Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?

Rena I. Steinzor*

Introduction .................................... 98
I. Definitional Issues .......................... 103
II. Theories of Federalism ..................... 111
   A. A Brief History of American Federalism ... 114
   B. New (New) Federalist Theory ............. 124
III. New (New) Federalism in Practice and Its Implications for Environmental Protection ......... 130
   A. Congress ................................ 131
      1. Fiscal Note Provisions ................ 135
      2. Point of Order Provisions ............ 143
   B. The Executive Branch .................... 149
   C. The Supreme Court ...................... 154
IV. Sorting Principles .......................... 165
   A. Five Sorting Principles ................. 166
      1. Transboundary Pollution ............ 166
      2. Economies of Scale in Regulating .... 168
      3. Equity and Equal Protection .......... 171
      4. Local Implementation ................. 174
      5. Local Autonomy and Freedom From Excessive Regulation ........... 175
   B. Three Rejected Candidates .............. 177
      1. Races-to-the-Bottom .................. 177

* Associate Professor, University of Maryland School of Law. B.A., University of Wisconsin, 1973, J.D. Columbia Law School, 1976. I am grateful for the insightful advice provided by Robert Percival, Ernest Isenstadt, and Jana Singer; the incomparable library skills of Maxine Grosshans; the administrative support provided by Laura Mrozek; and the research and editing assistance of Christopher Van de Verg, Kevin Robertson, Matthew Gilman, Susan Speer, and Robert Hogan. This Article is dedicated to my friends in the municipal and environmental communities who have taught me much over the last decade about the daunting challenges they face in their civic lives.
INTRODUCTION

It is clear that this is a concerted effort. . . . If they can't get it in one place, they try it another place. This is about shutting us down, there can be no mistake.

—Carol M. Browner, Administrator
U.S. Environmental Protection Agency

[T]he agency has headed in the wrong direction, for the wrong reasons, and in a manner which can impose unnecessary costs on American industry and, ultimately, the consumers and taxpayers of this country. The agency needs to recognize that there are simply not enough available financial resources to "fix" every perceived environmental problem.

—Report by the U.S. House of Representatives Committee on
Appropriations

The Republican Party's recapture of both houses of Congress for the first time in five decades portends a fundamental

change in the way America is governed. The next few years will determine whether this fundamental change will take firm hold, institutionalizing the conservative agenda set forth in the Contract with America, or whether it will be dismissed as an anomalous and short-lived departure. Whatever its fate in the electoral context, the conservative agenda has already had a profound effect on many Democrats and their President, who have hastened to embrace its more popular aspects. Now is clearly the time—and arguably past the time—for a robust public debate on the implications of these changes.

Two central tenets of the conservative agenda are the devolution of authority to state and local governments and federal regulatory retrenchment. Proponents herald these themes as a return to the federalism the Framers intended; opponents attack them as a cynical rollback of essential protections at the behest of American industry. The crusade by state and local government officials against unfunded federal environmental mandates is among the most important arenas for this debate. The unfunded mandates movement raises squarely the appropriate division of responsibility for environmental and other social welfare problems among the nation's three levels of government.

While the rebellion over unfunded mandates has percolated in the states for over two decades, it reached national prominence only three years ago. But so powerful is its raw
political energy that members of the 104th Congress introduced the Unfunded Mandates Reform Act of 1995 (UMRA) as S. 1 and H.R. 5. The bills were enacted within the first 100 days of the Republican majority's ascendance. President Clinton hastened to accept the legislation; indeed, Republicans and Democrats spent considerable time during the floor debate arguing over which party was more sincere in its commitment to relieve subnational governments from the plague of federal Big Brotherism.

By itself, the UMRA will not accomplish real change over the long run because its major enforcement mechanism—a point of order on the floor against any legislation that proposes an unfunded mandate—is waivable by a simple majority vote. This procedure may well serve to make legislators conscious of what they are doing when they vote to hand down mandates without raising taxes, but it will not force them to control themselves in the face of compelling political reasons to proceed.

Whether or not the UMRA proves the silver bullet envisioned by its supporters, the litany of complaints about federal environmental policies used to justify its passage will arise repeatedly as Congress reauthorizes the major federal environ...
mental statutes.12 Combined with other retrenchment initiatives, including EPA budget cutbacks13 and pending regulatory reform legislation,14 the unfunded mandates movement poses an immediate and serious threat to stable and effective environmental protection. The threat is particularly acute because the active participation of state and local elected officials gives retrenchment a credibility it would never achieve if regulated industries were its only visible supporters.

This Article considers the efforts that have been made to respond to the movement against unfunded federal environ-


13. See, e.g., John H. Cushman, Jr., E.P.A. Is Canceling Pollution Testing Across the Nation: Budget Cuts Are Blamed, N.Y. TIMES, Nov. 25, 1995, at A1 (describing EPA cutbacks in enforcement); Final EPA Report on Proposed Budget Cuts Outlines Stark "Real World" Consequences, 1995 Daily Env't Rep. (BNA) 140 (July 21, 1995) (enumerating the threats to various initiatives). In the final analysis, the Clinton administration managed to avoid the most severe budget cuts and riders restricting or eliminating the EPA's regulatory authority, although 1996 EPA funding was reduced by $700 million, or approximately 10%, below 1995 levels. See, e.g., Clinton Signs Omnibus Appropriations Bill, Immediately Waives Environmental Provisions, 27 Env't. Rep. (BNA) 8 (May 3, 1996) (explaining the mixed results from the Omnibus Recissions and Appropriations Act of 1996). As this Article went to press, the House and Senate had agreed on an appropriations bill that allocated approximately $6.7 billion to the EPA for fiscal year 1997, and President Clinton was expected to sign the legislation. Budget: House, Senate Pass Bill Giving EPA $6.7 Billion; Clinton Plans to Sign Measure, 1996 Daily Env't Rep. (BNA) A-11 (Sept. 26, 1996). This appropriation marks a slight increase above 1996 levels, but was about $400 million below the president's request. Society and Politics Budget: Congress Clears EPA Funding Bill, GREENWIRE, Sept. 25, 1995, available in WESTLAW, File No. 7.

mental mandates, concludes that these efforts will not be successful in resolving state and local officials' legitimate problems, and proposes an alternative framework for sorting environmental responsibilities among the three levels of government. Environmental mandates are defined for these purposes as enforceable federal requirements imposed on local governments when they act in their capacity as potential polluters, or regulatees. Unfunded environmental mandates therefore include restrictions on the way local governments deliver essential public services such as drinking water, solid waste management, and sewage treatment. They do not include the states' performance as regulators implementing federal requirements. Although the states must comply with a series of complex conditions when they administer and implement federal environmental programs, the threshold decision to participate is voluntary and does not fall within any conventional definition of an enforceable mandate used in the literature or the popular debate.

Part I of the Article considers the nature and the scope of unfunded mandates in both legal and policy terms. Part II places the current movement against such mandates in a historical context. It concludes with a consideration of contemporary "new (new) Federalist" political theory which advocates a restoration of subnational governments' traditional powers. Part III explores some procedural solutions to the problems raised by unfunded mandates that have been suggested by the three branches of the federal government, explaining why each has proved incomplete or ineffective. These solutions include the recent congressional entry, the UMRA, and the fiscal notes and studies it will spawn, executive orders issued or endorsed

15. Provisions delegating implementation and enforcement to state governments are a central feature of the Clean Water Act, 33 U.S.C. § 1342 (1994); the Safe Drinking Water Act, 42 U.S.C. § 300g-2 (1994); the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6926, 6946, and 6991c (1994); and the Clean Air Act, 42 U.S.C. § 7410 (1994). In characterizing the states' participation in delegated environmental programs as "voluntary," I do not mean to imply that there is not an element of coercion involved—especially because the alternative to accepting a voluntary delegation is federal preemption of state law. The bottom line of such programs, however, is that the states can decline to participate, while local governments are not given any option to decline to comply with environmental mandates imposed at the federal or, for that matter, state level.

16. See, e.g., 2 U.S.C.A. § 658 (West Supp. 1996) (requiring Congressional Budget Office (CBO) estimates of the costs that would be imposed by pending legislation containing intergovernmental and private sector mandates); id. §
by the last three Presidents,\footnote{Enhancing the Intergovernmental Partnership, Exec. Order No. 12875, 3 C.F.R. § 669 (1994), reprinted in 5 U.S.C. § 601 (1994) [hereinafter Intergovernmental Partnership] (issued by President Clinton); Federalism Considerations in Policy Formulation and Implementation, Exec. Order No. 12612, 3 C.F.R. § 252 (1988), reprinted in 5 U.S.C. § 601 (1994) [hereinafter Federalism] (issued by President Reagan and continued under President Bush, but repealed by President Clinton).} and the Supreme Court's efforts to expand and later restrict doctrines of federalism.\footnote{See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); National League of Cities v. Usery, 426 U.S. 833 (1976); Part III.C. infra (discussing Garcia's progeny).} Part IV proposes five substantive principles for resorting environmental responsibilities among the three levels of government as an alternative to the procedural solutions that have been tried thus far. Finally, Part V considers the most prominent environmental program that local governments love to hate—mandates imposed under the Safe Drinking Water Act.\footnote{42 U.S.C. §§ 300f-300j (1994), amended by P.L. 104-182, § 110 Stat. 1613 (1996).} It explores the implications of the current breakdown in intergovernmental relations and explains how these five sorting principles can be used to develop more effective solutions.

I. DEFINITIONAL ISSUES

*Mandates go to the heart of what governing is all about—autonomy and money... What is a mandate, anyway?... Most states employ a cost-based definition. ... The problem with a cost-based definition is that it necessarily reduces important arguments about mandates to money. ... A better approach is a penalty-based definition. Rather than ask “will it cost money?” a penalty-based definition asks “must I comply?” The latter is much easier to answer decisively than the former.*

—Janet M. Kelly, Advisor, National League of Cities\footnote{Janet M. Kelly, Issue: State Mandates to Local Governments, ISSUES & OPTIONS, July 1993, at 1.}

States and localities describe unfunded federal mandates broadly as all federal laws and regulations that apply to state and local governments without full federal funding. This definition, however, fails to account for expenditures that would be made even absent federal mandates, and expenditures that should be borne by the states and lo-
calities as a matter of sound policy, regardless of the source of the requirement.

—Robert W. Adler, Senior Attorney, Natural Resources Defense Council, Inc.21

The federally-funded U.S. Advisory Commission on Intergovernmental Relations (ACIR) has served for the past four decades as the chief intellectual guardian of federalist principles at the national level, producing a series of lengthy reports that are the primary source of research and analysis on these issues.22 In a 1994 report, ACIR acknowledged that “there is no universally accepted definition of a governmental mandate and surprisingly little consensus on the matter,” adding that “some of the most costly federal financial impacts on states and localities do not fit the standard definition of a federal mandate closely, if at all.”23 In large measure, definitional confusion and controversy arise from the paradigm that is at the heart of the unfunded mandates movement: the federal government should pay for any mandates it imposes and refrain from imposing mandates it is unwilling to finance.24 With the fiscal stakes


22. ACIR is composed of 26 members drawn from Congress, federal agency and department heads, governors, mayors, county elected officials, and private citizens. It was established in 1959 as a permanent, bipartisan commission designed to provide a forum for discussion and study of “emerging public problems that are likely to require intergovernmental cooperation” and to “recommend . . . the most desirable allocation of governmental functions.” 42 U.S.C. § 4272 (1994). As a practical matter, ACIR serves as the primary think tank for all of the organizations that represent elected and appointed state and local officials in national policy debates, including the National Governors’ Association, the National League of Cities, the U.S. Conference of Mayors, and the National Association of Counties, all of whom repeatedly refer to ACIR’s work to provide substantive justification for their political activities. The recent addition of EPA Administrator Carol M. Browner to the Commission confirms the importance of environmental issues to its mission. For a description of the role ACIR has played historically, see Rochelle L. Stanfield, It’s Back—But Does Anyone Know?, 26 NAT’L J. 1373 (1994).

23. ACIR federally induced costs, supra note 6, at 3.

24. See, e.g., NATIONAL ASS’N OF COUNTIES, THE AMERICAN COUNTY PLATFORM AND RESOLUTIONS 130 (1994-1995) (urging Congress “to enact legislation that would relieve counties and cities of all obligations to carry out any new mandate” if no federal funding is offered); NATIONAL LEAGUE OF CITIES, NATIONAL MUNICIPAL POLICY § 1.06(D) (1994) (proposing a reimbursement program); U.S. CONFERENCE OF MAYORS, OFFICIAL POLICY RESOLUTIONS 52 (1992) (opposing unfunded federal mandates). All three platforms emphasize that funding should serve as the quid pro quo of all new and
raised this high, it is not surprising that federal participants in the debate are reluctant to agree on a definition with the broad scope suggested by representatives of aggrieved subnational governments.

The restrictive effects of this paradigm were on full display when the Unfunded Mandates Reform Act, Congress's major response to state and local grievances, was enacted in the spring of 1995. ACIR's director of governmental policy research estimated at the time that only nine of the twenty-seven mandates approved by Congress from 1981 to 1990 would fall within the new law's definition; nearly all were environmental rules. The UMRA's definition of "intergovernmental mandate" reads, in pertinent part:

The term "Federal intergovernmental mandate" means . . . any provision in legislation, statute, or regulation that . . . would impose an enforceable duty upon State, local, or tribal governments, except . . . a condition of Federal assistance . . . or . . . a duty arising from participation in a voluntary Federal program, except as provided in subparagraph (B) . . . .

The concept of a mandate as an "enforceable duty" that is not undertaken voluntarily encompasses most of the environmental laws and regulations cited by local governments during their campaign for unfunded mandates relief. These include monitoring and treatment requirements imposed under the Safe Drinking Water Act, sewage treatment and disposal requirements imposed under the Clean Water Act, and municipal solid waste disposal requirements imposed under the Solid
Waste Disposal Act. This formulation, however, eliminates from consideration other federal laws, regulations, and administrative policies that indirectly make it more difficult and expensive for local governments to implement such enforceable environmental duties.

Although it is tempting to use the UMRA definition to circumscribe the larger policy debate over unfunded mandates, the daunting task of developing a convincing rationale for sorting environmental responsibilities nevertheless demands sidestepping the limitations of the funding paradigm and undertaking a more open inquiry into the implications of federal regulation. For example, the federal government often attaches conditions to the receipt of aid by state and local governments. The two most common conditions are crosscutting requirements, which demand the application of certain generic rules (e.g., prohibitions of discrimination) to programs funded with federal assistance, and crossover sanctions, which threaten the termination or reduction of aid provided under one program unless the requirements of another program are satisfied. While the curtailment of federal funding for municipal environmental programs may limit the utility of this approach, a creative Congress could use even relatively small amounts of funding to inspire compliance with new require-

---


30. These terms are used throughout the political science literature on intergovernmental relations to categorize federal regulatory activity. The two other categories commonly used are direct orders, which are the functional equivalent of the UMRA's enforceable duties, and partial preemptions, which establish federal standards for program administration but delegate administrative authority to the states if they adopt equivalent standards. See, e.g., Thomas J. Anton, American Federalism and Public Policy: How the System Works 184-87 (1989) (describing each instrument of regulation); Parris N. Glendening & Mavis Mann Reeves, Pragmatic Federalism 76-83 (1984) (discussing types of intergovernmental regulations and what they require of the state and local governments); U.S. Advisory Comm’n on Intergovernmental Relations, Federal Regulation of State and Local Governments: The Mixed Record of the 1980s, at 7-8 (1993) [hereinafter ACIR Mixed Record] (describing the four types of regulation and listing those used by 36 major regulations); David B. Walker, The Rebirth of Federalism, Slouching Toward Washington 8, 139, 238-40 (1995) (discussing each of the four types of conditions the federal government attaches to the receipt of aid); Michael Fix & Daphne A. Kenyon, Introduction to Coping with Mandates: What Are the Alternatives? 1, 3-4 (Michael Fix & Daphne Kenyon eds., 1990) [hereinafter Coping with Mandates] (defining and describing types of unfunded mandates).
mements and, incidentally, to circumvent the UMTRA process.

To the above collection of federal regulatory techniques, the ACIR has added the more subtle concept of so-called "federally-induced costs" that encompass actions taken by the federal government, whether in statutes, regulations, other administrative decisions, or litigation, that indirectly cause local governments to spend money. Although this concept goes well beyond the UMRA definition of mandate-as-enforceable-duty, simply combing the books for outright, direct orders eliminates from consideration more subtle policies that have a profound and unavoidable impact on municipalities. A prime example of federally-induced costs is adoption of tax policies that foreclose innovative and cost-effective methods of financing municipal environmental projects. A second example is lengthy delays in the promulgation of regulations that can make compliance both difficult and more expensive over the long run. Such delays can mean that local governments are unable to plan the installation of new pollution control technologies and end up buying one type of equipment, only to find their investment superseded by subsequent requirements. A final example is the imposition of liability for the handling and disposal of municipal solid waste under the Comprehensive Environmental Response, Compensation, and Liability Act

31. ACIR FEDERALLY INDUCED COSTS, supra note 6, at iii-iv.
32. See, e.g., Robert G. Harvey & Michael H. Levin, What You Can Do If You Don’t Have Cash—Financing Environmental Compliance, 24 Env’t Rep. (BNA) 1984 (1994) (examining a variety of financing options by which local governments can cover costs of complying with environmental controls and discussing tax considerations that may limit the range of available options for a given project); Taxation: IRS Says Plants Treating Toxic Pollutants Should Not Qualify for Tax Exempt Bonds, 1994 Daily Env’t Rep. (BNA) 83 (May 3, 1994) (discussing proposed IRS regulations to make sewage plants that treat toxic, priority, and non-conventional pollutants ineligible for tax-exempt facility bond financing). Tax issues have affected efforts to privatize municipal services, an alternative that is increasingly attractive to local government officials overwhelmed by the highly technical environmental requirements that apply to such facilities. See Mary Buckner Powers, Bureaucrats Begin Lean- ing Toward Privatization of Infrastructure, ENGINEERING NEWS-REC., Nov. 21, 1994, at 46, 47-48 (noting that unavailability of tax-exempt bonds and state revolving loan funds to private owners may discourage privatization, but suggesting that private operators can take more risks than public operators and can effectively compete with public financing).
(CERCLA or Superfund). This liability is most often asserted by other potentially responsible parties in "contribution" lawsuits brought to apportion cleanup costs.

Before the UMRA's passage, the National League of Cities (NLC) argued for combining all of the above concepts into the most expansive possible definition of a "mandate" as any action that "prevent[s] the locality from exercising its own discretion in administrative decisions and limit[s] the ability of the local government to respond to change." State and local governments are unlikely to win acceptance of such an all-encompassing and subjective definition in the context of any reform that conditions the validity of a mandate on whether Congress and the President provide federal funding. After all, to fall within this definition, state and local officials could contend that they were considering whether to exercise their discretion to take action when the federal government decided to impede them. As the debate over federal environmental mandates continues, however, state and local officials may well find that true relief from their predicament depends on allowing themselves and other participants in the debate—especially federal regulators and environmentalists—to escape the funding paradigm and view the ramifications of mandates from a larger perspective.

