislative action while the Brady Bill required only ministerial compliance with a final federal directive); *id.* at 4739-40 (noting that whether or not a "policymaking component" is involved is irrelevant).

295. The definitional and fiscal analysis suggested that, if the concept of unfunded federal mandates is useful at all, it should be limited more narrowly than many suggest. However, for those who may view this analysis as parsimonious, I will explore legal arguments with respect to all asserted categories of unfunded federal mandates.

296. It could be argued that unfunded federal mandates pose problems of accountability similar to those that led the Court to ban commandeering in *New York*. *New York*, 505 U.S. at 144. This argument is presented and refuted in Part VI.

297. *Board of Natural Resources of the State of Washington v. Brown*, 992 F.2d 937, 946-47 (9th Cir. 1993) (invalidating provision of the Forest Resources Conservation and Shortage Relief Act of 1990, Pub. L. No. 101-382, Title IV, 104 Stat. 714 (1990), codified at 16 U.S.C. §§ 620-620j (1994), because the state was required to issue regulations implementing a ban on the export of timber harvested from state public lands); *ACORN v. Edwards*, 81 F.3d 1387, 1393-94 (5th Cir. 1996), cert. denied, *ACORN v. Foster*, 117 S. Ct. 2532, 2532 (1997) (invalidating the provision of

courts have upheld federal mandates against challenges that they violated the commandeering prohibition of *New York*.²⁹⁸ Moreover, for the most part courts have adhered to the qualification in *New York*

the Lead Contamination Control Act of 1988, Pub. L. 100-572, 102 Stat. 2884 (1988), codified at 42 U.S.C. §§ 300j et seq. (1994), which required states to establish remedial action programs for lead contamination removal from school and daycare drinking water systems). For a discussion of the validity of *Washington v. Brown*, in the context of incidental fiscal impacts, see Part V.F.

298. See *Commonwealth of Virginia v. Browner*, 80 F.3d 869, 869 (4th Cir. 1996), cert. denied, *Virginia v. Browner*, 117 S. Ct. 764, 764 (1997) (upholding Clean Air Act conditions based on the spending power and partial preemption, and absent an affirmative mandate). See also *State of Missouri v. United States*, 918 F. Supp. 1320, 1330-34 (E.D. Mo. 1996), vacated and remanded by *Missouri v. United States*, 109 F.3d 440, 440 (8th Cir. 1997) (upholding Clean Air Act sanctions as a constitutional exercise of the Commerce Clause power, of the Spending Clause power, and of the threat of preemption); *Kelley v. United States*, 69 F.3d 1503, 1508-10 (10th Cir. 1995), cert. denied, *Kelley v. Department of Justice*, 116 S. Ct. 1566, 1566 (1996) (upholding a federal statute preempting state regulation of intrastate motor activity against the theory that it commanded states not to regulate even when no affirmative federal regulation existed); *Blount v. SEC*, 61 F.3d 938, 949 (D.C. Cir. 1995), cert. denied, *Blount v. SEC*, 116 S. Ct. 1351, 1351 (1996) (upholding a regulation prohibiting municipal securities professionals from contributing to political campaigns of state officials from whom they solicit or obtain business because it does not compel states to regulate directly); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995), cert. denied, *Wilson v. Voting Rights Coalition*, 116 S. Ct. 815 (1996) (upholding the affirmative regulatory mandate in the National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993), codified as amended at 42 U.S.C. §§ 1973gg et seq. (1994 & Supp. I.), based on specific constitutional authority under U.S. Const., Art. I, § 4 which "empowers Congress to impose on the states precisely the burden at issue"). See also *Association of Community Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 794-96 (7th Cir. 1995) (upholding the constitutionality of the National Voter Registration Act because the act did not directly alter voter qualifications fixed by Illinois); *Condon v. Reno*, 913 F. Supp. 946, 964-67 (D.S.C. 1995) (upholding the National Voter Registration Act because the act does not require states to adopt legislation, although states may do so); *Association of Community Orgs. for Reform Now v. Miller*, 912 F. Supp. 976, 983-85 (W.D. Mich. 1995) (denying a motion for summary judgment regarding claims that the National Voter Registration Act violated the Tenth Amendment by requiring Michigan to comply with its terms); *In re Brentwood Outpatient, Ltd.*, 43 F.3d at 265 (upholding disallowance of county tax collection in bankruptcy proceeding when no affirmative state action was mandated); *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422, 1432-36 (10th Cir. 1994), vacated and remanded by *Oklahoma v. Ponca Tribe*, 116 S. Ct. 1410, 1410 (1996) (upholding the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988), codified as amended at 25 U.S.C. §§ 2701-2721 (1994), against a Tenth Amendment challenge because states are merely required to negotiate in good faith, not to enter into agreements); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993) (upholding the Indian Gaming Regulatory Act against Tenth Amendment claims because the Act does not force states to enter into agreements with Indian tribes); *Kentucky Division, Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406, 1415-16 (6th Cir. 1994) (upholding the Interstate Horseracing Act of 1978, Pub. L. No. 95-515, 92 Stat. 1811 (1978), codified at 15 U.S.C. §§ 3001-3007 (1994); *State of Alaska v. Brown*, 850 F. Supp. 821, 827-28 (D. Alaska 1994) (upholding a federal prohibition on the export of Alaskan crude oil transported through the Trans Alaska Pipeline System when, unlike the timber export in *Brown*, 992 F.2d at 946-47, no state implementing regulations were required); *Zych v. The Unidentified, Wrecked, and Abandoned Vessel, Believed to be the SB "Seabird"*, 811 F. Supp. 1300, 1317-21 (N.D. Ill. 1992) (upholding the Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 102 Stat. 432 (1988), codified at 43 U.S.C. §§ 2101-2100) (1994), against the theory that it compels states to take title to embedded, abandoned shipwrecks and to enforce a federal regulatory program).

that funding is irrelevant to the legality of direct order federal mandates.²⁹⁹

Unfortunately, however, Justice Scalia's references to unfunded mandates by way of dictum in *Printz*³⁰⁰ could invite more lower courts to cite the unfunded nature of federal mandates as a legitimate basis to invalidate federal legislation. Under *New York* and *Printz*, unfunded mandates that apply to both private and governmental entities can be constitutional, while funded mandates that commandeer state legislative or administrative processes could be unlawful. Thus, continued use of the unfunded mandate rationale will serve only to confuse the distinction drawn by Justice O'Connor in *New York*, which avoids the troublesome judicial task of weighing the fiscal impacts of federal legislation on state and local governments.

No other category of direct order, other than those that commandeer the state regulatory apparatus, is unlawful as an unfunded federal mandate.³⁰¹ Direct orders to states in the Constitution cannot be unlawful under the Tenth Amendment, as they reflect express decisions of the people regarding states' rights and obligations.³⁰² Moreover, under the legislative authority granted to Congress in the Civil War amendments,³⁰³ congressional mandates designed to enforce individual rights are not subject to Tenth Amendment or other federalism limitations, even if those mandates require significant state

299. See *Edgar*, 56 F.3d at 794-96 (rejecting a challenge to the National Voter Registration Act as an unfunded mandate); *Condon*, 913 F. Supp. at 965 (rejecting a claim that a federal statute was invalid as an "unfunded mandate" and indicating that the Supreme Court has never used that reasoning to invalidate a statute).

300. See notes 291-92 and accompanying text.

301. This does not, of course, mean that they cannot be stricken on other grounds. For example, a federal statute may be invalidated because it is beyond the scope of authority granted to Congress under the Commerce Clause, even if it is not unlawful as an unfunded federal mandate. *Lopez*, 115 S. Ct. at 1626, 1634 (invalidating the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, Title XVII, § 1702, 104 Stat. 4844 (1990), codified at 18 U.S.C. §§ 921-924 (1994) While there were Tenth Amendment undercurrents in *Lopez*, see *id.* at 1642 (Kennedy, J., concurring), the law was invalidated on Commerce Clause grounds.

302. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (invalidating an Alabama law passed with intent to discriminate and indicating that "the Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment"); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) (stating that "state policy must give way when it operates to hinder vindication of federal constitutional guarantees").

303. See Anastaplo, *Amendments to the Constitution* at 168-83 (cited in note 16) (discussing the Thirteenth, Fourteenth, and Fifteenth Amendments); Shapiro, *Federalism* at 28, 50-60 (cited in note 1) (noting that the post-Civil War amendments to the Constitution solidified federal power and reduced the role of the states in the operation of the federal government); Peterson, *The Price of Federalism* at 9 (cited in note 8) (discussing the post-Civil War constitutional amendments).

expenditures.³⁰⁴ Thus, constitutional mandates, or mandates adopted by Congress or federal judges to enforce constitutional requirements, cannot require federal funding as a condition of their validity.³⁰⁵

A slightly more difficult question is raised with respect to legislative mandates that are authorized by the Constitution but are not directly required or are not necessary to implement or enforce direct constitutional requirements or guarantees of individual rights. However, so long as they constitute a valid exercise of congressional authority, they do not violate the Tenth Amendment, notwithstanding any substantial burdens on states, so long as they are enacted pursuant to the Commerce Clause³⁰⁶ or another source of constitutional power.³⁰⁷ The fact that an even broader category of federal requirements can be justified as conditions of aid under the Spending

304. *Missouri v. Jenkins*, 495 U.S. 33, 55 (1990) (upholding a court-ordered desegregation plan that required a local government to raise taxes); *City of Rome*, 446 U.S. at 178-80 (1980) (upholding the Voting Rights Act of 1965, even in light of *NLCs*); *Ex Parte Virginia*, 100 U.S. 339, 349 (1879) (upholding the 1875 Civil Rights Act).

305. See Whitman and Bezdek, Pub. Budgeting and Finance at 55 (cited in note 130) ("State and local governments have an obligation to uphold individual rights guaranteed by the Constitution and the Bill of Rights. These requirements should not be reimbursable mandates; they are simply a cost of belonging to the nation.").

306. *Garcia*, 469 U.S. at 555-56 (upholding minimum wage requirements as a valid exercise of the Commerce Clause); *Fry*, 421 U.S. at 548 (upholding temporary wage controls from a Commerce Clause challenge); *Parden*, 377 U.S. at 184, 190-91 (finding that Congress was authorized under the Commerce Clause to enact the Federal Employers' Liability Act, ch. 685, 53 Stat. 1404 (1939), codified as amended at 45 U.S.C. §§ 51 et seq. (1994)); *California v. Taylor*, 353 U.S. 553, 568 (1957) (upholding the Railway Labor Act, ch. 347, 44 Stat. 577 (1934), codified as amended at 45 U.S.C. §§ 151 et seq. (1994)); *Guy F. Atkinson Co.*, 313 U.S. at 524 (finding that a navigation and flood control project undertaken by Congress was a valid exercise of its power to regulate commerce). For post-*New York* cases upholding federal mandates so long as they did not commandeer state regulation, see note 298.

While the Supreme Court's recent decision in *Lopez* serves as a reminder that federal Commerce Clause power has some limits and may signal some retreat from the expansive interpretation of the Commerce Clause over the past half-century, it does not change the analysis of unfunded federal mandates. The validity of federal regulation still turns on whether it is a proper exercise of congressional authority and not on whether it is funded or unfunded.

307. *U.S. Term Limits, Inc.*, 115 S. Ct. at 1856 (finding that the States do not possess the power under the Tenth Amendment to create additional qualifications for representatives and senators); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (using Article III control of federal courts to uphold federal procedural rules); *Puerto Rico v. Branstad*, 483 U.S. 219, 229 (1987) (relying upon federal judicial power under the Extradition Clause to require Puerto Rico to deliver fugitives from justice); *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 403 (1963) (concluding the Patent Clause of the Constitution confers on Congress the power to grant patent rights); *United States v. Oregon*, 366 U.S. 643, 648-49 (1961) (using congressional power over veterans to uphold the federal statute); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958), overruled in part by *California v. United States*, 438 U.S. 645, 672 (1978)) (noting that the power of the federal government to impose reasonable conditions on the use of federal property is beyond challenge); *Fernandez v. Wiener*, 326 U.S. 340, 362 (1945) (finding that the Tenth Amendment does not place restrictions on the power of the federal government to tax).

Clause,³⁰⁸ does *not* mean that direct orders must be funded so long as they are properly justified as exercises of delegated federal authority.

C. Conditions of Federal Assistance

1. The Spending Clause

Even if considered mandates rather than voluntarily assumed obligations, conditions of federal assistance are supported by independent legal authority under the Spending Clause.³⁰⁹ Under prevailing Supreme Court jurisprudence,³¹⁰ federal aid conditions are lawful so long as they (1) promote the general welfare; (2) are not ambiguous; (3) are reasonably related to a legitimate federal purpose; and (4) do not violate any independent constitutional prohibition.³¹¹

While necessary to ensure that the spending power is not abused, these limitations have not proved particularly onerous, and no federal spending condition has been invalidated since 1935,³¹² despite the fact that most aid conditions were enacted after 1960.³¹³ The courts properly defer to Congress in deciding what spending is neces-

308. See Part V.C.1.

309. U.S. Const., Art. I, § 8, cl. 1 (stating that "[t]he Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States").

310. For a probing critique of the Supreme Court's understanding of the federal spending power, see Engdahl, 44 Duke L. J. at 20-37 (cited in note 78).

311. *New York*, 505 U.S. at 171-72; *Dole*, 483 U.S. at 207-08 (upholding the imposition of a minimum drinking age as a condition of highway funding).

312. Shapiro, *Federalism* at 32 n.66 (cited in note 1). In *United States v. Butler*, 297 U.S. 1, 68-72 (1935), price supports under the Agricultural Adjustment Act of 1933, ch. 25, Title I, 48 Stat. 31 (1933), codified as amended at 7 U.S.C. §§ 601 et seq. (1994), were invalidated, in part because the Court asserted that Congress's power to tax and spend could not be used to further goals in areas traditionally reserved to the states. The opinion itself is not inconsistent in this regard, having decided first that the spending power is independent of other grants of congressional authority as advocated by Hamilton in opposition to Madison's more restrictive view that spending was proper only in furtherance of otherwise delegated powers. *Butler*, 297 U.S. at 65-67. See Rosenthal, 39 Stan. L. Rev. at 1112-13 (cited in note 78); Engdahl, 44 Duke L. J. at 36-37 (cited in note 78) (stating that the *Butler* decision, while nominally endorsing Hamilton's view of Congress's spending power, followed Madison's view of Congress's spending power). While some commentators believe that the spending clause portion of the opinion is dictum, Baker, 95 Colum. L. Rev. at 1927 (cited in note 78), it has now been discredited in any event. See *Dole*, 483 U.S. at 209-10 (stating that "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly"); *Fullilove v. Klutznick*, 448 U.S. 448, 475 (1980) (concluding that the spending power is at least as broad as Congress's direct regulatory powers).

313. See Federal Regulation at 46 fig. 4-1 (cited in note 11) (illustrating that almost all federal mandates were enacted after 1960).

sary to promote the general welfare.³¹⁴ While the requirement that conditions be unambiguous, a variant on the “clear statement rule,”³¹⁵ ensures that conditions of aid are understood in advance and hence are truly voluntary, it does not limit the scope of federal spending power. It does, however, protect federalism values by ensuring that the burdens imposed by aid conditions are expressly considered in the “national political process.” And while it has been argued that the fourth requirement prohibits use of the spending power in areas that are otherwise beyond the scope of national power under the Tenth Amendment,³¹⁶ the Court has ruled that this condition stands for the “unexceptional proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.”³¹⁷ Thus, spending clause conditions are upheld routinely against Tenth Amendment attack.³¹⁸

314. *Dole*, 483 U.S. at 207 (concluding that courts should “defer substantially to the judgment of Congress”); *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (holding that courts should defer to Congress “unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment”). Professor Engdahl argues that federal spending need not even be limited by this requirement. Engdahl, 44 *Duke L. J.* at 49-53 (cited in note 78).

315. This principle requires that Congress express its intent clearly when enacting a statute that impinges on or preempts traditional state powers. See *Department of Revenue v. ACF Industries*, 114 S. Ct. 843, 850 (1994) (finding that Congress would have spoken with “clarity and precision” if it had intended to restrict state power to exempt certain types of property from taxes); *New York*, 505 U.S. at 169-72 (noting that the Commerce Clause’s limit on the ability of states to discriminate against interstate commerce may be lifted by “an expression of ‘unambiguous intent’”); *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (applying the “plain statement rule” to avoid a potential constitutional problem under the Commerce Clause); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1988) (finding that 42 U.S.C. § 1983 falls short of the ordinary rule that if “Congress intends to alter the usual constitutional balance between the states and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute”).

316. *Dole*, 483 U.S. at 209-10.

317. *Id.* at 210.

318. See *Bell v. New Jersey*, 461 U.S. 773, 790-91 (1983) (finding the imposition of liability for misused funds under Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965), codified as amended at 20 U.S.C. §§ 2701 et seq. (1994), does not violate the Tenth Amendment); *Oklahoma v. Civil Service Comm’n*, 330 U.S. 127, 142-43 (1947) (holding that section 12 of the Hatch Act, ch. 410, 53 Stat. 1147 (1939), codified as amended at 18 U.S.C. § 601 (1994), does not violate the Tenth Amendment); *Davis*, 301 U.S. at 640 (finding that benefits section of Title II of the Social Security Act of 1935, ch. 631, 49 Stat. 620 (1935), codified as amended at 42 U.S.C. §§ 301 et seq. (1994 & Supp. I), does not contravene Tenth Amendment limitations); *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937) (holding that an excise tax imposed by Title IX of the Social Security Act of 1935 does not violate the Tenth Amendment). A number of commentators have questioned whether this virtually unchecked federal authority under the Spending Clause is appropriate. See, for example, Baker, 95 *Colum. L. Rev.* at 1916, 1920 (cited in note 78) (arguing that if the Spending Clause is interpreted to permit Congress to seek otherwise forbidden aims indirectly through a conditional offer of federal funds, the notion of a “federal government of enumerated powers” will have no meaning); Resenthal, 39 *Stan. L. Rev.* at 1115-16 (cited in note 78) (arguing that conditional spending could be considered uncon-

On the other hand, the third limitation, while similarly unavailing to date as a basis for invalidating spending clause requirements, strikes closer to the heart of opposition to aid-condition federal mandates. State and city frustration with aid conditions stems in part from the use of cross-cutting requirements and crossover sanctions³¹⁹ as opposed to conditions that are tied directly to the program being funded. Cross-cutting regulations in particular are viewed as coercive because they apply to all federal grants; thus, avoiding such requirements entirely would require a state to forego all federal assistance, not just funding for a particular program.³²⁰

Although the challenge to a minimum federal drinking age requirement as a condition of federal highway aid in *South Dakota v. Dole* was based primarily on an asserted conflict between the Spending Clause and the Twenty-first Amendment,³²¹ the National Conference of State Legislatures as *amicus curiae* urged the Court to take the opportunity to address the requisite relationship between federal grant conditions and the specific program being funded.³²² Chief Justice Rehnquist's majority opinion declined this invitation:

Our cases have not required that we define the outer bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power. *Amici* urge that we take this occasion to establish that a condition on federal funds is legitimate only if it relates directly to the purpose of the expenditure to which it is attached. Because Petitioner has not sought such a restriction . . . and because we find any such limitation on conditional federal grants satisfied in this case in any event, we do not address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power.³²³

stitutional in some instances). Professor Rosenthal, however, appears to be relatively more concerned with the potential for federal spending to coerce individuals to waive their individual liberties than with the impact of federal spending on states' rights. See *id.* at 1115-16, 1132 (noting that conditional spending programs placing limits on individual rights would be unconstitutional). Nevertheless, Professor Rosenthal would object to a spending condition that destroyed "essential attributes of state and local governmental autonomy." *Id.* at 1133. Others believe that the federal spending power is, and should be, essentially unlimited. Engdahl, 44 *Duke L. J.* at 49-53 (cited in note 78).

