The Heritage Foundation State Backgrounder

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A Policy Analysis for Decision Makers

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HOME RULE: HOW STATES ARE FIGHTING UNFUNDED FEDERAL MANDATES

When all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the center of all power, it will render powerless the checks provided of one government on another, and will become as venal and oppressive as the government from which we separated.

—Thomas Jefferson.[1]

INTRODUCTION

Throughout much of American history, especially since the New Deal, the federal government increasingly has encroached upon the fiscal and constitutional prerogatives of state and local governments. Today, this imbalance has reached a crisis point, and the states are fighting back. Through a variety of initiatives, they are demanding that federal mandates be funded and, in many cases, even are challenging the authority of the federal government to impose these mandates, whether funded or not. With the new, more state-friendly Congress, states and localities have an historic opportunity not only to effect mandate relief, but also to restore balance in state-federal relations.

At one time states and localities saw compliance with Washington's conditions as a small price to pay for federal funding of popular state-implemented programs. But now the federal share of that funding is decreasing while the mandates are becoming more numerous, complex, and expensive. Unfunded federal mandates and highly prescriptive federal programs have backed many states and localities into a fiscal corner, forcing them to sacrifice their own programs and priorities in order to comply with standards set by a distant federal government. Aurora, Colorado, for example, calculates that it will have to re-

1 Letter to Charles Hammond, August 18, 1821.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

pair some 28,000 curbs in order to comply with the 1990 Americans with Disabilities Act (ADA) at an average cost of $1,500 per curb.[2] Like many municipalities, Aurora simply cannot afford the federal mandate, and the January 1995 deadline for compliance with ADA is looming. Columbus, Ohio's famous 1991 study found that unfunded federal environmental mandates alone will cost their city $856 per household per year by the year 2000.[3] The National Association of State Budget Officers reports that Medicaid's share of state spending will grow from just over 10 percent in 1987 to 20 percent in 1995.[4] Federal Funds Information for States projects state Medicaid spending of $77 billion in 1995.[5] Ohio Governor George Voinovich complained recently of a "forced trade-off between Medicaid and education funding. In the past five years, education declined as a share of state spending...because new Medicaid mandates consume more and more state resources."[6]

Micromanagement by federal agencies imposes costs and one-size-fits-all standards that treat Lubbock like Detroit and Wyoming like New York. For instance, Anchorage, Alaska's sewage inflow was so clean that the municipality could not meet Congress's requirement that all sewage treatment facilities reduce incoming organic waste by at least 30 percent. Still, the federal Environmental Protection Agency insisted that the city meet the arbitrary standard. Anchorage's response was to arrange for two local fisheries to dump fish viscera into the river so the city could remove them.[7] Arizona legislators have complained that the Clean Air Act is too strict even for the naturally occurring dust from Arizona's deserts, let alone automobile emissions. House Majority Leader Brenda Burns commented: "The Clean Air Act's one-size-fits-all standard cannot work in Arizona. We could take every car off the road and still not be in compliance. I suppose we could pave the desert, but I don't think that would be realistic." Federal courts also micromanage the states by mandating state policies ranging from prison library collections to local tax rates to the education of illegal immigrants. Time and again, Supreme Court decisions have allowed relentless expansion of Congress's enumerated powers.

But states and localities seem to have reached their limit and are fighting back in a number of ways:

- ✔ They are publicizing the costs of unfunded federal mandates and holding their Congressmen publicly accountable for mandate votes.

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2 Andre Henderson, "The Looming Disabilities Deadline," *Governing*, December 1994, p. 22.

3 *Environmental Legislation: The Increasing Costs of Regulatory Compliance to the City of Columbus,* Report of the Environmental Law Review Committee to the Mayor and City Council of the City of Columbus, Ohio, May 1991.

4 *1993 State Expenditure Report,* National Association of State Budget Officers, March 1994, p. 3.

5 *1995 Appropriations Summary—Conference Action Grants-in-Aid: Major Discretionary and Mandatory Programs,* Federal Funds Information for States, September 30, 1994.

6 George V. Voinovich, "The Need for a New Federalism: A State-Federal Legislative Agenda for the 104th Congress," memorandum, November 1994, p. 3.

7 Thomas J. DiLorenzo, "Unfunded Federal Mandates: Environmentalism's Achilles Heel?" *Contemporary Issues Series,* No. 62, Center for the Study of American Business, December 1993, p. 2.

- ✔ They are challenging Congress's authority to impose mandates, resisting micromanagement by the federal bureaucracy, and in some instances simply refusing to comply.
- ✔ They are suing the federal government for violation of the Tenth Amendment[8] and arguing to constrict the expansive interpretation of the Commerce Clause.[9]
- ✔ They are lobbying Congress to pass mandate-relief legislation and to submit for ratification by the states a "no money, no mandate" constitutional amendment.
- ✔ They are considering collective action to challenge the federal government's most grievous intrusions on states' autonomy and to amend the Constitution to reaffirm the principles of federalism.

With increasing frequency, these state actions are carried out alongside the efforts of a growing grassroots movement dedicated to reestablishing the constitutional limitations on the federal government. The National Tenth Amendment Committee in Colorado, for example, is working with legislators, activists, and groups in over 40 states to pass resolutions asserting state sovereignty under the Tenth Amendment.[10]

Opposing unfunded federal mandates is a nonpartisan "good government" issue. Whether Republican, Independent, or Democrat, liberal, moderate, or conservative, state and local government officials tend to agree: Washington politicians should not be allowed to take credit for promoting popular causes while states foot the bill. Local officials are quick to add that the same is true of unfunded *state* mandates. As Newark Mayor Sharpe James states, "If something is important enough to require a state or federal mandate, we should have a voice in deciding how to do it. And if it's important enough to require a mandate, it should be important enough to have state or federal funding to help carry out the mandate."[11]

Prohibiting unfunded federal mandates will restrain overall government spending and regulation and will virtually require Congress to set priorities among programs. It will allow states and localities greater flexibility to devise responses suited to their own particular circumstances, enabling them once again to become "laboratories of democracy."