Before considering how to frame a more comprehensive and acceptable working definition of mandate, however, the second component of the equation must be considered: when is a mandate "unfunded"? As noted earlier, all of the unfunded federal environmental mandates challenged by local governments concern the delivery of essential public services, including safe drinking water, sewage treatment, and garbage disposal. Since local governments provided such services long before the national government ever considered regulating them, defining an "unfunded" mandate in this context raises the extremely difficult problem of distinguishing between the costs of providing the service itself, which clearly should be

36. STATE MANDATES, supra note 11, at 1-2. This definition may include government inaction that prevents a locality from exercising discretion and limits its ability to respond to change.
37. See supra notes 27-29 and accompanying text (identifying those mandates).
paid at the local level, and the incremental or marginal costs added by federal regulation.

One way to assess this increment is to evaluate the public health rationale for federal regulation. If a mandate imposes costs that are not justified by public health concerns in the particular locality, it is unfunded in the sense that local governments would not choose to implement it during the course of providing essential services to their constituents. Put another way, unjustified regulation is almost always unfunded regulation.

There are, however, some important further complications. Many (if not most) regulatory requirements are not clearly unjustified, or at least they are justified in some contexts. Assessing the legitimacy of a regulation on the basis of whether a local government would choose to implement the regulation on its own has the potential to cause needless confusion and even damage to public health, since a local government might choose not to implement such a regulation for one of two distinct reasons. First, it might conclude that the regulation is not based on legitimate and important public health concerns, and it may or may not be correct in that judgment. Second, it might conclude that the regulation, while grounded in public health concerns, is simply unaffordable because of other priorities. Delegating the power to define public health priorities exclusively to local governments is a far more controversial proposition than simply acceding to the demand that a mandate be labeled "unfunded," although local governments obviously hope that obtaining the "unfunded" label will have the same effect.

The UMRA assigns the unenviable task of parsing these distinctions to the Congressional Budget Office (CBO) which must prepare estimates of the "direct cost of all [federal intergovernmental mandates] contained in legislation when such costs would exceed $50 million in the first fiscal year in which any such mandate takes effect.\(^\text{38}\) The UMRA defines "direct costs" as the difference between the costs of complying with the mandate and the amounts local governments would otherwise spend "to comply with or carry out all applicable Federal, State, [and] local . . . laws and regulations in effect at the time of the adoption of the Federal

\(^{38}\) 2 U.S.C.A. § 658c (West Supp. 1996). The estimate requirement also applies if the Director of the CBO believes that such costs will accrue in any of the four fiscal years following the initial year. \textit{Id.}
mandate . . . or . . . to comply with or carry out State [and] local . . . programs . . . for the same activity."\(^{39}\)

This convoluted series of instructions requires the CBO to first calculate the costs imposed by federal regulatory requirements. This exercise has always been more of an art than a science, especially where new and unproved technologies are involved and the crucial details of implementing regulations have yet to be worked out. Assuming moderate success with this admittedly difficult task, the CBO must then subtract the costs that subnational governments would have spent anyway not only under existing laws and regulations but also under existing administrative programs. It is mind-boggling to contemplate the seemingly endless stream of possibilities such an exercise might entail when executed at the national level with respect to regulations affecting literally tens of thousands of individual jurisdictions. Although the UMRA is easy to caricature, the instructions to the CBO nevertheless represent a principled, if impractical, effort to isolate the costs local governments should incur in any event from the incremental costs imposed upon them by federal mandates.

In the end, the importance of determining the extent to which a mandate is unfunded may pale in comparison to making a compelling policy argument either against its enactment or in favor of a less burdensome alternative.\(^{40}\) To meet that challenge, local governments and all other participants in the debate need a working definition of mandate that is not constrained by the necessity to either calculate or compensate costs.

This Article employs the following definition: a mandate is a federal statute, regulation, administrative or court order, or otherwise binding policy that directs, requires, prohibits, or restricts the actions of a state or local government in providing municipal services to its citizens. Administrative failures to

---

39. *Id.* § 658(3).

40. The importance of challenging mandates on policy as opposed to cost terms is recognized by the more thoughtful municipal advocates. Consider the following advice given by Janet Kelly the leading academic advising the National League of Cities on mandates issues, in a 1992 report:

Thinking of a mandate as a policy and following it through the policy cycle provides an opportunity to formulate responses that are much more creative than contesting cost. If mandates are treated as a policy, the aim of the policy and what it is designed to accomplish are more important considerations than the policy's cost.

*STATE MANDATES, supra* note 11, at vii.
act, including delays in regulations and the issuance of administrative orders, are mandates when they significantly impede the ability of state or local governments to implement direct orders or affirmative requirements concerning the same subject. Laws imposing liability are mandates when they concern the delivery of essential public services such as the management of municipal solid waste or sewage treatment. 41

II. THEORIES OF FEDERALISM

The truth is that for all the high-toned arguments, federalism and "the genius of the states" are almost always invoked more as tactics than as principles. Indeed, liberals and conservatives have shifted to and fro on federalism, depending on their needs at a given moment.

—E.J. Dionne, Jr. 42

"Back to 1900" is a serviceable summation of the conservatives' goal, which is to reverse many results of the liberal project first formulated around the turn of the century. That project was to concentrate political power in Washington, and Washington power in the presidency (and later also in the Supreme Court) in order to correct the incompetence of the people and the anachronistic—or worse—nature of their local allegiances and institutions.

....

Today the nation is in revolt against what Joyce and Schambra call "liberalism's campaign of civil eradication."

—George Will 43

The past, present, and future meaning of federalism in America has long fascinated political scientists and legal scholars. In recent years, this debate has achieved new levels of intensity, with some commentators attributing the country's fundamental problems to an imbalance in power between Washington and the states. 44 The Reagan administration

41. Mandates do not include laws or regulations that offer local governments the opportunity to receive a federal delegation of authority to implement or enforce their requirements. Because state and local participation in such programs is voluntary, they cannot fairly be considered mandates, no matter how rigorous those conditions may be.


44. See, e.g., id. (tracing the accumulation of power in Washington and discussing the recent revolt against central government, in favor of local organization); see also David S. Broder, Frayed Federalism, WASH. POST, Aug. 15, 1993, at C7 (noting the current deteriorated relationship between national
popularized the so-called “new Federalism”—a political doctrine that calls for radical downsizing of the federal government and the return of power to the states. The new Republican majority in Congress has reinvigorated this theme under the rubric the “new (new) Federalism.”

The movement against unfunded federal mandates can be viewed as the indispensable negative component of the new (new) federalism because it expresses the subnational governments’ refusals to take any more orders from Washington as they concurrently urge Congress and the President to turn over to them affirmative responsibilities for governing. In essence, state and local governments argue that they should not be compelled to carry out, much less pay for, any more bright ideas that originate at the federal level. The ramifications of restoring autonomy to determine and implement domestic priorities to state and local governments is well beyond the scope of this Article. Instead, it assesses one of the more important subtexts of the unfunded mandates movement, a subtext that in some ways is no less controversial.

Most federal environmental mandates control municipal conduct that is essentially indistinguishable from the same conduct in the private sector. Complaints about regulations to ensure the delivery of safe drinking water supplies, to prevent the fouling of rivers by sewage treatment plant discharges, or to contain the land disposal of solid waste apply with equal force to private sector conduct. Whether these policies are sound or necessary may be debatable. Why they represent inappropriate incursions on state and local autonomy and therefore threaten the new (new) federalism is less clear. True, local governments are elected democratically and deliver essential public services without earning a profit. There are numerous checks and balances on their conduct that do not similarly constrain the conduct of private industry. However, to expect local

45. For a description of Reagan’s “new Federalism” initiatives, see WALKER, supra note 30, at 152-62
46. See, e.g., CONTRACT, supra note 3, at 73, 133 (proposing ways to restore state authority over welfare policy and mandates); see also Dionne, supra note 42 (explaining that although House Republicans and others purport to be in favor of greater state control, appeals to devolution are used more for tactical than for principled reasons).
governments to form objective judgments with regard to their own industrial practices, given the seduction of cutting corners in a tax averse society, is to risk irreversible damage to human health, the environment, and even municipal credibility over the long run.

At the heart of the municipal protest against unfunded federal environmental mandates is a demand to be taken more seriously—to play a more influential role in the formulation of public policy. Municipal officials believe that unfunded mandates allow federal politicians to take credit for popular social initiatives while leaving the dirty job of raising taxes to pay for such programs to the lower end of the political food chain. They are convinced that the cumulative burden of federal mandates—so easy to conceive and impose in Washington, so difficult to implement in the field—has hijacked their ability to govern, consuming such a large percentage of available local revenue that they cannot develop a coherent set of programs of their own. Without a more compelling rationale for federal environmental regulation and a better method for sorting pollution control responsibilities between the three levels of government, the resistance of local governments to the federal government’s regulatory efforts will intensify and could undercut some of our most important environmental programs.

The resurgence of federalism as a viable political ideology began with President Reagan, who worked hard to advance the so-called “new federalism” because it provided a principled rationale for the major goal of his administration: eliminating big government in Washington. The Reagan “new federalist” rhetoric also disguised a far more complicated agenda that had
as one of its primary goals radical deregulation, especially in
the areas of public health, safety, and the environment. Gauging the real implications of the Reagan era and evaluat-
ing the outcome of the current self-proclaimed Republican
revolution require keeping the distinctions between the new
federalism and regulatory retrenchment firmly in mind. It was
the failure of the Reagan deregulatory campaign, and the
backlash it provoked in Congress, that produced even more
centralization of power in Washington and gave rise to the cur-
rent rebellion over unfunded mandates. This history suggests
that to avoid another destructive turn of the pendulum, a more
sensible reordering of governmental responsibility needs to oc-
cur.

A. A BRIEF HISTORY OF AMERICAN FEDERALISM

It perhaps goes without saying that the United States
began as a union of distinct, smaller states and that the Con-
stitution was a compromise between those who wished to pre-
serve the states' individual autonomy and those convinced that
a strong central government was the best way to navigate an
increasingly complex world.\textsuperscript{50} Debates over the proper roles of
the national and subnational governments are endemic to a
federalist system and as old as the American republic.\textsuperscript{51}

\textsuperscript{50} See, e.g., JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN
FEDERALISM: THE GROWTH OF NATIONAL POWER 14-54 (1992) (describing the
development of national-state relations); GLENDENING & REEVES, supra note
30, at 9-11, 36-37 (discussing the meaning of federalism and the Connecticut
Compromise); Martin Diamond, What the Framers Meant by Federalism, in
AMERICAN INTERGOVERNMENTAL RELATIONS 39, 39-48 (Laurence J. O'Toole,
Jr. ed., 2d ed. 1993) (positing American federalism as a compromise between
nationalists and true federalists); Martha Derthick, American Federalism:
Madison's Middle Ground in the 1980s, 47 PUB. ADMIN. REV. 66, 66-67 (1987)
descriving the ongoing quest for an acceptable balance of national and local
control); Deborah Jones Merritt, The Guarantee Clause and State Autonomy:
Federalism for a Third Century, 88 COLUM. L. REV. 1, 2-10 (1988) (discussing
the compromise). \textit{But see} RAOUl BERGER, FEDERALISM: THE FOUNDERS' DESIGN
48-76, 178-192 (1987) (arguing that the Founders intended to pre-
serve broad state autonomy and authority over domestic matters).

\textsuperscript{51} As Alice Rivlin has written:
To the Founding Fathers, the division of responsibility between the
states and the federal government was a crucial issue with high
emotional and intellectual content. Most of them believed that
the states should retain a large measure of autonomy. Their experience
with the English crown made them nervous about lodging too much
power in any central government. Life under the Articles of Confed-
eration, however, demonstrated that the national government could
not function effectively if its powers were too narrow or if it depended
Political scientist Daniel Elazar points out that the word "federalism" is derived from the Latin foedsus, meaning covenant. "By definition, federal relationships emphasize partnership between individuals, groups, and governments; cooperative relationships that make the partnership real; and negotiations among the partners as the basis for sharing power." Other political scientists begin with less optimistic definitions of the theory underlying federal relationships. David Walker, author of a recent book advocating the return of power to the states as a solution to the most important problems that plague the country, writes:

[F]ederalism is a governmental system that includes a central government and at least one major subnational tier of governments; that assigns significant substantive powers to both levels initially by the provisions of a written constitution; and that succeeds over time in sustaining a territorial division of powers by judicial, operational, representational, and political means.

As Walker's definition of federalism implies, the system requires constant realignment of power not only among the three levels of government, but also between the three branches of government—executive, legislative, and judicial.

Still another pair of prominent political scientists, John DiIulio and Donald Kettl, emphasize the mutual interdependence of the three levels of government:

By "federalism" the Framers of the Constitution meant a political regime in which local units of government have a specially protected existence and can make some final decisions over some governmental activities.

....

... [T]aken together, the relevant Articles of the Constitution and the Bill of Rights established a unique political regime in which sovereignty—supreme or ultimate political authority—resided in no one level of government (e.g., the national government) and no one unit of government (e.g., the national legislature or the state legislatures acting in concert). Instead, in what Madison aptly described as America's "compound republic," the national government and the

on state contributions for revenue.


52. Daniel J. Elazar, Cooperative Federalism, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 65, 69 (Daphne A. Kenyon & John Kincaid eds., 1991) [hereinafter COMPETITION AMONG STATES]. "Cooperative federalism" is a term of art in the political science literature. For a history and analysis of this mode of intergovernmental relations, see id. at 65-86; GLENDENING & REEVES, supra note 30, at 59-60; WALKER, supra note 30, at 92-128.

53. WALKER, supra note 30, at 20.
At its best, then, the federal system is a benign and cooperative partnership and, at its worst, a compound republic riven by tension and even antagonism, but unified by the force of 200 years of common experience.

The Civil War settled the issue of whether the states had enough autonomy to desert the Union and reaffirmed the importance of Washington as the central and centralizing influence. Political scientists have characterized the relationship between national and subnational governments before the New Deal as "dual federalism": national and subnational governments essentially ran their affairs on separate tracks, with clearly delineated areas of responsibility. State and local governments played a dominant role in this duality, serving as what Walker has nostalgically called the "senior operational partners" of the federal system. In fact, local governments had exclusive responsibility for primary and secondary education, public higher education, public welfare, public hospitals, police, fire protection, and local sanitation. In contrast, the federal government's domestic role was confined to such innovative areas as antitrust, fair trade practices, and the regulation of railroads and radio.

From the Great Depression through the New Deal, World War II, the post-war period of economic expansion, and into the War on Poverty and Great Society programs, the balance of power and resources gradually shifted 180 degrees. The Federal government created national institutions to govern everything from farm policy to higher education, from inner-city housing to social welfare programs, and from interstate high-

---

55. See, e.g., GLENDENNING & REEVES, supra note 30, at 58-59 (explaining dual federalism); RIVLIN, supra note 51, at 8, 83-84 (noting that state and local governments retained control of most services until the 1930s, after which government began to expand and power began to shift disproportionately to Washington); WALKER, supra note 30, at 23-24, 67-91 (discussing the history of dual federalism).
56. WALKER, supra note 30, at 91.
57. Id. at 84.
58. For a general description of this evolution, see RIVLIN, supra note 51, at 85-100, and WALKER, supra note 30, at 92-150.
way systems to environmental protection.\textsuperscript{59} Federal grants and, with them, federal power proliferated.\textsuperscript{60} By the late 1950s, the federal government was spending more on domestic programs than the combined total of state and local government expenditures, and this trend continues to this day.\textsuperscript{61}

The drive to expand Washington's fiscal control was matched by an equally energetic effort to govern the details of domestic life through regulation. This trend is commonly referred to as "regulatory federalism."\textsuperscript{62} In 1984, the Advisory Commission on Intergovernmental Relations wrote:

Over the past two decades, however—and since 1969 in particular—there has been a dramatic shift in the way in which the federal government deals with states and localities. Although the upward climb in grant subsidies persisted during most of this era, federal policymakers also turned increasingly to new, more intrusive, and more compulsory regulatory programs to work their will . . . .

\begin{itemize}
\item \textsuperscript{59} Rivlin, supra note 51, at 87-98.
\item \textsuperscript{60} By the end of the 1970s, no fewer than 500 programs for making categorical (or special purpose) grants had been established, "each with detailed rules, formulas for matching and distributing the money, bureaucracies charged with carrying out and overseeing the program, and beneficiaries and professional groups with an interest in perpetuating and enlarging the grant." Rivlin, supra note 51, at 98; see also Walker, supra note 30, at 206-48 (blaming the federal deficit on the proliferation of government programs spurred by "the public's appetite for government programs and antipathy to paying for them."). Additionally, in 1972, Congress enacted general revenue sharing, a "no-strings-attached" form of federal aid to the states and local governments, expanding the dependence of subnational governments, especially small and poor communities, on federal largesse. Rivlin, supra note 51, at 99-100; Walker, supra note 30, at 234, 236.
\item \textsuperscript{61} Rivlin, supra note 51, at 86. The ratio between the amounts of money spent by the national and subnational governments should not be confused with the ratio between their respective number of government employees. In 1992, the number of federal civilian employees was 3.1 million, compared to 4.6 million state employees and 11.1 million local government employees. Gareth G. Cook, Devolution Chic: Why Sending Power to the States Could Make a Monkey out of Uncle Sam, Wash. Monthly, April 1995, at 9, 10; see also U.S. Bureau of the Census, Statistical Abstract of the United States 319 (114th ed. 1994) (listing the total number of federal, state, and local employees during each year from 1980 to 1992).
\item \textsuperscript{62} Walker, supra note 30, at 29. Many of the regulations so resented by state and local governments were a direct result of the enactment of statutes preempting state and local authority over various aspects of domestic policy. Between 1970 and 1990, the number of preemptive statutes enacted by Congress doubled, with between 100 and 110 new statutes enacted each decade, in contrast to an average of 20-30 a decade between 1900 and 1960. U.S. Advisory Comm'n on Intergovernmental Relations, Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues 7-9 (1992).
\end{itemize}
In the intergovernmental sphere... regulation and subsidy are less like different parts of a dichotomy than opposing ends of a continuum. At one extreme is the general support grant with just a few associated conditions or rules; at the other is the costly, but wholly unfunded, national "mandate."\(^6\)

Given the interplay between subsidy and regulation, with the former used to facilitate acceptance of the latter, it was entirely predictable that state and local outrage over regulation would rise in direct proportion to the diminution of federal assistance. This trend has characterized the last two decades of American federalism.

In 1980, President Reagan came to Washington pledging to change government as we then knew it. The Reagan "new federalist" revolution had four major facets: (1) cutting the size of the federal bureaucracy; (2) cutting the levels of federal aid provided to state and local governments; (3) devolving responsibility for social programs to the states; and (4) deregulation, especially in the areas of public health, occupational safety and health, and the environment.\(^6\) By claiming to have the states' interest in more authority at heart, and by promising to dismantle the federal bureaucracies that had stolen that authority, the administration created political cover for withdrawing large amounts of federal funding from subnational governments and for rolling back regulation that its major industrial supporters found offensive.\(^6\)

Reagan's new federalism, then, was the label applied to an agenda that was far more complex than restoring the balance of authority between national and subnational governments. The label provided a simple and publicly appealing description for fulfilling much more pragmatic and less popular political

---


64. See RIVLIN, supra note 51, at 101-02 (discussing the Reagan administration's cuts in federal grants to the states); WALKER, supra note 30, at 152-53 (explaining Reagan's strategies to reduce the federal government's intergovernmental role); see also ANTON, supra note 30, at 217-22 (discussing Reagan proposals to devolve to the states responsibility for AFDC, Food Stamps, and some 44 other federal programs).