319. See notes 84-85 and accompanying text.

320. See Federal Regulation at 48 (cited in note 11) (discussing the use of cross-cutting regulations in new forms of regulatory federalism).

321. 483 U.S. 203, 205 (1987). *South Dakota* argued that Congress's Spending Clause power must give way to the states' power to regulate alcoholic beverages under the Twenty-first Amendment, a claim rejected by the Court. *Id.* at 209. But see *id.* at 212 (Brennan, J., dissenting) (arguing that the Twenty-first Amendment gives states the power to impose minimum age limits on the purchase of liquor).

322. *Id.* at 208 n.3.

323. *Id.*

In dissent, however, Justice O'Connor opined that conditioning highway funding on the establishment of a minimum drinking age was not "reasonably related to the expenditure of federal funds."³²⁴ While denying any disagreement with the basic legal principles articulated by the Court,³²⁵ Justice O'Connor disagreed with the application of those principles to this case:

[Congress] is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life³²⁶

Thus, while courts consistently uphold federal aid conditions against challenges that they are too remote from the purposes of the spending,³²⁷ the Supreme Court has suggested that there may be some limits to the elasticity of this principle.³²⁸

324. *Id.* at 212 (O'Connor, J., dissenting).

325. However, there may be a more fundamental difference between the views posited by the Chief Justice and Justice O'Connor. While it is easy to overinterpret the significance of subtle differences in language, Justice O'Connor also used a slightly different formulation of the third condition in her majority opinion in *New York*, 505 U.S. at 144. In *Dole*, Chief Justice Rehnquist wrote that "our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Id.* at 207 (quoting *Massachusetts*, 435 U.S. at 461). In *New York*, Justice O'Connor, citing *Dole*, stated that "[s]uch conditions must . . . bear some relationship to the purpose of the federal spending." *New York*, 505 U.S. at 167. Under the Chief Justice's language, the spending condition need only be related to a legitimate federal interest in the project or program as a whole, and it is not even clear that the federal interest must relate to the *same* federal program. Under Justice O'Connor's test, the conditions must be related to the *purpose* of the spending. See also Baker, 95 Colum. L. Rev. at 1960-61 (cited in note 78) (discussing O'Connor's call for a "clear fit" between the funding condition and the federal interest in *Dole*).

326. *Dole*, 483 U.S. at 215 (O'Connor, J., dissenting). As further evidence of her discomfort with the extent to which the Spending Clause has been stretched, Justice O'Connor cited with approval *Butler*, 297 U.S. at 66, the last case in which the Supreme Court invalidated an aid condition. See note 314.

327. *Dole*, 483 U.S. at 206 (upholding a program tying federal highway aid to state drinking age requirements); *Fullilove*, 448 U.S. at 453-55 (upholding a program which tied public works funding to minority business set-asides); *Civil Service Comm'n*, 330 U.S. at 129-30, 142-45 (upholding a requirement that state officials provided with federal highway funds refrain from political activities under the Hatch Political Activity Act); *Browner*, 80 F.3d at 881-82 (upholding a program which tied federal highway funds to air pollution compliance).

328. But see Engdahl, 44 Duke L. J. at 54-62 (cited in note 78) (presenting a compelling argument that germaneness should be irrelevant to the spending power analysis).

While the Court has upheld aid conditions tied to even the largest federal spending programs,³²⁹ Chief Justice Rehnquist suggested in *Dole* that in some circumstances federal financial inducements may be so coercive as to pass the point where pressure turns into compulsion. He declined to rule on that basis in *Dole*, however, because only a small percentage of state highway funds were at stake.³³⁰ Chief Justice Rehnquist's suggestion raises similar empirical and analytical problems as his analogous idea in *NLCs*.³³¹ Weighing the fiscal effects and the coercive impact of a particular aid condition is extremely difficult given the complexity of the federal-state-local fiscal relationship. Funding in one program, such as education, may be tied to compliance with another federal law such as the Civil Rights Act, which itself is independently funded.³³² Moreover, the costs of compliance with one program may be offset by a wide range of fiscal benefits provided by unrelated aspects of federal tax and spending policy. Thus, the degree of impact—hence coercion—of the combined funding and regulatory regime may be difficult to discern and potentially misleading. The degree of coercion imposed by a particular program also may vary from state to state, depending on relative social and economic needs and conditions as well as on each state's independent capacity to address the need without federal aid.

As with direct order mandates, these problems lend support to the view that such complex interactions are best resolved by the political rather than the judicial branches.³³³ The legality of aid condi-

329. See, for example, *Harris v. McRae*, 448 U.S. 297, 312-318 (1980) (upholding aid conditions in the Medicaid program); *Lau v. Nichols*, 414 U.S. 563, 566-69 (1974) (upholding conditions placed upon education funding); *Rosado v. Wyman*, 397 U.S. 397, 415-19 (1970) (upholding federal conditions placed upon state receipt of AFDC funds); *Davis*, 301 U.S. at 640 (upholding conditions placed upon Social Security funding). In *Harris*, 448 U.S. at 309, the Court ruled that aid conditions no longer apply once funding specifically tied to that condition is withdrawn, providing at least some redress for the "bait and switch" complaints raised by some anti-mandate advocates. See notes 81-83 and accompanying text. However, this constraint appears to apply relatively narrowly to those cases in which federal funding is withdrawn for a specific activity, as opposed to cases where Congress merely "depart[s] from the original design." *Harris*, 448 U.S. at 309. See also Engdahl, 44 Duke L. J. at 78-83 (cited in note 78) (rejecting the coercion rationale).

330. Only about five percent of state highway funds were implicated by the federal aid condition. *Dole*, 483 U.S. at 211.

331. See notes 273-75 and accompanying text.

332. See, for example, *Lau*, 414 U.S. at 566-69 (noting that schools receiving federal funds must comply with the federal Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), codified as amended at 42 U.S.C. §§ 2000a et seq. (1994 & Supp. I)).

333. Some who question the breadth of the spending power also note that the limits of this authority are difficult to assess due to the paucity of judicial precedent, which results in turn from Congress's reluctance to use spending in ways that impair basic elements of state autonomy. Rosenthal, 39 Stan. L. Rev. at 1134 (cited in note 78). This, of course, suggests that the political process has served as an effective check on potential congressional abuse of the spending

tions under the Spending Clause, like the legality of direct orders under the Tenth Amendment, should turn on whether they represent a valid exercise of federal spending power and not on the degree of their economic impact. Thus, while federal dollars obviously provide the underpinning for federal quasi-regulatory authority under the Spending Clause, the idea of spending conditions as unfunded federal mandates once again adds nothing useful to the legal debate.

2. The Sixteenth Amendment

Opponents of a broadly defined federal spending power argue that the federal government effectively limits available state revenue sources through the expansive use of its virtually unchecked taxing power, particularly after enactment of the Sixteenth Amendment.³³⁴ They argue that when the federal government redistributes federal tax receipts to the states, it attaches unwanted federal conditions. By contrast, dollars that the states would otherwise collect if the federal tax burden on state citizens were lower would be free of such federal conditions.³³⁵

Congress's power to redistribute wealth within and among the states through federal tax and spending policies,³³⁶ however, is amply supported by the language of the Sixteenth Amendment itself. Indeed, the significance of the Sixteenth Amendment may be understated or overlooked in debates about the constitutional role of the federal government.³³⁷ Like the Civil War amendments, the Sixteenth

power. But see *id.* at 1140-41, 1163 (suggesting that political safeguards may be less effective in preventing an abuse of federal spending than regulatory power).

334. See Baker, 95 Colum. L. Rev. at 1936-37 (cited in note 78) (noting that the states are able to tax the income and property of their residents only after the federal government has taken its share); Resenthal, 39 Stan. L. Rev. at 1123 (cited in note 78) (finding that federal tax policy has intruded into areas that Congress could not regulate either directly or through spending). While it is beyond the scope of this Article to respond to all of Professor Baker's and other commentators' normative objections to the current scope of the spending power, such arguments alone cannot overcome the Supreme Court's prevailing—and virtually unchallenged—*legal* analysis of the Spending Clause. Thus, even if these normative arguments are sufficiently compelling, a constitutional amendment still might be needed to change the scope of the spending power.

335. Baker, 95 Colum. L. Rev. at 1936-37 (cited in note 78).

336. The redistributive nature of and justification for unfunded federal mandates are discussed in Part VI.

337. Virtually nothing has been written about the federalism, as opposed to pure tax-related, implications of the Sixteenth Amendment. See Frohnmayer, 12 *Envir. L. J.* at 909 (cited in note 252) (noting that the Sixteenth Amendment is seldom adequately considered in modern academic or political discussions). Professor Choper cites the Sixteenth Amendment as one of many instances in which a judicial decision striking federal action on federalism grounds was

Amendment reflects a decision by the people to expand the power of the national government relative to the states.³³⁸

Under the Sixteenth Amendment, the federal government levies taxes "without apportionment among the several States, and without regard to any census or enumeration."³³⁹ By its express terms, federal income tax revenues need not be proportionate to state population or any other indicator of size. More important, these revenues need not be spent in proportion to state population. Indeed, elimination of any apportionment requirement was the main purpose of the Amendment.³⁴⁰

Clearly, federal tax and spending policies redistribute wealth among different segments of the population, usually as a result of policies chosen deliberately by the political branches of the federal

quickly overridden by political means—in this case by constitutional amendment. Choper, 86 Yale L. J. at 1583 (cited in note 10). However, he did not address the role of the amendment in enhancing the redistributive powers of the national government. Professor Shapiro notes that the Amendment "greatly enhanced federal power to raise revenue." Shapiro, *Federalism* at 29 (cited in note 1). As explained below, however, the real significance of the Amendment lies in its elimination of any federal requirement to apportion revenues among states, thus greatly enhancing federal power to redistribute income among states to save federal policy goals. See notes 339-43. Professor Kornhauser explains the Amendment in the context of a broad range of constitutional and other policy considerations, but not in the context of federalism. Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 Conn. L. Rev. 1, 52 (1992). Professor Rosenthal comes closest by acknowledging that the Amendment and the accompanying expansion of the federal tax base provided "the means with which to finance a welfare state and . . . a political consensus that it is the responsibility of the federal government to do so. . . ." Rosenthal, 39 Stan. L. Rev. at 1111 (cited in note 78).

338. See Anastaplo, *The Amendments to the Constitution* at 187 (cited in note 16) (observing that the Sixteenth Amendment was primarily intended to increase the power of the federal government).

339. U.S. Const., Amend. XVI.

340. The Sixteenth Amendment was adopted in response to the decision of the Supreme Court in *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, 582-83 (1895), overruled in part by *Baker*, 485 U.S. at 505, which ruled that a tax imposed on income derived from municipal bonds was unconstitutional because it was a tax against the power of the states and that a tax on rents or income was a "direct tax," which must be apportioned by state population. The Sixteenth Amendment did not expand the scope of federal taxing power. Rather, it eliminated the need to apportion the revenues derived from such taxes. *Eisner v. Macomber*, 252 U.S. 189, 192-93 (1920); *Peck v. Lowe*, 247 U.S. 165, 172-73 (1918); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 2-3 (1916). Indeed, the first federal income tax, passed to finance the Civil War, was upheld in *Springer v. United States*, 102 U.S. 586, 602 (1880). See Charles O. Galvin, *Tax Policy—Past, Present, and Future*, 49 SMU L. Rev. 83, 84 (1995) (discussing the first federal income tax and the *Springer* decision). This tax was repealed after the Civil War, however, and a later-enacted income tax was invalidated, amidst sharp division in the Court and the country. See *id.* at 86 n.13 (illustrating the extent of this division in the United States). However, the direct tax was invalid for lack of apportionment and not because income or property fell outside the proper scope of federal tax power. See Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 Tax Law. 3, 4 (1987) (citing the *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1866), which held that federal tax power, while limited by rules of apportionment and uniformity, "reaches every subject" except exports).

government.³⁴¹ In addition, funds are collected and distributed unequally among states, both on an absolute and on a per capita basis.³⁴² Thus, because federal revenues are collected disproportionately and federal funds are returned to states disproportionately, some states are net winners and others are net losers in the overall federal-state-local fiscal game.³⁴³

When Congress offers assistance conditioned on compliance with federal requirements, it uses its taxing and spending power as a means of inducing the states to act consistent with national policy. A state must decide whether it prefers to comply with those federal conditions or to forego federal funds. Each time it takes the latter course, it shifts its balance sheet further in the net loss direction, because the payment of income taxes by its citizens is not likewise voluntary. To avoid the federal policy, it must send more of its citizens' dollars to Washington than it receives in return. When a state declines federal funds, it cannot replace them by imposing higher

341. See Peterson, *The Price of Federalism* at 27 (cited in note 8) (concluding that the federal government is the "most capable agent of redistribution"). While *Pollock* was decided on issues of federalism, tax law commentators explain the result in terms of a conservative Supreme Court's reaction to Progressive Era efforts to transfer wealth from rich industrialists to poor agrarian and industrial laborers. Kornhauser, 25 Conn. L. Rev. at 23 (cited in note 337); Galvin, 49 SMU L. Rev. at 86 n.13 (cited in note 340); Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 Ind. L. J. 119, 136-44 (1994); Retunda, 57 U. Colo. L. Rev. at 856-57 (cited in note 2).

342. In calendar year 1993, total individual federal income tax liability ranged from a low of \$968 million in Wyoming to almost \$64 billion in California. U.S. Department of Commerce, Bureau of the Census, *Statistical Abstracts of the United States* 342 (U.S. G.P.O., 1996). On a per capita basis, contributions ranged from \$1,170 per person in Mississippi to \$3,491 per person in Connecticut. *Id.* In fiscal year 1995, in absolute terms, the total distribution of federal funds to states ranged from \$2.5 billion for Wyoming to \$152.5 billion for California. U.S. Department of Commerce, Bureau of the Census, *Federal Expenditures by State for Fiscal Year 1995* at 1 (U.S. G.P.O., 1995). The distribution of grant funds alone ranged from \$560 million in Delaware to \$26.9 billion in California. *Id.* On a per capita basis, the distribution of federal grant funds ranged from \$534.84 per person in Virginia to \$1,856.02 per person in Alaska (almost 3½ times higher). *Id.* at 34. Total federal spending ranged from \$3,898.97 per person in Wisconsin to \$7,830.39 per person in Virginia. *Id.* Thus, differences in federal spending among the states cannot be attributed to size alone, but rather reflect redistributive decisions or impacts. The fact that Virginia ranks last in per capita grant distributions but first in total per capita federal spending, *id.* at 51, probably reflects the presence of many federal military and civilian government installations and employees in that state.

343. Indeed, when the Sixteenth Amendment was ratified, it was envisioned to redistribute wealth from rich Northeastern states to debtor states in the South and the West. Galvin, 49 SMU L. Rev. at 87 (cited in note 340).

taxes without paying an economic price in terms of the overall tax burden of its populace relative to states that receive federal funds.³⁴⁴

Anti-mandate advocates are correct that this is a form of economic coercion by the federal government vis-à-vis the states, which raises issues of equity and efficiency discussed in Part VI.³⁴⁵ Legally, however, the power to redistribute federally generated funds among states is sanctioned as an instrument of national policy by the Sixteenth Amendment³⁴⁶ coupled with the broad authority in the Spending Clause to provide for the "general welfare" as Congress sees fit. Specifically, the Sixteenth Amendment granted Congress the power to collect revenue from a *national* body of taxpayers without regard to state proportionality and to spend these funds for the *national* welfare.

Similarly, the fact that the federal government may redistribute wealth among states rebuts the contention that Congress must use federal tax dollars to subsidize compliance with otherwise legitimate federal regulations. From a political perspective, state and local elected officials may prefer federal mandates to be funded so that tax increases come from Congress and not from them. From a policy perspective, however, if all federal mandates must be funded through federal tax dollars, Congress would have less latitude to distribute federal revenues to meet policy goals. Nationwide costs of compliance with federal programs would be spread among national taxpayers in proportion to their contribution to the national taxbase, rather than among taxpayers within a jurisdiction in proportion to their contribution to the problem, as represented by differential compliance costs. If Congress must pay for state or local compliance with federal law, the citizens of states with lower compliance costs will subsidize compliance by states with higher costs. For policy reasons Congress may *elect* to subsidize some states at the expense of others, but under the Sixteenth Amendment and the Spending Clause it is not required to do so.

344. In fact, to the extent that a state deliberately chooses to forego federal funds, its citizens further subsidize the citizens of other states, who will then receive a higher percentage of federal funds relative to the share of revenues they send to Washington.

345. See Baker, 95 Colum. L. Rev. at 1935-38 (cited in note 78). While criticizing the role of the Sixteenth Amendment in facilitating this federal power, Professor Baker fails to acknowledge that, by ratifying the Amendment, the states and the public at large effectively legitimized this federal role.

346. See Donald J. Boudreaux and A.C. Pritchard, *Rewriting the Constitution, An Economic Analysis of the Constitutional Amendment Process*, 62 Fordham L. Rev. 111, 146 (1993) (noting that Congress needed the Sixteenth Amendment to fund wealth redistribution directly).

D. Full and Partial Preemption

Although complaints about federal preemption are raised in concert with those about unfunded federal mandates,³⁴⁷ they are analytically distinct. A mandate dictates what a state or city must do, while a preemption limits what it can do because the national government has chosen to act in the field instead. There can be no legal challenge based on the idea of unfunded federal mandates when there is no affirmative federal mandate and hence nothing to fund.

While preemption raises policy issues similar to those in the debate over unfunded federal mandates such as intrusion on state and local autonomy, accountability, equity, and efficiency,³⁴⁸ from a legal perspective, preemption no longer raises serious issues of federalism. So long as Congress acts within its constitutional authority under the Supremacy Clause³⁴⁹ and does not intrude on domains expressly reserved to the states, it may preempt entirely in a given field.³⁵⁰

Opponents of unfunded federal mandates more often assail partial or conditional preemption than full preemption. However, requirements of federal programs that are assumed voluntarily cannot be challenged on grounds that they are unfunded. If Congress has the authority to preempt a field entirely, there is no reason why it cannot do so partially or conditionally.³⁵¹ *New York* did nothing to change this principle.³⁵²

347. See Federally Induced Costs at 22-24 (cited in note 17) (describing the manner in which preemptions may constitute unfunded federal mandates); Federal Regulation at 47 fig. 4-3 (cited in note 11) (depicting partial preemptions as among federal regulatory instruments).