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8 The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people."

9 With increasing boldness and frequency throughout most of America's history, Congress has exploited expansive interpretations of the Commerce Clause to justify its intrusion into almost any area of American life, so long as some connection (often a distant one) can be made to interstate commerce.

10 The Committee of 50 States also reports having 28 state coordinators in place to promote its sweeping "Ultimatum Resolution." Describing the states as the "principals" who created the U.S. government to "act as their agent," its resolution calls for states to dissolve the U.S. government if the national debt reaches $6 trillion or if either Congress or the President attempts to abolish the Constitution or render it "ineffective, or null or void."

11 "Mandate Malarkey," *The Wall Street Journal,* July 14, 1994, p. A-10. Unfunded state mandates are a common problem in the state-local relationship as well, but some states actually have imposed on themselves the "no money, no mandate" requirement they are demanding from the federal government. Twenty-five have statutory and/or constitutional limitations on their ability to impose mandates on local governments. See Joseph F. Zimmerman, "State Mandate Relief: A Quick Look," *Intergovernmental Perspective*, Vol. 20, No. 2 (Spring 1994), p. 28.

Most important, it will make government more accountable by bringing it closer to the people. Controlling their state legislatures and town councils is far easier than controlling the immense federal bureaucracy.

COUNTING THE COST

One of the most difficult challenges for states in fighting unfunded federal mandates has been the complexity involved in calculating the costs. The very definition of an "unfunded mandate" is ambiguous. Technically speaking, strings-attached programs, or grants-in-aid, such as Medicaid are not mandates. Theoretically, the state can refuse federal funding and decline to participate in the program. In reality, grants-in-aid are offers the states find it difficult to refuse. To deal with this problem of definition, the Advisory Commission on Intergovernmental Relations (ACIR) has coined the phrase "federally induced costs," a useful umbrella that encompasses all unfunded costs the federal government imposes on states and localities.[12] Generally, when state and local officials complain about unfunded federal mandates, they are thinking of this broader concept.

Even with the problem of definition clarified, the task of calculating the costs of federal mandates is daunting. Hundreds of jurisdictions and agencies can be affected by a single mandate. These entities usually do not have the capacity to monitor the costs. And even if they did, another office would have to assemble the data from all the agencies involved in order to calculate the total. Still, these costs need to be counted, and state and local governments have an interest in making that happen.

Cost Studies

Fortunately, some jurisdictions and research organizations have begun to calculate and publicize the costs of mandates. Among Washington-based state and local government associations, for example, the U.S. Conference of Mayors recently reported that the Clean Water Act alone cost cities with populations greater than 30,000 more than $3.6 billion in 1993. From 1994 through 1998, the ten studied mandates will cost cities $54 billion: the Clean Water Act alone will cost $29.3 billion; the Safe Drinking Water Act, $8.6 billion; and the Resource Conservation and Recovery Act, $5.5 billion.[13] The 1993 survey performed by Price Waterhouse for the National Association of Counties estimated that "counties are spending $4.8 billion annually to comply with just twelve of the many unfunded mandates in federal programs" and that they will spend close to $33.7 billion over the next five years.[14] The National Conference of State Legislatures' regularly updated *Hall of States Mandate Monitor* tracks Congress's unfunded mandates and mandate-relief legislation.

In 1993, the governments of Tennessee and Ohio issued federal mandate cost studies—the first such studies to be focused on individual states. The Ohio report found that unfunded mandates would cost the state $356 million in 1994 and over $1.74 billion from

12 *Federally Induced Costs Affecting State and Local Governments*, U.S. Advisory Commission on Intergovernmental Relations, June 1994.

13 *Impact of Unfunded Federal Mandates on U.S. Cities*, U.S. Conference of Mayors, October 26, 1993.

14 Price Waterhouse, *The Burden of Unfunded Federal Mandates*, National Association of Counties, October 26, 1993.

1992-1995.[15] Tennessee found that the annual costs of federal mandates imposed between FY 1986-1987 and the end of 1992 would grow from $12 million the first year to $195 million in 1994-1995 and $242 million in 2001-2002.[16] In 1994, Texas reported that its federally induced costs rose from $6.5 billion in the 1990-1991 biennium to $8.9 billion in the 1992-1993 biennium, and $11.4 billion in the 1994-1995 biennium.[17] Among state-based research institutes studying mandate costs are the Wisconsin Policy Research Institute[18] and the Barry Goldwater Institute for Public Policy Research in Arizona.

Cost figures such as these demonstrate the major impact unfunded federal mandates have on state and local budgets. Union County, North Carolina, cleverly shows the effects of mandates on its budget by itemizing the costs of unfunded state and federal mandates in its tax bills. Moreover, by providing reliable mandate cost figures to the Congressional Budget Office and the Office of Management and Budget, states can help improve the accuracy of these offices' calculations. If states and localities do not develop their own hard numbers, they have less standing to challenge CBO and OMB estimates.