65. See, e.g., ANTON, supra note 30, at 217-22 (examining Reagan federalism initiatives and concluding they were based more on budget reduction than on structural reform); Timothy J. Conlan, Federalism and Competing Values in the Reagan Administration, in AMERICAN INTERGOVERNMENTAL RELATIONS 265, 265-80 (Laurence J. O'Toole, Jr. ed., 2d ed. 1985) (examining instances in which the Reagan administration abandoned its federalist objectives in favor of reducing the federal budget and deregulating the private sector).
goals. As the administration wore on, close observers of its de-
regulatory initiatives increasingly questioned the purity of its
commitment to devolution.66

In the end, the Reagan administration was far more suc-
cessful in cutting grants and dismantling bureaucracy than in
devolving authority and deregulating. The administration
sharply cut aid to states and local governments; while Con-
gress resisted further deep cuts, the rate of growth in categori-
cal grants was far slower than in earlier decades, and general
revenue sharing was eliminated in 1986.67 The Reagan ad-

---

66. See Susan Rose-Ackerman, Defending the State: A Skeptical Look at
discussing the Reagan administration's failure to follow its expressed rhetori-
cal commitment to delegate more authority to the states). In a particularly
ironic and revealing twist, federalism was abruptly abandoned when the
chemical industry discovered that the inevitable result of a federal rollback
was the creation of an annoying patchwork of state laws, some of which were
far more stringent than what it could expect from the Reagan administration,
which quickly stepped back into the breach. See, e.g., Business's War against
the States, FORTUNE, Dec. 12, 1983, at 49, 49, 52:

Ask a businessman about centralized government and you're likely to
get an earful about its dangers and a paean to federalism . . . . Yet in
the capital this autumn, business pleas for the feds to take over vari-
ous state functions have been as numerous as falling leaves. Even
the Reagan administration, which only yesterday was touting its New
Federalism, has turned a sympathetic ear to some of these demands

. . . .

. . . Lately the chemical industry has sought a uniform federal re-
quirement that labels be affixed to containers of toxic substances
identifying the chemical composition of their contents and recom-
ended antidotes. The standard would supersede a patchwork of
state requirements . . . . The Reagan Administration's proposal . . . is
expected to be promulgated around Thanksgiving.

Id.; see also Michael Wines, Chemical Industry Fears Pendulum's Swing Back

The nation's chemical industry, one of the chief beneficiaries of the
Reagan Administration's deregulation crusade, apparently wonders
now whether it is getting too much of a good thing . . . .

. . . . [W]ith federal oversight dwindling, the states are stepping up
their regulatory roles—and the prospect of dealing with "50 little
EPAs" instead of one . . . has clearly become an industry worry.

Id.

67. RIVLIN, supra note 51, at 101-02; WALKER, supra note 30, at 157-58
describing cuts made in Reagan's first year in office; id. at 234 (describing
the demise of general revenue sharing in 1986). It is also important to distin-
guish between the level of funding provided throughout the period for welfare
programs and the level of funding provided for such non-welfare programs as
environmental and natural resource protection. Even though federal aid for
social welfare programs has grown on a per capita basis since 1980, federal
administration's sustained attack on the federal bureaucracy also significantly reduced the number of federal employees and exacerbated the gap between private and public sector earnings. These results in turn produced what some political scientists have called the "hollow government," connoting an incompetent and demoralized workforce incapable of implementing the complex maze of laws, regulations, and programs for which it was responsible.68 However, the major Reagan devolutionary initiatives—the so-called "Big Swap" and the "Turnback" proposals—died in the face of concerted resistance from members of Congress and many prominent governors who feared the implications of its suggestion that the states should assume full responsibility for the Aid for Dependent Children (AFDC), Food Stamps, and forty-four other smaller social welfare programs in exchange for federal assumption of responsibility for Medicaid.69 The administration's efforts to expunge ambitious federal regulatory programs also foundered early on, hoisted on the petard of impolitic appointees like James Watt and Ann Gorsuch Burford, as well as an increasingly activist Democratic Congress.70

Yet perhaps the most significant long-term effect of the Reagan revolution was the federal deficit. By 1989, it had soared to $2.8 trillion (three times the 1980 figure); by 1993, federal debt had reached nearly $4 trillion.71 The strain of

68. WALKER, supra note 30, at 156; see also Murray L. Weidenbaum, Regulatory Reform under the Reagan Administration, in THE REAGAN REGULATORY STRATEGY 15, 34-35 (George C. Eads & Michael Fix eds., 1984) (reporting a 16% decline in the number of federal regulators—defined as the number of people working full-time in federal regulatory agencies—in the period between 1980 and 1984).

69. ANTON, supra note 30, at 219-22; RIVLIN, supra note 51, at 123-25; WALKER, supra note 30, at 326.

70. See, e.g., WALKER, supra note 30, at 8, 158-61 (explaining that Reagan's deregulatory accomplishments did not extend beyond his first two years in office); George C. Eads & Michael Fix, Introduction to THE REAGAN REGULATORY STRATEGY 1, 1-3 (George C. Eads & Michael Fix eds., 1984) (summarizing the first two and a half years of the Reagan administration's regulatory relief program); Timothy J. Conlan, And the Beat Goes On: Intergovernmental Mandates and Preemption in an Era of Deregulation, 21 PUBLIUS 43, 55 (1991) (discussing the Reagan administration's failure to halt increases in regulatory legislation).

71. WALKER, supra note 30, at 163.
dealing with the political and economic pressure caused by the deficit accelerated the end of so-called "cooperative federalism," producing a "coercive" or "fend-for-yourself" federalism that persists to this day. Federal politicians continued to enact ambitious social programs but gave up any pretense of providing substantial aid for the implementation of such mandates at the state and local levels.

In no area are the implications of the failed Reagan deregulatory agenda and the deficit-induced tensions in intergovernmental relations more evident than in environmental protection. Rather than inspiring a thoughtful reexamination of the relationship between the three levels of government, the Reagan Revolution polarized the debate into one between environmentalists and "polluters," provoking a backlash in Congress that produced a heyday for ambitious legislation. State and local governments were lost in the shuffle of those battles, only to emerge in the next decade as a major subject of regulations implementing the many mandates that Congress launched.

Within the space of three years, Congress passed expansive reauthorizations of the Resource Conservation and Recovery Act, the Safe Drinking Water Act, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund), and the Clean Water Act. However, instructing an Agency to regulate and enabling it to regulate wisely and effectively are two very different things, and Congress systematically refused to put its money where its mouth was. The EPA's budget barely kept pace with inflation and its rule-making efforts fell further and further behind rigorous statutory schedules. The EPA's travails were mirrored

72. Id. at 31, 163; see also John Kincaid, From Cooperative to Coercive Federalism, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 147-50 (1990) (arguing that the sharp increase in the federal deficit in the 1980s and concurrent loss of revenue to liberal reformers weakened state and federal cooperation and spurred more federal mandates).

77. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/RCED DOC. NO. 88-
at the state level. While the federal government effectively occupied the field in crafting regulatory standards for clean air, clean water, and the management of solid waste, it depended on state governments to implement and enforce those rules.\textsuperscript{78} Funding for state programs dropped steadily and was not replaced by state legislatures.\textsuperscript{79} Thus, the problem was compounded: the EPA eked out scores of new regulations, only to turn them over to a state bureaucracy that staggered under the load.

In the nine years following President Reagan's departure from office, these trends have continued. George Bush served as a benign caretaker of the Reagan revolution, failing to take radical action to devolve more authority to the states, to roll back regulation, or to reduce the deficit.\textsuperscript{80} Like Reagan, he failed to resolve the growing tensions between fervent, pro-business advocates of deregulation within his administration

\textsuperscript{101}, \textit{ENVIRONMENTAL PROTECTION AGENCY: PROTECTING HUMAN HEALTH AND THE ENVIRONMENT THROUGH IMPROVED MANAGEMENT} 20 (1988) ("[T]he increase in responsibilities brought about by new legislation and emerging environmental problems, budget amounts have experienced little change over the last four years in terms of constant dollars."); \textit{Hollow Government: EPA's Budget Blues}, \textit{GOV'T EXECUTIVE}, May 1991, at 8. This article notes:

\textquote{[EPA's] operating budget, which covers all the agency's programs except sewage treatment plant construction grants and Superfund, has not increased in constant dollars from its fiscal 1979 level of $1.7 billion . . . . Yet during this same period, EPA has seen a tremendous expansion of its responsibilities, including new duties for hazardous waste treatment and transportation, underground storage tanks, asbestos cleanups and the regulation of drinking water contaminants.}

\textit{Id.} These grim analyses are particularly noteworthy because they were written before passage of the 1990 Clean Air Act Amendments, which dramatically expanded the Agency's responsibilities and imposed another series of tight rule-making deadlines that have not been met. \textit{See}, e.g., George Lob-senz, \textit{Budget Cuts Mean Missed Deadlines for EPA's Air Quality Program}, 8 ENV'T Wk. 8105, 8105 (1995) (discussing the EPA's claims that deep cuts in its toxic air and acid rain programs would prevent it from meeting deadlines for regulation imposed by the 1990 Clean Air Act Amendments).

\textsuperscript{78}. For citations to the provisions in major federal environmental laws that delegate implementation and enforcement authority to state governments, see \textit{supra} note 15.


and activist Democrats in Congress. While much has been made of Bill Clinton's victory over Bush, he too has found it difficult to make lasting changes given his own instinct to compromise, the pressures of the deficit, and Americans' growing antipathy to big government in Washington.81

Early in his administration, President Clinton wrote a multi-billion dollar "economic stimulus" package designed to revitalize the cities, raising high and, in retrospect, absurd hopes that the balance between federal mandates and federal funding was about to be restored.82 Despite the punishment municipal officials had endured over twelve years of Republican rule and despite what should have been their better judgment about the limits of federal largesse in a deficit-ridden environment, national municipal leaders allowed themselves one last flirtation with the inflated expectations of a bygone era and fervently supported the legislation. When Republican fiscal conservatives torpedoed the proposal, the stage was set for the unfunded mandates movement—a crusade that in the view of most municipal officials was the only rational response to their deteriorating relationship with Washington.

In 1994, with a brilliant repackaging of the most fervent Reagan rhetoric, Republicans took back control of the national legislature for the first time in fifty years and also won a majority of seats in the statehouses of some thirty states.83

81. See, e.g., Michael Kelly, Bill Clinton's Climb, N.Y. TIMES, July 21, 1994, § 6 (Magazine), at 20 (discussing President Clinton's career).


The uphill struggle against intractable urban problems has taken its toll on big-city mayors this year: at least 15 large cities are losing their top officials . . . .

. . . .

The last straw for some mayors may have been the defeat earlier this year of President Clinton's economic stimulus package, for which cities compiled a list of 4,400 ready-to-go urban infrastructure projects that would have brought them $7.2 billion and 200,000 new jobs.

83. See, e.g., Dan Balz, GOP and the White House Confront an Era of New Relations, Turning Agenda into Action Poses Urgent Test for Congress, WASH. POST, Nov. 14, 1994, at A1 (discussing GOP agenda); Federalism, Too, WALL
*Contract with America* is in many ways an eerie reprise of the most popular Reagan rhetoric. It hails federalism as the centerpiece of a revolution that would restore the health of the nation by cutting big government, turning power and responsibility back to the states, and deregulating in the areas important to American industry. Like its predecessor, this new revolution's invocation of federalism masks a far more complicated agenda. For example, in a direct parallel to events in the early eighties, the *Contract* calls for blanket federal preemption of state product liability law at the same time that it promises to get the federal government off the backs of the states in other areas. In sum, the track record of government over the last two decades vindicates E.J. Dionne's observation that proponents of federalism more often invoke it as a tactic than as a principle. The fact remains, however, that this period of upheaval in our national politics has produced more thoughtful, if less well-known, analyses of the state of our federalist system, as well as recommendations for restoring comity between the three levels of government.

B. NEW (NEW) FEDERALIST THEORY

New (new) federalist political theory holds that the solution to much of what ails the country is to reorganize the way responsibility for the domestic agenda is distributed among the three levels of government. Proponents of the theory cover the entire political spectrum and have worked to develop their arguments over the course of two decades.

St. J., Jan. 3, 1995, at A8 (asserting that the goal of many new generation Republicans is to shift power and authority away from the federal government).

84. See, e.g., Albert R. Hunt, *Federalism Debate is as Much About Power as About Principle*, WALL ST. J., Jan. 19, 1995, at A19 (claiming that new GOP Congress's policy measures would be held out as a "watershed" in transferring power back to state and local governments); Will, *supra* note 43, at C7 (implying that the Republican electoral victories in 1994 indicate a "national revolt" against centralized government).

85. *Contract*, *supra* note 3, at 146-48. At the behest of major manufacturers, the Reagan administration also supported federal preemption of state tort laws imposing liability for defective products. For a noble if unintentionally humorous effort to rationalize this position as consistent with Reagan New Federalism and the return of power to the states, see C. Boyden Gray, *Regulation and Federalism*, 1 YALE J. ON REG. 93, 96 (1983) ("[S]tate product liability laws have created such significant burdens on interstate commerce that preemptive federal legislation was necessary to provide consistent nationwide treatment of product liability disputes.").


87. See, e.g., DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM
theory does not support a wholesale abandonment of a strong federal role in regulating the environment. Instead, it advocates the continuation of programs that allocate responsibility among the three levels of government on the basis of principles similar to those proposed in Part IV below.  

For example, Alice M. Rivlin posits that the United States is enmeshed, for the foreseeable future, in a period of economic stagnation; this period is characterized by working people losing economic ground so consistently that they can no longer believe in the "American dream" of offering their children a better future. Rivlin argues that the major reason for this the States (3d ed. 1984) (discussing the American political system in the context of a "partnership" of governments and individuals); GLENDENING & REEVES, supra note 30, at 170-212 (discussing "dynamic federalism"); David R. Beam et al., Federalism: The Challenge of Conflicting Theories and Contemporary Practice, in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 247 (Ada W. Finifter ed., 1983) (critiquing traditional theories of federalism and suggesting need for new "functional theory"); Martha Derthick, Federal Government Mandates, Why the States Are Complaining, BROOKINGS REV., Fall 1992, at 51, 53 (discussing new "common tax method" as a means to revitalize state governments). For an excellent dialogue concerning the content and implications of new (new) federalist theory, see SAMUAL H. BEER ET AL., CENTER FOR NAT'L POLICY, FEDERALISM: MAKING THE SYSTEM WORK (1982).

88. As discussed in Part IV, a strong federal role in setting environmental standards is justified by (1) the effects of transboundary pollution; (2) economies of scale in the scientific, administrative, and legal work that must be done to formulate sensible regulation; and (3) considerations of equity and equal protection for disadvantaged Americans. On the other hand, the federal government should defer to subnational governments (1) when it is necessary to tailor regulation to local conditions, and (2) in order to provide local governments with sufficient autonomy to establish priorities for the use of limited resources by freeing them from excessive and unnecessary regulatory controls.

89. RIVLIN, supra note 51, at 1-2. Rivlin contends that a growing understanding of the ramifications of a constricting economy has left middle and lower income Americans frustrated and hopeless, producing, in turn, a disillusioned and volatile electorate. Id. at 6. She argues that the widening gap in income between the richest Americans and the vast majority of the population is among the most troubling symptoms of this stagnation. Id. at 58-61, 70-72.

Rivlin currently serves as Director of the Office of Management and Budget in the Clinton administration. She wrote her book before she joined the Clinton administration and the credibility of her ideas is by no means dependent on her current political role. Indeed, political scientists John DiIulio and Donald Kettl report that Rivlin's ideas were specifically embraced by prominent Republican conservative William J. Bennett, who has hailed the emerging "consensus" on devolution across the political spectrum. But, DiIulio and Kettl quickly add, Bennett's pronouncement may be premature because "the devolution is in the details." Although Rivlin's ideas may seem similar to those of many prominent Republicans, there are significant differences, the most important of which is Rivlin's advocacy of universal health care coverage guaranteed at the federal level and steadfast Republican oppo-
economic stagnation is that the national government is grossly overextended because it has inserted itself into areas such as education, crime, and welfare that were once, and should again be, the province of subnational governments.\textsuperscript{90} She contends that the federal government's intrusiveness is no longer justified by the incompetence of subnational governments which have reformed themselves and are now capable of assuming a more equal partnership role.\textsuperscript{91} Delegating the primary responsibility for economic development to state and local governments will restore the nation's capacity to find grassroots, "bottom up" solutions to stagnation.\textsuperscript{92}

A second, more conservative perspective is put forth by David B. Walker in his 1995 book \textit{The Rebirth of Federalism, Slouching Toward Washington}. Walker focuses on the "spend, spend, borrow, borrow" ethic of the 1980s that produced a fatal combination of high expectations about what government could achieve and an unwillingness to pay new taxes either to reduce the deficit or to fund new programs.\textsuperscript{93} Politicians understandably believe that lowering taxes is expedient and raising them is unthinkable. They have tremendous difficulty delivering the bad news about the effects of budget cuts to their constituents. Wherever possible, Walker observes, federal politicians seek to escape the dilemma by handing off the responsibility for financing popular new programs to state and local governments.\textsuperscript{94} The gap between public expectations and willingness to pay has so overburdened federal and state bureaucracies that they can no longer credibly administer even the most popular programs.\textsuperscript{95}

Having made their diagnoses, Rivlin and Walker prescribe similar cures. Rivlin calls her prescription "dividing the job." She advocates a massive turnback of responsibility for "the Productivity Agenda"—public infrastructure, job training, edu-

\begin{itemize}
\item \textsuperscript{90} Id. at 2, 9.
\item \textsuperscript{91} Id. at 102-07; see also WALKER, supra note 30, at 9-10, 249-83 (arguing real solutions to regional problems must come from regional entities); Mavis Mann Reeves, \textit{The States as Polities: Reformed, Reinvigorated, Resourceful}, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 83 (1990) (arguing that states have developed new capabilities to undertake governance and policymaking). For a contrary view about the states' competence in relationship to the federal government, see Cook, \textit{supra} note 61, at 9.
\item \textsuperscript{92} RIVLIN, supra note 51, at 11-13.
\item \textsuperscript{93} WALKER, supra note 30, at 168, 206-48.
\item \textsuperscript{94} Id. at 151-70, 240-41, 302-03.
\item \textsuperscript{95} Id. at 151-70, 206-48, 311.
\end{itemize}
cation, housing, rural services, and economic development—to state and local governments. This move would leave the federal government free to concentrate on international relations and those aspects of domestic policy that clearly require a national solution. Rivlin would finance this turnback through the national imposition of so-called "shared taxes"; the revenue collected by the new taxes would be distributed according to need among the states. Walker basically agrees with Rivlin's proposals to devolve broad areas of social policy to the states, although he does not advance a specific proposal for generating new funding at any level of government.