348. See Part VI.

349. U.S. Const., Art. VI, cl. 2.

350. *New York*, 505 U.S. at 167-68; *FERC*, 456 U.S. at 765; *Hodel*, 452 U.S. at 291; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695-96 (1979); *Sperry*, 373 U.S. at 403; *Ivanhoe Irrigation Dist.*, 357 U.S. at 295; *Taylor*, 353 U.S. at 560, 568; *Case*, 327 U.S. at 101-03.

351. *FERC*, 456 U.S. at 764-65; *Hodel*, 452 U.S. at 289-90. *Hodel* cites a number of lower court rulings upholding the validity of delegated federal programs on this basis. *Hodel*, 452 U.S. at 289 n.30 (citing *United States v. Helsey*, 615 F.2d 784, 786 (9th Cir. 1979) (upholding the Airborne Hunting Act of 1971, Pub. L. No. 92-156, 85 Stat. 480 (1970), codified as amended at 16 U.S.C. § 742j-1 (1994)); *Friends of the Earth v. Carey*, 552 F.2d 25, 36-34 (2d Cir. 1977) (upholding the Clean Air Act), Pub. L. No. 88-206, 77 Stat. 392 (1960), codified as amended at 42 U.S.C. §§ 7401 et seq. (1994); *Sierra Club v. Environmental Protection Agency*, 540 F.2d 1114, 1140 (D.C. Cir. 1976), vacated by *Montana Power Co. v. Environmental Protection Agency*, 434 U.S. 809, 809 (1977) (upholding the Clean Water Act), Pub. L. No. 92-500, 86 Stat. 816 (1972), codified as amended at 33 U.S.C. §§ 1251 et seq. (1994)).

352. *New York*, 505 U.S. at 167-68. See *Kelley*, 69 F.3d at 1509 (rejecting an argument that federal regulation "compels the states not to regulate at all"); *Kentucky Div., Horsemen's*

Moreover, from the perspective of unfunded federal mandates, conditional preemption is no different from conditions of aid through which Congress induces but does not require states and cities to adopt federal policies. Rather than using the spending power to entice grant recipients to implement federal programs,³⁵³ Congress encourages states to adopt such programs to avoid full preemption and, therefore, a complete loss of state or local autonomy in the field. Indeed, it is for this very reason—to allow some state flexibility rather than complete federal domination—that such “cooperative federalism” programs are designed.³⁵⁴ While anti-mandate advocates argue that Congress’s real goal is to coerce the states into paying to implement national policy, program assumption remains entirely voluntary. Therefore, Congress may offer the option of state and local delegation with full, partial, or no funding attached.

E. Tax Policy Provisions

The national government can impose substantial fiscal impacts on state and local governments through tax policy. Legally, however, federal taxes or other aspects of tax policy cannot be challenged on the grounds that they are unfunded federal mandates.

1. Direct Taxation

Federal tax policy has the clearest effect on states and cities through direct taxation. For a long time, states and their instrumentalities enjoyed substantial immunity from federal taxation.³⁵⁵ This was fueled by Chief Justice Marshall’s famous rhetoric in *McCulloch*

Benevolent & Protective Ass’n, 20 F.3d at 1415-16 (upholding partial preemption provision under which federal law applies absent state action).

353. Many partial preemption programs, however, are accompanied by federal grant funding. See notes 143-45 and accompanying text (discussing Clean Water Act funding programs).

354. *Hodel*, 452 U.S. at 264, 289 (observing that “[t]he most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs”); *FERC*, 456 U.S. at 765 n.29 (noting that “[c]ertainly, it is a curious type of federalism that encourages Congress to preempt a field entirely, when its preference is to let the States retain the primary regulatory role”).

355. See, for example, *Pollock*, 157 U.S. at 429, 584-86 (invalidating a federal tax on proceeds of municipal bonds as a tax against the power of the state); *Collector v. Day*, 78 U.S. (11 Wall.) 113, 128 (1871) (invalidating federal tax on the salary of a state judicial officer). For a more detailed summary of the evolution and later decline of intergovernmental tax immunity, see Rotunda, 57 U. Colo. L. Rev. at 852-60 (cited in note 2).

v. Maryland that the “power to tax involves the power to destroy”³⁵⁶ and by views of dual federalism.³⁵⁷ However, state immunity from federal taxation was never as broad as federal immunity from state taxation, for reasons that parallel the “structural protection” theory of federalism.³⁵⁸

Over time, the Court narrowed the range of state activities that were immune from federal taxation.³⁵⁹ Unfortunately, the circum-

356. *McCulloch*, 17 U.S. (4 Wheat.) 315, 431 (1819). In *McCulloch*, the Supreme Court upheld the authority of the national government to create a national bank and rejected the authority of a state to impose a tax on that bank. *Id.* at 436-37.

357. See *Day*, 78 U.S. (11 Wall.) at 124-26 (concluding that federal taxes on a county judge impair the separate and independent sovereignty of the states).

358. In *McCulloch*, the Supreme Court noted that all states are represented in the national government, but not vice versa:

The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

McCulloch, 17 U.S. (4 Wheat.) at 435. See also *Baker*, 484 U.S. at 512-13 (noting that structural protection reasoning applies to tax policy); *id.* at 518 n.11 (stating that federal tax immunity, arising from the Supremacy Clause, is broader than state tax immunity, which stems from concerns about state sovereignty); *Massachusetts*, 435 U.S. at 456 (stating that states are protected from federal taxation through the national political process, which is “uniquely adapted to accommodating the competing demands” for national revenue and state action); *New York v. United States*, 326 U.S. 572, 577 (1946) (Frankfurter, J., plurality opinion) (“*New York (Tax)*”) (concluding that the “considerations bearing upon taxation by the States of activities or agencies of the federal government are not correlative with the considerations bearing upon federal taxation of State agencies or activities” and that “all the States share in the legislative process by which a tax of general applicability is laid”); *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 477-78 (1939) (noting that the immunities of state governments and the federal government from taxation by the other do not stand on equal footing). But see *Day*, 78 U.S. (11 Wall.) at 122-124 (holding that a state judicial officer is immune from federal taxation for reasons similar to immunity of federal judicial officers from state taxation). Intergovernmental tax immunity was narrowed substantially over time. Such immunity was eliminated first with respect to federal taxes on state employees, *Helvering v. Gerhardt*, 304 U.S. 405, 420-21 (1938), and later with respect to state taxes on federal employees. *Graves*, 306 U.S. at 486 (overruling *Day*, 78 U.S. (11 Wall.) at 113, and other cases). Significantly for purposes of the unfunded mandate issue, the Court in *Graves* rejected as incorrect or irrelevant the fact that taxes on government employees might increase costs to the employer government. *Graves*, 306 U.S. at 483-85 nn.3-4.

359. First, the Court upheld federal taxation of “proprietary” as distinguished from “essential” or “governmental” state functions or activities. *South Carolina v. United States*, 199 U.S. 437, 463 (1905); *Ohio v. Helvering*, 292 U.S. 360, 371 (1934) (upholding a federal liquor tax); *Helvering v. Powers*, 293 U.S. 214, 227 (1934) (upholding a federal tax against state-owned

stances in which federal taxation of state functions could be suspect were obscured by the split opinions in *New York v. United States (Tax)*. In an opinion announcing the judgment for the Court, but joined only by Justice Rutledge, Justice Frankfurter appeared to support a rule that would uphold all federal taxes on state government so long as they were not discriminatory and did not tax states uniquely as states.³⁶⁰ Chief Justice Stone's concurrence, joined by Justices Reed, Murphy, and Barton,³⁶¹ agreed that a "governmental" versus "proprietary" distinction should be abandoned.³⁶² However, these Justices believed that a federal tax could be stricken, even if nondiscriminatory, if the tax "unduly interferes with the performance of the State's functions of government."³⁶³

Justice Frankfurter's view is more consistent with the current law of intergovernmental regulation under *Garcia*, because the federal government may regulate states in the same manner as private parties,³⁶⁴ regardless of the resulting burden to state or local governments.³⁶⁵ States are protected from undue burdens of federal taxation by the political process and because the resulting burdens are no greater for states than for private enterprises. It is unlikely that a nondiscriminatory tax could severely impair state functions and yet still be politically viable with respect to similarly situated private parties.

railroads). Later, in upholding a federal tax on the sale of mineral waters from springs owned and operated by the state, the Court rejected the "governmental" versus "proprietary" distinction in the context of tax immunity. *New York (Tax)*, 326 U.S. at 572. As discussed earlier, the concept of "traditional state functions" was revived temporarily in the regulatory context in *NLCs*, but was abandoned in *Garcia* with express reliance on the Court's earlier rejection of the distinction in the tax context in *New York v. United States*. See notes 269-80 and accompanying text.

360. *New York (Tax)*, 326 U.S. at 582.

361. Because it was joined by more Justices, the Supreme Court has since viewed Chief Justice Stone's opinion as the "majority" view. *Massachusetts*, 435 U.S. at 457-58 n.15.

362. *New York (Tax)*, 326 U.S. at 586 (Stone, J., concurring). The Frankfurter and Stone opinions, therefore, combined to create a majority of six on this point of law. Justices Douglas and Black dissented, *id.* at 590, and Justice Jackson took no part in the decision. *Id.* at 584.

363. *Id.* at 588 (Stone, J., concurring).

364. See note 286.

365. Compare *New York (Tax)*, 326 U.S. at 582 (stating Justice Frankfurter's view that taxes are permissible where applied equally to state and private parties), with *Garcia*, 469 U.S. at 546-47 (stating Justice Blackmun's view that permissibility of federal regulation cannot turn on the distinction between "integral" governmental versus "proprietary" functions). See also *New York*, 505 U.S. at 159-60 (stating Justice O'Connor's view that Congress may regulate states through generally applicable laws). Justice Stone's view is more consistent with the impact analysis approach in *NLCs*. Compare *New York (Tax)*, 326 U.S. at 587-88 (stating Justice Stone's view that taxes should be stricken if they interfere unduly with state functions), with *NLCs*, 426 U.S. at 852 (stating Justice Rehnquist's view that federal regulation is invalid if it interferes with integral state functions).

Moreover, as with Justice Rehnquist's similar idea in *NLCs* that the validity of federal regulation of states should turn on the qualitative "degree of intrusion upon the protected area of state sovereignty,"³⁶⁶ judging the validity of federal taxes based on the resulting degree of burden is vague and unworkable. While the precise fiscal impact of a tax may be somewhat easier to determine than the impact of a regulation, the resulting "burden" on state government is subjective, variable among jurisdictions, and impossible to determine precisely. As with regulation or spending, the impacts of federal taxes cannot be divorced from other components of the federal-state-local fiscal relationship including the resulting loss of federal revenue which must then be derived from other sources.³⁶⁷ For example, the burden of a federal tax on a particular jurisdiction must be balanced against the benefits received. But the receipts of federal taxation are redistributed among the states through spending programs that may or may not be related to the source of the revenue.

This calculus becomes impossibly complex when all federal tax and spending programs are viewed together. In one program, a state may be required to pay more in taxes than it receives in benefits, but in another program the opposite may be true. Congress may impose stiff taxes either for revenue or for policy reasons in one area, but increase grants or tax benefits in another to reduce the resulting impacts to states or cities. Therefore, narrow party-defined litigation challenging a specific tax is an inappropriate context in which to judge the "burdens" imposed by Congress on states and cities. This complex analysis, infused with interrelated issues of national policy, is better left to the national political process than to judicial review.³⁶⁸ Thus, constitutional challenges to direct taxation mandates are neither supported by precedent nor appropriate for judicial resolution.

366. See note 275 and accompanying text.

367. See *Massachusetts*, 435 U.S. at 456. The *Massachusetts* Court stated that:

[A]ny immunity for the protection of state sovereignty is at the expense of the sovereign power of the National Government to tax. Therefore, when the scope of the States' constitutional immunity is enlarged beyond that necessary to protect the continued ability of the States to deliver traditional governmental services, the burden of the immunity is thrown upon the National Government without any corresponding promotion of the constitutionally protected values.

Id.

368. See *New York (Tax)*, 326 U.S. at 581 (Frankfurter, J., concurring) (noting that "[t]he problem [of measuring the burdens of taxation] cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges").

This is evident in the most recent Supreme Court decision on the validity of a federal intergovernmental tax. In *Massachusetts v. United States*, the Court upheld a flat fee registration tax on civil aircraft, including state helicopters used for police purposes, against claims that it impaired "the essential and traditional state function of operating a police force."³⁶⁹ Consistent with Justice Frankfurter's opinion in *New York (Tax)*, the tax was upheld as nondiscriminatory against state as opposed to private aircraft.³⁷⁰ Moreover, in a manner prophetic of the idea's resurrection in the regulatory context in *Garcia*, Justice Brennan's majority opinion relied on the fact that states receive protection against excess taxation through the national political process.³⁷¹ Justice Brennan also rejected the idea that economic impacts via increased costs—even of essential state services—were sufficient to invalidate the federal tax,³⁷² again consistent with *New York (Tax)* and other earlier cases in which intergovernmental tax immunity was eroded.³⁷³

Consistent with the reasoning of *Garcia*, it is now difficult to justify the idea that a nondiscriminatory federal tax can be stricken because it impairs a traditional state function.³⁷⁴ If the national political process is adequate to protect states against excessive nondiscriminatory regulation by Congress, it should be adequate as well to protect states against excessive nondiscriminatory taxation.³⁷⁵ Moreover, just as it is impossible for judges in an isolated piece of

369. 435 U.S. 444, 452 (1978).

370. *Id.* at 457-58. In addition, this tax was justified as more of a fee than a tax because aircraft rates were tied reasonably to services rendered. *Id.* at 463-67.

371. *Id.* at 456 (noting that the political process is "uniquely adapted to accommodating competing demands" for national revenue versus state needs). While recognizing the Court's rejection of the political process theory in *NLCs*, which was then still good law, Justice Brennan opined that it was still relevant to intergovernmental tax cases. *Id.* at 456-57 n.13.

372. *Id.* at 459.

373. Nevertheless, Justice Brennan's opinion in *Massachusetts* clings to the idea that some residual state tax immunity remains, even in the case of nondiscriminatory taxes, in order "solely to protect the States from undue interference with their traditional governmental functions." *Id.* at 459. See *In re Brentwood Outpatient, Ltd.*, 43 F.3d at 263-64 (upholding the federal bankruptcy preemption of a county tax but suggesting a different result if the impact were greater). This remnant may be explained by the fact that *Massachusetts* was decided after *NLCs* but before *Garcia* and, thus, was still influenced by the *NLCs* prohibition against the impairment of traditional functions. Alternatively, it may be explained by adherence to the views of the majority of Justices who endorsed Chief Justice Stone's opinion in *New York (Tax)*. Or perhaps the Court simply wanted to keep its options open in order to address a particularly egregious abuse of the federal tax power.

374. See Rotunda, 57 U. Colo. L. Rev. at 866-68 (cited in note 2) (arguing for further erosion of intergovernmental tax immunity).

375. Even Justice Frankfurter would have stricken federal taxes that discriminate against states, especially by taxing instrumentalities that are unique to state government, such as statehouses. *New York (Tax)*, 326 U.S. at 582.

litigation to weigh the competing benefits and burdens of overall national policy in the context of isolated federal regulations, so is it impossible with respect to isolated federal taxes.³⁷⁶

2. Indirect Effects of Tax Policy

States and cities argue that federal tax policy adversely affects their finances indirectly as well. The ACIR, for example, asserted that Congress impaired state and local revenue generation by eliminating the tax-exempt status of unregistered bonds,³⁷⁷ by eliminating the tax-exempt status of industrial development bonds issued to fund certain private activities, and by placing a cap on the total amount of industrial development bonds issued in each state.³⁷⁸

The legal response to this claim is identical to that given for federal spending because tax-exempt bond authority is really a different form of federal grant or subsidy.³⁷⁹ When the federal government reduces or eliminates taxes on income from state and local bonds, it lowers state and local interest costs at the expense of lower federal revenues.³⁸⁰ The same net result could be obtained via grant rather

376. *Baker*, 485 U.S. at 505, 527. This decision was written by Justice Brennan and was decided after and relied expressly on *Garcia*. *Id.* It upheld the validity of a federal tax law eliminating tax exemptions for unregistered bearer bonds. *Id.* However, while involving taxation, the statute was upheld as an exercise of federal regulation, not as a direct tax. *Id.* Nevertheless, it suggests further that the full reasoning of *Garcia* should be applied to direct tax cases as well.

377. This provision was upheld in *Baker*, 485 U.S. at 505, as a legitimate and nondiscriminatory exercise of federal regulatory power.

378. Federally Induced Costs at 24 (cited in note 17). See also Tax-exempt Financing at 1-5 (cited in note 102) (describing other restrictions on tax-exempt bond authority).

379. See *Baker*, 485 U.S. at 511 n.6 (suggesting, but not ruling, that exemptions from federal taxation constitute a subsidy); Rotunda, 55 U. Colo. L. Rev. at 850-51 (cited in note 2) (arguing that tax-exempt bonds are, in essence, a subsidy); Rosenthal, 39 Stan. L. Rev. at 1123 (cited in note 78) (noting that some conditional tax benefits are in some ways indistinguishable from conditional grants).

380. Rymarewicz and Zimmerman, *Federal Budget and Tax Policy* at 18 (cited in note 29). Of course, some question has been raised about whether the Sixteenth Amendment overruled the portion of *Pollock* invalidating federal taxation of state and local bond interest, as opposed to the portion of the opinion invalidating direct taxes for lack of apportionment. See *Evans v. Gore*, 253 U.S. 245, 262-64 (1920), overruled in part by *O'Malley v. Woodrough*, 307 U.S. 277, 280-83 (1939) (citing *Pollock* in course of invalidating tax on judicial salary); Bittker, 41 Tax Law. at 4 (cited in note 340) (noting the ambiguity in the Sixteenth Amendment and asking whether the Sixteenth Amendment overruled *Pollock's* prohibition on taxing income from state and municipal bonds); Kornhauser, 25 Conn. L. Rev. at 12 n.42 (cited in note 337) (discussing whether the expansion of congressional power would now allow Congress to tax state and local bonds as well as the salaries of local judges). As a textual matter, this doubt appears resolved by the words "from whatever source derived" and from ratification of the Amendment in the face of contemporaneous concerns that it would allow taxation of bond income. Rymarewicz and Zimmerman, *Federal*

than tax subsidy, possibly with lower transaction costs to the federal government.³⁸¹

From the state and local perspective, the fiscal benefits of tax-exempt bonds may be preferable to direct grants because they are not accompanied by direct and cross-cutting grant conditions that require some funds to be spent in order to receive others. However, when Congress delimits the activities that are eligible for tax-exempt bonds or defines the manner in which such bonds may be issued, it imposes accountability requirements on the uses of federal tax subsidies, just as it imposes accountability conditions on the use of federal grants. Thus, a federal decision to reduce or condition tax-exempt bond authority should be treated legally the same as a condition of federal aid.