Mandates Auditor Acts

Another way states and localities have begun to address the problem of producing cost figures is by creating mandates auditor offices. In May 1994, Missouri became the first state to establish an office for the sole purpose of tracking federally induced costs. The Missouri legislation charged the "Federal Mandate Auditor" with creating an "inventory of all unfunded federal mandates on all levels of government in the state, calculating by program and agency the cost of such mandates, and performing an historical analysis of year-to-year trends in unfunded federal mandates."[19]

Michigan State Representative Michael Nye plans to introduce a similar bill in 1995 proposing a state "Mandate Ombudsman" and a mandate database. Modeled after a 1993 Mackinac Center for Public Policy proposal,[20] the ombudsman would "track, forecast, disseminate, and distribute information regarding mandated legislation." This new office will coordinate a systematic effort across all agencies of state government to monitor and report on Michigan's federally induced costs.

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15 *The Need for a New Federalism: Federal Mandates and Their Impact on the State of Ohio*, State of Ohio Washington Office, August 1993, p. iii.

16 *The Impact of Federal Mandates*, State of Tennessee Department of Finance and Administration, Division of Budget, February 1993, Text—p. 2.

17 *Analysis of Federal Initiatives and State Expenditures*, State of Texas Legislative Budget Board, June 15, 1994, p. 4.

18 Douglas P. Munro, *The Effect of Federal Mandates on Wisconsin State Government*, Wisconsin Policy Research Institute, September 1993.

19 Missouri H.C.S. H.B. 1109, et al.

20 Michael D. LaFaive and Lawrence W. Reed, *Washington Should Kick the Mandate Habit: The Fiscal Impact of Medicaid Mandates on Michigan*, Mackinac Center for Public Policy, May 1993.

PUBLICIZING THE PROBLEM

State and local officials have developed several creative ways to publicize the problem and hold federal lawmakers accountable to their constituents. Among them:

1) Mandate-Relief and Tenth Amendment Resolutions

In the past year at least twelve states passed resolutions calling on Congress to pass specific mandate-relief legislation, to fully fund mandates, to stop imposing mandates, and/or to provide cost estimates for any bills that would impose new mandates. But while some state and local officials are satisfied simply to have federal mandates funded, others believe that many mandates represent an overreaching of the federal government's constitutional authority. Eight states (Arizona, California, Colorado, Hawaii, Illinois, Missouri, Oklahoma, and Pennsylvania) expressed this concern in 1994 by passing resolutions that assert state sovereignty under the Tenth Amendment. California's is typical: "The State of California hereby claims sovereignty under the 10th Amendment to the Constitution of the United States over all powers not otherwise enumerated and granted to the federal government by the United States Constitution and that this measure shall serve as notice and demand to the federal government to cease and desist, effective immediately, mandates that are beyond the scope of its constitutionally delegated powers."[21] Some Tenth Amendment resolutions argue further that the states authorized the federal government, not vice versa. According to the National Tenth Amendment Committee, legislators in over twenty states plan to introduce similar resolutions next session. While mandate-relief and Tenth Amendment resolutions may have little or no legal force, they effectively publicize the problem and deliver a clear message to Congress.

2) Congressional Delegation Mandates Consultation Acts

One particularly effective way states are publicizing the mandate problem is by passing "congressional delegation mandates consultation acts." Noting the recent explosion in federal mandates and the consequent strain on state budgets, these acts "invite" the state congressional delegation to appear before a special session of the legislature to discuss the problem of unfunded federal mandates. Initially, the idea was to invite the state's U.S. Senators, not its entire congressional delegation, to explain their votes on mandate legislation.[22] The theory was that while the Seventeenth Amendment changed the election of senators from election by state legislatures to direct election by the people, it did not change the legal principle of the relationship between U.S. Senators and their respective states. However, all the mandates consultation acts actually introduced invite the entire congressional delegation and the American Legislative Exchange Council's model legislation also invites the entire delegation.

Mandates consultation acts have been passed in seven states. Alabama led the way, adopting the innovative resolution in 1992 under the leadership of State Representative

21 California Senate Joint Resolution No. 44.

22 Andrew J. Cowin, "How Washington Boosts State and Local Budget Deficits," Heritage Foundation *Backgrounder* No. 908, July 31, 1992, pp. 14-15.

Perry Hooper. South Dakota followed in January 1993. Since then, Arizona, California, Delaware, Michigan, and Pennsylvania have adopted the act.

Alabama, South Dakota, Delaware, and Arizona have held, or attempted to hold, meetings with their congressional delegations. The other three states are scheduling meetings or have not yet followed up on the resolution. In Alabama all nine congressmen participated in the meetings, and all nine signed on to the most far-reaching mandate-relief bills in the 103rd Congress. Despite their participation in meetings, only one of the three in South Dakota's delegation supported a strong mandate-relief measure in 1994. Delaware tried unsuccessfully to schedule meetings, but two out of three from its delegation still supported substantial mandate-relief legislation in 1994. Six out of eight from Arizona's congressional delegation participated in a November 1994 meeting with the state legislature's Committee on Federal Mandates. All six promised to end unfunded federal mandates on states. Concerned about meddlesome federal judges, Senator-elect Jon Kyl (R-AZ) suggested in particular that "it may be time to invoke a little-used portion of the Constitution [Article III, Section 2] that allows the House and Senate to set the parameters of federal judicial powers."[23]

While state legislatures may not have the legal power to require the presence of federal legislators, a Member of Congress who declines the invitation opens himself up to charges of "inside-the-Beltway arrogance." If he accepts, he is not likely to argue for requiring his home state to pay for Washington's latest schemes. More likely, he will profess his faithful opposition to mandates on behalf of his beleaguered state. In any case, he is likely to think twice before voting for the next proposed unfunded mandate he encounters.

3) Congressional Delegation Voting Reports

Another way to give states leverage over their congressional delegations is to conduct regular voting reports. In 1994, the Virginia House of Delegates expanded the duties of the Commonwealth's liaison office in Washington, D.C., to include "[r]eporting in a timely manner to the General Assembly all federal mandates and regulations which may have an effect on the Commonwealth." The reports are to include "the names of those Virginia congressional members who voted for such mandates and regulations."