In their 1995 book, *Fine Print: The Contract with America, Devolution, and the Administrative Realities of American Federalism*, John Dilulio and Donald Kettl also accept that devolution is bound to occur, either for the reasons espoused by Rivlin and Walker or because of the political imperatives that allowed Republicans to recapture Congress in 1994. However, they urge abandonment of the naive notion that true reform can accompany more drastic cutbacks in the resources devoted to government at the federal, state, and local levels:

Some evidence suggests that the anti-government, anti-Washington consensus is 3,000 miles wide but only a few miles deep . . . . [H]ow many contemporary Americans really do not want government in general, or the national government in particular, to act on reducing crime, encouraging family values, and all the rest? Unless we have misplaced or completely misread the last half-century's worth of public opinion data, and unless the $3 trillion worth of government Americans have voted for themselves is a mirage, the only reasonable answer is "a minority" . . . .

Whatever form devolution takes, the question remains whether this liberating realignment should embrace the central demand of the unfunded mandates movement: should the federal government abandon any effort to regulate the conduct of state and local governments unless it is willing to pay the full cost of compliance? Or, narrowing the question one important step further, is there a role for the federal government in policing the delivery of public services by state and local governments when such operations could have an adverse impact on the environment and public health?

Both Rivlin and Walker place environmental protection in

---

97. Id. at 16-19, 126-52.
99. DILLULIO AND KETTL, *supra* note 54, at 59, 61, 64.
the category of problems that require federal solutions, largely on the basis that it causes transboundary pollution that crosses state lines.\textsuperscript{100} Rivlin also argues that the federal government must provide leadership on international environmental issues and cannot do so without keeping its own house in order.\textsuperscript{101} Walker decries unfunded mandates and specifically lists the Safe Drinking Water Act as an example of a costly and unwarranted burden on local governments.\textsuperscript{102} On the other hand, he supports the basic divisions proposed by Rivlin, commenting that "[s]hared Federal-state programs [should] continue in the areas of the environment . . . [and] natural resources . . . ."\textsuperscript{103} Of course, DiIulio and Kettl have emphasized, recognizing the need for shared programs does not answer the difficult question of how responsibility for specific problems should be allocated.\textsuperscript{104}

In a more detailed analysis, Jerry Mashaw and Susan Rose-Ackerman suggest five standards for justifying federal intervention in an area of domestic policy.\textsuperscript{105} First, federal regulation is justified when "interstate externalities" (for example, transboundary pollution) exist. Second, economies and diseconomies of scale in administration should be evaluated, although such considerations can cut both ways: at times, only the federal government will have the resources to gather sufficient information and, at other times, effective implementation will require information that is best gathered and analyzed at the local level. Third, a strong federal role is necessary in areas where the states can fall prey to "prisoners' dilemmas" that trap them in destructive competition with each other. Fourth, federal regulation is justified where uniform standards provide benefits to regulated industry (for example, large national

\textsuperscript{100} RIVLIN, supra note 51, at 12, 119; see WALKER, supra note 30, at 327 (listing the environment and natural resources among those areas in which states and the federal government should share responsibility).

\textsuperscript{101} RIVLIN, supra note 51, at 24-25.

\textsuperscript{102} WALKER, supra note 30, at 302.

\textsuperscript{103} Id. at 327.

\textsuperscript{104} DIULIO AND KETTL, supra note 54, at 9.

\textsuperscript{105} Jerry L. Mashaw & Susan Rose-Ackerman, Federalism and Regulation, in THE REAGAN REGULATORY STRATEGY 115-22 (George C. Eads & Michael Fix eds., 1984); see also SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA 159-73 (1992). A similar set of criteria were proposed by David Osborne in Mandate for Change, a book credited as a "blueprint" for the Clinton administration. David Osborne, A New Federal Compact: Sorting Out Washington's Proper Role, in MANDATE FOR CHANGE 244-45 (Will Marshall & Martin Schram eds., 1993).
firms) by easing the burden of compliance. Finally, in an interesting twist on traditional public choice theory, the authors argue that state governments are more easily captured by narrow special interest groups and that a strong federal role is often necessary to guarantee a full range of public participation in the regulatory process.\footnote{With some important variations, these standards are consistent with the five sorting principles for allocating environmental responsibility that are proposed in Part IV below.} Given the current national political climate, it is inevitable that ambitious devolution will occur in many areas of domestic policy. As responsibility for social welfare programs shifts to the states, with reductions in federal fiscal support provided for such programs, state financial and governmental resources will be taxed to their limits. To accomplish a reordering of government on this grand scale—dividing the job, devolving responsibility, freeing the national government to deal with international problems, and re-engaging state and local governments in solving the major social issues of the day—the technically complex and important problems posed by municipal pollution should stay on the federal, as well as the state and local lists. The federal government must approach the business of regulating in a more sensible and sensitive way or it will continue to be dogged by municipal anger and resistance. But leaving counties, cities, and towns to their own devices risks turning the clock back to a time when we did not appreciate either the magnitude of the problems caused by the pollution they produce or the difficulty of finding the best solutions. Application of the sorting principles proposed below would result in a shared system of environmental regulation that would stand in sharp contrast to the unequivocal devolution of federal authority proposed by scholars in other contexts.

106. This last argument directly challenges the central assumption of the municipal crusade against unfunded federal mandates that making decisions at a level of government that is closer to the people will restore democracy and accountability to policy-making. For a fuller discussion of the implications of this vein of public choice theory on the sorting of environmental responsibilities between the three levels of government, see infra notes 270-273 and accompanying text.
III. NEW (NEW) FEDERALISM IN PRACTICE AND ITS IMPLICATIONS FOR ENVIRONMENTAL PROTECTION

What happens along the Mississippi River . . . if they choose not to clean up the municipal sewage because the Federal Government will not pay 100 percent? . . . An unfunded mandate upstream is untreated sewage downstream.

—Rep. George Miller (D-CA.)

Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

—Executive Order 12,612, issued by President Ronald Reagan

The Court today surveys the battle scene of federalism and sounds a retreat. . . . I would prefer to hold the field and, at the very least, render a little aid to the wounded. . . . [State autonomy is a relevant factor in assessing the means by which Congress exercises its powers. This principle requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power.

—Justice O'Connor, dissenting in Garcia v. San Antonio Metropolitan Transit Authority

Over the past two decades, all three branches of the federal government have attempted to restore a healthier balance of power between federal and subnational governments. As the rising decibels of the unfunded mandates debate indicate, though, none has had either significant or lasting success. The latest and most significant entry in the quest for effective solutions, the Unfunded Mandates Reform Act of 1995 (UMRA), was enacted because state and local governments believed they could not secure effective relief from either the President or the Supreme Court. As discussed below, however, there is every reason to expect that the UMRA will prove a disappointment to its supporters and that the quest will continue.

The federal government's failures are the result of two

closely related threshold assumptions. First, all three branches define the “problem” of modern federalism as a matter of correctly calibrating the internal structure and processes of American government. As a result, they pay only lip service to the substantive issues at stake in any given dispute between the three levels of government. The question becomes whether there should be across-the-board limits on congressional and presidential authority rather than the appropriate question: whether there are compelling reasons why a particular level of government is best suited to grapple with a specific problem, be it welfare, crime, or environmental protection. Second, because they define the problems of modern federalism in procedural terms, all three branches have crafted generic solutions designed to restrain the behavior of the federal government without regard to the details of the problem before it. These restrictions have proven all too easy to evade as Congress and the President continue to centralize authority over specific aspects of domestic policy.

Ultimately, the search for more enduring solutions to the unfunded mandates problem will require Congress, the executive branch, and state and local governments to eschew procedural solutions and instead undertake the difficult job of formulating and applying sorting principles like those discussed in Part IV, below. Only by developing a more compelling substantive rationale for dividing responsibility can cooperation be restored in an era when federal largesse is not available to tranquilize intergovernmental tensions.

A. CONGRESS

From the state and local perspective, asking Congress to resolve the problem of unfunded federal mandates is a dubious proposition, requiring an institution that craves public recognition to relinquish a key piece of its authority to launch popular initiatives. Overwhelmed by the prospect of crafting tailored reforms for the federal regulatory programs that impose the most troubling mandates, state and local strategists decided to settle for across-the-board procedural solutions. In effect, the UMRA requires Congress to exercise self-restraint unless it decides not to do so. The statute is unlikely to deter the imposition of new mandates. To the extent that it appears effective, its success will almost certainly be attributable to a

111. Id.
general antipathy to new regulation rather than the fiscal note process that is at the heart of its provisions.\textsuperscript{112}

State and local government reluctance to tackle unfunded mandates on a program-specific basis is understandable, if self-defeating. As illustrated by the examples presented in Part V, programmatic reforms require the development of a detailed critique of existing regulatory requirements. If the goals served by mandates are popular ones—and, as discussed below, environmental protection remains a popular, even politically sacred, goal—proponents of change must suggest equally effective alternatives. The most obvious solution is to obtain federal funding for the mandate. That possibility, though, is increasingly remote in the current political climate. Other possible solutions include shifting the cost burden to industry or persuading Congress to modify or circumscribe the mandate. All of these alternatives provoke their own intractable controversies and can take a very long time to accomplish legislatively.

The difficulty of achieving specific programmatic reforms is compounded by the fact that unfunded environmental mandates apply to services performed by both the public and private sector. Alleviating the burden on local governments alone would establish a troubling double standard. Removing the burden across-the-board means reducing environmental protection without any countervailing federalist justification. Given these political and practical realities, the temptation to support a relatively noncontroversial, generic approach to the problem, especially one that could be packaged as a single piece of legislation, proved irresistible.

The UMRA was a quick, almost painless, political fix. The legislation was introduced in the opening days of the 104th Congress by a newly elected Republican leadership eager to implement the \textit{Contract with America}.\textsuperscript{113} It was put on an extraordinarily fast track, approved by large margins in the Senate (86-10) and House (360-74) within a month after introduction, and referred from conference six weeks later to be passed by even larger margins (the Senate vote was 91-9 and the


\textsuperscript{113} S. 1, 104th Cong. (1995); H.R. 5, 104th Cong. (1995). The \textit{contract} specifically promised to pass unfunded mandates legislation, although the version it proposed would have \textquote{cap[ped] mandates cost below its level for the preceding year.} \textit{contract, supra} note 3, at 133.
House vote was 394-28). A disoriented and isolated liberal Democratic minority put up only token resistance on the House floor, losing vote after vote on amendments designed to narrow the scope of the bill. In the Senate, the opposition was led by Robert Byrd, a legendary master of parliamentary procedure, who tied up the Senate floor debate for several days but ultimately gave way to the overwhelming political popularity of the issue.

The most serious challenge to the legislation's rapid progress was raised by companies providing services such as garbage collection, recycling, and disposal who were afraid local governments would use the UMRA to win exclusive exemptions from costly environmental requirements, thus making it impossible for the private sector to compete with municipal providers. The bill's sponsors neutralized these concerns by expanding its coverage to incorporate so-called "private sector" mandates, instantly creating multiple new constituencies for the legislation.

The UMRA may have achieved such overwhelming and

117. See, e.g., 141 CONG. REC. S1652 (daily ed. Jan. 27, 1995) (statement of Sen. Lieberman) (stating that the legislation disadvantages the private sector and that it should be amended to eliminate the disparate treatment).
118. See, e.g., 2 U.S.C.A. §§ 658c(b) (West Supp. 1996) (applying fiscal note requirements to private sector mandates), 658d(a)(1) (establishing a point of order for a failure to publish a fiscal note regarding both intergovernmental and private sector mandates). The implications of the UMRA's private sector provisions are beyond the scope of this Article, although the subject could assume growing importance if the Act is implemented aggressively. Privatization is a promising solution to many of the mandates problems cited by local governments because it shifts responsibility for mastering technically complex environmental regulations to private sector companies that specialize in delivering a single service, such as garbage disposal, sewage treatment, or drinking water treatment. See infra note 264 and accompanying text (discussing privatization of services traditionally provided by local governments). Such companies generally favor more demanding regulation because they believe it gives them a competitive advantage. To the extent that concerns about UMRA cost estimates result in the drastic weakening of regulation, or result in other policies that protect municipal providers at the expense of private sector providers, the private sector will resume its political protest, even if it must part company with the local government lobby which represents its potential customers.
rapid political success because state and local governments persuaded Congress that its ways were in error and their cause was just. After all, the 104th Congress is widely touted as representing a watershed in American history, willing to make profound and even revolutionary changes in the way the nation is governed.119 But it is far more likely that the legislation passed quickly because it will not have any significant effect on public policy until and unless Congress decides that it should. It was, in short, a promise of future repentance that miraculously sufficed to quell a present rebellion.

Symbolic law has obvious benefits to a society that is unwilling to come to grips with a problem, but it represents a defeat for those who care whether the problem is actually solved.120 The defeat lies not only in the ineffectiveness of the symbolic law, but also in its use to justify resistance to other efforts to address the problem.121 If, as argued below, the UMRA proves to be a symbolic law, its most unfortunate effect may well be to complicate the search for better solutions.

The UMRA includes two basic approaches to procedural reform: (1) fiscal note provisions requiring the preparation of cost estimates for various types of legislative and regulatory

---

119. See, e.g., David Broder, A Congress for the History Books, NEW ORLEANS TIMES-PICAYUNE, Sept. 20, 1995, at B7 (characterizing the 104th Congress as "one of the most significant [Congresses] in the last half-century."). Many of these initiatives, however, ultimately floundered legislatively and, by the end of the second session, the Republican majority compromised its more radical principles for the sake of getting several popular initiatives passed. Helen Dewar and Eric Pianin, Pragmatism Drives Frenzy of Legislation: Chastened GOP Leaders Drop Ideological Battles, WASH. POST, Aug. 4, 1996, at A1.

120. Lawrence Friedman has written of the "Victorian compromise" that prevailed in 19th century American law. During this period, draconian laws to punish immoral behavior were on the books but were rarely enforced, serving instead as a well-understood symbol that such behavior, while inevitable and widespread, should remain underground. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 585-88 (2d ed. 1985); Lawrence M. Friedman, Notes Toward a History of American Justice, 24 BUFF. L. REV. 111, 120-21 (1974).

121. John Dwyer has also used the metaphor of "symbolic" legislation to describe congressional enactment of environmental laws that are so stringent that they cannot be implemented as written. John P. Dwyer, The Pathology of Symbolic Legislation, 17 ECOLOGY L.Q. 233, 233 (1990). As Dwyer would almost surely acknowledge, however, Congress intended to take decisive action regarding such problems as air pollution even if it suspected that the remedies it had chosen would be very difficult to implement, while Friedman's point is that society sometimes leaves laws on the books counting on the fact that they will never be used.
activities, and (2) point of order provisions establishing an enforcement mechanism against future unfunded mandates on the House and Senate floor. Each approach raises distinct problems considered separately below.

1. Fiscal Note Provisions

The UMRA requires House and Senate authorizing committees to identify any “mandate” contained in a bill they report and to submit such legislation to the CBO for analysis. The statute defines a “mandate” as an “enforceable duty” imposed on subnational governments or the private sector. Mandates also include legislation, statutes, or regulations that would “reduce or eliminate” appropriations that support compliance with enforceable duties. In theory, then, the UMRA applies to virtually any federal effort to regulate the conduct of the private sector, whether or not the requirement also applies to state, local, or tribal governments.

Once a committee has identified a mandate, the committee report that accompanies the legislation must contain a “qualitative, and if practicable, quantitative assessment of costs and benefits anticipated from the Federal mandates.” It must also analyze its potential effect on the “competitive balance” between the public and private sector. The report must state whether the committee intends to fund the mandate, identify existing and new sources of funding, or, if necessary, explain why the mandate should remain unfunded.

None of these provisions is likely to result in much more than self-serving paperwork; the fiscal notes prepared by the CBO trigger the real action.

The CBO is required to prepare estimates for “intergovernmental” mandates that would exceed $50 million in “direct costs” annually in any of the five fiscal years following the date

123. Id. § 658b(b).
124. Id. § 658(5)(A)(i), (5)(B), (7)(A).
126. Id. § 658b(c)(2).
127. Id. § 658b(c)(3) (Supp. 1996).
128. Id. § 658b(d).
when the mandate would become effective;\textsuperscript{129} for "private sector" mandates, the threshold is doubled, to $100 million in annual direct costs.\textsuperscript{130} For both intergovernmental and private sector mandates, estimates must include a statement of the total amount of the direct costs of mandate compliance.\textsuperscript{131}

As discussed in Part I above, the UMRA's definition of "direct costs" is both convoluted and vague, but it basically requires a three-step estimation process.\textsuperscript{132} First, the CBO must ascertain the total costs the mandate would impose.\textsuperscript{133} This estimate must be developed in the absence of regulations specifying how the mandate is to be implemented; it must incorporate the mandate's likely effect on the full spectrum of public and private actors that comprise the regulated community; and it must assume that any conceivable steps to lower costs can and will be taken. Second, the CBO must quantify the increment within the total estimated cost that would be spent, regardless of the mandate, as a result of state and local laws, regulations, or "programs" in effect when the mandate is adopted.\textsuperscript{134} This increment would be subtracted from the total to produce a second estimate of the mandate's "direct" cost. Third, the CBO must evaluate whether the legislation as a whole contains any opportunities for local governments to save costs, once again subtracting this figure to come up with a final direct cost total.\textsuperscript{135}

The expectation that the CBO can master the cost implications of legal and regulatory regimes in fifty states and tens of thousands of local jurisdictions is unreasonable enough to

\textsuperscript{129} Id. § 658c(a)(1), (2).
\textsuperscript{130} Id. § 658c(b)(1), (2). The UMRA requires the CBO to explain any determination that a submitted mandate falls below either of these thresholds. Id. § 658c(c).
\textsuperscript{131} Id. § 658c(a)(2) (intergovernmental mandates), (b)(2) (private sector mandates). For intergovernmental mandates, the UMRA further requires the CBO to state the amounts of new budget authority that would be necessary to fund compliance over a ten-year period. Id. § 658c(a)(2)(B). For intergovernmental mandates that depend on existing budget authority, the CBO must only state what amounts are provided under the legislation in authorizations of future appropriations. Id. § 658c(a)(2)(C). For private sector mandates, the CBO is merely required to restate whether any authorization of future appropriations to assist compliance is contained in the legislation. Id. § 658c(b)(2)(B).
\textsuperscript{132} Id. § 658(3) (Supp. 1996).
\textsuperscript{133} Id. § 658(3)(A), (B).
\textsuperscript{134} Id. § 658(3)(D)(i).
\textsuperscript{135} Id. § 658(e)(D)(ii).
undermine the credibility of the estimates prepared in accordance with these instructions. But the UMRA takes this impossible exercise one significant step further, requiring the CBO to quantify the costs imposed and the savings made possible by standard municipal practice and voluntary self-regulation. The only source for this information is the regulated community itself, which has every incentive to exaggerate the costs imposed by federal mandates and minimize the costs that would be incurred in any event.

