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## The Unfunded Mandates Reform Act of 1995: Where Will the New Federalism Take Environmental Policy

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# ESSAY

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## The Unfunded Mandates Reform Act of 1995: Where will the New Federalism Take Environmental Policy?

As the 104th Congress continues its march across the landscape of American regulatory law, the struggle for outsiders (practitioners, academics, citizens) to keep pace with its actions seems to be a losing one. With hindsight, the Contract with America deserved more attention than the typical "agenda" issued during the heat of an election (President Clinton was actually criticized by political pundits for drawing as much attention to it as he did during the November elections) and the neglectful observer must now trot to understand the new order.

One of the first items of the new leadership was S. 1, the "Unfunded Mandates Reform Act of 1995." Pub. L. 104-4, 109 Stat. 48. The legislation was introduced on January 4, 1995, and signed into law by President Clinton on March 22, 1995. It enjoyed overwhelming bipartisan support and the President endorsed it in his State of the Union speech. Relatively little opposition surfaced during the brief period of its consideration.

As a common sense proposition, the core of the legislation proved to be very appealing: if the federal government directs states (and local governments and tribes) to undertake tasks, it should pay for them. Nonetheless, this single proposition will, by itself, radically restructure the federal-state relationship in the area of environmental regulation. The ultimate effect will presumably be fewer federal requirements, with states and tribes left to determine for themselves whether or not to regulate activities. Other components of the Act are also significant in their intended effect on environmental regulation.

Cities appear to have provided the primary impetus for the legislation, because of the costs imposed on them as operators of

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regulated facilities. (One coalition supporting the legislation consisted of the powerful combination of members of the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the League of Cities and the U.S. Conference of Mayors. *Env't. Rep.(BNA) No.25 at 1877 (Feb., 1995)*). There is some irony here, because cities were among the supporters of many of the major environmental laws in the 1970s. When these statutes were passed, industries were viewed as the likely targets to bear the costs, with cities the beneficiaries of cleaner air and water. As it happened, cities have also become regulatory targets, paying these costs because of their operation of wastewater treatment facilities, public water supply systems and landfills, and because of their responsibilities in meeting air quality standards and in complying with other costly regulatory mandates. While Congress might not have responded as promptly to the complaints of regulated industries, municipal governments were better situated to plead the case of over-regulation.

Columbus, Ohio, became the symbol of a city suffering under environmental compliance burdens. In the debate on the Senate Floor, Senator Glenn relied upon a study performed by the city,

[T]he city concluded that its cost of compliance for environmental statutes would rise from \$62.1 million in 1991 to \$107.4 million in 1995. That is—in 1995 constant dollars—a 73 percent increase. The city estimates that its share of the total city budget going to pay for the mandates will increase from 10.6 percent to 18.3 percent over that time frame. 141 *Cong.Rec. S3879 (daily ed. March 14, 1995)*

The response to these and like complaints was the Unfunded Mandates Act, in which Congress has expressed its intent to identify and pay for newly imposed mandates (above an identified threshold amount) imposed on cities, states and tribal governments, or, alternatively, not impose the new mandates. It also demonstrated its concern about mandates imposed on private entities.

Title I, Legislative Responsibility and Reform, is directed at Congress's consideration of proposed legislation that contains 'federal mandates'. "Federal mandates" are defined as including mandates imposed on both governmental units and the private sector. § 421(6). A "Federal intergovernmental mandate" is a legislative provision that 'would impose an enforceable duty upon State, local, or tribal governments', subject to some exceptions. § 421(5). "Federal private sector mandate" is defined as a provision that 'would impose an enforceable duty upon the private sector'. § 421(7) Bills or resolutions that include federal mandates must be accompanied by an informational report when the bills are reported by an authorizing committee. § 423(a). This report is to provide information about the effect of the legislation on the public

and private sectors and the benefits of the legislation. § 423(f). The Congressional Budget Office prepares the reports. § 424.