In a similar effort to restore accountability, the Arizona-based Barry Goldwater Institute for Public Policy Research has developed a "mandate scorecard" for the U.S. Congress. The November 1994 report scores members of the 103rd Congress for their votes on selected unfunded federal mandates and mandate-relief legislation. Those who voted with the states at least 75 percent of the time are termed "friends of the states," while those who voted with the states less than 25 percent of the time are labeled "foes of the states." Those who scored between 25 percent and 75 percent are labeled "neutral." According to the report, the highest-scoring "friends of the states" were Senators Hank Brown (R-CO), Larry Craig (R-ID), Judd Gregg (R-NH), Dirk Kempthorne (R-ID), Richard Lugar (R-IN), and Alan Simpson (R-WY) and Repre-

23 Chris Coppola, "Lawmakers target federal power over state," *Mesa Tribune*, November 17, 1994, p. B3.

sentatives Chris Cox (R-CA), Jennifer Dunn (R-WA), Thomas Ewing (R-IL), Tillie Fowler (R-FL), Porter Goss (R-FL), Joel Hefley (R-CO), David Levy (R-NY), Howard (Buck) McKeon (R-CA), Dan Miller (R-FL), Dana Rohrabacher (R-CA), Edward Royce (R-CA), and Bob Stump (R-AZ). The lowest scoring "foes of the states" were Senators Max Baucus (D-MT), Barbara Boxer (D-CA), Wendell Ford (D-KY), Howard Metzenbaum (D-OH), Donald Riegle (D-MI), and Paul Wellstone (D-MN) and Representatives John Dingell (D-MI), Sam Gejdenson (D-CT), Barbara Kennelly (D-CT), Jim McDermott (D-WA), Joe Moakley (D-MA), Ray Thornton (D-AR), Craig Washington (D-TX), and Maxine Waters (D-CA).[24]

Mandate voting reports provide a political tool for holding federal lawmakers publicly accountable for shrinking the share of state budgets available for local priorities such as education or police. As these reports become more sophisticated, it may become possible to calculate each senator's or representative's cost to state and local budgets.

MAKING THE FEDERAL GOVERNMENT PAY

The most conspicuous objective of the anti-mandates movement is to require the federal government to fund its mandates on states and localities. State and local officials have considered two approaches: supporting federal mandate-relief legislation and intercepting federal taxes.

Federal Legislation

The "Big Seven" national associations of state and local governments—National Governors' Association, National Conference of State Legislatures, U.S. Conference of Mayors, National Association of Counties, National League of Cities, Council of State Governments, and International City/County Management Association—have been lobbying Congress resolutely to pass effective mandate-relief legislation.

The Community Regulatory Relief Act (S.993) introduced by Senator Dirk Kempthorne (R-ID) and the Federal Mandate Relief Act of 1993 (H.R.140) sponsored by Representative Gary Condit (D-CA) were strong bills that received widespread attention and support in 1994. Neither addressed existing mandates, but both would have required Congress to fund any new mandates imposed on state and local governments. Both bills had a majority signed on as cosponsors, but neither house's leadership allowed a vote. Congress also failed to vote on less restrictive bills negotiated by Senator Kempthorne and Senator John Glenn (D-OH) and by Representatives John Conyers (D-MI) and William Clinger (R-PA) (H.R. 5128). These bipartisan bills would have established a point of order requiring Congress to authorize funding of mandates whose estimated costs exceed $50 million annually, unless the majority by roll call vote waive the point of order. The bills also would have required CBO cost estimates of private sector mandates exceeding $200 million and executive branch consultations with state and local officials before writing federal regulations.[25]

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24 John Berthoud, "The Federal Mandates Scorecard: In Search of Friends of the 10th Amendment," *Goldwater Institute Issue Analysis Report* No. 134, Barry Goldwater Institute for Public Policy Research, November 1994.

Shortly after the election, incoming Senate Majority Leader Bob Dole (R-KS) promised Republican governors that "the first bill in the Senate, S. 1., is going to be unfunded mandates." The 104th Congress's mandate-relief agenda will likely build upon and strengthen 1994's bipartisan bills—perhaps by requiring a three-fifths supermajority to waive the point of order; by lowering the $50 million point-of-order threshold; by requiring the *appropriation*, not just the authorization, of funding for mandates in order to avoid the point of order; or by allowing states and localities not to implement mandates for which funds have not been appropriated. Incoming Senate Judiciary Committee Chairman Orrin Hatch of Utah has indicated his intent to propose a "no money, no mandate" amendment to the Constitution. By offering it simultaneously with a Balanced Budget Amendment (BBA), he hopes to ease the concerns of states and localities which fear that a BBA would lead the federal government to balance its budget by imposing still more unfunded mandates on them. Governors strongly prefer that the two amendments be written as one.[26] State and local leaders also are likely to raise with the 104th Congress broader issues many considered it unrealistic to address in 1994—issues such as repealing or reforming *existing* unfunded federal mandates, transferring federal programs to states and localities, compelling federal agencies to allow states greater flexibility in implementing federal programs, and restricting federal judges from directing state and local policies.