Significantly, the law allows the CBO to control both its workload and its professional credibility to some extent: if the CBO director decides it is "not feasible to make a reasonable estimate," he or she can furnish a statement to that effect to the committee, but must explain the reasons for the determination. In a further concession to the potentially overwhelming difficulties involved in estimating costs for legislative provisions that are in a constant state of flux as they move through the process, the law requires the CBO to update its estimates for legislation passed in amended form or revised during conference only "to the greatest extent practicable." The UMRA allows individual senators to request cost estimates for amendments they intend to offer in committee or on the floor, but again requires the CBO to comply with these requests only "to the extent practicable." It is tempting to speculate that all of these escape routes were negotiated by the CBO as its career staff began to comprehend the enormity of the workload the statute would settle on their shoulders. Even if it was conceivably possible, with unlimited resources, to perform the daunting task of estimating direct costs for the many pieces of legislation that pass through the House and Senate, the UMRA authorizes only $4.5 million annually to fund the CBO's responsibilities under the statute.

Of course, the CBO is not a novice in the cost estimation business either in general or as it applies to state and local

---

136. Id. § 658c(a)(3), (b)(3).
137. Id. § 658c(d). In recognition of the possibility that the CBO will find it "impracticable" to prepare revised estimates for conference reports, the omission of such an estimate is not subject to a point of order under the UMRA's enforcement provisions. Id. § 658d(1). However, a conference report's failure to fully fund the direct costs imposed by a mandate is subject to a point of order. Id. § 658d(2). It is not clear how Congress will determine that a conference report falls short of full funding in the absence of a CBO estimate.
138. Id. § 658f.
139. Id. § 1516.
governments, although its track record does not provide much comfort to those who count on fiscal notes to change the course of legislation. The State and Local Government Cost Estimate Act of 1981 required the CBO to prepare cost estimates for reported bills that are “likely” to result in an aggregate price tag of at least $200 million.140 According to an analysis prepared by the Advisory Commission on Intergovernmental Relations (ACIR), between 1983 and 1988 the CBO generated 3,554 cost estimates on 2,821 bills approved by House and Senate committees, but only 382 of the fiscal notes prepared—or eleven percent of the total—showed a measurable intergovernmental fiscal impact, and only eighty-nine bills—or three percent of the total—were estimated to impose costs over $200 million.141

From a state and local perspective, it is undoubtedly true that some estimates are better than no estimates, and that estimates are an important weapon in the crusade to make Congress more aware of the implications of proposed legislation. It does not follow, however, that legislatures should use such admittedly imperfect measurements as a determinative factor in future policy-making. In fact, cost estimates are a double-edged sword for state and local governments. Low estimates could be used to justify passage of objectionable legislation just as easily as high estimates could be used to stop it.

The states’ own experience confirms the pitfalls of fiscal noting. According to a 1992 report by Janet Kelly, a nationally recognized expert on unfunded mandates legislation who advises the National League of Cities (NLC), fiscal note requirements do not work well in most of the 28 states that have adopted this approach.142 Kelly concludes that the central cause of unreliable and therefore unconvincing cost estimates at the state level is the necessity of using so-called “loose”

140. 2 U.S.C. § 653 (1994). In contrast to the UMRA, this law does not prescribe rules for CBO estimates and does not impose conditions on the consideration of legislation if estimates are not prepared.

141. ACIR MIXED RECORD, supra note 30, at 62. ACIR is scathing in its evaluation of the process that produced these results:

[E]stimates are often developed hurriedly at a relatively late stage in the legislative process . . .
CBO’s cost estimates, therefore, are often based on data provided by a relatively few state and local officials . . .

. . . Some of the statutes without estimates were significant intergovernmental regulatory measures . . . for which CBO lacked sufficient time or information to prepare a reliable cost estimate.

142. STATE MANDATES, supra note 11, at v.
Because statistically valid random sampling is impossible as a practical matter, cost estimators rely on contacts they have developed with local governments that have the personnel and resources available to make good estimates on an uncompensated basis. Big cities are usually over-represented in such loose samples, further skewing their results. The problem of compiling a reliable “loose” sample is compounded at the federal level, where the potential universe of contacts is far more numerous and diverse.

One final indication of the difficulties the CBO will encounter as it implements the UMRA is the methodology used by state and local governments to estimate costs during their campaign for legislative relief. The preparation of mandate studies documenting astronomical costs became a cottage industry in the three years leading up to the UMRA’s passage, culminating in the release of two national surveys prepared by Price Waterhouse for the United States Conference of Mayors (USCM) and the National Association of Counties (NACO) which claimed that between 1994 and 1998, unfunded mandates will cost cities $54 billion and counties $33.7 billion.

Major federal environmental programs impose approximately three-quarters of the mandates itemized in the two studies.

---

143. Id. at 27-28.
144. Id. at 27.
145. For a detailed bibliography of these reports, see JANET M. KELLY, A COMPREHENSIVE GUIDE TO STUDIES ON STATE AND FEDERAL MANDATES TO LOCALITIES, AN ANNOTATED BIBLIOGRAPHY, NATIONAL LEAGUE OF CITIES RESEARCH REPORT ON AMERICA’S CITIES (1994). The bibliography contains citations to 61 studies performed by or at the behest of state and local officials in 29 states. For a description of some of the studies’ key findings, see Markell, supra note 6, at 885-904.
146. See PRICE WATERHOUSE, IMPACT OF UNFUNDED FEDERAL MANDATES ON U.S. CITIES, A 314-CITY SURVEY 2 (1993) [hereinafter USCM SURVEY] (noting cost to cities); PRICE WATERHOUSE, THE BURDEN OF UNFUNDED MANDATES, A SURVEY OF THE IMPACT OF UNFUNDED MANDATES ON AMERICA’S COUNTIES 2 (1993) [hereinafter NACO SURVEY] (noting cost to counties). Although the methodology used in these surveys is highly questionable and resulted in overinflated cost estimates, the costs that federal environmental mandates impose on local governments are high, and growing. A 1990 report by the EPA concluded that “annualized [local government] costs under the [full implementation] scenario are expected to increase from $19 billion in 1987 to over $32 billion by the year 2000, a 69 percent increase.” U.S. EPA, EPA-230-12-90-084, ENVIRONMENTAL INVESTMENTS: THE COST OF A CLEAN ENVIRONMENT 9-4 (1990).
147. Price Waterhouse prepared the two reports on the basis of survey forms sent to USCM and NACO members. The forms sought information about ten mandates applicable to cities and twelve applicable to counties;
The USCM and NACO studies garnered so much attention on Capital Hill that both the CBO and the professional staff of the Senate Environment and Public Works Committee conducted independent audits of the studies' results. The CBO's analysis focused on survey results concerning the Safe Drinking Water Act, one of the most expensive set of mandates claimed by the cities and counties. The CBO found that the Price Waterhouse analysis was based on flawed and misleading data provided by many survey respondents, including such practices as attributing the entire cost of capital investments to the year in which they were made rather than amortizing them over the life of the facility; combining the actual costs of complying with existing and the projected costs of complying with proposed rules; and adjusting future costs for price inflation at widely varying rates.\(^{148}\) When the CBO corrected for these and other data errors, it found that eighty-eight percent of survey respondents estimated drinking water costs of less than $10 per household in 1993.\(^{149}\) The CBO cautions, however, even as corrected, the data reported in the surveys "do not reflect the incremental cost of the SDWA . . . [and] cannot be used to determine national costs because the survey was not designed to be representative at the national level."\(^{150}\)

The audit conducted by the Senate Environment and Public Works professional staff focused on the overall methodology used to compile the studies. In addition to reviewing the original survey forms, the staff contacted a purportedly "random" sample of twenty-five respondents, finding numerous mistakes in the data they submitted.\(^{151}\) On June 14, 1994, the Committee's Chairman, Max Baucus, and Ranking Minority Member, John Chafee, forwarded the staff report to NACO and USCM.

---


\(^{149}\) Id. at 21.

\(^{150}\) Id. (emphasis added).

with a cover letter which concluded:

[T]he Price Waterhouse surveys on unfunded mandates cannot be used to reliably identify any unfunded federal mandates. The surveys' fatal flaw is that they are not surveys of unfunded mandates at all, but a review of total compliance costs for federal, state, and local requirements. There is no way to separate from the cost totals what activities would have been conducted even without being mandates by the U.S. Government, or how much of the costs are truly unfunded.  

This unequivocal rejection of municipal cost estimates by the CBO's own customers underscores the difficulty of the task it has been assigned. Of course, the CBO would presumably try to avoid the blatant mistakes contained in studies that were commissioned by organizations with an avowedly political agenda. But the studies reveal a common mind-set among municipal officials that is diametrically opposed to the UMRA's direct cost approach. Unless the CBO is extraordinarily careful when it approaches local governments, it will at best receive biased information and at worst encounter strong resistance to the development of a more objective database.

The UMRA's requirements for the fiscal noting of regulatory mandates are similar to its congressional fiscal note provisions but lack even the pretense of enforcement. Whenever a federal agency issues a notice of proposed rulemaking that would impose either intergovernmental or private sector mandates costing more than $100 million annually, the agency must draft a detailed statement containing a "qualitative and quantitative assessment" of the anticipated costs and benefits of the mandate, its effect on "health, safety, and the natural environment," and, if feasible, its effect on the "national economy." The statement must explain whether the mandate is or will be funded and disclose any "disproportionate budgetary effects . . . upon any particular regions of the nation or particular State, local, or tribal governments." The statement must describe the agency's consultations with elected representatives of affected state, local, and tribal governments. Finally, the agency must identify and consider a "reasonable" number

---

152. Letter from Max Baucus, Chairman, Senate Comm. on Env't. & Pub. Works, and John Chafee, Ranking Minority Member, Senate Comm. on Env't. & Pub. Works, to Barbara Sheen Todd, Commissioner, National Ass'n of Counties 2 (June 14, 1994) (on file with author).
154. Id. § 1532(a)(2)(B), (3)(B).
155. Id. § 1532(a)(5).
of regulatory alternatives, and from those alternatives select the "least costly, most cost-effective or least burdensome" choice that still achieves the rule's objectives. If an agency simply fails to prepare such a statement, the omission is subject to a court challenge, but the only remedy available is an order compelling the agency to prepare the statement. Courts do not have jurisdiction under the UMRA either to review the adequacy of a statement or to invalidate an otherwise valid regulation.

The ongoing assault on federal bureaucrats, over-regulation, and big government in general may mean that those charged with responsibility for drafting UMRA statements will put substantial effort into the exercise. Yet in the face of a statutory mandate instructing an agency to regulate, or a sincere belief by the agency officials that a given regulation is a good idea, these provisions require little more than well-written regulatory preambles and well-publicized consultations with affected interest groups, neither of which will necessarily change the content of the rule at issue.

Finally, the UMRA makes a weak attempt to grapple with the very difficult problem of existing mandates. As noted above, the UMRA's chief advantage as a political vehicle was that it enabled Congress to take action on unfunded mandates quickly, avoiding the time-consuming and punishing process of reviewing mandates on a statute- or rule-specific basis. By definition, this generic approach only works prospectively, deferring the specific problems that inspired the UMRA's passage to the normal reauthorization process. Unable to resist the temptation of scoring political points with municipal supporters of the legislation, Congress resorted to the time-honored ploy of commissioning a study that would document the worst offenders, presumably laying the groundwork for further legislative action.

The task of writing this study of all intergovernmental and private mandates was assigned to the Advisory Commission on

156. Id. § 1535(a).
157. Id. § 1571(a)(2)(B).
158. Id. § 1571(a), (b). The subject of judicial review was the major bone of contention at the conference, with Democrats and some Republicans arguing that the UMRA should not provide a vehicle for tying up regulatory proposals indefinitely in court. See, e.g., Hosansky, supra note 114, at 1087 (discussing the legislative debate surrounding the UMRA).
Intergovernmental Relations (ACIR), which has thus far been unable to accomplish this mammoth and unmanageable assignment. In July 1996, the senior elected and appointed officials who comprise the Commission voted 13 to 7, mostly along party lines, to reject a report prepared by ACIR staff that recommended giving state and local governments more money and more flexibility to implement federal environmental mandates.


Even where fiscal noting is performed credibly, it is in essence a consciousness-raising exercise, providing information about a mandate's cost that the legislature can then weigh against the substantive and political reasons for enacting it. Because fiscal notes have been ignored so consistently at the federal and state levels, as of 1993, sixteen states have gone one crucial step further and enacted reimbursement provisions that require them to pay all or a portion of the costs of intergovernmental mandates that they impose on local governments. Even these requirements have once again proven disappointing to municipal advocates: "The experience of local governments in states with reimbursement requirements varies in details but not in theme. Basically, when the legislature has the will to bypass a reimbursement requirement, a way presents itself."

160. Id. § 1552(c), (d) (requiring a twelve month study of existing mandates), 1556 (authorizing ACIR appropriations of $500,000 for each of the fiscal years 1995 and 1996). There were virtually no limits placed on ACIR's portfolio: it was instructed to investigate the effects of both private and intergovernmental mandates on everything from the operation of state, local, and tribal governments to the competitive balance between subnational governments and the private sector. For a description of ACIR, see supra note 22.


162. JANET KELLY, ANTI-MANDATES STRATEGIES, REIMBURSEMENT REQUIREMENTS IN THE STATES, NATIONAL LEAGUE OF CITIES RESEARCH REPORTS ON AMERICA'S CITIES 4 (1994) [hereinafter ANTI-MANDATES STRATEGIES].

163. Id. at 10. One commentator has argued that fiscal noting and reimbursement requirements are so ineffective that local governments will only achieve real relief from unfunded mandates through the enactment of judicially enforceable constitutional amendments at both the federal and state levels. Edward A. Zelinsky, Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services, 46
Congress was unwilling to go as far as to promise reimbursement when it drafted the UMRA, instead adopting an enforcement mechanism that allows any member to raise a point of order challenging legislation that does not fully fund the intergovernmental duties it imposes.\textsuperscript{164} All points of order are waivable by a simple majority vote.\textsuperscript{165} The political will neces-

\textsuperscript{164} Members may raise points of order with respect to legislation imposing intergovernmental mandates exceeding the $50 million annual cost threshold unless the legislation fully “funds” the mandate by providing new budget, entitlement, or direct spending authority. 2 U.S.C.A. § 658d(a)(2) (West Supp. 1996); see also id. § 658c(a)(1). The conference report notes that the UMRA does not waive “any existing provisions of law that establish controls on Federal spending,” including the elaborate procedure that would apply to efforts to fund a mandate with spending authority outside the normal appropriations process. H.R. CONF. REP. NO. 104-76, at 64 (1995); 141 Cong. Rec. H3053, 3061 (daily ed. March 15, 1995). Lastly, the UMRA also allows members to raise a point of order if a “bill or joint resolution” lacks a CBO fiscal note. 2 U.S.C.A. § 658d(a)(1) (West Supp. 1996). The point of order based on the absence of a fiscal note applies to either intergovernmental or private sector mandates, while the point of order based on the absence of funding applies only to intergovernmental mandates imposing enforceable duties on state, local, or tribal governments. See id. § 658d(a)(2) (establishing point of order solely for intergovernmental mandates).

\textsuperscript{165} Section 425 of the UMRA, which establishes points of order for unfunded mandates in the House and Senate, is silent on the procedures to be followed in asserting and resolving such motions. See 2 U.S.C.A. 658d(c)(2) (West Supp. 1996) (advising only that if the Chair sustains a member’s point of order, the offending provisions shall be stricken from the bill or resolution). Section 426 of the UMRA, however, prohibits the House Rules Committee from crafting a rule that waives in advance a member’s right to assert a point of order on the floor of the House, thereby ensuring that a vote will occur on the floor and will be resolved by majority vote. Id. § 658e(a). Such waivers have been used historically to thwart those seeking to assert points of order to affect the outcome of a legislative debate. Cong. Gerald B. H. Solomon and Donald R. Wolfensberger, The Decline of Deliberative Democracy in the House and Proposals for Reform, 31 HARV. J. ON LEGIS. 321, 359 (1994). Section 426 further stipulates how the point of order shall be framed to the larger body. See 2 U.S.C.A. § 658e(b)(2) (West Supp. 1996) (requiring that a point of order must “specify the precise language on which it is premised”). Additionally, section 426 establishes the procedure for debate. See id. § 658e(b)(4) (“A question of consideration under this section shall be debatable for 10 minutes by each Member initiating a point of order and for 10 minutes by an opponent on each point of order, but shall otherwise be decided without intervening motion except one that the House adjourn or that the Committee of the Whole rise . . . .”).

As for Senate procedures to resolve points of order, the Conference Report on the UMRA notes that the Senate bill applied the procedures established by section 904 of the Congressional Budget and Impoundment Control Act of 1974 (CBICA), Pub. L. 93-344, § 88 Stat. 331 (1974), which requires points of order to be resolved “by a majority vote of the Members voting, a quorum being present, or by the unanimous consent of the Senate.” H.R.
necessary to override the UMRA is therefore no more—and no less—than the will necessary to enact the mandate in the first place.

Where Congress considers authorizing legislation that imposes mandates to be funded by subsequent appropriations, the UMRA requires that the legislation specify the annual appropriations necessary for each year, up to ten years, that the mandate will be in effect.\footnote{166} If subsequent appropriations are not adequate, the federal agency or department responsible for implementing the mandate must report back to Congress, which will then have sixty days to either provide the money, modify or nullify the mandate, or impose it without funding.\footnote{167} If Congress fails to act, the mandate will either not go into effect or will immediately cease to be effective.\footnote{168} This “negative option” rule is likely to have more teeth than all of the other provisions combined because a simple failure to act nullifies a mandate with no political repercussions unless the omission attracts major media attention. On the other hand, the UMRA may give Congress the perverse incentive to pass mandates without funding at the outset in order to insulate them from future risk.