The ACIR also argues that states are hurt by intergovernmental tax competition. States allegedly lose revenue when both the state and federal governments tax the same commodity such as gasoline.³⁸² The empirical basis for this claim is not clear. A state may choose as a matter of policy to avoid additional taxes on a commodity already taxed by Congress in order to avoid making that commodity too expensive to consumers. However, from a purely fiscal perspective, those revenues can be replaced by increasing other types of taxes not imposed by the federal government, such as those on property.³⁸³ While this reduces state and local autonomy by restricting the scope of tax policy decisions, federal taxation probably does not reduce state and local revenue-generation capacity unless all taxable commodities are being taxed to the maximum extent economically possible.

Moreover, intergovernmental tax competition raises legal issues no different from those suggested by preemption. Congress has authority to impose taxes to "provide for the common Defence and

Budget and Tax Policy at 18 (cited in note 29). For a more detailed argument that federal taxation of state and local bond interest is constitutional, see Rotunda, 57 U. Colo. L. Rev. at 866-68 (cited in note 2).

381. See Tax-exempt Financing at 18 (cited in note 102) (discussing a failed 1976 proposal by President Carter to replace tax-exempt bonds with a more efficient direct transfer of federal funds); Rotunda, 57 U. Colo. L. Rev. at 851 (cited in note 2) (citing statistics that the federal government loses 50% more in taxes than cities and states save in interest).

382. Federally Induced Costs at 24 (cited in note 17). See Rosenthal, 39 Stan. L. Rev. at 1936-38 (cited in note 78) (explaining that the federal government, when offering funds to the states with conditions attached, is in effect offering to return to the states funds which could have been taxed directly by the states).

383. The three basic levels of government tend to tax different revenue sources. Federal revenue is derived primarily from income taxes, local revenue predominantly from property taxes, and state revenue from a mixture of the two. Peterson, *The Price of Federalism* at 20 tbl. 2.1 (cited in note 8) (listing sources of revenue for federal, state, and local governments).

general Welfare of the United States.”³⁸⁴ Federal tax power clearly infringes on state sovereignty to some degree. So long as the tax is within the scope of authority granted by the Constitution, however, the intrusion is legally sanctioned, even if it results in revenue loss or incidental regulatory impacts.³⁸⁵

F. Incidental Federal Policy Impacts

1. Increased Demands for State Services

By including in its definition of federally induced costs any federal action that “imposes additional financial burdens on states and localities,”³⁸⁶ the ACIR included a wide range of incidental federal policy impacts. These include increased demand for state and local services near federal installations and for education, health, and other benefits for legal and illegal immigrants.³⁸⁷

While several such impacts have been challenged under the unfunded federal mandate rubric, most of those challenges have failed. For example, in *Padavan v. United States*,³⁸⁸ the Second Circuit rejected claims that the federal government, because it has plenary power over immigration and the impact of immigration policy, must reimburse the state of New York for expenditures made on legal and illegal aliens.³⁸⁹ To the contrary, Congress may act within its plenary powers even though the intergovernmental effects may be onerous.³⁹⁰ The court found the claims based on the Naturalization and

384. U.S. Const., Art. I, § 8, cl. 1.

385. See *United States v. Oregon*, 366 U.S. 643, 648-49 (1961) (upholding against a Tenth Amendment challenge a federal statute vesting in the United States the property of deceased veterans who died intestate or without heirs); *Fernandez v. Wiener*, 326 U.S. at 363 (upholding a federal estate tax against a Tenth Amendment challenge despite incidental regulatory impacts); *Steward Machine Co.*, 301 U.S. at 549-50 (upholding against claims of nonuniformity and violations of state sovereignty portions of the Social Security Act allowing credits against federal unemployment tax for contributions to state unemployment funds); *Florida v. Mellon*, 273 U.S. 12, 12 (1927) (upholding against a federalism challenge federal inheritance tax that allowed deduction of state inheritance tax).

386. See note 71.

387. Federally Induced Costs at 3, 24 (cited in note 17).

388. 82 F.3d 23 (2d Cir. 1996). The service expenditures involved the costs of providing for the “education, confinement, health, and welfare of legal and illegal aliens.” *Id.* at 25.

389. *Id.* at 26-27.

390. *Id.* at 26 (citation omitted).

Guarantee Clauses nonjusticiable³⁹¹ and rejected a Tenth Amendment challenge under the commandeering theory of *New York v. United States*, reasoning that the federal government does not "commandeer" the state to provide the services in question.³⁹²

Each of the services for which the state sought reimbursement in *Padavan* have been addressed above in other categories. For example, states provide emergency medical services through voluntary participation in Medicaid, from which they are legally free to withdraw.³⁹³ Further, any requirement that states provide education to illegal immigrant children derives not from a congressional mandate, but from the Constitution,³⁹⁴ and thus cannot violate the Tenth Amendment.³⁹⁵ In addition, any state obligations to prosecute and incarcerate legal and illegal immigrants stem from their own laws and "not from any federal mandate."³⁹⁶

Thus, two principles already discussed appear to preclude most, if not all, possible legal challenges to this potpourri of "other" federal actions that may have an incidental fiscal impact on states and cities by increasing the cost of providing public services. First, when Congress acts within its enumerated powers, principles of supremacy dictate that the action is valid notwithstanding incidental requirements on states, however burdensome. Second, in order to be vulnerable under *New York*, Congress must actually command the state to engage in the underlying activity; it is not enough that the federal action merely increases demand for a service. No *New York* violation occurs when the activity is undertaken voluntarily or due to independent constitutional or other legal requirements placed on the states.

2. Limits on State-Owned Commodities

Federal bans or constraints on the export of state-owned commodities, with incidental impacts on state revenues due to differential

391. *Id.* at 27-28. The court summarily dismissed, presumably as not worthy of comment, an argument that the impact of masses of new immigrants violated the Invasion Clause. *Id.* at 28.

392. See *Chiles*, 69 F.3d at 1096-97 (rejecting similar arguments made by Florida).

393. *Padavan*, 82 F.3d at 29.

394. *Plyler v. Doe*, 457 U.S. 202, 210-11 (1982) (concluding that illegal aliens are entitled to equal protection). See also *Shapiro*, 394 U.S. at 641-42 (applying equal protection to welfare benefits).

395. *Padavan*, 82 F.3d at 29.

396. *Id.*

prices in export as opposed to domestic markets, also raise another type of "incidental impact" on states.³⁹⁷

In *Board of Natural Resources of the State of Washington v. Brown*,³⁹⁸ the Ninth Circuit invalidated a provision of the Forest Resources Conservation and Shortage Relief Act³⁹⁹ that restricted exports of timber harvested from state public lands west of the 100th meridian and within the continental United States.⁴⁰⁰ The court noted that the ban would result in financial losses to the state of over \$500 million.⁴⁰¹ However, it did not decide the case on the basis of this incidental unfunded federal mandate argument; rather, the Ninth Circuit invalidated the provision under *New York* because the law required states to issue regulations to implement the export ban. Thus, even though the state itself was the only subject of the "regulations," the court reasoned that the Act included "direct commands to the states to regulate according to Congress's instructions" in violation of *New York*.⁴⁰²

One year later, the federal district court for Alaska refused to invalidate Congress's prohibition on the export of crude oil transported through the Trans Alaska Pipeline System (TAPS).⁴⁰³ The district court held that control over oil exports through the Export Administration Act⁴⁰⁴ was a valid exercise of Congress's plenary power over foreign commerce.⁴⁰⁵ To the extent that exercise of this power impaired state autonomy, the court held that Alaska must rely on the political process. Reliance on *New York* was misguided because the Act neither fell outside of Congress's enumerated powers nor contravened the structure of the Union.⁴⁰⁶

The district court may not have applied *New York* correctly. Under *New York*, it is possible for Congress to act within the scope of its substantive authority under the Constitution but to violate the Tenth Amendment if the *means* chosen are impermissible, *i.e.*, com-

397. These two cases also can be viewed as direct order mandates, but the legal analysis is not affected by this definitional issue.

398. 992 F.2d at 937 (9th Cir. 1993).

399. Pub. L. No. 101-382, 104 Stat. 714 (1990), codified at 16 U.S.C. §§ 620-620j (1994).

400. *Brown*, 992 F.2d at 941, 949.

401. *Id.* at 941.

402. *Id.* at 947.

403. *Brown*, 850 F. Supp. at 828.

404. 50 U.S.C. app. § 2406(d) (1994).

405. *Brown*, 850 F. Supp. at 827.

406. *Id.* at 828. The court also rejected claims based on the Guarantee Clause, as nonjusticiable, *id.*; issues of presentment, bicameralism, and separation of powers, *id.* at 825-26; and the Port Preference Clause. *Id.* at 826-27.

mandeering the state's regulatory apparatus rather than regulating the matter directly or through the spending power. Although the oil export prohibition was a substantively valid exercise of congressional power over foreign commerce, it still might be prohibited under *New York*, as was the timber export ban in *Washington v. Brown*, if it forced the state to promulgate regulations. The TAPS export ban, however, can be upheld consistent with both *New York* and *Washington v. Brown* because it operates directly and does not require Alaska to promulgate regulations.

The inconsistency between these two cases, however, suggests a problem either with the manner in which the *New York* test is articulated or in the manner in which it was interpreted in *Washington v. Brown*. In *New York*, the state was forced either to take title to the low-level nuclear waste in question or to issue regulations effective against third parties.⁴⁰⁷ The target of regulation was not the state, but other parties who generate low-level waste. The violation identified by Justice O'Connor was that Congress, rather than regulating directly, required the state to regulate the third parties.

While the statute in question in *Brown* required that "regulations" be issued, the target of regulation was the state itself, and the "regulations" were simply a vehicle to require the state to comply with the federal statute.⁴⁰⁸ It is anomalous to hold that the validity of the congressional enactment turns on the use of "regulation" terminology in the timber ban as opposed to the more direct command in the TAPS export ban. The real thrust of *New York* and the reasoning that would prevent this anomalous result is that while Congress may regulate states as the targets of legitimate regulation, it may not require states to act as unwilling federal agents to regulate third parties.⁴⁰⁹ To cure this problem, *New York* could be modified to adopt a "target of regulation" test.

407. *New York*, 505 U.S. at 153 (quoting 42 U.S.C. § 2021e(d)(2)(C) (1994)).

408. It could be argued that private parties issued leases to harvest state timber also would be the targets of the state regulations. However, the state owns the timber which is the subject of the federal export ban. Arguing that a state can render direct federal regulation invalid under *id.* at 144, by leasing or contracting its legal rights to a third party could be used to avoid a wide range of federal direct orders.

409. Stated with regard to the language of the Tenth Amendment, the "power" not delegated to Congress is the power to require states to regulate third parties, rather than the power that Congress clearly does have to regulate third parties—including states—directly. What is "reserved" to the states is the power to decide how they will use their own regulatory power, on whom, and on what issues. This view is consistent with the accountability reasoning in *New York*, 505 U.S. at 144. See Part VI. See also Dana, 69 S. Cal. L. Rev. at 6 (cited in note 4) (distinguishing between "implementation" and "compliance" mandates).

3. Conclusion

In sum, the only “incidental impact” case in which a federal action was stricken on Tenth Amendment grounds might be based on a misapplication by the Ninth Circuit of the prohibition against “commandeering” in *New York*. Even if *Brown* was decided correctly, the federal regulation therein was struck down because it included a direct order for the state to regulate within the meaning of *New York* and not because it resulted in indirect fiscal impacts on the state. Thus, there is no independent legal basis on which a federal action with incidental fiscal impacts can be rejected because it constitutes an unfunded federal mandate. While federal actions may be struck down if they stray beyond the bounds of authority granted by the Constitution, the fact that otherwise valid exercises of such authority cause incidental fiscal impacts appears to be legally irrelevant.

G. Federal Statutory Liability

Federal statutory liability⁴¹⁰ differs qualitatively from other mandates because liability merely requires compensation for conduct that causes identifiable damages to third parties.⁴¹¹ It does not, as do most “mandates,” require states or cities to take new action.⁴¹²

410. Opponents of unfunded federal mandates have not, at least to date, identified federal common law liabilities as a problem. This may be because, after the decision in *Erie R.R. Co., v. Tompkins*, 304 U.S. 64, 64 (1938), the scope of federal common law is relatively narrow and of minor, if any, concern to states and cities as a source of federal dictates. Nevertheless, Professor Meltzer maintains that a small body of legitimate federal common law remains:

Despite *Erie's* declaration that “[t]here is no federal general common law,” courts have fashioned what Judge Friendly has termed “specialized federal common law” to govern a broad range of areas. Unlike the “spurious” federal common law of the era of *Swift v. Tyson*, this new federal common law is binding under the Supremacy Clause in the state courts.

The proper scope of federal common lawmaking is a matter of considerable uncertainty.

John J. Cound, et al., *Civil Procedure, Cases and Materials* 394 (West, 5th ed. 1990) (quoting David J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1167-72 (1986)). Thus, it is at least possible that liability may be imposed on states and cities under federal common law. Presumably, such liability would be subject to the same rules of validity under the Supremacy Clause as federal statutory liability. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (discussing the application of federal law to achieve uniformity and finding commercial law to be a reference source).

411. See notes 119-22 and accompanying text.

412. Superfund and other federal environmental laws may require states or localities to take affirmative remedial steps. See, for example, 42 U.S.C. § 9606 (1994) (requiring abatement actions). However, such requirements constitute direct regulatory orders discussed above, rather than liability for damages. See notes 120-22 and accompanying text.

Nevertheless, it does meet the two criteria of a mandate: authority to issue and duty to comply.⁴¹³

There appears to be no reason why federal statutory liability should be more vulnerable to legal challenges based on federalism than direct order mandates. So long as the statute constitutes a proper exercise of federal power, the fact that it results in state and local liability should be treated no differently from other burdens imposed by federal enactments.

There are, however, Eleventh Amendment⁴¹⁴ constraints on the judicial forum in which liability may be imposed against states. Unless waived,⁴¹⁵ the Eleventh Amendment bars not only cases seeking monetary damages,⁴¹⁶ but all cases brought by citizens of another state⁴¹⁷ *against states* in federal court regardless of the nature of relief sought, even injunctive relief resulting in state expenditures.⁴¹⁸ If a state allows suit in its own courts, this limit might be insignificant except for differences in the likelihood of success in state versus fed-

413. See notes 64-73 and accompanying text. The allegedly most onerous example of such liability is CERCLA, 42 U.S.C. §§ 9601 et seq. (1994). While CERCLA liability is based largely on existing common law, see notes 138-39 and accompanying text, federal courts could interpret this liability more broadly in light of the broad deterrent and remedial purposes of the statute. See, for example, *United States v. Aceto Agricultural Chemical Co.*, 872 F.2d 1373, 1380 (8th Cir. 1989) (noting the broad language used in CERCLA and finding that a liberal judicial interpretation consistent with the remedial scheme should be used). Other statutes might impose new liability or higher measures of liability.

414. U.S. Const., Amend. XI (stating that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"). The Amendment protects many of the same principles of federalism as are at issue with unfunded federal mandates. See *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 (1996) (concluding that the Amendment "serves to avoid 'the indignity of subjecting a State to the coercive process of [federal] judicial tribunals at the instance of private parties'" and quoting *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). It was passed after *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 419 (1792), which ruled that states could be sued in federal court by citizens of another state. The decision "created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed." *Hans v. Louisiana*, 134 U.S. 1, 11 (1890). See Anastaplo, *The Amendments to the Constitution* at 102 (cited in note 16) (discussing the circumstances surrounding the adoption of the Eleventh Amendment).

415. *Seminole Tribe*, 116 S. Ct. at 1122. In CERCLA cases, for example, a state can waive its immunity by bringing a cost recovery claim against a private party, which then may bring a compulsory counterclaim against the state; or when the state brings its own counterclaim in a suit filed by a private party. See Gail Ruderman Feuer and David S. Beckman, *Citizen Suits Are Alive and Well Following the Seminole Tribe Decision*, 5 *Envir. L. News* 40, 40-41 & n.10 (1996) (discussing private cost recovery actions under CERCLA).

416. *Edelman v. Jordan*, 415 U.S. 651, 665-68 (1974).

417. In *Hans*, 134 U.S. at 20-21, the Supreme Court ruled that, despite the literal limitations of the text, suits brought against a state by its own citizens are also barred by the Amendment.

418. *Seminole Tribe*, 116 S. Ct. at 1124 (citing *Cory v. White*, 457 U.S. 85, 90 (1982)).

eral court.⁴¹⁹ If a similar suit is barred in state court, though, the Eleventh Amendment may shield states altogether from statutory liability otherwise imposed by federal law. There are limits, however, to a state's ability to avoid a federal claim when there is no "neutral or valid" reason for the state court to apply governmental immunity to a federal as opposed to a state cause of action.⁴²⁰

Moreover, the Eleventh Amendment provides only partial relief from unfunded federal statutory mandates. First, the Amendment is limited to suits brought by citizens. Suits may be brought in federal court by the federal government⁴²¹ or by another state⁴²² to impose liability created by federal statute. In addition, the Eleventh Amendment provides potential mandate relief only to states and not to their political subdivisions.⁴²³ Thus, counties and municipalities remain subject to federal statutory liability in federal and state courts. Congress may also override the Eleventh Amendment under Section 5 of the Fourteenth Amendment.⁴²⁴ This can include the imposition of

419. Moreover, federal review by the Supreme Court ultimately will be available for federal issues decided by state courts. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation of Florida*, 496 U.S. 18, 30-31 (1990).

420. *Howlett v. Rose*, 496 U.S. 356, 379-81 (1990).

421. *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

422. U.S. Const., Art. III, § 2 (conferring jurisdiction on federal courts to hear cases between states and all cases in which the United States is a party); *South Dakota v. North Carolina*, 192 U.S. 286, 315-21 (1904).

423. See *Will*, 491 U.S. at 70 (finding that municipalities enjoy no Eleventh Amendment protection). In some cases, however, it may be difficult to decide whether a defendant is an "arm of the state" for purposes of Eleventh Amendment immunity. See *Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 292 (2d Cir. 1996), cert. denied, *New York State Thruway Auth. v. Mancuso*, 117 S. Ct. 481, 481 (1996) (finding that a Thruway Authority would be entitled to Eleventh Amendment immunity if it could show that it is more like an arm of the state than a municipality); *New Jersey v. Gloucester Environmental Management Services*, 923 F. Supp. 651, 655-60 (D.N.J. 1995) (noting that a party is entitled to Eleventh Amendment immunity if it is basically an "alter ego" of the state).

424. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that the Eleventh Amendment is limited by the enforcement provisions of the Fourteenth Amendment). The key remaining issue is whether Congress may abrogate state sovereign immunity under constitutional authority other than the Civil War amendments. Presumably, the reasoning of *Fitzpatrick* applies to authority granted to Congress under other post-Civil War amendments, such as Section 2 of the Thirteenth and Fifteenth Amendments. A plurality in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 6 (1989), overruled by *Seminole Tribe*, 65 U.S.L.W. at 4731, addressing the ability of a private party to bring a cost recovery action against a state under CERCLA, found that Congress may abrogate state sovereign immunity under the Interstate Commerce Clause. In *Seminole Tribe*, however, the Court rejected a claim that Congress could revoke state immunity under the Indian Commerce Clause. *Seminole Tribe*, 116 S. Ct. at 1122. Rather than distinguishing the Indian Commerce from the Interstate Commerce Clause, a five-Justice majority instead overruled *Union Gas*:

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dis-

retroactive damages⁴²⁵ and orders for prospective payments to ensure future compliance with substantive federal law.⁴²⁶ Finally, under *Ex parte Young*,⁴²⁷ the Eleventh Amendment does not bar suits against state officials to enjoin prospective or ongoing violations of federal law.⁴²⁸ While this may not result in the imposition of retroactive liability except in Fourteenth Amendment cases,⁴²⁹ state or local expenditures might be needed to prevent recurring violations in other areas as well.⁴³⁰

The application of the Eleventh Amendment in the context of unfunded federal mandates is not entirely clear. Now, sovereign immunity probably bars all cases brought by private parties against states seeking to impose federal statutory liability enacted under

sipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.