The Interception of Federal Taxes

One of the most aggressive approaches to fighting unfunded federal mandates is the possible interception of federal taxes as reimbursement for federally induced costs. For instance, South Carolina State Representative Ralph Davenport introduced a bill in 1994 instructing the State Budget and Control Board to devise a plan for intercepting federal individual and corporate income tax payments made by South Carolina residents to compensate the state for the cost of unfunded federal mandates. The idea had considerable support among legislators but failed to make it out of committee. A few states have considered intercepting federal gasoline taxes in response to the burdensome Clean Air Act. In both cases, it is unclear how the state would manage the interception, considering that federal income and gasoline taxes generally are paid directly by individuals and corporations to the federal government. Colorado State Representative Charles Duke plans to introduce legislation in 1995 that would set up escrow accounts to which Colorado businesses would be required to send their federal taxes.

There is, however, at least one federal tax states could intercept very easily: the federal income taxes of state employees. Such monies are already in the state treasury, and no collection procedure would have to be altered.

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25 Susan M. Eckerly, "Kempthorne's and Glenn's Welcome Bill to Curb Unfunded Federal Mandates," Heritage Foundation *Executive Memorandum* No. 395, October 4, 1994.

26 Dan Balz, "GOP Governors Seek Shift in Power," *The Washington Post*, November 21, 1994, p. A9.

No state has acted to intercept federal taxes, but many are resisting compliance with onerous federal mandates, for example, by disputing federal agencies' implementing regulations, by asserting the states' right to challenge the constitutionality of a federal mandate and direct its implementation, through simple noncompliance, by opting out of federal programs, and through return of primacy.

Negotiated Compliance

The courts have ruled that regulations set by federal agencies have the same force of law as associated legislation. But some states argue that there is a difference between the performance standards set in congressional legislation and the fine print of the federal bureaucracy's implementing regulations. Virginia's Secretary of Natural Resources, Becky Norton Dunlop, has used this argument to explain the opposition of Governor George Allen's administration to the expensive, centralizing emission inspection systems the federal Environmental Protection Agency insisted Virginia use to comply with the Clean Air Act: "Once we had reviewed the law and determined that the plan was not mandated by law but rather by unelected bureaucrats at EPA, we pulled the plan back and submitted a plan that met the performance standards of the Clean Air Act but was consumer friendly, more cost effective, and would result in real improvements in air quality."[27]

More than a dozen states have resisted this EPA plan that requires "test-only" inspection stations and specified high-tech equipment costing $150,000 at each site. Test-only stations have proven quite unpopular because they require drivers whose vehicles fail inspection to go elsewhere for the necessary repairs and then to return to the test station for re-inspection. States also complain that the high-tech equipment is unreliable. Understandably, they want to devise their own system of compliance rather than have a one-size-fits-all approach imposed on them. They tend to agree with Columbus Mayor Greg Lashutka: "The federal role should be one measuring *results*: how much pollution is reduced, rather than prescribing how it should be done."[28]

Until recently, however, EPA generally has responded to states' proposed alternate compliance plans inflexibly, frequently threatening to withhold federal funds. Virginia's proposal, for example, imitated one of four methods for testing fleets that EPA itself had recommended to state governments in a 1993 memorandum.[29] Still, EPA dismissed it and threatened to withhold federal highway funds. In explaining the rejection, EPA regional administrator Peter Kostmayer obligingly displayed what Governor Allen calls the federal bureaucracy's "monarchical elitism": "We needed to get their attention," asserted Kostmayer. "The governor has given every indication that he does not want to do it our

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27 Becky Norton Dunlop, "Virginia's Federalist Challenge," address to American Legislative Exchange Council 21st Annual Meeting, August 5, 1994, p. 6.

28 Gregory S. Lashutka,"Local Rebellion: How Cities Are Rising up Against Unfunded Federal Mandates," *Commonsense*, Vol. 1, No. 3 (Summer 1994), p. 72.

29 Lorraine Woellert, "Virginia fumes on emissions: EPA rejected plan similar to its own," *The Washington Times*, August 9, 1994, p. A-1.

way."[30] EPA officials further explained that if EPA approved Virginia's innovative plan, other states would want to reopen and renegotiate their plans.[31]

The states perhaps are beginning to have their way, however. The EPA is backing down from its rigid insistence on the test-only stations and expensive high-tech equipment. EPA Administrator Carol Browner recently announced that the agency would help states design alternative plans. Kostmayer is striking a more conciliatory tone: "Voters have sent a message that they want less confrontation and more cooperation. I think we can do a better job of that," he said recently.[32] This case is a good example of the impact states can have on federal agencies by focusing their resistance simultaneously on the same problem.

Noncompliance, Opting Out, and Return of Primacy

Simple noncompliance is another response to unfunded federal mandates. Asserting they do not have the resources to implement the regulations, many law enforcement officials across the country are ignoring Brady Act gun control standards that require background checks on gun buyers.[33] Governor Pete Wilson has announced that California will not implement "motor voter" sections of the National Voter Registration Act without federal funding. In his August 26, 1994, executive order Governor Wilson stated that "California's motor voter program will be ready to go on January 1, 1995, but it won't go anywhere unless the federal government pays for the mandate they have imposed." At the time of Administrator Browner's recent announcement that the EPA would be more flexible about Clean Air implementing regulations, several states had announced they simply would not follow some of the specifications.

Serious compliance issues also have arisen over the Clinton Administration's implementation of the liberalized Hyde Amendment provision that allows Medicaid funds to be used to pay for abortions in cases of rape or incest. Some lawmakers, including Representative Henry Hyde (R-IL) himself, assert the new provision does not *require* funding for such abortions; it only *allows* it. Moreover, at the time of this change in the amendment, funding abortions, except when there is a threat to the life of the mother, violated 29 states' laws and constitutions. Nevertheless, the Clinton Administration ordered states to fund rape and incest abortions. Many states threatened to ignore the order. Several states succumbed and are bringing their laws into compliance with the mandate. Eleven states—Arkansas, Colorado, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Montana, North Dakota, South Dakota, and Utah—were threatened with loss of Medicaid funds if they did not comply. Faced with such widespread opposition from state officials, the federal Health Care Financing Administration (HCFA) has allowed some flexibility regarding how long states take to comply, although it continues to insist that states fund rape and incest abortions. Considerable legal action is still pending.