The core of the legislation is a restriction on Congress that requires both reporting and funding of intergovernmental mandates: it "shall not be in order in the Senate or the House of Representatives to consider" bills or joint resolutions unless the appropriate report is prepared and, in the case of "federal intergovernmental mandates," budgetary authorization (in a variety of forms) must be provided for the new costs. § 425(a). These new costs must only be covered where the total cost of the mandates in the bill exceeds \$50,000,000 annually. *Id.*

Less well publicized are the changes in agency rule making established by Title II, "Regulatory Accountability and Reform." While the Act does not affect existing legislation, this title will affect rule making under existing statutes. In general, its provisions are procedural, rather than substantive. The primary Senate sponsor, Senator Kempthorne, summarized these provisions,

"For significant rule makings, which are judicially reviewable, an agency shall provide; a written statement of the authority under which the agency is proceeding; a qualitative and quantitative assessment of the cost and benefits of the rule; estimates, to the extent it's feasible to determine it, of the future compliance costs of the mandate and any disproportionate effect on particular regions of the country or sectors of the economy; a macro economic analysis of the effect of the rule on the national economy; and, a description of the agency's contacts with State, local and tribal governments." 141 Cong. Rec. S3877 (daily ed. March 14, 1995).

The "least costly, most cost-effective or least burdensome alternative" must be selected by agencies in rule-making, unless the agency provides an explanation for its refusal to do so. § 205.

Title III of the Act is directed at existing mandates that were created by statutes and regulations. The Advisory Commission on Intergovernmental Relations is to prepare a report to Congress with its recommendation on these. The Commission is given a broad charter to review all federal mandates, with the legislation reflecting the complaints that are leveled against them by affected entities. For example, Congress directed the Commission to make recommendations regarding "suspending, on a temporary basis, Federal mandates which are not vital to public health and safety and which compound the fiscal difficulties of State, local, and tribal governments, including recommendations for triggering such suspension." § 302(a)(3)(D). It is also to investigate regulatory relief for the private sector. § 302(a)(3)(G)(ii).

Indeed, while this legislation was described in the popular media as providing relief for the governmental sector, it has important implications for the private sector as well. Industries that compete with the public sector raised the argument that they would be disadvantaged

by the legislation. For example, while county governments may be freed in subsequent legislation from additional unfunded mandates (regulations) that control their operation of landfills, a private company would not necessarily share in this relief. The company would then, by its logic, be subject to unfair competition. Congress must have been sympathetic to these concerns, because much of the legislation addresses 'federal mandates', which encompasses both 'federal intergovernmental mandates' and 'federal private sector mandates'.

To label an environmental regulation imposed on a private business an 'unfunded mandate' reveals a truly radical change in environmental policy. From the perspective of the existing principles of environmental law, the notion that a private entity should be compensated for its costs in reducing its pollution is a conceptual leap, to say the least.<sup>1</sup> Nor, it should be noted, is it one that the Congress has yet made. In this legislation the concern of Congress over the costs of environmental regulation to the private sector is evident, but the immediate force of the Act is simply information-gathering.

This legislation will reveal its meaning as Congress considers new environmental legislation (and the reauthorization of existing legislation). The Act arose in a broader context than environmental regulation and is reflective of a far reaching reordering of the federal-state relationship. By no means are the mandates in the Act limited to environmental mandates. It seems premature to assume that this legislation marks the last word for particular regulatory areas.

Congress can always decide to fund mandates that were previously borne by state and local governments. Only if it fails to do so will state and local governments be free to determine what levels of environmental regulation they wish to impose on themselves.

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1. This leap can be traced directly to the logic of the Act. If governmental units are to be exempted from pollution laws because of the costs of compliance, then private entities are not out of line to ask similar treatment. Certainly the federal government can pay governments, and even private entities, for their costs of pollution reduction. Federal funding of sewage treatment facilities helped much of the country make the switch to secondary treatment of wastewater. But, as we provide this funding, we need to be aware of the beneficial policy aspects of imposing the costs of pollution on a discharger. Pollution prevention, just a short time ago an area of agreement in environmental policy, derives much of its force from a discharger's desire to decrease its compliance costs.