Seminole Tribe, 116 S. Ct. at 1131. See *Will*, 491 U.S. at 65 (stating in the context of 42 U.S.C. § 1983 the rule of statutory construction that if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to alter the balance "unmistakeably clear in the language of the statute"); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985) (concluding that Congress may exercise its Fourteenth Amendment powers to abrogate the states' Eleventh Amendment immunity only where "an unequivocal expression of intent" to do so exists). The *Seminole Tribe* dissent argued that Congress had the authority to abrogate state sovereign immunity, at least with respect to citizens of the defendant state, who are not covered by the express terms of the Eleventh Amendment, so long as Congress acts within its sphere of delegated authority. *Seminole Tribe*, 116 S. Ct. at 1144-45 (Stevens, J., dissenting). In essence, Justice Stevens argued that sovereign immunity was among the elements of sovereignty surrendered by the States when they ratified the Constitution.

425. See *Fitzpatrick*, 427 U.S. at 456 (upholding an award of back pay against a state when the cause of action was created by Congress under Section 5 of the Fourteenth Amendment).

426. See *Millikin v. Bradley*, 433 U.S. 267, 289-91 (1977) (concluding that prospective relief in the form of payments for future educational costs did not violate the Eleventh Amendment); *Edelman v. Jordan*, 415 U.S. at 664-66 (concluding that the Eleventh Amendment barred payment of retroactive benefits by Illinois). However, in another application of the plain statement doctrine, the courts have found that state sovereign immunity is abridged only when Congress has done so clearly. *Millikin*, 433 U.S. at 266; *Edelman*, 415 U.S. at 651.

427. 209 U.S. 123, 123 (1908).

428. See *Seminole Tribe*, 116 S. Ct. at 1132 (stating that federal jurisdiction exists in suits against state officials "when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law'").

429. *Millikin*, 433 U.S. at 289-91.

430. The majority appeared to accept this possibility in footnote 17 of *Seminole Tribe*, which suggested that Congress properly authorized prospective remedies under *Ex parte Young* in statutes such as the Clean Water Act, 33 U.S.C. § 1365(a) (authorizing suits against any person, including a state or municipality, alleged to be in violation of water pollution control requirements). *Seminole Tribe*, 116 S. Ct. at 1134-35. In most cases, state or local expenditures will be required to remedy water pollution violations, and plainly it cannot be envisioned that such costs be borne by the nominal state official being sued. The Court found no such congressional intent in the relevant provision of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7), which was at issue in *Seminole Tribe*. *Id.*

authority other than the Civil War amendments.⁴³¹ However, Congress can impose similar requirements in other ways. First, depending on the nature of the issue, the United States and other states may sue directly to impose statutory liability notwithstanding the Eleventh Amendment.⁴³² Second, citizens may still sue state officials who act in violation of federal law, at least to obtain prospective injunctive relief and attorney's fees.⁴³³

H. Conclusion: The Legal Implications of Unfunded Federal Mandates

Evaluation of potential legal challenges to unfunded federal mandates leads to several conclusions. First, as suggested by the definitional and fiscal analysis, the idea of unfunded federal mandates adds little or nothing to the legal discourse on federalism. For those limited types of federal mandates prohibited by *New York*, federal funding would make no legal difference.⁴³⁴ Second, analysis of federal-

431. *Seminole Tribe*, 116 S. Ct. at 1125-28.

432. In CERCLA, for example, Congress created causes of action for the federal government, a state or an Indian tribe, or "any other person" to recover cleanup costs from other responsible parties. 42 U.S.C. § 9607(a) (providing for cost recovery actions). Any person may also bring "contribution" actions against other responsible parties when the plaintiff is subject to a civil action by a governmental or nongovernmental party. Id. § 9613(f). Under *Seminole Tribe*, CERCLA suits against states by private parties appear to be barred in federal court. At least one lower federal court has dismissed a CERCLA suit against a state on the basis of *Seminole Tribe*. *Prisco v. New York*, No. 91 Civ. 3990 (RLC), 1996 U.S. Dist. LEXIS 14944 at *42-44 (S.D.N.Y., Oct. 16, 1996). According to some experts, the effect of *Seminole Tribe* "will be limited because counties and municipalities . . . are sued for contribution most frequently." Robert V. Percival, et al., *Environmental Regulation, Law, Science and Policy* 332 (Little Brown, 2d ed. 1996). Moreover, even with respect to states, the scope of the shield depends on how a cleanup is conducted. The federal government could conduct its own cleanup, 42 U.S.C. § 9604, and bring a cost recovery action directly against a responsible state. Or, in some circumstances, the United States could bring an action to force a responsible state to conduct the cleanup, see id. § 9606, and the state may then bring cost recovery or contribution actions against other parties. In either case, the state would incur liability in ways that do not implicate the Eleventh Amendment. As discussed in note 415, states may waive their immunity in CERCLA cases by bringing a cost recovery action or responding to a claim by filing a counterclaim.

433. In a case following *Seminole Tribe*, the Ninth Circuit dismissed a Clean Water Act citizen suit against the state and against state officials with respect to retroactive relief involving payments of state funds but declined to dismiss the suit against state officials seeking prospective injunctive relief. *Natural Resources Defense Council v. California Dept. of Transportation*, 96 F.3d 420, 421-24 (9th Cir. 1996). See *Strahan v. Coxe*, 939 F. Supp. 963, 981-83 (D. Mass. 1996) (finding that the Eleventh Amendment does not bar citizen suits under the Endangered Species Act). See generally Feuer and Beckman, 5 *Envir. L. News* at 40 (cited in note 415) (discussing CERCLA private citizen suits).

434. Except for federal requirements attached to aid conditions, when federal funding itself provides the legal justification for the requirement, the unfunded status of a federal requirement appears irrelevant to its legality. Nor was the decision in *New York*, 505 U.S. at 144, premised

ism from the perspective of unfunded federal mandates counsels against any temptation to return to the impact-focus approach to regulatory challenges in *National League of Cities*, at least to the extent that it implicates evaluation of fiscal burdens.⁴³⁵ Similarly, it suggests that an impact test is also inappropriate in other contexts, such as challenges to aid conditions or federal taxes.⁴³⁶ Third, judicial use of plain statement and similar rules of statutory construction safeguards principles of federalism. If states are protected against excess national power through the national political process, plain statement rules ensure that Congress in fact considers potential impacts on state and local governments and announces its decision on the matter clearly. In this sense, plain statement rules are more consistent theoretically with the view that states are protected by the national political process than with the view that states are entitled to judicial protection as well. Finally, evaluation of legal issues involving federalism in the context of unfunded federal mandates underscores the overlooked role of the Sixteenth Amendment in supporting federal spending and regulatory policy as well as taxation. Because it allows the collection of income taxes "without apportionment among the several States," the Sixteenth Amendment, read together with the Spending Clause, authorizes the federal government to redistribute income among the states to meet federal policy objectives. At a minimum, the Amendment justifies the use of the spending power to promote federal policy without regard to proportionate distribution among states. More broadly, however, the Amendment also rebuts the idea that Congress must offset the burdens of any given federal regulation through federal dollars.

In conclusion, there appear to be few viable legal avenues to challenge unfunded federal mandates. Under *New York*, a federal

on the fiscal burdens imposed on the state by the mandate, as was true in *NLCs*. Thus, those lower courts which used unfunded federal mandates as a basis to invalidate the Brady Bill were wrong in reasoning if not in result.

435. As explained above, Justice Rehnquist advocated use of a similar impact test in the context of the Spending Clause. *Dole*, 483 U.S. at 211. Due to the split decision in *New York (Tax)*, 326 U.S. at 572, a degree of burden analysis remains a potential basis to invalidate elements of federal tax policy.

436. Legal challenges to federal spending, tax, or regulatory policies usually focus narrowly on individual programs as defined by the challenging plaintiff. Often, it is difficult or impossible to weigh the fiscal impact of a given federal policy on a single jurisdiction, and the impact may vary considerably among jurisdictions. Moreover, assessing the fiscal impacts of discrete federal actions ignores the complex relationship between a wide range of related or unrelated federal decisions, some of which may burden and others of which may benefit state and local governments. This provides support for the proposition that such issues are best left to the national political process. Unlike courts in individual cases, Congress can evaluate the combined effects of federal tax, spending, and regulatory decisions.

statute is vulnerable only when it commandeers the state's regulatory process. This leaves most forms of unfunded federal mandates, including aid conditions, direct orders, and full and partial preemptions, legally permissible so long as they are properly grounded in a valid source of congressional power. Indeed, federal courts may be barred from hearing claims based on statutory liability mandates because of the Eleventh Amendment or related principles of sovereign immunity. However, neither principle bars suits brought by the United States or another state or suits against state officials acting in violation of federal law.

VI. NORMATIVE OPPOSITION TO UNFUNDED FEDERAL MANDATES

Even if unfunded federal mandates are constitutionally sanctioned and even if they do not impose substantial fiscal burdens on states and cities, important policy questions remain about which government *should* decide what types and amounts of public goods, services, and regulations are required and by which government these requirements are funded.⁴³⁷ In fact, those who remain convinced that unfunded federal mandates burden state and local finances object to mandates on public policy as well as fiscal grounds.⁴³⁸ While such arguments are best directed to the political branches rather than the courts, they are equally deserving of serious analysis.

437. Robert D. Reischauer, testifying before the Senate Committee on Governmental Affairs, stated:

The issue of who pays for federal mandates is a serious one and goes to the heart of our system of government. When the federal government identifies problems and mandates solutions that affect different localities in different ways, which taxpayers should bear the burden of the costs? Or which level of government should cut funding for other programs in order to pay for such costs?

... On a philosophical level, a key question is whether the federal government ought to automatically be responsible for the costs of remedial actions it mandates, regardless of who caused the problem and who is responsible for the affected activities. Reischauer Testimony at 8-9 (cited in note 54).

438. See generally *State of America's Cities* at 1-2, 7-9, 23-24 (cited in note 40) (identifying unfunded federal mandates as a worsening problem despite generally improved city fiscal health); Fix and Kenyon, *Introduction*, in Fix and Kenyon, eds., *Coping with Mandates* at 5-6 (cited in note 11) (discussing the growth of unfunded federal mandates in the 1980s); *Federal Mandate Relief* at 17 (cited in note 34) (arguing that unfunded federal mandates reduce efficiency and obscure congressional accountability); *Towns Report* at 2 (cited in note 44) (listing the concerns of state and local officials concerning unfunded federal mandates); *Federally Induced Costs* at 4 (cited in note 17) (discussing the problems associated with unfunded federal mandates).

Some policy challenges to unfunded federal mandates can be dismissed as substantive opposition to individual programs⁴³⁹ rather than structural opposition to the use of unfunded federal mandates as vehicles to implement those programs. Other critics admit that most federal mandates address legitimate problems, but argue that the use of unfunded federal mandates, as opposed to other legal and policy tools, results in inappropriate solutions.⁴⁴⁰ These policy arguments include the two related political issues of autonomy and accountability and the two related economic and ethical issues of efficiency and equity.⁴⁴¹

A. Political Autonomy and Accountability

State and local autonomy is central to federalism⁴⁴² and serves two fundamental values.⁴⁴³ First, "[a] system of local govern-

439. Fix, *Observations*, in Fix and Kenyon, eds., *Coping with Mandates* at 34 (cited in note 158) (noting that legitimate questions of federalism have been "distorted to serve the regulation-bashing objectives of many who had grown impatient with a rise in the size and power of the federal government"); Tryens, *Unfunded Mandates* at 2, 7-8 (cited in note 12) (finding the misuse of the issue by groups opposed to particular governmental activity); James P. Lester, *A New Federalism? Environmental Policy in the States*, in Norman J. Vig and Michael E. Kraft, eds., *Environmental Policy in the 1990s* 59, 60-61 (Congressional Quarterly, 1990) (comparing proponents of increased flexibility in federal environmental regulation with critics who charged that the real goal was to eliminate programs altogether). See also Choper, 86 *Yale L. J.* at 1578-79 (cited in note 10) (citing examples of legal challenges by private individuals based on federalism that did not necessarily reflect opposition by the state itself). Some argue that the issue of federalism in general has been used throughout U.S. history, by Supreme Court Justices as well as others, as a subterfuge to oppose substantive policies. See Shapiro, *Federalism* at 7-8, 30 (cited in note 1) (discussing scholars who urged that federalism arguments should not be taken seriously); Dana, 69 *S. Cal. L. Rev.* at 3 (cited in note 4) (concluding that many "ostensible attacks" on unfunded federal regulation are actually "attacks on the broad reach of government regulation" and on the decline of "substantive limitations on federal authority"); Rubin and Feeley, 42 *UCLA L. Rev.* at 948, 950 (cited in note 10) (suggesting that claims of federalism are mere strategies to advance substantive positions).

440. See Federal Regulation at iii (cited in note 11) ("Many of the new requirements addressed longstanding social problems. Most also enjoyed broad support from the general public and from state and local officials. As the number of requirements proliferated, however, questions began to be raised about the appropriateness, costs, complexity, effectiveness, and efficiency of intergovernmental relations.").

441. See generally Fix and Kenyon, *Introduction*, in Fix and Kenyon, eds., *Coping with Mandates* at 5-6 (cited in note 11) (grouping concerns into issues of intergovernmental resource distribution, responsibility and authority, and program effectiveness); Towns Report at 2 (cited in note 44) (noting that typical concerns involve cost, local flexibility and priorities, and validity of federal regulations); Federally Induced Costs at 2 (cited in note 17) (stating that nonfiscal concerns include "legitimacy, accountability and political representation"); Kelly, *State Mandates* at 11 (cited in note 3) (noting that mandates raise issues of "responsibility, accountability, and autonomy").

442. See generally Peterson, *The Price of Federalism* at 18-25 (cited in note 8) (discussing the ability of state and local governments to successfully create and implement the nation's physical and social infrastructure).

ment . . . gives citizens some choice in the level and type of basic governmental services they are to have."⁴⁴⁴ Citizen choice is enhanced through exit rights: the right to move if a citizen disagrees with state or local policies.⁴⁴⁵ Second, autonomy serves as a check to protect individual liberties against abuse of power by a strong national government.⁴⁴⁶

443. Obviously, the values of federalism can be categorized in other ways. See, for example, Caminker, 95 Colum. L. Rev. at 1060 n.232 (cited in note 68) (classifying the following as the values of federalism: greater political liberty from tyrannical regimes, greater rates of personal participation in self-government, and greater local tailoring and aggregate diversity of policies throughout the nation); Rubin and Feeley, 41 UCLA L. Rev. at 906-07 (cited in note 10) (discussing the themes which support federalism).

444. Peterson, *The Price of Federalism* at 19 (cited in note 8). See Shapiro, *Federalism* at 91-106 (cited in note 1) (discussing the argument that decentralization of government would bring government closer to the people); Kaden, 79 Colum. L. Rev. at 852-54 (cited in note 4) (finding a primary value of the federal form to be the potential for public participation in government to its maximum extent); Merritt, 88 Colum. L. Rev. at 10 (cited in note 9) (noting that state and local governments increase the opportunities for citizens to participate in the democratic process); Caminker, 95 Colum. L. Rev. at 1078 (cited in note 68) (noting that scholars often claim that state and local governments can best meet the needs of their residents); Michael McConnell, *Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987) (discussing the advantages of decentralized decision making). But see Rubin and Feeley, 41 UCLA L. Rev. at 917-22 (cited in note 10) (arguing that federalism does not promote adequate variability to support the choice hypothesis).

445. See Shapiro, *Federalism* at 78, 96 (cited in note 1) (finding competition among states, combined with the right of exit, to be at the heart of the argument in support of federalism); McConnell, 54 U. Chi. L. Rev. at 1498-99 (cited in note 444) (finding that smaller units of government will compete with each other to attract additional taxpayers to move into their community). Exit rights are related to the constitutionally guaranteed right to travel and to enjoy the legal benefits of a new jurisdiction. See *Dunn v. Blumstein*, 405 U.S. 330, 336-340 (1972) (invalidating a durational residency requirement for voters based on the protected right to travel); Shapiro, 394 U.S. at 627 (invalidating a one-year residency requirement for welfare benefits based on the right to travel and equal protection, notwithstanding state fiscal impacts); *Nevada v. Crandall*, 73 U.S. (6 Wall.) 35, 49 (1867) (invalidating a tax on persons leaving the state by common carrier). Autonomy coupled with exit rights breeds innovation and interjurisdictional competition, but also creates disparities between levels of service provided to different citizens, linking autonomy with the related issues of economic efficiency and equity. See notes 499-538 and accompanying text. Thus, while the types and levels of government services provided in each jurisdiction reflect the preferences of the majority of its citizens, individuals may seek their own preferences in another jurisdiction where priorities better match their own. This system is impaired to some degree whenever uniform requirements are imposed at the national level.

446. See Shapiro, *Federalism* at 76 n.74, 95-99 (cited in note 1) (arguing that federalism does, in some ways, protect individual rights and liberties); Amar, 96 Yale L. J. at 1428 (cited in note 2) (arguing that competition among the federal government and states can "protect popular sovereignty"); Merritt, 88 Colum. L. Rev. at 10 (cited in note 9) (finding that a dual system of government is one of the principal values of federalism).

1. The Choice Value of Autonomy

a. State and Local Fiscal Priorities

In the context of unfunded federal mandates, the choice value of autonomy is impaired to the extent that states and cities must raise funds to address national priorities, reducing their ability to meet state and locally-defined needs.⁴⁴⁷ As noted in the Price Waterhouse city survey, "having to pay for unfunded federal mandates means that local revenues are not available for other programs and services that may be needed."⁴⁴⁸

It is difficult to assess the validity of these claims. Every local dollar spent to comply with a federal mandate no longer is available to meet other priorities. However, if the value of federal aid to states and localities exceeds the costs of unfunded federal mandates, as suggested in Part IV, those mandates might have little or no real impact on state and local priorities, depending on the amounts and types of expenditures imposed on a jurisdiction. Federal mandates restrict local priorities only to the extent that they impose costs beyond those the city would have spent anyway on the subject program.