The salient point in this last example is that similar situations are predictable outcomes of federal strings-attached programs: States succumb to the temptation of federal funds

30 Peter Baker, "EPA Warns Virginia on Air Quality," *The Washington Post,* June 3, 1994, p. A1.
31 Dunlop, "Virginia's Federalist Challenge," p. 7.
32 D'Vera Cohn, "EPA Yields to Governors on Auto Emissions Tests," *The Washington Post*, December 10, 1994, p. B1.
33 Nancy E. Roman, "Fed-up states seize on the 10th Amendment," *The Washington Times*, July 7, 1994, p. A-8.

and buy into a program; the people and the state become dependent on it; Congress changes the rules of the game; and the state is directed actually to change its law or even its constitution in order to continue receiving the popular funding. Strings-attached programs can lead to the federal government's virtually dictating state law. Yet, all too often, states have been quick to bargain away their autonomy in pursuit of federal dollars. They responded no differently to 1994's temptation, the crime bill's prison construction money. Most state and local officials who took a public position supported this centralizing bill, despite the additional $28 billion liability it imposes on the states and the greatly increased federal intrusion it allows into states' criminal justice systems.[34] "No doubt," argues Edward Zelinsky, former alderman and member of the Board of Finance of New Haven, Connecticut, "most mayors and city council members feel they have no choice but to accept any law enforcement assistance offered by federal and state governments. However, I suggest an alternative course: Municipal officials should respectfully, but firmly, refuse such assistance and demand mandate relief instead."[35]

States should consider opting out of federal strings-attached programs. Studying which federal programs are the best prospects for this would be a worthy project for mandates auditor offices and nonprofit research institutes. In 1992, as Medicaid costs were rising at nearly 14 percent a year and consuming a huge proportion of the state budget, Colorado legislators actually considered opting out of Medicaid and implementing their own Medicaid-style program. In a bipartisan effort, both houses of the legislature passed a bill that would have charged a joint budget committee with studying this possibility. Even with the prospective loss of federal funding, Colorado lawmakers felt they could manage their own system in a more cost-efficient manner. Despite their efforts, Governor Roy Romer, apparently uncomfortable with such sweeping reform, vetoed the bill.

Another rarely used option is to turn over state-administered federal programs, or parts of such programs, to federal agencies. This "return of primacy" allows state agencies to forfeit, for an indefinite period of time, programs which prove too burdensome to administer. Once surrendered, these programs are funded and enforced by the federal government. Iowa, for example, returned primacy over Resource Conservation Recovery Act (RCRA) hazardous waste inspection and permits to the EPA in 1985. The state Department of Natural Resources, despite its successful implementation of the program with fifteen employees, was told by EPA that it had to dedicate fifteen more employees to the permit and inspection process in order to come up to standard. The state determined that compliance with this arbitrary standard was not worth the expense. According to an official in the Iowa Environmental Protection Division, EPA now administers the program with no more than two employees working from the EPA regional office. As one might expect, the EPA does not have the resources to administer that which it requires of the states. More widespread return of primacy would help expose the unrealistic burden EPA and other agencies place on states by forcing the federal government to be accountable to its own regulations. There are downsides to return of primacy, however. For instance,

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34 Scott A. Hodge, "The Crime Bill's Faulty Math Means a $28 Billion Unfunded Liability to the States," Heritage Foundation *F.Y.I.* No. 29, August 16, 1994, and Scott A. Hodge, "The Crime Bill: Few Cops, Many Social Workers," Heritage Foundation *Issue Bulletin* No. 201, August 2, 1994.

35 Edward Zelinsky, "Mandates and Cops: The Unspoken Connection," *Governing*, November 1994, p. 13.

state-level administration of regulatory programs tends to yield a friendlier, more flexible and responsive environment for citizens and businesses. But states may regain primacy at any time.

Colorado's Federal Mandates Act. Colorado's Federal Mandates Act (Senate Bill 94-157) is one of the sternest and most comprehensive responses to unfunded mandates to date. The bill is intended "to ensure that federal mandates implemented in Colorado comply with state policy as established by the General Assembly." Most important, it asserts Colorado's right to determine the constitutionality of any federally mandated program, prohibits any state appropriations unless the federal program meets the state's established criteria, and establishes programs and principles for the development of legal theories and legal action to oppose federal mandates. The bill declares the state's primacy in directing the implementation of federally mandated programs and puts state employees involved in implementing these programs on notice that they report to the state, not to the federal government. It argues that the "burden to prove the insufficiency of the state's efforts to implement federal requirements [should be] shifted to the person or agency who asserts such insufficiency." In other words, Colorado should not be required to prove that its implementation plan for a mandated program is sufficient; rather, before it can require a plan's alteration, the federal government should have to prove that the plan is *in*sufficient. Colorado's Federal Mandates Act lists 19 of the most egregious unfunded federal mandates and criticizes federal mandates for failing to reflect the realities of the Rocky Mountain region, for not allowing the state sufficient flexibility, and for not respecting the rights of the state, its local governments, and its citizens.

LEGAL ACTION

States also are taking various kinds of legal action against unfunded mandates. They are commissioning offices to study possible legal action; they are suing the federal government, using Tenth Amendment and other constitutional and legal arguments; and they are suing the federal government for reimbursement for the costs of mandated programs for illegal immigrants.