How likely is Congress to slip its leash, mandating again with abandon? If, as the states’ experience suggests, the out-

---

\footnote{CONF. REP. NO. 104-76, at 31 (1995). Although the Conference Committee adopted the House bill’s “similar” point of order provisions in lieu of the Senate language, in an otherwise meticulous recitation of small differences between the two pieces of legislation, the Committee did not identify the majority vote requirement as one where it intended any change from the original Senate legislation. \textit{Id.}}

\footnote{It is worth noting that section 904 of CBICA is not codified in the United States Code because it is an exercise by the House and Senate of their internal rule-making authority rather than a generally applicable statutory provision. Instead, section 904 appears as a note to 2 U.S.C. § 621. In the same vein, UMRA section 108 states unequivocally that its point of order provisions were enacted “as an exercise of the rule-making power of the Senate and the House of Representatives, respectively ... with full recognition of the constitutional right of either House to change such rules ... at any time, in the same manner, and to the same extent as in the case of any other rule of each House.” 2 U.S.C.A. § 1515 (West Supp. 1996). As one commentator has noted, because Congress only changed Senate and House rules, the point of order provisions did not require a presidential signature, although Congress did submit the UMRA as a whole to President Clinton for signature. Adam Babich. \textit{Our Federalism, Our Hazardous Waste, and Our Good Fortune}, 54 Md. L. Rev. 1516, 1546 n.124 (1995).}


\footnote{167. Id. § 658d(a)(2)(B)(iii). The authorizing legislation that imposes the mandate must also create special legislative procedures to expedite consideration of such agency reports.}

\footnote{168. Id. § 658d(a)(2)(B)(iii)(III).}
come depends on the exercise of political will, the long-term outlook for new and unfunded environmental mandates is probably bright. Nationwide polls indicate a steady and enduring concern among Americans for the health of the environment.\textsuperscript{169} Even when pollsters link environmental protection to otherwise unpopular concepts, such as unemployment and governmental regulation, the environment still garners majority support.\textsuperscript{170} Such polls confirm the observation made by pollster

\textsuperscript{169} See, e.g., 4 of 5 in Poll Believe Pollution Threatens the Quality of U.S. Life, L.A. TIMES, June 12, 1990, at A20 (citing nationwide poll, conducted by Media General-Associated Press, which found that "[f]our in five Americans say pollution threatens the quality of their lives"); Bob Benenson, GOP Sets the 104th Congress on New Regulatory Course, 53 CONG. Q. 1693, 1696-97 (1995) (describing the results of nine polls conducted by Cambridge Reports/Research International from 1982 to 1994 showing that more people thought there was "too little" government regulation of the environment than thought there was "too much" in every year except 1982, and also describing the results of an annual survey conducted by Roper Starch Worldwide which in recent years has "shown consistently that more than 75 percent of Americans view themselves as active environmentalists or sympathetic but not active on the environment"); Gary Lee, Environmental Groups Launch Counterattack After Losses on Hill, WASH. POST, Aug. 19, 1995, at A6 (citing Mellman Group poll in which "62 percent of respondents said Congress's priority should be to do more to protect the environment, while 29 percent said Congress should reduce regulations"); Richard Morin, Polls Show Public Wants Cleanup, but Will It Pay?, WASH. POST, June 18, 1989, at H3 (citing nationwide poll conducted Opinion Research Corporation, which found that "[e]ight out of 10 Americans said they were very concerned about the quality of the water they drink" and that "[n]early eight out of 10 were very concerned about the quality of the air they breathe"); R. Roger Pryor, Environmental Safeguards in Jeopardy, ST. LOUIS POST DISPATCH, Dec. 14, 1994, at 9C (citing Times/Mirror poll which found that "82 percent of the public wants stricter laws to protect the environment" and that "63 percent believe more federal spending should go to the environment"); Philip Shabecoff, Poll Finds Strong Support for Environmental Code, N.Y. TIMES, Oct. 4, 1981, § 1, at 30 (citing New York Times/CBS News Poll in which "[b]etter than two out of three people questioned agreed that 'we need to maintain present environmental laws in order to preserve the environment for future generations' " and in which "[l]eveler than one in four felt '[w]e need to relax our environmental laws in order to achieve economic growth."

\textsuperscript{170} See, e.g., Timothy Egan, Thunder of Debate on Owls and Jobs Rings in Forests as Opponents Face Off, N.Y. TIMES, Apr. 2, 1993, at A22. In his article, Mr. Egan cited a 1993 New York Times/CBS News Poll in which 60% agreed and 31% disagreed with the statement that "[w]e must protect the environment, even if it means jobs in your community are lost because of it."

When the same poll was taken during the 1992 presidential election period, "a time of public worry about the recession," 45% agreed and 45% disagreed. In 1990, "before the recession began," 56% agreed and 36% disagreed. \textit{Id.}; see also Richard L. Berke, Oratory of Environmentalism Becomes the Sound of Politics, N.Y. TIMES, Apr. 17, 1990, at B10 (citing New York Times/CBS poll, conducted in the spring of 1990, which found that "seventy-one percent of
Lou Harris in testimony before a congressional committee in 1981: "[The] desire on the part of the American people to battle pollution is one of the most overwhelming and clearest we have ever recorded in our 25 years of surveying public opinion in this country."\footnote{It's a Depression at EPA, WASH. POST, Nov. 3, 1981, at A22 (quoting testimony before Congress by public opinion pollster Lou Harris).}

Of course, public opinion polls do not necessarily translate into either the initiation or the substance of legislative activity. A variety of other factors influence congressional decisions, including the political strength of the relevant interest groups as well as legislators’ sincere beliefs about the substance of the public policy at issue. Members of Congress clearly share the perception that state and local elected officials have substantial political clout and that there may well be some kind of payback for failing to heed their concerns. This perception placed the UMRA at the top of the legislative agenda and ensured its rapid passage. It may well translate into significant restrictions on federal regulatory authority as new environmental mandates come up for legislative consideration.

On the other hand, state and local politicians are vulnerable to the same backlash of public opinion as their federal
counterparts. The UMRA allowed them to ventilate their anger and seek relief from environmental mandates in the context of a legislative debate that was never labeled as an attack on environmental programs by the popular media. Launching a direct attack on new environmental initiatives without the political cover of the UMRA’s crusade against big government and budget-busting themes would require a great deal of courage, especially if environmentalists described the legislation as an effort to protect people from municipal pollution.  

In the immediate wake of the UMRA’s passage, conservative Republican leaders in the House passed legislation reauthorizing the Clean Water Act that cut back sharply on regulatory requirements but, as this Article goes to press, the legislation remains stalled in the Senate. Another important Republican initiative, legislation to reform the regulatory process and impose risk assessment requirements on EPA rulemakings, has suffered a similar fate. The only major pieces of environmental legislation passed by the 104th Congress required Republicans to negotiate bipartisan compromises with environmental activists in and out of Congress. While it is too soon to determine the long-term effects of the Republican revolution on major national environmental programs, it is becoming very clear that the revolution will be neither quick nor

172. Interestingly, local governments crusading against unfunded mandates at the state level have avoided challenging environmental mandates. "The 1992 NLC study revealed that state [municipal] leagues and county associations do not contest every mandate. They are particularly careful to avoid divisive battles over mandates that are popular with the public (such as some environmental mandates) . . . ." ANTI-MANDATES STRATEGIES, supra note 162, at 50.


174. See supra note 4 and accompanying text (referring to the Republican’s published legislative plan for the 104th Congress).

bloodless. In this larger context, the UMRA's point of order provisions are likely to prove to be relatively minor procedural impediments when measured against these more powerful, competing political forces.

B. THE EXECUTIVE BRANCH

Presidents Reagan, Bush, and Clinton have all tried to respond to the growing strains in federal, state, and local relationships by commanding federal agencies to be more careful regulators and by authorizing the Office of Management and Budget (OMB) to ride herd over recalcitrants. President Reagan heralded his administration's commitment to federalist principles in Executive Order Number 12,612, which remained in effect throughout the Bush administration. President Clinton, anxious to distance himself from his predecessors' regulatory policies, developed his own approach to intergovernmental relations, issuing Executive Order Number 12,875 in October 1993.

Although there are differences in the style and the substance of the Reagan/Bush and Clinton executive orders, they

176. See, e.g., Margaret Kriz, Not-So-Silent Spring, 28 NAT'L J. 522 (Mar. 9, 1996) ("Environmentalists have held back the conservative Republican tide that threatened to wash out 25 years of legislative success. But the fight isn't over, and the debate may yet get a lot noisier."); John H. Cushman, Jr., G.O.P. Backing Off from Tough Stand over Environment, Fear of Political Harm, Congress Could Loosen Fiscal Vice on E.P.A. and Interior Department Programs, N.Y. TIMES, Jan. 26, 1996, at A1 ("Republicans are increasingly worried that by imposing deep cuts on environmental programs they are doing even deeper political damage to their party...[although] Administration officials and environmentalists can hardly claim victory yet."); Gary Lee, GOP Is Warned of Backlash on Environment, Rolling Back Legal Safeguards, Cutting Funds Could Cost the Party Votes, National Poll Indicates, WASH. POST, Jan. 24, 1996, at A6 ("Attacking the Environmental Protection Agency is a non-starter," concluded a report by leading GOP pollster Linda DiVall, containing the results of a national opinion survey. "Republicans should be...emphasizing the safeguarding of reasonable and balanced environmental protection done in a more efficient manner."); Dan Morgan, Bid to Curb EPA Fails in House, WASH. POST, Nov. 3, 1995, at A1 ("Republican moderates, who bucked the GOP leadership, said the 227 to 194 floor vote indicated deepening awareness in party ranks of public concern over air, water and food safety. Republicans can read the polls," said Rep. Sherwood L. Boehlert (R-N.Y.), who led the GOP moderates.").

177. Federalism, supra note 17. President Bush issued a memorandum on February 16, 1990 reminding the heads of executive departments and agencies of the importance of Executive Order 12,612. Memorandum on Federalism, 1 PUB. PAPERS 238 (Feb. 16, 1990).

178. Intergovernmental Partnership, supra note 17.
have proved fundamentally ineffective for the same reasons. First and foremost, environmental rulemaking was developed in accordance with statutory instructions and deadlines. While the orders could affect the details of a rule, they could not remove the issue from the EPA's regulatory agenda. But the administrative structure of the orders meant they did not even have much effect on the details of regulatory proposals. Because they imposed generic procedures applicable to the wide range of federal regulatory activity, the orders could do no more than require the agencies to prepare analyses of the potential effects of their decisions, in theory on the basis of consultations with state and local representatives. The OMB could review regulatory proposals to make sure the analyses were sufficient, but it did not have authority to turn back the rule if agencies failed to comply with these requirements. The orders gave the OMB another excuse to harangue regulatory agencies about state and local concerns. They did not provide any meaningful advice for crafting better solutions.

The heart of the Reagan order was a list of nine "fundamental" principles designed to guide agencies and departments in formulating policies that have "federalism implications."\textsuperscript{179} The principles are expressed in hortatory, vague rhetoric, but their general thrust is captured in the fifth and ninth entries:

\begin{quote}
In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. . . . .

In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.\textsuperscript{180}
\end{quote}

The Reagan order instructed agencies and departments to construe all federal statutes as not preempting state law unless the statute contains express preemption provisions or there was some other "firm and palpable evidence" demonstrating preemptive intent.\textsuperscript{181}

The order directed each agency to designate an official to ensure its implementation through the performance of a "Federalism Assessment" for any proposed policy that has

\textsuperscript{179} Federalism, \textit{supra} note 17, § 2.

\textsuperscript{180} \textit{Id.} § 2(e), (i).

\textsuperscript{181} \textit{Id.} § 4(a).
“sufficient federalism implications.”\textsuperscript{182} The order defined “policies that have federalism implications” as regulations or proposed legislation that have “substantial direct effects on the \text[s\text]tates, on the relationship between the national government and the \text[s\text]tates, or on the distribution of power and responsibilities among the various levels of government.”\textsuperscript{183} Federalism Assessments were to include a certification that the agency had diligently applied the nine principles, identified any inconsistencies with the principles, and assessed the additional costs or burdens that the policy would impose on the states.\textsuperscript{184}

In July 1993, the ACIR issued a study concluding that the Reagan order had failed dismally in its mission of controlling regulatory federalism, largely because many agencies chose to ignore its requirements and were never held accountable by the OMB.\textsuperscript{185} The study found that the EPA was among the worst offenders:

OMB reported that EPA promulgated six major final rules in 1988 and another three in 1989. Not one of the nine rules referred to E.O. 12612, and none was accompanied by a formal federalism assessment.

The absence of references to the executive order does not mean that EPA did not promulgate any rules... that imposed significant fiscal and administrative requirements on state and local governments. On the contrary, several of the most costly and far-reaching rules issued during this period were clearly intergovernmental in character. Included in this group were rules covering... asbestos in schools;... underground storage tanks; toxic chemical release reporting;... national drinking water regulations for filtration, disinfection, and turbidity; and effluent guideline plans under the Clean Water Act.\textsuperscript{186}

Of course, it remains unclear whether a Federalism Assessment, had it been performed, would have had a noticeable effect on the outcome of the rule-making process. OMB staff interviewed for the ACIR study could not point to a single example where the order significantly affected regulatory decisions. They attributed these failures to a review process that

\textsuperscript{182} \textit{Id.} § 6(a), (b).
\textsuperscript{183} \textit{Id.} § 1(a).
\textsuperscript{184} \textit{Id.} § 6(c).
\textsuperscript{185} \textit{ACIR MIXED RECORD, supra} note 30, at 30-39.
\textsuperscript{186} \textit{Id.} at 37 (citations omitted). ACIR’s frustration with the EPA’s performance is understandable. The rules listed are among the most important environmental mandates handed down to local governments in the last two decades, imposing, by the EPA’s own estimates, billions of dollars of compliance costs. \textit{Id.}
lacks teeth because it does not give the OMB authority to stop or rewrite regulations.\textsuperscript{187}

The Clinton executive order on federalism forswears the heated rhetoric of the Reagan order, but it is no less vague in its instructions to agencies and departments. The order targets the "cumulative effect of unfunded federal mandates" on state, local, and tribal governments; it acknowledges in its opening lines that such mandates—and the "cost, complexity, and delay" in obtaining waivers from them in appropriate cases—have "increasingly strained" the budgets of subnational governments.\textsuperscript{188} The order states that "to the extent feasible and permitted by law," no agency should promulgate a mandate unless the mandate is funded or the agency provides the OMB with a description of its "prior consultation" with representatives of affected state, local, and tribal governments.\textsuperscript{189} It further instructs agencies to develop "an effective process" for conducting such consultations and to try wherever possible to act favorably on waiver requests by subnational governments.\textsuperscript{190}

Although Executive Orders 12,612 and 12,875 were the only ones dedicated to federalism issues, they were implemented in the context of two other executive orders designed to accomplish broader regulatory reform, a much more significant preoccupation of the executive branch.\textsuperscript{191} It is beyond the scope of this Article to analyze the larger implications of those efforts; others have already performed this task very well, at least with respect to Reagan reform initiatives.\textsuperscript{192} It is worth

\textsuperscript{187} Id. at 33.

\textsuperscript{188} Intergovernmental Partnership, supra note 17.

\textsuperscript{189} Id. § 1(a).

\textsuperscript{190} Id. §§ 1(b), 2.


\textsuperscript{192} See, e.g., Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 DUKE L. J. 1385, 1429-36 (1992) (demonstrating that Reagan regulatory reforms have made agency rulemaking significantly more cumbersome); Alan B. Morrison, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation, 99 HARV. L. REV. 1059, 1068-71 (1986) (arguing that the Reagan administration's regulatory approach has unwisely centralized control of agency rulemaking in the OMB); Robert V. Percival, Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency, LAW & CONTEMP. PROBS., Autumn 1991, at 127, 147-54, 156-72 (evaluating the impact of Reagan administration oversight on the EPA's
considering, however, the more limited question of whether such broader regulatory reforms have helped or exacerbated the unfunded mandates dilemma.

President Reagan and, to a lesser extent, President Bush established powerful offices in the White House that were designed to give regulated industries, as well as state and local governments, an opportunity to side-step offensive regulatory decisions. As discussed in Part II of this Article, these efforts provoked a strong backlash in Congress that propelled the enactment of many of the environmental statutes that are now at the heart of the unfunded mandates debate. In sharp contrast to its two predecessors, the Clinton administration has won high marks from public interest organizations for opening up the OMB review process to public scrutiny, eliminating regulatory delays, fostering better cooperation between the OMB and regulatory agencies, and considering the interests of all constituencies. Ironically, these reforms have occurred just as Congress is in the grips of another backlash, this time in diametric opposition to the activism it embraced during the Reagan era.

It remains to be seen whether Congress will succeed in passing legislation compelling radical regulatory reform. Even if state and local lobbyists manage to persuade Congress to give them this type of relief, however, the current atmosphere may well doom the long-term endurance of their achievements. One clear lesson of the Reagan era is that extreme efforts to roll back environmental protections in the name of "regulatory reform" eventually produce another turn of the pendulum because antipathy to big government is not the same as antipathy to strong federal pollution controls. A second, equally
troubling result of extreme reforms is the foreclosure of opportunities to write helpful regulations.\textsuperscript{197}

At this stage in the development of the unfunded mandates movement, state and local officials do not acknowledge that they need federal environmental regulations in any form. Yet it is difficult to imagine that they would advocate the wholesale elimination of all regulatory standards, even if they were given the opportunity to do so. For all rational participants in the debate, the goal must be smarter regulation, not wholesale deregulation. Obviously, drawing lines between what is smart and what is not and crafting alternative approaches is an enormously complex and challenging task. But it is questionable whether radical regulatory reform will simplify and streamline this effort.

C. THE SUPREME COURT

The Supreme Court's consideration of regulatory federalism requires it to evaluate whether the Tenth Amendment's\textsuperscript{198} reservation of authority to the states should be read to impose limits on the Constitution's broad grant of authority to Congress under the Commerce Clause.\textsuperscript{199} Conservatives on the Court, led by Justices Rehnquist and O'Connor, have excoriated their brethren to protect state and local governments against excessive intrusions by a federal government ineffectively constrained via the political process.\textsuperscript{200} Liberals on the Court have issued equally impassioned warnings that the Court has no role to play in mediating what are essentially political disputes between the states and Congress.\textsuperscript{201} Both ends

\begin{flushright}
\textsuperscript{197} Thomas McGarity has described the role played by Reagan regulatory reforms in the "ossification" of the rule-making process, observing that radical reforms make the search for better solutions far more difficult and time-consuming because they polarize the debate, cripple bureaucratic initiative, and make it impossible to replace existing regulations with new approaches. McGarity, \textit{supra} note 192, at 1391-92.

\textsuperscript{198} U.S. CONST. amend. X.

\textsuperscript{199} U.S. CONST. art. I, § 8, cl. 3.


\textsuperscript{201} \textit{See, e.g., National League of Cities,} 426 U.S. at 876 (Brennan, J., dissenting) ("It is unacceptable that the judicial process should be thought superior to the political process in this arena").
\end{flushright}
of the spectrum battle for the Court's more moderate center—
until his retirement, Justice Blackmun, who provided the
swing vote on the Court's two most important decisions: Na-
tional League of Cities v. Usery in 1976\textsuperscript{202} and Garcia v. San
Antonio Metropolitan Transit Authority in 1985.\textsuperscript{203}

A coalition of state and local governments\textsuperscript{204} argued in Na-
tional League of Cities that application of federal minimum
wage and overtime requirements would be costly enough to
disrupt the ability to provide citizens with such essential serv-
ices as police and fire protection, sanitation, public health, and
parks and recreation.\textsuperscript{205} Without necessarily adopting the facts
as presented by the appellants, the Court held that congres-
sional prescription of a minimum wage for state and municipal
employees "directly displace[d]" the [s]tates' freedom to struc-
ture integral operations in areas of traditional governmental
functions" and therefore exceeded congressional authority un-
der the Commerce Clause.\textsuperscript{206} The Court recognized that Con-
gress had authority to prescribe minimum wage and overtime
standards for private employers, but concluded that applica-
tion of similar rules to public employers crossed the constitu-
tional "barrier" circumscribing the application of Commerce
Clause authority to the states qua states.\textsuperscript{207} The majority
opinion did not address the reasons why the federal govern-
ment may have a compelling interest in regulating working
conditions. Instead, it focused exclusively on the impact of
such regulation on the structure of state government.