447. See Towns Report at 2 (cited in note 44) (noting that as states and cities were faced with budget constraints in the 1980s, their ability to "absorb mandate costs" declined); Federally Induced Costs at 4, 12, 15-16 (cited in note 17) (discussing the distortion of state and local budget priorities, noting combined impacts of federal mandates and state spending limits); Steinzor, 81 Minn. L. Rev. at 175-77 (cited in note 4) (discussing the arguments of local officials that cities should have autonomy to ignore federal mandates altogether "depending on the budgetary exigencies of their individual communities"). Even Alexander Hamilton accepted "the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants." *Federalist No. 32 (Hamilton)*, in Rensselaer, ed., *The Federalist Papers* 197-98 (cited in note 103). Former New York Mayor Ed Koch complained that mandates impair local autonomy as well as fiscal health: "Throughout its history, this nation has encouraged local independence and diversity. We cannot allow the powerful diversity of spirit that is a basic characteristic of our federal system to be crushed under the grim conformity that will be the most enduring legacy of the mandate millstone." Koch, 61 Pub. Interest at 57 (cited in note 11). Professor Caminker, who rejects virtually every aspect of the anti-commandeering rationale of *New York*, 505 U.S. at 144, writes that "externality-induced state program reductions mean that local policies are less responsive to the needs and preferences of particular communities" and that this creates the "only realistic threat to federalism values . . . posed by a regime of commandeering authority." Caminker, 95 Colum. L. Rev. at 1080-81 (cited in note 68).

448. Price Waterhouse City Report at 1-15 (cited in note 42). The survey gave city officials an "open-ended" opportunity to identify programs and services that were reduced or foregone to pay for federal mandates, to which officials responded with a profusion of unmet needs. *Id.* The programs and services identified, with the numbers of respondents in parentheses, included infrastructure (135 cities), police and fire services (76), water and sewer services (70), streets (63), community services (56), parks (55), waste services (28), and maintenance (31). *Id.* The claims made by individual cities are identified in Appendix C of the report.

Similarly, if a federal mandate dictates how, as opposed to whether, a service is provided, local fiscal priorities are displaced only to the extent that federal methods cost more than local methods.⁴⁴⁹ As noted above, Price Waterhouse measured total rather than incremental costs and did not distinguish between procedural and substantive mandates.⁴⁵⁰

Some light was shed on this subject by the early research of Lovell and Tobin, who found that most federal and state mandates were procedural ("how to") rather than substantive ("what to do").⁴⁵¹ Somewhat inconsistently, this research also found that nearly half of all mandates introduced new activities, which are more likely to displace local priorities.⁴⁵² However, the study also showed that half or more of all mandated programs would be continued even if the mandate were withdrawn, because the "values behind some of the mandates apparently have become internalized and organization structures, support systems, and budget lines have been developed around the mandated activities."⁴⁵³ These data suggest competing conclusions. A mandate may become a local priority because local constituents or officials agree that the program is beneficial. But if costs continue merely because bureaucracies perpetuate themselves, unwanted mandate costs may persist even after the formal mandate lapses.

Similarly, the degree to which intergovernmental policies displace local priorities depends on the amount and types of aid received by a jurisdiction. If direct federal spending meets needs that otherwise would be met at the state and local level, other state or local funds are freed to meet local priorities. Partial federal funding of direct order mandates reduces but does not eliminate the degree to which the mandate displaces local priorities. By contrast, when a state or city chooses to participate in a voluntary federal program, by definition it decides that the program constitutes a state or local priority.⁴⁵⁴ The degree of accompanying autonomy, however, depends

449. Of course, procedural mandates impair local autonomy to the extent that they force methods of implementation that are disfavored by the local electorate.

450. See notes 216-25 and accompanying text.

451. Lovell and Tobin, 41 *Pub. Admin. Rev.* at 320 (cited in note 11) (noting that nearly 84% of federal and 90% of state mandates were procedural rather than substantive).

452. *Id.* at 323 (finding that new programs were introduced in 42% of cases).

453. *Id.* (noting that nearly 62% of vertical mandates and 50% of horizontal mandates would be continued even if the mandate was withdrawn).

454. It is less clear whether the same is true for voluntary participation in a cooperative or partial preemption program, because the state or city may participate either because it agrees

on the funding vehicle. Some federal aid, such as the deductibility of state and local taxes, comes with few if any strings attached. Other forms of aid, such as block grants or tax-exempt bonds, can be used to meet priorities that are at least partially defined at the local level, although some restrictions apply even to these relatively flexible forms of aid. Categorical grants, though, are more restricted to federally defined methods or priorities.⁴⁵⁵ Thus, it is extremely difficult empirically to assess the degree to which state and local priorities are displaced by the net impact of federal mandates considered—as they should be—in conjunction with other intergovernmental fiscal policies.

b. Political Accountability

Even assuming that such impacts are real, however, it is equally important to ask whether they are necessarily inappropriate. Because the real economic effect of federal, state, and local policies is felt by individual citizens and taxpayers, this issue best is expressed as one of political accountability or the extent to which policies reflect the will of the public.⁴⁵⁶ Unrestricted use of the Spending Clause similarly has been assailed on political accountability grounds analogous to those used to challenge direct orders.⁴⁵⁷

Federal mandates are neither enacted by autocratic national fiat nor passed without input from state and local governments. Under a structural protection view of federalism, states are represented and protected in the national government through elected members of both houses⁴⁵⁸ and through election of the President by the

the program is important or because it wants to minimize the degree of federal intrusion on state or local autonomy.

455. See note 23.

456. See Dana, 69 S. Cal. L. Rev. at 10 (cited in note 4) (arguing that the absence of political accountability is "at the core of the critique of unfunded mandates"); Kaden, 79 Colum. L. Rev. at 853 (cited in note 4) (finding that public participation in government is "critical to any viable notion of accountability"); La Pierre, 80 Nw. L. Rev. at 645-46 (cited in note 10) (discussing how political accountability forces Congress to act responsibly); Caminker, 95 Colum. L. Rev. at 1020 (cited in note 68) (noting that concerns of political accountability motivated the Supreme Court's anti-commandeering rule).

457. See Baker, 95 Colum. L. Rev. at 1933-35 (cited in note 78) (discussing issues of accountability under the spending power given to Congress).

458. It is argued that the degree to which states are represented in Congress was diminished by the Seventeenth Amendment. See, for example, Kaden, 79 Colum. L. Rev. at 858 (cited in note 4) (discussing the effects, or lack thereof, of popular election of Senators upon state autonomy); Merritt, 88 Colum. L. Rev. at 16 n.90 (cited in note 9) (noting that many scholars suggest that any link between Congress and state politics has declined substantially in recent decades); McConnell, 51 U. Chi. L. Rev. at 1488 (cited in note 444) (noting that the Seventeenth Amendment contributed to the erosion of state and local political autonomy). However, Senators, like Representatives, are elected entirely by the citizens of individual states and presumably

Electoral College.⁴⁵⁹ Moreover, state and local governments maintain a substantial lobbying force at the national level.⁴⁶⁰ Federal mandates are passed because they are supported by a majority of the national electorate and in many cases state and local officials.⁴⁶¹ Thus, they meet the test of political accountability.⁴⁶²

It is frequently argued, however, that state and local governments are more democratic because they are more accessible to local citizens and better represent local needs.⁴⁶³ Spending priorities determined locally are more likely to reflect direct citizen participation and local needs and preferences than those established in

reflect the views and preferences of that subset of the national electorate. Moreover, the Seventeenth Amendment was adopted because many states, and the public at large, believed that direct election was more democratic than selection by state legislatures. See generally Anastaplo, *The Amendments to the Constitution* at 188-91 (cited in note 16) (describing the American preference to allow citizens to decide how the federal government should use its power).

459. See *Federalist No. 17 (Hamilton)*, in Rossiter, ed., *The Federalist Papers* at 119 (cited in note 10) (arguing that the states are protected from encroachments on their power made by the federal government).

460. Major intergovernmental organizations that maintain professional lobbying staffs in Washington, D.C., include the National Governor's Association, the National Conference of State Legislatures, the U.S. Conference of Mayors, the National League of Cities, and the National Association of Counties. These omnibus groups are supported by an army of more specialized lobbying forces. In the environmental field alone, for example, there are the Association of State and Interstate Water Pollution Control Agencies, the Association of State and Territorial Air Pollution Control Agencies, the Association of State Waste Management Organizations, and the Association of Metropolitan Sewerage Agencies. See also Dana, 69 S. Cal. L. Rev. at 23-25 (cited in note 4) (citing the effectiveness of state and local lobbyists in weakening environmental requirements); Anastaplo, *The Amendments to the Constitution* at 193 (cited in note 16) (finding that the states are most effective in Congress).

461. For example, the legislative history of the Clean Air Act reflects strong support for uniform national standards from states and localities to prevent the use of disparate standards to attract business and jobs. H.R. Rep. No. 91-294, 91st Cong., 2d Sess. 134, 194-95 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1212, 1273-74. Of course, the statute invalidated in *New York* was enacted not only with the support, but at the behest, of the National Governor's Association. See *New York*, 505 U.S. at 188 (White, J., concurring in part and dissenting in part) (discussing the National Governor's Association meeting on policy proposals regarding radioactive waste management).

462. Federal Regulation at iii (cited in note 11) (noting that many federal requirements addressed longstanding social problems and enjoyed broad support from the public and from state and local officials).

463. See Shapiro, *Federalism* at 91-92 (cited in note 1) (examining the argument that a decentralized political structure brings government closer to its citizens, more fully realizing democratic ideals); Kaden, 79 Colum. L. Rev. at 853-54 (cited in note 4) (finding that smaller units of government provide more public participation); McConnell, 54 U. Chi. L. Rev. at 1493, 1509 (cited in note 444) (finding that decentralized decision making better reflects the preferences and interests of a community). The danger that national representatives would be "too little acquainted with all their local circumstances" was acknowledged in *Federalist No. 10 (Madison)*, in Clinton Rossiter, ed., *The Federalist Papers* 83 (Mentor, 1961), and *Federalist No. 17 (Hamilton)*, in Clinton Rossiter, ed., *The Federalist Papers* at 120 (cited in note 10).

Washington, D.C. Based on historically lower levels of voter participation in local as opposed to national elections,⁴⁶⁴ it is not clear that this is true. Moreover, it is not altogether clear why elected members of Congress are any less valid "representatives" of state and local interests than governors or mayors.⁴⁶⁵ Nevertheless, the thrust of the argument is that state and local officials better represent local needs because they are "closer" to the people they represent.⁴⁶⁶

This supposed lack of political accountability is a particular concern in the context of unfunded federal mandates. It is one thing for a national legislature to enact requirements that reflect the will of the national electorate if the resulting costs are borne by the national taxpayer. To take credit for addressing a national need, Congress also must be held accountable for raising taxes. According to the ACIR:

Intergovernmental mandat[es] interfere with th[e] chain of democratic accountability by breaking key linkages between policy adoption and implementation. Officials responsible for setting policy objectives are freed from the responsibility for financing their decisions. This can distort public choices about government services and taxes and create confusion and intergovernmental conflict.⁴⁶⁷

464. Pat Dunham, *Electoral Behavior in the United States* 48, 205 (Prentice-Hall, 1991). Dunham has noted the irony of lower voter turnout in elections of officials "who have the most direct impact on our daily lives." *Id.* at 48. See William H. Flanagan and Nancy H. Zingale, *Political Behavior of the American Electorate* 12-13 (Congressional Quarterly, 7th ed. 1991) (observing a higher voting turnout in presidential elections than congressional elections); David B. Hill and Norman R. Luttbeg, *Trends in American Electoral Behavior* 86-88 (F.E. Peacock, 2d ed. 1980) (discussing the psychology behind voter turnout and noting that the increased saliency of the national government to most people accounts for the higher voter turnout in national elections). See also Rubin and Feeley, 41 *UCLA L. Rev.* at 915-16 n.54 (cited in note 10) (noting low voter turnout in local elections and suggesting other means to increase local participation).

465. Choper, 86 *Yale L. J.* at 1563, 1565-67 (cited in note 10).

466. See Caminker, 95 *Colum. L. Rev.* at 1077-78 (cited in note 68) (noting that state and local governments allow greater public involvement in the political process than does the federal government).

467. Federally Induced Costs at 17 (cited in note 17). See also Federal Mandate Relief at 11, 17 (cited in note 34) (observing that unfunded mandates obscure congressional accountability and reduce efficiency because the "pleasure of spending tax dollars is divorced from the pain of raising those dollars"); Dana, 69 *S. Cal. L. Rev.* at 3 (cited in note 4) (stating that issues of political accountability arise when unfunded mandates are utilized); Lovell and Tobin, 41 *Pub. Admin. Rev.* at 326 (cited in note 11) (noting that traditional notions of accountability are not applicable in the face of pervasive mandates); Whitman and Bezdek, *Pub. Budgeting and Finance* at 52 (cited in note 130) (discussing the effect of unfunded federal mandates upon the political accountability of both state and federal officials); Caminker, 95 *Colum. L. Rev.* at 1061-62 (cited in note 68) (discussing reasons that voters may blame state officials for the content of federal policies that Congress imposes through mandates); Merritt, 88 *Colum. L. Rev.* at 62 (cited in note 9) (finding that citizens will hold local officials responsible for congressional mandates). But see Zelinsky, 46 *Vand. L. Rev.* at 1370 (cited in note 4) (finding unfunded mandates to be an issue of hidden taxation rather than accountability).

A similar notion of political accountability underlies *New York v. United States*, although with respect to a narrower category of federal actions. In cases of preemption, Justice O'Connor wrote:

[I]t 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.⁴⁶⁸

For purposes of the debate over unfunded mandates, Justice Scalia took this argument one step further in *Printz* by tying accountability more directly to the absence of federal funding.⁴⁶⁹

The most straightforward response to the political accountability argument⁴⁷⁰ is that, by delegating constitutional authority in some areas to a duly elected and hence representative Congress, the people

468. *New York*, 505 U.S. at 168-69. See Kaden, 79 Colum. L. Rev. at 857 (cited in note 4) ("To the extent accountability is diminished by reason of the electorate's lack of knowledge or understanding of the lines of authority, the value or effectiveness of participation is necessarily reduced, and the protection of political liberty is necessarily jeopardized."); La Pierre, 80 Nw. L. Rev. at 657-62 (cited in note 10) (distinguishing commandeering from general applicability or accountability grounds).

469. In response to the Government's attempt to distinguish *New York* on grounds that the Brady Bill did not pose the same accountability problems as the statute in *New York*, Justice Scalia wrote:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the claim for its burdensomeness and for its defects. Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.

Printz, 65 U.S.L.W. at 4740 (citing Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1580 n.65 (1994)).

470. In addition to the policy considerations suggested below, a public choice theory justification for unfunded federal environmental mandates has been presented by Professor Dana. Dana, 69 S. Cal. L. Rev. at 1 (cited in note 4). Professor Dana counters Professor Zehinsky's public choice theory indictment of unfunded federal mandates. *Id.*; Zehinsky, 46 Vand. L. Rev. at 1369 (cited in note 4). See Caminker, 95 Colum. L. Rev. at 1085 n.320 (cited in note 68) (challenging Professor Zehinsky's public choice theory). Public choice theory cannot currently address the full range of variables that affect legislative behavior, and variables affecting legislation cannot be tested well empirically. See Kaden, 79 Colum. L. Rev. at 858 (cited in note 4) (noting the various factors affecting legislation). I attempt to address a wider range of policy arguments relevant to mandate validity.

decided that the national government legitimately can be responsible for particular legislative policy decisions.⁴⁷¹ Nothing in the text or history of the Constitution suggests that funding in these areas is a prerequisite of accountability. In *New York*, however, the Supreme Court invalidated the take-title provision of the LLRWPA despite the fact that Congress has plenary power to regulate low-level nuclear waste under the Commerce Clause. The provision was stricken because the means chosen to regulate in an otherwise permissible area of federal authority lacked, in Justice O'Connor's view, adequate political accountability.⁴⁷² In upholding certain portions of the LLRWPA as simple exercises of federal preemption, Justice O'Connor was not faced with—and did not address—whether similar issues of accountability arise where the federal government has the power to act in a field but regulates states or localities directly without providing federal funds for compliance.

Several possible conclusions could be reached about the applicability of Justice O'Connor's accountability argument to unfunded federal mandates. If unfunded mandates raise similar issues of accountability as commandeering state regulatory power, they might be viewed as equally unconstitutional. Alternatively, Justice O'Connor could have erred in using extra-textual grounds to invalidate an otherwise valid exercise of constitutional power.⁴⁷³ Otherwise, unfunded federal mandates must be distinguished from commandeering with respect to the issue of accountability.

The accountability argument assumes an uninformed electorate which is not able to discern the source of a mandate.⁴⁷⁴ One corollary assumption is that only the government that raises taxes is held accountable for a requirement, even though the mandate was imposed from above; a second is that good public information about the source

471. See Caminker, 95 Colum. L. Rev. at 1022-28 (cited in note 68) (affirming the legitimacy of federal law within individual states).

472. See note 468 and accompanying text.

473. See generally Caminker, 95 Colum. L. Rev. at 1022-28 (cited in note 68) (discussing the anti-commandeering principle). Moreover, Justice O'Connor may not have fully recognized competing issues of political accountability. See notes 468-71 and accompanying text. See also *Printz*, 65 U.S.L.W. at 4744 (Stevens, J., dissenting) ("There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I.").

474. Caminker, 95 Colum. L. Rev. at 1061-68 (cited in note 68). Professor Caminker argues convincingly that the case for misplaced blame may be incorrect and, in any event, is irrelevant because there are many ways in which the electorate is uninformed or misinformed. Such imperfections in public understanding do not constitute constitutional flaws. *Id.* at 1061-63.

of a mandate⁴⁷⁵ is not adequate to solve the accountability problem. A properly informed electorate can express approval or disapproval to the level of government responsible for imposing the costs⁴⁷⁶ or vote them out of office in favor of those who would adopt different policies.⁴⁷⁷

This argument probably works best with respect to individual mandates that are the subject of targeted opposition from local officials. The case against unfunded federal mandates, however, rests upon aggregate costs from a large number of individual mandates. Faced with a rising local tax bill that cannot be tied to a single federal mandate, local citizens are likely to target their blame on state and local, as opposed to federal, elected officials in spite of the skill with which these local officials shift the blame back to Washington. Moreover, a similar argument could be made with respect to commandeering. The public could be informed that a regulation implemented by state and local officials derived from Congress, and they would be free to object to their senators and representatives.⁴⁷⁸

A more compelling distinction is that competing issues of accountability suggest that unfunded federal mandates are not only legitimate, but in many cases necessary. Moreover, in a number of important respects the relief sought by anti-mandate advocates would create the opposite problem by eliminating the accountability of state and local officials for their decisions.

First, many federal mandates are enacted to enforce a legitimate obligation on state and local officials. In such cases, there is no reason why the federal government should pay for individual jurisdic-

475. See *id.* at 1063-64 (discussing the incentives of affected private and public parties to inform voters of the true source of unpalatable mandates). For example, public water companies who must raise their rates to meet federal Safe Drinking Water Act requirements can place a notice in the bill informing customers why water bills are rising.

476. See Stanton, *One Nation Indivisible* at 19 (cited in note 12) (stating that "American taxpayers ultimately pay the costs [of meeting federal requirements], and they have shown the ability to direct all levels of government to reduce spending when such costs prove unacceptable"). Of course, the electorate can reach sound conclusions about the validity of a mandate only if it is properly informed about the mandate's benefits as well as its costs.