Constitutional Defense Councils

In response to Governor Fife Symington's proposal in November 1993, the Arizona legislature was the first to commission a "Constitutional Defense Council" to direct the study, initiation, and prosecution of appropriate legal action aimed at "restoring, maintaining, and advancing the state's sovereignty and authority over issues that affect this state and the well-being of its citizens." Meetings and hearings will examine "federal mandates; court rulings; the authority granted to, or assumed by, the federal government; laws, regulations, and practices of the federal government; and any other activity deemed appropriate given the purposes of the council." The council has the authority to direct the attorney general to take appropriate legal action. Its million-dollar budget will fund the hiring of qualified attorneys to research and prosecute the cases.

Several other states also are studying possible legal action. Utah has established a constitutional defense council based on the Arizona model. Within the last year, Colorado, Hawaii, and Maine have directed their attorneys general to investigate legal action to challenge unfunded federal mandates.

Resuscitating the Tenth Amendment

While Tenth Amendment jurisprudence in the post-New Deal era has not been favorable to state autonomy, efforts to restore a more balanced understanding of federalism in the courts are mounting. One encouraging sign came in the Supreme Court's 1992 decision, *New York v. United States*, in which the Court sided 6-3 with New York's argument that it had been "commandeered to do the government's regulation" by a federal requirement to dispose of low-level nuclear waste. Deciding on Tenth Amendment grounds, Justice O'Connor wrote for the majority that "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the states to regulate."

A similar suit, *Missouri v. United States*, filed in July 1994 by Missouri Governor Mel Carnahan, addresses congressional and EPA authority with regard to punitive sanctions within the Clean Air Act. Penalties imposed on nonattainment include the withholding of federal highway funds and "offset" rules which effectively halt economic development in the region and, if the EPA wishes, in the entire state. Missouri claims these regulations conflict with the Tenth Amendment and the Spending Clause. Like *New York*, the *Missouri* suit claims that "Congress has effectively commandeered the legislative process of the States by compelling them to implement regulatory programs...." But *Missouri* would take *New York* a step further by broadening the concept of "impermissible Congressional compulsion" to include the threat of withheld federal funding. Tenth Amendment challenges also have arisen in response to federal gun-control mandates contained in the Brady Act, which imposes duties on local law enforcement officials such as background checks on gun purchasers and is being challenged in several courts around the country. A Montana federal district court judge, for example, struck down part of the law, citing *New York v. U.S.*

Another related constitutional issue being considered in the courts is reliance on the Commerce Clause as the basis for congressional legislation.[36] The expansion of Congress's Commerce Clause powers throughout most of American history has been one of the major causes of the erosion of state powers. Today it is claimed as the authority for approximately 97 percent of all federal legislation. At issue in a circuit court decision the Supreme Court recently heard—*United States v. Lopez*—is whether Congress has constitutional authority under the Commerce Clause to ban the possession of guns near schools under the Gun Free School Zones Act. The connection between interstate commerce and the possession of guns near schools is indeed difficult to discern. The *Lopez* decision, which is expected early 1995, will be a strong indication of how much the present Supreme Court wants to correct the imbalance in America's federalist system. Seven national associations of state and local government officials—including the National Conference of State Legislatures, National Governors' Association, and National League of Cities—filed an *amicus curiae* brief arguing against such sweeping Commerce Clause authority for Congress.

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36 Glenn Harlan Reynolds, "Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government," Cato Institute, *Policy Analysis* No. 216, October 10, 1994.

Immigration Lawsuits

Governors in Florida, California, Texas, and Arizona have filed suit against the federal government for costs their states have incurred from illegal immigrants. The federal failure to secure the borders against illegal immigration has resulted in substantially increased costs to these four states in particular. Strictly speaking, not all these costs are unfunded federal mandates. States always have been obliged to prosecute and incarcerate criminals, whether they are illegal immigrants or not. Such costs, because they are not federally mandated in the same sense that safe drinking water standards or motor voter compliance are, constitute a "cost shift." Attorney General Janet Reno has responded to the California suit by promising a small partial reimbursement for the state's incarceration of illegal immigrants. The Immigration Reform and Control Act of 1986 provides for federal reimbursement for such expenses, but this will be the first time funds actually have been appropriated for this purpose.

State costs of educating and providing health care to illegal immigrants, on the other hand, are federally mandated. The Omnibus Budget Reconciliation Act of 1986 requires states to reimburse hospitals for expenses incurred in caring for uninsured illegal aliens. The requirement that states cover the education costs for illegal immigrants is mandated by the Supreme Court's *Plyler v. Doe* decision. California estimated that illegal immigrants will cost state taxpayers $3.4 billion in 1994, including $1.9 billion in unfunded federal mandates (education and health services) and $474 million for incarceration. Adjusting for taxes paid by illegal immigrants, California estimated its net loss will still be $2.7 billion.[37] These figures do not include the costs of providing services to the children of illegal immigrants.

AMENDING THE CONSTITUTION

Some state officials believe that states ultimately will have to take constitutional action to establish reliable protection against federally induced costs. Kansas and South Dakota have passed resolutions calling for a constitutional convention to pass an amendment that would prohibit unfunded federal mandates on states. However, there are some in the anti-mandates coalition who wonder just how limited a "limited" constitutional convention might be. They are concerned about the possibility of a "runaway" convention that would dramatically alter the Constitution, despite the fact that even a constitutional convention may propose only amendments that must be ratified by the states. These people are not likely to be satisfied even by South Dakota's language stipulating that its application should "be deemed null and void, rescinded, and of no effect in the event that such convention not be limited to such specific and exclusive purpose."