Justices Brennan and Stevens filed dissents. Justice
Brennan, writing on behalf of Justices White and Marshall,
denounced the opinion as a "catastrophic judicial body blow" to
congressional authority, and accused the majority of usurping

\textsuperscript{202} 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Tran-

\textsuperscript{203} 469 U.S. 528 (1985).

\textsuperscript{204} As befit the importance of the decision, appellants in the two consoli-
dated cases were an unusually broad and diverse coalition including the Na-
tional League of Cities, the National Governors' Conference, the states of Ari-
izona, California, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Mis-
souri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon,
South Carolina, South Dakota, Texas, Utah, Washington, and Wyoming, the
Metropolitan Government of Nashville and Davidson County, Tennessee, and
the cities of Cape Girardeau, in Missouri, Lompoc, in California, and Salt

\textsuperscript{205} Id. at 845-51.

\textsuperscript{206} Id. at 852.

\textsuperscript{207} Id. at 841-43, 845.
the proper constitutional role of the political process on the basis of "an abstraction without substance" (that is, the notion that there is such a thing as a "traditional" state function that deserves protection from otherwise legitimate exercises of congressional Commerce Clause authority). 208 The dissent decried the implications of a double standard for public and private sector conduct, asking rhetorically, "Can the States engage in businesses competing with the private sector and then come to the courts arguing that withdrawing the employees of those businesses from the private sector evades the power of the Federal Government to regulate commerce? 209

The double standard also bothered Justice Stevens, who wrote in his separate dissent:

The Court holds that the Federal Government may not interfere with a sovereign State's inherent right to pay a substandard wage to the janitor at the state capitol. The principle on which the holding rests is difficult to perceive.

The Federal Government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the Governor's limousine over 55 miles an hour. Even though these and many other activities of the capitol janitor are activities of the State qua State, I have no doubt that they are subject to federal regulation. 210

Justice Stevens's choice of environmental problems to illustrate the scope of federal regulatory authority potentially undercut by the decision probably was not coincidental. Environmental problems were much on the mind of Justice Blackmun, who explained his swing vote in a one paragraph concurrence: "I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 211

In what may have been more than coincidence, the Court's next best chance to opine on the implications of National

---

208. Id. at 860, 880 (Brennan, J., dissenting).
209. Id. at 872-73 (Brennan, J., dissenting) (citation omitted).
210. Id. at 880-81 (Stevens, J., dissenting).
211. Id. at 856 (Blackmun, J., concurring).
League of Cities came in an environmental case. Hodel v. Virginia Surface Mining and Reclamation Ass'n\(^{212}\) involved a challenge brought by a group of strip miners and the State of Virginia to federal environmental regulations under the Surface Mining Control and Reclamation Act of 1977.\(^{213}\) Taking National League of Cities to an extreme, but arguably logical, conclusion, appellants contended that the regulations interfered with the "traditional state function" of supervising the use of private land.\(^{214}\)

As if to reassure Justice Blackmun, the Court made short shrift of these arguments, holding that the regulations were based on a "rational" finding that improper strip mining interfered with interstate commerce.\(^{215}\) In an effort to provide further guidance to the lower courts, Hodel reframed National League of Cities's holding as a four-part test: (1) the challenged statute must regulate the "States as States"; (2) the statute must address matters that are "attributes of state sovereignty"; (3) it must be "apparent" that the State's compliance will directly impair its ability to fulfill "traditional government functions"; and (4) a compelling federal interest in the subject matter of the regulation may override the first three factors.\(^{216}\)

This effort to further interpret and clarify the National League of Cities test did not ameliorate the turmoil below. National League of Cities launched a veritable tidal wave of litigation; by one estimate, 300 cases inspired by the new doctrine wended their way through the lower courts within a period of only a few years.\(^{217}\) By 1985, when the Court decided to consider yet another FLSA case, the lower federal courts had


\(^{214}\) Hodel, 452 U.S. at 275-76.

\(^{215}\) Id. at 289.

\(^{216}\) Id. at 287-88. The fourth part of the test is specified in footnote 29, which explains that meeting the first three "requirements" does not mean that a constitutional challenge will succeed because "the nature of the federal interest advanced may be such that it justifies state submission." Id. at 288 n.29.

\(^{217}\) For a list of citations and an analysis of these cases, see D. Bruce La Pierre, The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation, 60 WASH. U. L.Q. 779, 808 n.115, 896 n.454 (1982) and 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, 580 n.9 (1985) [hereinafter Political Accountability].
compiled a mystifying lineup of decisions. As catalogued by the majority in Garcia, activities held by the lower federal courts to be "traditional governmental functions" entitled to protection under National League of Cities included state and local efforts to regulate ambulance services, license automobile drivers, operate a municipal airport, perform solid waste disposal, and operate a highway authority. Activities held not immune included issuance of industrial development bonds, regulation of intrastate natural gas sales, regulation of traffic on public roads, regulation of air transportation, operation of a telephone system, leasing and sale of natural gas, operation of a mental health facility, and provision of in-house domestic services for elderly and handicapped individuals.

The newly-aligned majority recoiled from this welter of legal doctrines, observing that the increased trend toward privatization of government services made the distinction between public and private "functions" collapse under its own weight. Instead, the new majority referred future federal, state, and local disputants to the political process, noting calmly that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." In 1985, in a fitting coda to the Garcia decision, President Reagan signed into law a FLSA amendment sought by state and local governments in the immediate wake of the decision. The immediacy of this reaction vindicates the Garcia majority's faith in the political process. It did little, however, to mollify the Garcia dissenters, who, having had their victory snatched roughly from their grasp, were no less passionate in their predictions of catastrophic results than the National League of Cities dissenters had been.

---

219. Id. at 538-39.
220. Id. at 545.
221. Id. at 550. The seminal article suggesting this interpretation of the Framers' intent is 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 (1954). For a more recent discussion of these issues, see Political Accountability, supra note 217.
223. Ironically, during the period of mourning by state and local advocates
Burger and Justices Rehnquist and O'Connor, accused the majority of abdicating its proper constitutional role by irresponsibly referring intergovernmental disputes to "federal political officials, invoking the Commerce Clause, [who will be] the sole judges of the limits of their own power." The dissenters refused to accept that the National League of Cities "traditional functions" test was unworkable; they insisted that while the task may not be easy, it was the Court's duty to continue to define the scope of state autonomy constitutionally protected against federal incursion.

Since overturning National League of Cities, the Court has revisited the "battlefield of federalism" on three relevant occasions. In New York v. United States, the Court held that

in the immediate aftermath of the Garcia opinion, ACIR issued a report conceding that the opinion was probably correct in its interpretation of the Constitution, but calling for a series of constitutional amendments that would restore state and local autonomy and sovereignty in relation to the federal government. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, REFLECTIONS ON GARCIA AND ITS IMPLICATIONS FOR FEDERALISM M-147 (1986).


225. Id. at 574-79 (Powell, J., dissenting); id. at 588-89 (O'Connor, J., dissenting). Some commentators have argued that the abandonment of the test and the Court's failure to replace it with any alternative mechanism amounts to a repeal of judicial review of federalism questions. See, e.g., Merritt, supra note 50, at 19-20 (noting that Garcia "raises the specter of the Court curtailing judicial review in other areas as well"); William W. Van Alstyne, The Second Death of Federalism, 83 MICH. L. REV. 1709, 1724 (1985) (observing that Garcia appears to repudiate Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

226. Two other recent cases applying Garcia are important in the larger context of the Court's ongoing dialogue concerning federalism, but are not directly relevant to the specific issues addressed here. Gregory v. Ashcroft, 501 U.S. 452, 470 (1990), declined to apply federal age discrimination provisions to state judges. The case provides support to a post-Garcia theory developed by one commentator to the effect that states and their citizens should have control over the organizational structure of state government and the processes by which such governments make decisions. Merritt, supra note 50, at 40-42. The case does not modify Garcia's application to municipal services provided by both public and private entities, however. A second case, South Carolina v. Baker, 485 U.S. 505, 512-13 (1988), affirmed the federal government's authority to tax interest income from state and local government bonds. The case reaffirmed the Court's reluctance to question the result reached by Congress unless it is presented with evidence of "extraordinary defects in the national political process," although the strength of this holding may be limited to taxation issues. Id. at 512.
Congress had overstepped its bounds to the point of "commandeering" the legislative processes of the states when it gave them no choice but to enact and enforce a federal regulatory program. At issue was a provision in the Low-Level Radioactive Waste Policy Act that gave the states the choice of either finding safe disposal capacity or taking title to the waste themselves. Writing for the majority, Justice O'Connor invalidated the provision because neither alternative represented an acceptable exercise of congressional Commerce Clause authority. She hastened, however, to assure her audience that because the statute did not involve the regulation of similar conduct by private parties, the Court had "no occasion to apply or revisit" Garcia.

United States v. Lopez considered the constitutionality of a federal statute that resulted in the conviction of a high school student for carrying a weapon to school. Led by Chief Justice Rehnquist, a conservative majority struck down the law because Congress did not articulate why such behavior burdened interstate commerce. In an opinion laced with sar-

228. Id. at 178. This standard was first suggested in Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 288 (1981), where the Court concluded that the statute at issue did not "commandeer" the states into regulating mining. The Court reached the same result in FERC v. Mississippi, 456 U.S. 742, 764 (1982), which also involved a statute that gave the states a choice between regulating themselves or tolerating federal regulation.
229. These statutory provisions, 42 U.S.C. § 2021e(d)(2)(C), are described in New York, 505 U.S. at 153-54.
231. Id. at 160. Justice White, writing to concur in part and dissent in part on behalf of himself and Justices Blackmun and Stevens, expressed relief that Justice O'Connor sent the signal that the Court "does not intend to cut a wide swath through our recent Tenth Amendment precedents," but pronounced himself unconvinced by her effort to distinguish the New York facts. He argued instead that the Court should defer to the political process and uphold the "take title" provisions. Id. at 201, 205-06 (White, J., concurring).

Although commentators immediately got to work divining the likely future scope of the opinion, none have argued that it marked a major departure from the central holding of Garcia. See, e.g., Evan H. Caminker, State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?, 95 COLUM. L. REV. 1001 (1995) (urging the Court to abandon efforts to develop the "commandeering" doctrine); H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 VA. L. REV. 633 (1993) (urging Justice O'Connor to continue to develop her "vision of federalism" in subsequent cases).
233. Id. at 1626 ("The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.")
the Court admonished Congress to either develop a more convincing rationale for its federalization of crime or defer to the states to deal with the problem.\footnote{234}

The Court's third and most recent effort to revive federalist doctrine involved yet another bitterly divided, five-to-four decision holding that the Eleventh Amendment bars private lawsuits against the states. \textit{Seminole Tribe of Florida v. Florida}\footnote{235} invalidated a federal statute permitting Native American tribes to sue states in federal court for failing to negotiate gaming compacts in good faith. In the course of forging this reaffirmation of state immunity, the \textit{Seminole Tribe} majority overruled \textit{Pennsylvania v. Union Gas}, an environmental case making states vulnerable to contribution lawsuits brought by private parties under the CERCLA.\footnote{237}

None of these cases is likely to have a significant effect on federal regulation of municipal activities that pollute the environment. As Justice O'Connor noted in the \textit{New York} opinion,\footnote{238} federal environmental statutes give the states the option to apply for delegated authority,\footnote{239} and the commandeering cases are therefore unlikely to affect most major environmental programs.\footnote{240}

---

\footnote{234. See id. at 1630-31 ("Section 922(q) [of the Gun-Free School Zones Act] is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.").}

\footnote{235. 64 U.S.L.W. 4167 (U.S. Mar. 27, 1996). Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas were in the majority, while Justices Stevens, Souter, Ginsburg, and Breyer were in dissent. Id.}

\footnote{236. 491 U.S. 1 (1989).}

\footnote{237. The Superfund provision authorizing contribution lawsuits is found at 42 U.S.C. § 9613(f). The Court recognized the nature of federal environmental law, but held nevertheless that: "The background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government . . . . \textit{[T]he Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.}\textit{64 U.S.L.W. at 4175.}"}

\footnote{238. New York v. United States, 505 U.S. 144, 167-68 (1992).}

\footnote{239. See supra note 15 (citing federal environmental statutes that delegate implementation and enforcement to state governments).}

\footnote{240. A recent Fifth Circuit case suggests that this area is still volatile and that Congress should craft delegation provisions very carefully. ACORN v. Edwards, 81 F.3d 1387 (5th Cir. 1996), involved a Tenth Amendment challenge to the State of Louisiana's implementation of provisions of the Safe Drinking Water Act that required the states to establish programs to assist
Lopez was probably intended as a warning to Congress to draft statutes more carefully rather than a significant change in the Court's interpretation of the Commerce Clause. Its true import remains to be seen, however, especially if the Court gains more conservative appointees over the next decade or two, solidifying what is now a very fragile majority for more ambitious expansion of states' rights. Even in that event, if conservative justices are really determined to cut a significant path through the thicket of precedent that reads Commerce Clause authority expansively, they have several decades of very difficult work ahead of them.\textsuperscript{241}

Given the narrow vote and the lengthy and occasionally obtuse reasoning advanced to justify the majority and two dissenting opinions, Seminole Tribe's full implications likewise are not clear. Dissenting Justice Stevens feared the worst, predicting that Seminole Tribe will prevent Congress "from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy."\textsuperscript{242} The majority blithely dismissed this dire forecast in a pair of footnotes contending that a wide range of remedies remain open to Congress, from lawsuits brought by the federal government against states to private lawsuits enjoining state officers from violating federal law.\textsuperscript{243}

Seminole Tribe's most obvious threat is to the current scheme of citizen suit enforcement authorized by all of the major environmental statutes.\textsuperscript{244} Citizens' suits against states local schools in eliminating lead contamination of drinking water. Because the Act did not give the states a choice whether to implement its requirements and did not contain the traditional default that the federal government would regulate if the states elected not to do so, the Fifth Circuit declared it unconstitutional. 81 F.3d 1394 ("States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government."). Clearly, Congress and the EPA take a significant risk—at least in the Fifth Circuit—when they cross the line from requesting regulatory volunteers to drafting the states into involuntary service.

\textsuperscript{241} For an interesting analysis of the pitfalls of that journey, see Mark Tushnet, \textit{Why the Supreme Court Overruled National League of Cities}, 47 VAND. L. REV. 1623 (1994).

\textsuperscript{242} 64 U.S.L.W. 4167, 4176 (U.S. Mar. 27, 1996).

\textsuperscript{243} Id. at 4175 nn.13-14.

\textsuperscript{244} See, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1365(a) (1996) (authorizing citizen suits to enforce states' obligations under federal environmental law); Safe Drinking Water Act, 42 U.S.C. § 300j-8(a) (1996)
are arguably eliminated by the opinion. In general, however, the Court has refused to extend immunity under the Eleventh Amendment to political subdivisions, unless they are acting as an "arm of the state." *Seminole Tribe* would therefore have no effect on most of the actors and practices discussed in this Article.

Assuming that *New York*, *Lopez*, and *Seminole Tribe* represent contained instances of the Court gently fanning the smoldering embers of federalism, rather than the beginning of a campaign to revive *National League of Cities*, how would the Court respond to a case challenging an unfunded federal environmental mandate brought, *National League of Cities*-style, by a large coalition of local governments? The issues presented by such a case not only vindicate *Garcia*, they underscore the perils of resuscitating *National League of Cities*.

What would be the facts of an unfunded environmental mandates challenge? Most probably, such a case would attack regulations that prescribe highly technical and admittedly expensive requirements for the performance of such routine municipal functions as collecting garbage, providing drinking water, and treating sewage. The EPA would defend the mandates on the basis that they were necessary to protect public health and the environment; municipalities would argue that the

---

245. See John Cronin and Robert F. Kennedy, *Losing Our Day in Court*, N.Y. TIMES, Apr. 4, 1996, at A25 (criticizing the Supreme Court's holding in *Seminole Tribe* and its potential negative impact on enforcement of federal environmental laws). As Cronin and Kennedy acknowledge, the suggestion in footnote 14 of the *Seminole Tribe* opinion, 64 U.S.L.W. at 4175, that citizens would still be permitted to sue individual state officials for violating federal law under the doctrine set forth in *Ex Parte Young*, 209 U.S. 123 (1908), may require nothing more than revised pleadings in environmental citizen suits, or, alternatively, it may be ignored by lower federal courts anxious to apply *Seminole Tribe*’s central holding. 64 U.S.L.W. at 4175 n.14. The *Seminole Tribe* dissent filed by Justice Souter provides support for the second interpretation. 64 U.S.L.W. at 4205-06. A recent Ninth Circuit ruling upholds citizen suits against individual state officials accused of violating federal environmental laws. National Resources Defense Council v. Cal. Dep’t of Transp., 65 U.S.L.W. 221 (Sept. 17, 1996).

246. See *Monell* v. Department of Soc. Serv., 436 U.S. 658, 700 (1978) (holding that local governments are not covered by the Eleventh Amendment except to the extent that they are part of the state); *Lincoln County v. Luming*, 133 U.S. 529, 533 (1890) (same). For a general discussion of the implications of extending Eleventh Amendment immunity to political subdivisions, see Melvyn R. Durchslag, *Should Political Subdivision Be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577 (1994).
mandates represented an unwarranted and extremely disruptive interference in their ability to implement their essential and traditional government role. Each side would introduce complex technical information and expert opinion to document the merits and pitfalls of the regulations. However energetic the parties and however careful the lower federal courts in requiring them to prove and brief their cases, the most likely result would be a factual record that is confusing at best regarding the substance of the regulations and almost certainly insufficient to inform the Court about the implications of invalidating them.

Although the conservative justices are intent on using any reasonable opportunity to reinvigorate the Court's federalist doctrine, it is unlikely that they would choose this case as a vehicle to overturn Garcia wholesale. The more interesting question, however, is whether the conservatives could discern a valid Tenth Amendment claim in this hypothetical case that would mark a midway point between National League of Cities and Garcia. The answer is no for one fundamental and unavoidable reason: the Court cannot recognize the municipalities' claim and still uphold uniform regulation of identical public and private conduct under the Commerce Clause. The difficulty arises not only in deciding what functions a local government "traditionally" provide, but also in drawing a rational distinction between those functions and the same services provided by the private sector. Given this dilemma, there is no way to avoid a double standard that would fatally undermine the constitutional justification for federal environmental regulations, just as Justice Blackmun feared.

Nor does the possibility of focusing on the existence of a compelling federal interest, weighing that interest against the burden on municipalities, help much to clarify the matter. If the federal government has a compelling interest in regulating the safety of drinking water sold in commerce by private parties, it must have a similarly strong interest in regulating the same conduct by public entities. Yet balancing this interest against the inconvenience and cost to the municipalities posed by the regulations leads back to the same place. Unless the Court is willing to weigh the burden on private providers of the service—an approach with drastic implications for its analysis of congressional authority under the Commerce Clause—any conclusion that the municipalities' interest outweighs the federal interest will establish a dual standard of regulation and a
dual level of public health protection. In short, without radically changing its interpretation of the Commerce Clause and its own role in reviewing regulations, the Court cannot provide a forum for the resolution of unfunded mandates issues. Participants in the conflict must therefore look elsewhere for relief.