477. The dramatic realignment of Congress in 1994 could be seen as the electorate's reaction against perceived excesses by the federal government and, hence, an example of political accountability. Indeed, the enactment of UMRA itself by this new Congress can be viewed as evidence of the structural protection model of federalism at work. *Printz*, 65 U.S.L.W. at 4749 (Stevens, J., dissenting) (noting that UMRA's "passage demonstrates that unelected judges are better off leaving the protection of federalism to the political process in all but the most extraordinary circumstances").

478. Thus, this argument could be used to refute the political accountability rationale of *New York* as well as its potential applicability to unfunded federal mandates.

tions to meet their legal obligations. This is clearest with respect to legislation adopted to enforce constitutional principles.⁴⁷⁹ If the federal government must pay states and cities to comply with constitutional requirements, those jurisdictions would avoid accountability to their citizens to meet their most fundamental legal obligations.⁴⁸⁰

Similar arguments can be made with respect to federal mandates designed to address issues other than constitutional rights, particularly when private parties are held equally accountable. For example, most federal environmental statutes adopt the principle that a polluter should pay the costs of preventing or controlling its own pollution. And while all jurisdictions provide basic services such as water supply and waste disposal, federal statutes impose requirements to ensure that all citizens receive certain minimum levels of protection. Exempting state and local governments from compliance with these laws absent federal funding would shift accountability for meeting those basic requirements from the states and cities to the national government. Jurisdictions that do the best job of meeting their public obligations would be penalized, and those who do the least rewarded, by a rule that the incremental costs of minimum federal requirements must be funded at the national level.⁴⁸¹ Criticism of the shift from the pure federal aid approach to the more coercive regulatory approach ignores the fact that federal statutory mandates were enacted, with the approval of the national public, because of the inadequacy of the earlier approach.⁴⁸²

Proposed solutions to the issue of unfunded federal mandates include increases in federal aid and increased flexibility in the use of federal aid through block grants and other less restricted funding vehicles.⁴⁸³ The call for more federal dollars with fewer requirements and restrictions, however, suggests opposite but equally disturbing problems of accountability. States and cities complain that by enacting unfunded federal mandates, Congress takes credit for solving national problems and sends the bills downward. However, states and

479. The political accountability argument is not relevant to direct constitutional mandates.

480. Whitman and Bezdek, Pub. Budgeting and Finance at 55 (cited in note 130).

481. Indeed, accountability to the local electorate would produce the opposite effects. Local citizens would urge their officials to avoid spending local dollars in the hope that programs would be funded federally.

482. For example, enactment of the Clean Water Act in 1972 was preceded by two decades in which the federal water pollution role was largely to provide grants for state and local pollution controls. The modern regulatory approach was adopted because Congress found the old approach to be "inadequate in every vital aspect," leading to a severe nationwide water pollution crisis. See Adler, Landman, and Cameron, *The Clean Water Act* at 5-8 (cited in note 143) (discussing the background of the Clean Water Act).

483. See notes 31-34, 45-49 and accompanying text.

cities are net beneficiaries of intergovernmental transfers.⁴⁸⁴ For every dollar of federal aid in excess of the costs imposed by federal mandates, Congress is held accountable for raising taxes and creating a deficit, while state and local public officials take credit for solving local problems with federal dollars.⁴⁸⁵

While block grants provide more flexibility in the implementation of cooperative programs, they have been criticized as imposing too little accountability for the proper use of federal funds.⁴⁸⁶ State and local officials are saved from the politically unpopular task of raising taxes,⁴⁸⁷ but may use federal dollars to meet locally defined priorities—a mirror image of the accountability problem posed by unfunded federal mandates.⁴⁸⁸ Completely unrestricted federal aid, as with general revenue sharing, leaves both Congress and recipients with virtually no accountability for the proper use of those funds.⁴⁸⁹

Moreover, ironically, the use of block grants and other less restricted forms of funding decreases the accountability of the national government as well. Congress can throw money at a problem but leave the details of implementation—and potential blame for program failure—to lower levels of government.⁴⁹⁰ While Congress is held accountable for raising taxes, it relieves itself of responsibility for how those funds are spent.

484. See notes 235-37 and accompanying text.

485. This model is somewhat less true, of course, in the case of pork barrel politics, where Senators and Representatives make sure that they receive appropriate credit for winning targeted funding for local projects.

486. Peterson, *The Price of Federalism* at 33, 60, 63 (cited in note 8) (concluding that categorical grants are better at ensuring that federal funds are not misdirected and discussing problems with block grants). See generally Block Grants at 4-7, 10-17 (cited in note 23) (discussing the need for accountability provisions in federal block grant programs).

487. Peterson, *The Price of Federalism* at 60 (cited in note 8) (observing that block grants “were a local politician’s dream—‘free’ money to be spent on whatever legal purpose one wanted without having to tax the local voters”).

488. *Id.* at 63 (“Why . . . should the federal taxpayer give unrestricted money to local governments? Would not local officials be more accountable to their own citizens and taxpayers if they were not so dependent on federal assistance?”).

489. See Block Grants at 16-17 (cited in note 23) (noting the problems that arose in the federal general revenue sharing program). For example, while states and cities criticize recent restrictions on the use of tax-exempt bond authority, Tax-exempt Financing at 10-18 (cited in note 102), those restrictions were passed to prevent the use of federally subsidized public bonds to finance projects with predominantly private benefits, that is, to impose accountability on the use of federal bond subsidies. Rymarowicz and Zimmerman, *Federal Budget and Tax Policy* at 17-24 (cited in note 29).

490. Peterson, *The Price of Federalism* at xi (cited in note 8) (stating, with respect to welfare block grants, that “[p]oliticians in Washington can avoid blame for the welfare mess by handing over to lower tiers of government the obligation to clean it up”).

Political accountability is a legitimate concern in assessing the propriety of unfunded federal mandates. The issue, however, cuts two ways. While the accountability of Congress is reduced when it imposes requirements that must be funded at the state and local level, often those mandates are imposed to ensure that states and cities, like private entities, are held accountable for their actions and responsibilities. Moreover, opposite issues of accountability are raised given that states and cities are net beneficiaries in intergovernmental relations. Congress is held accountable for raising federal taxes, while state and local elected officials benefit politically from the use of federal dollars. Block grants, tax-exempt bonds, and similarly flexible means of federal funding pose particularly troublesome issues of accountability, because it is difficult to ensure that those funds are spent for appropriate purposes.

2. The Liberty Value of Autonomy

State autonomy can protect individual liberty against abuse of power by a strong national government.⁴⁹¹ Professor Shapiro cites numerous cases in which states successfully resisted national efforts to curtail individual rights.⁴⁹² The relevance of this value to the debate over unfunded federal mandates is somewhat less clear, especially in the context of mandates imposed on states and cities rather than individuals. Presumably, however, the national government will be somewhat less inclined to enact measures that infringe on individual rights if the resulting bill must be paid from the federal treasury.

The liberty value of federalism, however, must be balanced against the value of uniformity as a check against the abuse of state power. One reason for establishing a strong national government was "its tendency to break and control the violence of faction."⁴⁹³ National

491. Shapiro, *Federalism* at 51 (cited in note 1); Amar, 96 Yale L. J. at 1428, 1500-09 (cited in note 2); Kaden, 79 Colum. L. Rev. at 855-57 (cited in note 4); Merritt, 88 Colum. L. Rev. at 10, 18 (cited in note 9); McConnell, 54 U. Chi. L. Rev. at 1500-07 (cited in note 444).

492. See Shapiro, *Federalism* at 76 n.74, 95-99 (cited in note 1) (citing the role of states in opposing the Alien and Sedition Acts and the Fugitive Slave Laws and as early champions of individual rights). See also *id.* at 56 n.155 (listing situations in which state courts and legislatures have provided broader protection to individual rights than has been provided by the Constitution); Amar, 96 Yale L. J. at 1500-09 (cited in note 2) (providing examples of state remedies against federal infringement upon individual rights).

493. *Federalist No. 10 (Madison)*, in Rossiter, ed., *The Federalist Papers* at 77 (cited in note 463). Madison explained that by extending the sphere of the national government, a greater variety of parties and interests can be taken into account, making it less probable that a majority will have a common motive to invade the rights of other citizens. *Id.* at 80-81. If such a common motive exists, extending the sphere of the national government will make it more difficult for all who feel the common motive to act in unison upon the motive. *Id.* See *Federalist No. 85*

power to defend individual rights was strengthened in the Civil War amendments with express grants of congressional enforcement power.⁴⁹⁴ As such, the national government probably has been more successful in protecting citizens against state abuse than vice versa.⁴⁹⁵

Political accountability is also not an issue as it is irrelevant in the context of legally protected individual rights. Constitutional protections and freedoms are of value primarily because they protect the liberties of a minority from the prejudices and abuses of a hostile majority. When the federal government intervenes, judicially or legislatively, to protect individual rights against state or local abuse, the federal action often will be unpopular with the majority in the target jurisdiction.⁴⁹⁶ By definition, federal intervention will likely violate principles of political accountability at the local level while meeting the test of accountability nationally. This, however, is the very justification for federal action to protect individual rights.

In addition, national uniformity has been lauded as a "moral and practical force" in areas such as minimum national requirements for education.⁴⁹⁷ When used to promote extraconstitutional values, however, national uniformity cannot be justified based on legal rights. While it may be argued, for example, that all U.S. citizens have an equal moral right to clean air or clean water, no such "rights" have

(Hamilton), in Clinton Rossiter, ed., *The Federalist Papers* 521 (Mentor, 1961) ("The additional securities to republican government, to liberty, and to property . . . consist chiefly in the restraints which the preservation of the Union will impose on local factions and insurrections . . . [among others].").

494. Anastaplo, *The Amendments to the Constitution* at 169 (cited in note 16); Shapiro, *Federalism* at 28, 50-56 (cited in note 1).

495. While citing cases in which states guarded against federal abuses of individual rights, Professor Shapiro concludes that "these instances may, in total, fall short in both quantity and quality when compared with the converse cases in which national power has been used to sustain individual rights against the assertion of state power." Shapiro, *Federalism* at 99 (cited in note 1). National power has also been used to protect constitutional rights in areas that go beyond racial discrimination. See *id.* at 56 ("[T]he historical record, viewed in its entirety, fails to support the existence of state autonomy as a critical means of protecting against abuse of governmental power. On the contrary, national power has had to be continually invoked in order to protect our freedoms against state infringement."); McConnell, 54 U. Chi. L. Rev. at 1501 (cited in note 444) (finding that the federal government, rather than state governments, is the primary protector of individual liberties); Peterson, *The Price of Federalism* at 9 (cited in note 8) (noting the increased importance of the federal government). Examples in which the federal government has led the way in protecting individual rights include criminal procedure, free speech, and the Establishment and Free Exercise Clauses of the First Amendment. Shapiro, *Federalism* at 55 (cited in note 1).

496. See, for example, *Brown v. Board of Educ.*, 347 U.S. 483, 483 (1954) (making a decision which was politically unpopular in many parts of the country).

497. Shapiro, *Federalism* at 138 (cited in note 1). The same argument could be made for other issues such as environmental quality.

been recognized judicially.⁴⁹⁸ Moreover, it can be argued with equal force that state and local autonomy is needed so that citizens have some choice about the appropriate level and nature of various governmental services. Thus, in areas other than constitutional rights, uniformity must be justified on other grounds.

B. *Economic Efficiency and Equity*

A separate but related structural criticism is that because Congress does not have to pay for unfunded federal mandates, it is not subject to market constraints. This, in turn, leads to inefficient, ineffective, and inappropriate solutions to social and economic problems. Mandate opponents argue that because Congress is not forced to face compliance costs directly, it does not select the most cost-effective solutions, it does not ensure that costs are justified in relation to benefits, and it does not necessarily select solutions that are appropriate to individual jurisdictions with diverse needs and problems but instead adopts "one-size-fits-all" programs.⁴⁹⁹

Economic efficiency approaches to regulatory policy, however, can be criticized on various grounds. For example, cost-benefit analysis is of dubious utility when compliance costs are readily quantified but program benefits are intangible and difficult to put in monetary terms.⁵⁰⁰ For purposes of this analysis, however, it may be conceded that the absence of market constraints on congressional decisions presents a legitimate structural concern.

Of course, the same efficiency arguments also apply to governmental mandates imposed on private parties, who usually bear the full costs of regulatory compliance. If unfunded mandates produce inefficient results for the affected public sector, the same is true for the private sector.⁵⁰¹ Thus, the efficiency argument proves too much to

498. See William H. Rodgers, *Environmental Law* 62-67 (West, 2d ed. 1994) (discussing judicial rejection of various theories of constitutionally derived rights to a clean environment).

499. See Federally Induced Costs at 16 (cited in note 17) (noting that Congress often imposes "unduly expensive requirements on jurisdictions" when a simpler or more efficient solution could be implemented); Federal Mandate Relief at 4-9, 17, 24 (cited in note 34) (observing that Congress has little incentive to tailor programs adequately to accomplish goals); Lovell and Tobin, 41 Pub. Admin. Rev. at 326 (cited in note 11) (discussing the standardization versus particularization issue in mandates); Whitman and Bezdek, Pub. Budgeting and Finance at 53 (Spring 1989) (cited in note 130) (discussing the tailoring of grand programs); Steinzor, 81 Minn. L. Rev. at 174-75 (cited in note 4) (arguing that Congress should only impose those requirements on state and local governments that allow for flexibility).

500. See Percival, et al., *Environmental Regulation* at 562-67 (cited in note 432) (discussing problems that arise in a cost-benefit analysis when intangible benefits are involved).

501. While UMRA includes no procedural barriers to the enactment of unfunded federal mandates imposed on private parties as it does for public sector parties, the Act does require the

the extent that it indicts all regulations along with unfunded intergovernmental mandates.⁵⁰² Intergovernmental mandates are distinguishable, however, because they dictate the extent to which public funds are spent on public goods and services. Thus, it is fair to ask whether public funds are spent efficiently when the level of government that decides to impose the costs is not required to pay the bill.

A related efficiency argument is that autonomy breeds interjurisdictional competition and innovation, which is suppressed by the imposition of uniform national requirements. Interjurisdictional competition is valuable to induce states and cities to improve programs and services to maximize economic and social welfare.⁵⁰³ Autonomy is valuable because it allows states or cities to try a variety of approaches. Diverse approaches may be desirable if different solutions are appropriate to places with distinct needs and conditions. If an experiment fails, the consequences are reduced if it is limited to one jurisdiction.

This position is misplaced, however, as an argument against federal legislative activity.⁵⁰⁴ When federal judges invalidate state social and economic experiments on grounds other than federal preemption, they leave a void in which no solutions are sought to a par-

CBO to estimate the costs and benefits of private as well as public compliance. 2 U.S.C. § 658b(c)(1).

502. Opposition to unfunded federal mandates was packaged along with broader attacks on federal regulatory policy as applied to both the public and the private sectors. See Tryens, *Unfunded Mandates* at 2 (cited in note 12) (discussing opposition to unfunded mandates). In the Contract with America promoted by Republicans during the 1994 congressional election, unfunded mandates were included along with other regulatory reforms as part of the proposed "Job Creation and Wage Enhancement Act." H.R. 9, 10th Cong., 1st Sess. (January 8, 1995).

503. Shapiro, *Federalism* at 35-38, 78 (cited in note 1); McConnell, 54 U. Chi. L. Rev. at 1498 (cited in note 444). Again, because citizens and businesses have exit rights, they fuel competition to the extent that they can move in search of their preferred mix of governmental policies and services. For a similar argument in the context of the spending power, see Baker, 95 Colum. L. Rev. at 1947-54 (cited in note 78) (discussing the negative effects of reduced competition among states due to mandates, including increased aggregate social welfare costs). But see Rubin and Feeley, 41 UCLA L. Rev. at 923-26 (cited in note 10) (arguing that experimentation in identifying preferred means of achieving a shared goal is better promoted by decentralization than by true federalism).

504. See, for example, Derthick, *The Brookings Review* at 35 (cited in note 11) (arguing that states assist Congress by enacting novel solutions to certain issues and by handling many familiar problems Congress "chooses to ignore"); *Federally Induced Costs* at 16 (cited in note 17) (arguing that uniform national standards and procedures erode "the ability of state and local governments to experiment and test varying programs under different circumstances"); Lopez, 115 S. Ct. at 1641 (Kennedy, J., concurring) (citing *New York State Ice Co. v. Liebmann*, 285 U.S. 262, 262 (1932), and arguing that federalism allows state experimentation); *Chandler v. Florida*, 449 U.S. 560, 579-80 (1981) (invoking *New York State Ice Co.*, 285 U.S. at 262, to uphold state experimentation with televised trials against federal judicial intervention).

ticular problem. Justice Brandeis⁵⁰⁵ believed that it was not appropriate for federal judges to usurp state as well as federal legislative decisions on social and economic policy.⁵⁰⁶ It is far different to argue, however, that the national legislature cannot decide, as a matter of policy, that a uniform national program is preferable to disparate state solutions. In fact, one of the justifications for innovation is that individual jurisdictions, through experimentation, may discover innovative and effective solutions which then may be adopted nationally.⁵⁰⁷ While uniformity must be balanced against the value of state innovation and competition, this policy choice is appropriately made by the national legislature rather than the judiciary.

The value of innovation and competition, moreover, must be balanced against competing issues of efficiency and equity. Intra-jurisdictional decisions are efficient only to the extent that they address the full costs of state and local actions and policies. Public goods and services are likely to be supplied only to the extent that they serve the local electorate and not where they benefit citizens across state or local borders.⁵⁰⁸ Where activities result in external

505. In his famous dissent in *New York State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting), opposing federal judicial action to invalidate state activity under notions of substantive due process, Justice Brandeis wrote:

There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . To staid experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

This position is cited out of context, however, as an argument against federal legislative activity.

506. Compare *id.* at 271 (Sutherland, J., majority opinion); *id.* at 280 (Brandeis, Stone, JJ., dissenting); *Butler*, 297 U.S. at 53 (Roberts, J., majority opinion); *id.* at 78 (Stone, Brandeis, Cardozo, JJ., dissenting); with *Davis*, 301 U.S. at 634 (Cardozo, J., majority opinion); *id.* at 646 (McReynolds, Butler, JJ., dissenting); *Darby*, 312 U.S. at 100.

507. See Shapiro, *Federalism* at 77, 85-88 (cited in note 1) (citing workers' compensation, public education, welfare reform, health care, tax systems, penology, and environmental protection as areas in which state programs later were adopted nationally); Derthick, *The Brookings Review* at 34-35 (cited in note 11) (proclaiming state experiments as models for subsequent national action); Lester, *A New Federalism?*, in Vig and Kraft, eds., *Environmental Policy in the 1990s* at 59, 62 (cited in note 439) (concluding that state environmental programs should serve as models for national action).