A Conference of the States

Utah Governor Mike Leavitt has offered a proposal that may make this a moot point. Leavitt's "Conference of the States" proposal, if successful, would demonstrate to Congress the states' ability to conduct a constitutional convention while avoiding the contro-

37 Philip J. Romero and Andrew J. Chang, *Shifting the Costs of a Failed Federal Policy: The Net Fiscal Impact of Illegal Immigrants in California*, Governor's Office of Planning and Research, California Department of Finance, pp. viii - xi.

versy and risk (to whatever extent it exists) of an actual convention. Governor Leavitt and his Democratic partner, Nebraska Governor Ben Nelson, intend this Conference of the States to address "one narrow purpose"—the development of "an agenda or action plan that would give states leverage to compete in the federal system, ultimately restoring balance between the states and the national government. The action plan could consist of legal strategies, carefully crafted amendments to the U.S. Constitution, or other components."

In response to this proposal, the National Governors' Association and National Conference of State Legislatures have formed a task force to consider a conference of the states as one possible device for organizing "collective state action, concentrating state power, and focusing national attention on federalism." The American Legislative Exchange Council also has indicated interest in the proposal. Governors Leavitt and Nelson are determined that the effort remain bipartisan and focused solely on federal-state relations.

According to Governor Leavitt's plan, the conference would be preceded by a series of "Federalism Summits." The agenda for the Conference of the States would be drafted at these meetings of state and local leaders and analysts. To convene the conference, each state would send a delegation, most likely legislators and governors. If any states were unable to pass resolutions authorizing a delegation, individual legislators would represent their states on their own. The action plan resolved by the conference would be reported back to the legislatures. If three-quarters of the states formally endorsed the plan, it would be particularly difficult for Congress to ignore. If Congress did not submit the conference's proposed amendments to the states for ratification, the option of calling for a constitutional convention remains open. Says Governor Leavitt, "Supporters of this proposal hope and believe that such dire action as calling a constitutional convention would not be necessary. But the threat must exist to motivate Congress to act."

The States' Initiative and the States' Veto

At the November 1994 Republican Governors' Association meeting in Williamsburg, Governor Allen proposed a constitutional amendment with two complementary parts: the States' Initiative and the States' Veto. As described in the Governor's Executive Order Number Thirty-Seven, the proposed amendment would enable states to amend the Constitution or to overturn federal legislation without either a constitutional convention or congressional or judicial action: "Under the proposed States' Initiative, if three-quarters of the States approve a proposed amendment within a specified time period, and if Congress thereafter fails to override the States' action by a two-thirds vote of the Senate and the House of Representatives, then the state-initiated action would become part of the Constitution."[38] The States' Veto would enable three-quarters of the states to repeal objectionable federal legislation or regulations unless Congress overrides the states' action by a two-thirds vote of both houses.[39]

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38 Commonwealth of Virginia Executive Order Number Thirty-Seven (94), p. 5.

39 The order also calls for educating the public on federal usurpation of state and local prerogatives; suing the federal government for Tenth Amendment violations; supporting federal legislation to prohibit unfunded federal mandates; organizing collective state actions to combat federal intrusion into state and local jurisdictions; and assembling a Conference of the States to adopt an agenda to reinvigorate federalism. The order also formed the Governor's Advisory Council on Self-Determination and Federalism to advise the governor on federalism, his initiative, and related issues.

CONCLUSION

As much as excessive taxation, wasteful spending, and picayune regulation, the centralization of power in Washington threatens to smother America's enterprise and liberty. The states have the power, the authority, the opportunity, and the responsibility to rein in an out-of-control federal government. Successful efforts to end unfunded federal mandates and restore balance to America's intergovernmental system will transfer decision-making to levels of government more accessible and, therefore, more accountable to the people—namely, state and local governments. States and localities are leading the fight against federal encroachment by a variety of means: educating the public; publishing mandate cost studies; holding federal lawmakers personally accountable to their constituents; challenging Congress's authority to impose mandates; resisting or refusing compliance with federal micromanagement; suing the federal government; working with each other to lobby Congress and plan strategies to restore balance to federal-state relations, including constitutional amendment strategies and more. The sleeping giant in American governance—the states—has re-awakened. It is a force that can moderate, if not tame, the federal leviathan.

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Mandate-Related State Action and Legislation

	Mandates Consultation Acts	Voting Reports	Mandate Auditor	Cost Studies	Mandate Relief Resolutions	Tenth Amendment Sovereignty Resolutions	Return of Primacy	Constit. Defense Councils	Resolutions for Constit. Amendment	Lawsuits	Federal Mandates Bill
Alabama	HJR 51				HJR 162						
Arizona	SCM 1013 SB 1257					SB 1257		HB 2371		✓	
California	AJR 50					SJR 44				✓	
Colorado				SB 94-157	HJR 1035	SB 94-157 HJR 1035					SB 94-157
Delaware	HJR 2										
Florida					SM 1818					✓	
Hawaii					SR 117	HCR 108					
Illinois					SR 1279	SR 1279					
Iowa							RCRA				
Kansas					HCR 5030				SCR 1620		
Kentucky					HR 40 SJR 13						
Maine					HJR 1376 W-1508						
Michigan	HCR 232										
Missouri			HB 1109	HB 1109		HCR 27				✓	
Montana					91-SJ 2 93-SJ 3						
New Hampshire					HJR 22						
New York										✓	
Ohio				Governor & City of Columbus							
Oklahoma					SCR 30	HR 1056					
Penn.	HR 106					HJR 106					
South Dakota	SB 9								SJR 3		
Tennessee				Dept. of Finance & Admin.							
Texas				Legislat. Budget Board						✓	
Utah								HB 276			
Virginia		HB 892									

Note: Table refers only to enacted legislation.