508. Shapiro, *Federalism* at 131 (cited in note 1). Indeed, spillover effects and disparities in existing state solutions probably explain strong state and local support for uniform national environmental laws in the 1970s.

costs to other jurisdictions,⁵⁰⁹ adequate state or local action is unlikely and federal intervention is appropriate.⁵¹⁰

Similarly, as a proposed solution to unfunded federal mandates, requiring the federal government to subsidize or fully reimburse state and local compliance costs itself can produce inefficient results. When compliance with federal mandates is subsidized from a national taxbase, taxpayers in the recipient governments may reap most or all of the benefits, but pay only a small fraction of the costs. Thus, they have little incentive to minimize costs and to implement the most efficient solutions.⁵¹¹

One proposed solution to this dilemma is to identify an optimal cost-sharing arrangement whereby intrajurisdictional and national taxpayers pay the appropriate, efficient percentage of any given program. A somewhat crude variation on this theme is that public goods should be provided by the government that can tax all program beneficiaries.⁵¹² However, "pure" public goods that benefit all national taxpayers equally, such as reducing the likelihood of nuclear war, are extremely rare.⁵¹³ A more refined proposal is to tie the appropriate level of intergovernmental funding to the percentage of non-local benefit.⁵¹⁴ Alternatively, federal regulation could be limited to the extent necessary to address externalities.⁵¹⁵

509. A good example is interjurisdictional pollution, where internal control costs may primarily benefit external citizens. *Id.* at 83. See Rymarowicz and Zimmerman, *Federal Budget and Tax Policy* at 2 (cited in note 29) (discussing these external costs).

510. Shapiro, *Federalism* at 83-84 (cited in note 1); McConnell, 54 U. Chi. L. Rev. at 1495 (cited in note 444); Steinzor, 81 Minn. L. Rev. at 167-68 (cited in note 4). But see Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2341, 2349-60 (1996) (agreeing with the validity of the externality rationale but arguing that existing regulatory approaches are not effective).

511. See McConnell, 54 U. Chi. L. Rev. at 1496 (cited in note 444) (discussing the inefficiency of centralized capital spending). One notorious example is the federal sewage treatment grant programs, which have been criticized for encouraging "perverse incentives for overinvestment." Kenneth I. Rubin, *Managing Community Wastewater in the 1990s: What is Needed to Attain National Water Quality Goals and Why*, in Martin Reuss, ed., *Water Administration in the United States: Policy, Practice and Emerging Issues* 231, 238 (Michigan State U. 1993). In fact, some argue that this overinvestment partially offsets the water quality gains attained through better sewage treatment by stimulating suburban growth and increased stormwater runoff pollution. Richard G. Cohn-Lee and Diane M. Cameron, *Urban Stormwater Runoff Contamination of the Chesapeake Bay: Sources and Mitigation*, 14 *Envir. Prof.* 10, 10-11 (1992).

512. Shapiro, *Federalism* at 82 (cited in note 1).

513. *Id.*

514. See Peterson, *The Price of Federalism* at 23 (cited in note 8) (proposing that, under such a functional theory, "the amount of [the] national grant should exactly match the amount of benefit enjoyed by non-local residents"); Whitman and Bezdek, *Pub. Budgeting & Finance* at 51 (cited in note 130) (discussing a proposal to tie intergovernmental funding to the percentage of local benefit). Many federal water resource development programs were based on this theory.

The goal of optimal funding and regulation by different levels of government, however, is elusive and objectionable in some applications. The degree of local versus national benefit to be obtained by a given program may be very hard to measure or predict and often involves subjective judgments.⁵¹⁶ While an optimum federal-state-local cost split may reflect sound economic theory, in practice the principle would have to be applied to tens of thousands of jurisdictions implementing hundreds of separate federal programs. Moreover, while cost-sharing may be fair for programs that provide benefits, such as dams that provide water and power for local and interjurisdictional uses, it is not appropriate in situations such as cross-border pollution where activities in one jurisdiction cause both internal and external effects.

In contrast, some suggest that inefficiencies and intergovernmental tension have been created by too much cooperative federalism between federal and state governments.⁵¹⁷ These commentators advocate a move back to distinct separate spheres of authority for the federal and state governments. Paul Peterson, for example, argues that the federal government acts most efficiently and appropriately in the area of redistributive policy, where market constraints pose a barrier to good policy, while state and local governments act more efficiently in the area of developmental policy, where market constraints provide healthy incentives for efficient public spending and regulatory policy.⁵¹⁸ The ACIR proposes that federal action be limited to clearly negative interjurisdictional externalities, federal treaty obli-

See Adler, 25 *Envir. L.* at 1028 (cited in note 83) (stating that an early federal flood control act introduced the concept "that state and local beneficiaries should pay a fair share of project costs tied to the value of benefits received").

515. Whitman and Bezdek, *Pub. Budgeting & Finance* at 53 (cited in note 130).

516. Rymarowicz and Zimmerman, *Federal Budget and Tax Policy* at 2 (cited in note 29); Whitman and Bezdek, *Pub. Budgeting & Finance* at 52 (cited in note 130).

517. As discussed in Part II, intergovernmental relations in the United States evolved from the idea of dual sovereignty or "layer cake" federalism in which each level of government acted within its own sphere, with little interference from above or below, to one of "marble cake" or cooperative federalism in which states implement federal policies through acceptance of federal aid, or later, through compliance with federal regulations. See Peterson, *The Price of Federalism* at 55 (cited in note 8) (discussing "layer cake" and "marble cake" federalism).

518. *Id.* at 17-19, 25-29, 35-37. Developmental policy involves the provision of physical and social infrastructure to facilitate economic growth and prosperity; redistributive policy addresses disparities between income and other benefits and amenities. *Id.* at 17. Alice Rivlin agrees that while the federal government should act in areas such as social security, health care, and other social programs, it should withdraw from developmental programs such as job training, road improvements, and other public works programs. *Id.* at 176 (citing Alice M. Rivlin, *Reviving the American Dream: the Economy, the States, and the Federal Government* (The Brookings Institution, 1992)). Some refer to this philosophy as the "new (new) federalism." Steinzor, 81 *Minn. L. Rev.* at 124-29 (cited in note 4).

gations, uniform policy goals not attainable through purely state action, necessary redistributive policies, and clear state and local failures to protect basic rights.⁵¹⁹

The theory that more separation should be sought between areas of federal and state policy is most sound where there is a clear distinction between developmental and redistributive policies. However, this distinction is artificial in many ways. Road construction could be viewed as an issue of purely local developmental policy, but decisions about interstate highways affect national modes of transportation and commerce and a wide range of related issues of national policy.⁵²⁰ Even decisions about local highways can affect issues of national concern, such as regional or interstate air pollution.⁵²¹ Job training programs are developmental when they promote local employment, but federal job training serves redistributive goals where some states can afford better programs than others.⁵²²

Moreover, federal withdrawal from many areas of policy could raise serious equity concerns. Absent national standards, citizens of different states and cities receive disproportionate levels of public services and protections.⁵²³ If constitutional or other legal rights are not affected, such differences may reflect legitimate differences in choice.⁵²⁴ For several reasons, however, interjurisdictional differences may produce inequitable results. Some jurisdictions may have no choice but to sacrifice important public goals for reasons of economic compulsion. There is a strong moral argument⁵²⁵ that citizens of poor cities and states should not enjoy fewer public benefits, such as educa-

519. Federal Mandate Relief at 23 (cited in note 34). For five suggested "sorting principles" to allocate authority for environmental programs between the federal and state governments, see Steinzor, 81 Minn. L. Rev. at 166-77 (cited in note 4).

520. A national network of highways facilitates national as opposed to purely local commerce. Moreover, the choice between alternative modes of transportation, such as highways versus railroads, can affect broader issues of national commercial, social, and environmental policy.

521. See 42 U.S.C. § 7506 (1994) (linking federal aid, including highway grants, to compliance with transportation planning and air quality requirements); *Browner*, 80 F.3d at 880-82 (upholding Clean Air Act highway sanctions against a Tenth Amendment challenge).

522. Moreover, decisions about the focus of job training programs can affect national as well as local economies.

523. Peterson, *The Price of Federalism* at 22 (cited in note 8); Steinzor, 81 Minn. L. Rev. at 171-74 (cited in note 4).

524. For example, some jurisdictions might prefer higher taxes and more services, while others prefer lower taxes and fewer services. Some jurisdictions might prefer lower environmental quality in order to attract more industry and hence more jobs, while others place a higher value on the environment relative to economic growth.

525. Shapiro, *Federalism* at 138 (cited in note 1).

tion, health programs, and environmental protection, than those in wealthier states.

Redistributive rather than regulatory programs may be a more efficient means for the federal government to solve these problems.⁵²⁶ Purely redistributive approaches fail, however, when the impacts of weaker standards and services fall disproportionately on the poorest, politically least powerful citizens within the jurisdiction.⁵²⁷ Even in areas other than civil rights, uniform national standards can provide important protection for individuals with little political power within a jurisdiction.

In fact, interjurisdictional competition itself may cause some jurisdictions to sacrifice less tangible benefits, such as public health, safety, and welfare, in favor of the tangible benefits of economic growth.⁵²⁸ Again, the legitimacy of this strategy turns in part on the degree to which the benefits and burdens of a policy are shared equally or disproportionately within the jurisdiction. As intrajurisdictional disparities increase, the moral and legal case for federal intervention improves. While some dispute the reality of this "race to the bottom" phenomenon,⁵²⁹ there is considerable support for the existence

526. Peterson, *The Price of Federalism* at 22 (cited in note 8).

527. For example, those who can afford to send their children to private schools, and who exert disproportionate political influence, may prefer to pay lower taxes at the expense of the public education system. *Id.* (discussing the possible effect of choices made by politically influential citizens). Similarly, the benefits and environmental impacts of new industrial growth may be distributed disproportionately among the population, resulting in unfair decisions made in the name of economic efficiency. See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787, 792-806 (1993) (discussing the potential for disparity between the distribution of the benefits of environmental regulation and the related burdens).

528. In *Davis*, 301 U.S. at 644, Justice Cardozo stated:

Apart from the failure of resources, states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors. A system of old age pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all.

See McConnell, 54 U. Chi. L. Rev. at 1499-1500 (cited in note 444) (noting the existence of both "races to the bottom" and "races to the top").

529. See, for example, Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210, 1211-13, 1233-44 (1992) (challenging validity of "race-to-the-bottom" arguments and emphasizing competition between states); Steinzor, 81 Minn. L. Rev. at 177-78 (cited in note 4) (noting that "race-to-the-bottom" arguments are based merely on threats of future behavior derived from perception and not derived from empirical evidence). But see Kristen H. Engel, *State Environmental Standard-Setting: Is There a Race and is it "To the Bottom"?*, 48 Hastings L. J. 271, 374-76 (1997) (concluding, based on an empirical study, that states do engage in "race-to-the-bottom" behavior in the environmental area).

of service and protection disparities in areas such as welfare⁵³⁰ and environmental protection.⁵³¹

The value of national uniformity justifies substantive mandates to a greater degree than procedural mandates. National performance standards can equilibrate levels of public rights, goods, and services without demanding inflexible, arguably inefficient implementation strategies. Thus, many policy analysts suggest the use of more outcome-oriented as opposed to output-oriented⁵³² federal programs.⁵³³ There may be serious problems, however, with the efficacy of performance standards without compulsory compliance requirements.⁵³⁴ Moreover, for some issues it may be difficult to define meaningful national performance standards.⁵³⁵

530. Out of fear that better welfare benefits will attract more poor residents, the history of welfare reform shows a steady race to the hottom. Peterson, *The Price of Federalism* at 108-115 (cited in note 8). The implications of the recent federal welfare reform legislation, however, are beyond the scope of this Article.

531. Researchers have documented severe differences in levels of expenditures and the degree of protection afforded by different states in the area of environmental quality. See, for example, Lester, *A New Federalism?*, in Vig and Kraft, eds., *Environmental Policy in the 1990s* at 63-70 (cited in note 439) (discussing the disparities among states in environmental funding and quality); National Association of Public Administration, *Setting Priorities, Getting Results: a New Direction for EPA 72-74* (1995) (noting the different levels of expenditures and environmental protection among various states).

532. For example, an outcome-oriented environmental program might require that certain end performance standards be met in all states, see 42 U.S.C. § 7409 (1994) (requiring the EPA to establish national ambient air quality standards), while an output-oriented program would require that prescribed implementation strategies be used. See *id.* §§ 7661 et seq. (requiring states to implement air quality permit programs).

533. With respect to environmental programs in particular, see National Association of Public Administration, *Setting Priorities* at 71-77 (cited in note 531) (discussing environmental program performance standards); Lester, *A New Federalism?*, in Vig and Kraft, eds., *Environmental Policy in the 1990s* at 75-76 (cited in note 439). See also U.S. General Accounting Office, *Managing for Results, Achieving GPRA's Objectives Requires Strong Congressional Role 1* (U.S. G.P.O., 1996) (discussing the Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993) ("GPRA"), codified as amended at scattered sections of 39 U.S.C. (1994 & Supp. I), which requires federal agencies to "set strategic goals, measure performance, and report to the President and Congress on the degree to which goals are met").

534. For example, water quality improvements have been achieved through the use of uniform minimum national control requirements that apply automatically to all dischargers. See Adler, Landman, and Cameron, *The Clean Water Act* at 14-16 (cited in note 143) (describing pollution reduction achieved through minimum national requirements, but noting that there remain needed improvements). By contrast, related programs designed to achieve ambient (in-stream) water quality standards through flexible state implementation strategies have been far less successful. *Id.* at 126-27, 158-64.

535. For example, it may be appropriate to make a national judgment about the level of air pollution at which human health is adversely affected. By contrast, it may not be appropriate to establish minimum national educational test score requirements when different populations vary greatly in predictive indicators, for example, based on the percentage of the population for which English is a second language.

The private sector also may receive inequitable treatment as a result of efforts to prevent unfunded federal mandates. If federal mandates apply to private but not to competing public parties, or if mandates are federally subsidized for public but not private parties, public activities enjoy a competitive advantage,⁵³⁶ especially when public and private entities compete directly.⁵³⁷ In addition, in some areas, the efficiency of the private economy is better served by uniform national standards as opposed to fifty or more separate regulatory targets.⁵³⁸

C. Conclusion: A Neutral Approach to Federal Mandates and the Flawed Policy of UMRA

Opponents of unfunded federal mandates raise legitimate issues of autonomy, accountability, economic efficiency, and equity. However, unfunded federal mandates can be justified on the basis of equally compelling normative grounds. This balance of policy interests refutes categorical arguments against the structural validity of all unfunded federal mandates. Rather, it suggests a neutral approach under which the wisdom of individual mandates should be weighed through the normal political process.

To this end, procedural rules and protections, such as the judicially created plain statement doctrine, legitimately seek to ensure that Congress considers intergovernmental impacts before it adopts intergovernmental mandates. At the same time, however, such procedural rules are consistent with the notion that the ultimate policy wisdom of specific mandates should be left to the political rather than the judicial branch of government.

Congress's effort to impose its own procedural protections through UMRA pursues similar goals but suffers from many of the same problems that render substantive judicial intervention inappropriate. Congress envisioned in UMRA that decisions on individual legislation should be based on bill-specific fiscal statements prepared

536. Whitman and Bezdek, Pub. Budgeting & Finance at 53 (cited in note 130); Dana, 69 S. Cal. L. Rev. at 35 (cited in note 4).

537. For example, public and private entities compete in areas such as waste disposal, water supply, and education. Disparate regulatory requirements may favor public over private enterprises, resulting in less efficient or more costly provision of services to the consuming public. See Steinzor, 81 Minn. L. Rev. at 133 (cited in note 4) (noting opposition to UMRA by private companies who compete with the public sector to provide environmental services).

538. See generally Dana, 69 S. Cal. L. Rev. at 31 (cited in note 4) (observing that regulated private industries prefer that "state and local governments bear the costs of implementing and complying with federal standards").

by the CBO. As acknowledged by CBO experts, however, the accuracy of pre-implementation cost estimates is open to serious question. While it is difficult to quarrel with the notion that public spending and regulatory decisions should be based on better information, sound public policy decisions may be impaired rather than promoted if the best available information is inaccurate or misleading.

Moreover, just as judges are not able to assess the effects of individual federal programs outside the context of overall intergovernmental policy, legislative policy decisions will suffer if they are based on a narrow focus on the direct fiscal costs of individual bills. As with cost-benefit analyses, such assessments cannot focus well on the offsetting value of proposed legislation, particularly when benefits are difficult or impossible to express in monetary terms. More importantly, if Congress is tempted to focus narrowly on the costs of an individual bill, it risks loss of its broader institutional perspective from which the overall effects of combined federal tax, spending, and regulatory policy are viewed in balance.

Finally, the point of order procedure in UMRA suffers from the inappropriate assumption that unfunded federal mandates are categorically bad from a policy perspective. Proponents of a bill must overcome this presumption through a majority vote before the merits of legislation can even be debated. A return to a neutral approach to unfunded federal mandates in which the wisdom and validity of the mandate are addressed in concert with the substantive debate on the bill would better serve a sound legislative process.

VII. CONCLUSION

The argument that unfunded federal mandates impose an undue fiscal burden on states and cities lacks credible empirical support. Most mandate impact studies rely on inappropriately broad definitions and suffer from serious methodological flaws, which suggest that the resulting impact estimates are overstated. Even if current estimates are accepted, when the estimates are viewed in the context of overall intergovernmental relations, states and cities remain net fiscal beneficiaries of federal policy.

Legal opposition to unfunded federal mandates is similarly flawed. Federal mandates are valid if they stem from legitimate sources of constitutional authority, irrespective of either the degree to which they are accompanied by federal aid or the resulting fiscal

impact on states or localities. If federal mandates lack such authority or if they use impermissible means of exercising that authority, they cannot be saved with federal funding.

Unfunded federal mandates do pose legitimate normative issues of autonomy, accountability, efficiency, and equity. Mandates, however, can also be supported on equally valid competing grounds. This balance of interests refutes the notion that unfunded federal mandates are presumptively bad and suggests a neutral approach to assessing their validity in individual cases. Therefore, Congress should reconsider its adoption of procedural barriers in UMRA, which inappropriately skews the legislative debate in opposition to the use of unfunded federal mandates.

The unfunded federal mandate terminology contributes little to serious legal, fiscal, or political discourse on issues of federalism. The idea presents intractable problems of definition that render it an uncertain if not misleading tool for legal and policy analysis. It is extremely difficult to ascertain which federal policies qualify as "mandates" as opposed to voluntarily assumed exercises of cooperative federalism; which costs result from federal versus state, local, or other dictates; and which costs are unfunded, especially given the complex nature of intergovernmental fiscal and other relations. Moreover, the fiscal impacts of individual federal mandates cannot properly be assessed in isolation from overall federal tax, spending, and regulatory policy. This problem poses even more difficult issues of accounting and analysis.

All of these conclusions support the notion that issues of federalism are best left to the national political process. Given the complex interrelationship of federal tax, spending, and regulatory policies, it is impossible for federal courts, bound by the narrow constraints of party-defined litigation, to assess the fiscal burdens of individual federal programs in the proper context. These issues are viewed more appropriately by elected federal officials in the course of the national political process. The fact that states and cities remain net fiscal beneficiaries of intergovernmental programs suggests that lower levels of government do receive adequate protection and representation in this manner.