IV. SORTING PRINCIPLES

Today . . . the Federal system is in complete disarray. Congress has lost all sense of restraint.

....

It is long past time to dust off the Federalist Papers and to renew the debate commenced by Hamilton, Madison, and Jay. They would ask not only whether a proposal is a good program, but also "Is this a Federal function?"

—Then-Governor Bruce Babbitt of Arizona in a 1980 address to the National Governors' Association

Over the last two decades, Congress and the President have expressed dissatisfaction with the federal regulatory system by either cutting funding for the bureaucracy or controlling the bureaucrats with procedural red tape. If the scope and intensity of the movement against unfunded mandates are any indication, however, these efforts have proven largely ineffective both in relieving intergovernmental tensions and in allocating clear responsibility for important areas of domestic policy among the three levels of government. Until and unless such responsibilities are sorted more effectively, failed regulation may create a significant and unacceptable risk of damage to public health and natural resources, as well as the more subtle risk of entrenching public cynicism about government’s ability to respond sensibly to serious problems.

The best alternative to fiscal deprivation and procedural paralysis is to craft a set of sorting principles for distributing authority and responsibility among federal, state, and local governments. Those principles should vary depending on the area of public policy involved. In areas such as environmental protection and other public health and safety regulation, programs would be shared. The federal government would concentrate on establishing a substantive framework for regulation, while state and local governments would have sufficient

247. GLENDENING & REEVES, supra note 30, at 103 (Governor Bruce Babbitt, Remarks to the National Governors’ Association (Aug. 4, 1980)) (first omission in original).
autonomy to implement those requirements cost-effectively.

To be effective, sorting principles must have two attributes. First, their application to specific regulatory proposals must be verifiable empirically. Regulators must be able to develop facts during the course of the rulemaking that either support or fail to support application of a given principle. Second, federal, state, and local officials, as well as representatives of other interests affected by intergovernmental regulation, must acknowledge the validity of the principles. If a rough consensus confirms that a principle reflects sound public policy, its application will improve the credibility of regulation and reduce intergovernmental tensions. This section proposes five sorting principles and rejects three other possible candidates. The next section tests the validity of the principles by applying them in one of the most prominent contexts for the unfunded mandates debate: implementation of the Safe Drinking Water Act.\textsuperscript{248}

A. FIVE SORTING PRINCIPLES

1. Transboundary Pollution

The most obvious justification for federal regulation of environmental problems is the effect of pollution that crosses state lines, or so-called "transboundary" pollution.\textsuperscript{249} Only the

\textsuperscript{248} 42 U.S.C.A. §§ 300f-300j (West 1991 & Supp. 1996), amended by Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, § 110 Stat. 1613. Before launching into the discussion, however, it is important to acknowledge the seminal work on this subject: Richard B. Stewart's 1977 article Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 YALE L.J. 1196, 1210-22 (1977). Stewart undertook his analysis before the Supreme Court decided Garcia, before the emergence of so-called "new federalism" as a major theory dominating the nation's political life, and well before the advent of the campaign against unfunded mandates. Nevertheless, he insightfully described the potential factors available to sort intergovernmental responsibility. Although the following analysis disagrees with his conclusions in several important respects, it revisits his work throughout.

\textsuperscript{249} Stewart calls the transboundary pollution problem the "spillover impact," noting that it is manifested both by physical pollution that travels across state lines and by the degradation of nationally valued natural resources because of the local controlling jurisdiction's decisions. Stewart, supra note 248, at 1215-16. Decades before major federal environmental laws were passed, states sued each other, as well as industry located in other states and individual cities, over the problems of transboundary pollution, begging the federal courts to develop a federal "common law" of nuisance to provide a remedy in such cases. See, e.g., City of Milwaukee v. Illinois, 451
most diehard federalist would disagree that if industry within one state can manage to export most of its pollution to another state, the source state is unlikely to impose effective controls and the receiving state lacks the leverage to protect itself. The transboundary rationale applies in any situation where pollution is transported across state lines via the ambient air or interconnecting natural geology such as rivers or aquifers. If the effects of such pollution would motivate regulation when they occurred primarily within the boundaries of the source state, but the impetus to regulate is thwarted by the state's opportunity to export pollution, then the rationale for federal intervention is compelling.

Many of the environmental problems caused by local government operations and challenged as unfunded mandates fall into this category. Sewage discharges into major waterways, for example, can have severe transboundary effects. Municipal solid waste landfills cause contamination of underground water supplies, many of which are linked across state lines. Those same aquifers provide potentially contaminated drinking water to large portions of the population.

Although the transboundary pollution rationale remains a central organizing principle for federal environmental regulation, it becomes increasingly less compelling in situations where the effects of pollution occur equally or primarily within the state where the source is located. In such circumstances, it is more difficult to predict that the source state will fail to regulate. Thus, if federal regulation is to occur in this context, it must be premised on other principles.

U.S. 304, 317 (1981) (holding that the Clean Water Act effectively preempts common law claims); Illinois v. City of Milwaukee, 406 U.S. 91, 99-101 (1972) (recognizing the existence of a federal common law of nuisance in water pollution cases); Georgia v. Tennessee Copper Co., 206 U.S. 230, 239 (1907) (granting Georgia's request that the company, which was located in Tennessee, be enjoined from releasing "noxious gas" that traveled through the ambient air into Georgia); Missouri v. Illinois, 200 U.S. 496, 526 (1906) (declining to enjoin the discharge of sewage from Chicago into the Mississippi River).

The one caveat to this generalization is localized pollution that causes damage to natural resources that have value to the nation as a whole. William Pedersen has suggested a strong role for federal regulation in protecting "uniquely national areas," such as national parks and wilderness regions, observing that the Prevention of Significant Deterioration program under the Clean Air Act, 42 U.S.C. §§ 7470-7492 (1994), is based on this principle. William F. Pedersen, Jr., Federal/State Relations in the Clean Air Act, the Clean Water Act, and RCRA: Does the Pattern Make Sense?, 12 ENVTLL. L. REP. 15069, 15071 (1982). Determining when a natural resource rises to the level of national importance is a judgment call. Given the strong national identity...
The existence of transboundary effects is measurable both qualitatively and quantitatively in the context of a specific legislative or regulatory decision. Because there is a broad-based consensus that the prevalence of such effects warrants federal intervention, justifying decisions on this basis should help to reduce antagonism among the three levels of government.251

2. Economies of Scale in Regulating

Research concerning the acute and chronic effects of pollution on people and ecosystems is much more sophisticated than it was two decades ago. Not only do scientists have a better understanding of how individual pollutants affect human health and the environment, they are increasingly able to measure the synergistic and cumulative effects of routine exposures. This emerging understanding of potential effects demonstrates that there is still an enormous research agenda left to accomplish.252 It also makes the business of developing ef-

and mobility of Americans, an argument could be made for labeling virtually any beautiful place a national treasure. On the other hand, there are many resources that a broad spectrum of the public views as nationally important resources, including many communities that promote tourism.

251. The transboundary rationale may also be useful in other contexts, such as protecting the nation's food supply from contamination, controlling the spread of infectious diseases, or preventing tampering with drugs commonly transported interstate.

252. The best comprehensive discussions of what we know, what we do not know, and the implications of our emerging knowledge for effective environmental regulation are two EPA reports issued in an effort to reexamine national environmental priorities. In 1987, the EPA published an analysis by its career staff of the environmental problems that should be on the Agency's regulatory agenda. U.S. EPA, UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS (1987) [hereinafter UNFINISHED BUSINESS]. Three years later, the EPA asked its Science Advisory Board to review UNFINISHED BUSINESS and prepare its own recommendations for the Agency's future direction. U.S. EPA, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION (1990) [hereinafter REDUCING RISK]. Both reports emphasized the gaps in information and scientific uncertainty that must be addressed at the national level:

The basic data . . . on many subjects studied in this project are surprisingly poor. The general weakness of exposure data is a special problem because exposure is such an important determinant of risk . . . . The best information available is for cancer risk. Even there, however, it was not nearly as good as one might expect . . . . There is no generally applicable methodology for ecological risk assessment . . . . While there are generally accepted methods for assessing welfare effects, there is a general scarcity of data and analysis in this area.

UNFINISHED BUSINESS, supra, at 98-99.

The ability to assess environmental risks, compare them, and select
fective regulation both complicated and expensive.\textsuperscript{253} To meet the challenge of continuing to protect and improve the environment in a period of limited and diminishing government resources, the nation must devote its best available resources to the assessment and prioritization of environmental risks.

In the environmental and other public health contexts, economies of scale in regulations demand that such work be

\begin{quote}
strategies to reduce them all depend on the availability and sophistication of the relevant data and analytical tools. The weakness in Unfinished Business stems in large part from the weakness of the data and analytical tools used, and those weaknesses still exist. If EPA's efforts to assess, compare, and reduce risks are to improve in the future, the data and analytical tools must improve as well.
\end{quote}

REDUCING RISK, supra, at 18.

\textsuperscript{253} Estimating the public costs of developing effective regulatory programs is a complex task that has yet to receive the comprehensive analysis it deserves. The best indication of how expensive this work can be is the money the EPA receives to develop regulatory proposals. The EPA's annual operating expenses totaled $7.2 billion for fiscal year 1995. U.S. EPA, FISCAL YEAR 1996 JUSTIFICATION APPROPRIATION ESTIMATES FOR COMMITTEE ON APPROPRIATIONS, 1-1 (1995) [hereinafter EPA FY 1996 BUDGET JUSTIFICATION]. This total represents what the EPA spent in one year to meet its duties under 13 environmental statutes. The 1996 report of the U.S. House of Representatives Appropriations Committee provides a further breakdown of what the Agency spent to develop regulations, as opposed to tracking compliance and enforcement, because it gives separate totals for each discrete program activity and explains what these activities entail. The report accompanying the Committee's FY 1996 appropriations bill explains how money was appropriated for FY 1995 and breaks down the EPA's regulatory responsibilities into two basic categories: "Research and Development" and "Environmental Programs and Compliance." In FY 1995, the Committee appropriated $350 million for Research and Development:

The Research and Development account funds all extramural Environmental Protection Agency research . . . . Research addresses a wide range of environmental and health concerns across all environmental media and encompasses both long-term basic and near-term applied research to provide the scientific knowledge and technologies necessary for preventing, regulating, and abating pollution, and to anticipate merging [sic] environmental issues.


A brief fiscal portrait of a single regulatory area provides further insight into the costs of regulating. For instance, the EPA spent $165 million in FY 1995 to carry out its regulatory duties under the Safe Drinking Water Act. This sum includes the following specific budget allocations: (1) $22 million for the Drinking Water Research program, which "provides the scientific and technical basis [to support] Agency rule making activities under the Safe Drinking Water Act Amendments," and (2) $31 million for Criteria, Standards and Guidelines programs. EPA FY 1996 BUDGET JUSTIFICATION, supra, at 5-1, 5-9, 5-12. While these amounts do not sound large in the context of the EPA's overall multi-billion dollar budget, they are very significant in the context of the limited funds available at the state level to implement such programs. See infra notes 396-399 and accompanying text.
done at the federal and not the state level, especially where effective regulation demands the development or analysis of a complex body of data. It simply makes no sense to reinvent the wheel fifty times with respect to problems that are prevalent throughout the nation. Deferring complex problems to the state level may also mean that they do not get addressed because the states lack the resources to analyze them effectively. Finally, national regulation makes it possible to target regulation on the most serious environmental—and other—risks.

Significant economies of scale are usually possible in the development of standards that establish maximum levels of contamination because such work requires analysis of available scientific information about the contaminant's toxicological effects. Similarly, economies of scale are achievable in the development of technology-based standards, especially where competing technologies are just emerging on an international level. Where technologies are well established and achieve comparable results from a pollution control perspective, the need for federal regulation is acute.

The availability of economies of scale in the development of market-based incentive approaches to regulation depends on the market dynamics of the activity that causes the pollution. The most significant experiment to date, marketing allowances for emissions that cause acid rain under the Clean Air Act, required the establishment of a national market for the allowances in an effort to equalize the costs of controlling the production of sulfur dioxide across many regions. It is possible that in other circumstances—marketing of credits for water pollution of large rivers, for instance—a regional market would be sufficient to ensure economic viability.

Although it is almost always more economically efficient

254. Stewart also recognizes economies of scale in regulating, although he gives them relatively short shrift in his justification of a strong national regulatory system for protecting the environment. Stewart, supra note 248, at 1212.

255. See S. REP. No. 101-228, at 315-27 (1989) (explaining how the allowance market will operate on a national scale to equalize costs and stimulate innovation in emission-reduction strategies).

256. Of course, the creation of regional markets does not necessarily depend on federal government action. States are perfectly capable of crafting regional compacts when they share a mutual perception of a common pollution problem. See, e.g., Patricia S. Florestano, Past and Present Utilization of Interstate Compacts in the United States, 24 PUBLIUS 13, 18-25 (1994) (discussing the use of interstate compacts).
for the federal government to assume responsibility for analyzing a major regulatory problem than for numerous states to attempt to develop independent factual records, this principle can be taken to illogical extremes. The federal government's resources are also limited and should not be used to address problems that are neither prevalent in the states nor severe in their overall impact on human health or the environment. Gauging the severity or prevalence of a problem at the national level will remain a judgment call. In some cases, the fact that a problem occurs in some states but not in others will mean that the federal government should defer regulation to the states. For example, the use of certain specialized agricultural pesticides or fertilizers may result in environmental contamination that is prevalent in only a few areas of the country and is therefore within the state government's ability to detect and remediate. In other cases, variations in local conditions will mean that the federal government should develop a uniform, regulatory approach with readily available waivers or exceptions. For example, the safe design of landfills is a national priority, although the geology where the landfill is located may affect some aspects of such designs. The federal government could provide uniform design standards, with waivers tailored to specific local conditions.

The degree of complexity and level of expense required to develop regulatory policy is verifiable and should become a threshold consideration for federal policy-makers at both the EPA and Congress. Because there is a widespread consensus that solutions to the most difficult scientific and technical problems require a pooling of our best national resources, justifying decisions on this basis should also help to reduce antagonism among the three levels of government.

3. Equity and Equal Protection

Conservative commentators have called environmental protection a "luxury good," affordable in flush times, expendable in tough times, and presumably out of reach for poor people no matter what the state of the economy. While only a

257. See, e.g., P.J. O'Rourke, ALL THE TROUBLE IN THE WORLD 201 (1994):
Neither is a "clean environment" a political right of humans.
Rights must be free . . . . You have the right to bear arms. You don't have the right to take a gun without paying for it.
Pollution control is not free . . . .
The environment turns out to be the "luxury good" that Cato In-
small minority of Americans probably agree with this assessment, the unrestricted devolution of fundamental regulatory decisions to the local level could well make it a reality. Principles of equity and equal protection demand the establishment of baseline national standards so that Americans are not exposed to fundamentally unequal levels of environmental risk. Or, put another way, it is the rare public official today who would suggest that people should receive different levels of protection from environmental problems depending on the demographics of the community where they live.

The need for baseline standards is particularly acute given the unequal distribution of environmental problems in society. The disproportionate effects of pollution on low-income, minority communities is increasingly well-documented. If determining the level of protection became the sole province of such communities, gross discrepancies between the exposures tolerated by poor and minority Americans and those tolerated by

Stewart's analysis of the equal protection problem is the most dated and wrongheaded aspect of his article. He argued that the ground swell of public concern about the environment that arose in the late 1960s was a "moral crusade" that could best achieve success if carried out at the national level because the crusaders needed to demonstrate that every community was making equal sacrifices for the good of the whole and because national implementation obscured the true costs of the crusade. Stewart, supra note 248, at 1217-18. On the other hand, he worried that centralizing such decisions at the national level disadvantages the poor, who would have more clout if the decisions were made at the local level and who are, in any event, forced to pay for the improvements. The so-called "Pyramid of Sacrifice," which he said the poor must endure, was premised on the idea that the poor receive relatively less benefit from and do not value the morals that are the subject of the crusade. Id. at 1221-22. Stewart offers no evidence for this essentially elitist conclusion, which is, in any event, challenged by the emergence of the environmental justice movement, among other developments.

the middle and upper class would increase. Not only do low-income communities lack the resources to devise effective regulation, they are considerably more vulnerable to threats that they must choose between jobs and protecting the environment. They are also overloaded with other social problems that compete for resources and the attention of the body politic.

Of course, in the absence of federal or state funding, the level of protection actually achieved depends on each individual community's ability to pay, no matter what the federal government decides is the ideal standard. Strict federalists might argue that unless Washington puts its money where its mouth is, low-income and minority communities fare no better than if they had been left to their own devices in the first place. This argument, however, rapidly degenerates: it is better to abandon the effort to establish baseline standards because funding will probably not come through at either the federal or state level. The willingness of government to fund environmental programs, however, cannot be determined in the absence of standards defining the protection that is necessary. The fact that funding poses major problems for implementation is not a reason to eschew valid standard-setting in the first place.

The effect of regulatory decisions on the disadvantaged and vulnerable can be evaluated both qualitatively and quantitatively throughout a legislative debate or a rulemaking, and this principle therefore satisfies the verification criterion. As for its capacity to reduce intergovernmental tensions, the principle is on weaker ground. There is no broad-based consensus that equity is served only at the national level. Indeed, many states would argue that they are perfectly capable of providing it without prodding from the federal government. Whatever the merits of this argument in the context of individual states, some states are sufficiently weak economically that they cannot ensure equity without federal assistance. This claim is also suspect from an historical perspective; states’ overall track record on race relations was and is a major justification for active federal civil rights enforcement and environmental justice issues are but the latest manifestations of these concerns. In sum, the overriding importance of equity and equal protection warrant their use as a sorting principle despite the possibility that they will exacerbate intergovernmental tensions.

As with the transboundary rationale and considerations of economies of scale in regulating, these equity principles are
also transferable to other areas of regulatory policy. The difficulty in applying them to social issues lies in defining a baseline level of minimal protection or other benefit that all people deserve. However difficult this task, national values arguably compel its undertaking.

The impact of transboundary pollution, economies of scale in regulation, and the moral imperatives of equity and equal protection justify the establishment of baseline federal standards for the protection of human health and the environment. But some of the federal environmental regulations targeted by local governments go well beyond establishing a national baseline, imposing burdens that simply cannot be justified on these grounds. The next two principles turn the sorting process on its head and serve to determine when the federal government should defer to state and local governments to address environmental problems.

4. Local Implementation

Federal regulations should only impose requirements that make sense in the context of specific local conditions. Even where federal regulatory mandates are justified, local governments should have adequate flexibility to implement them in the most cost-effective manner. Both ideas are frequently labeled as the “one-size-fits-all” problem: rigid edicts handed down from Washington often straitjacket local initiative, infuriating municipal officials who are already under pressure to resolve a lengthening list of difficult social problems with an ever-diminishing public fisc.

In some instances, the best way to address the issue of local implementation is to refrain from imposing regulatory requirements. In others, a national standard is necessary, but the regulations should include a workable, accessible system for granting waivers or exceptions. For example, a federal requirement that municipal solid waste landfills have two liners should not apply to landfills in arid areas where there is no groundwater. Similarly, federal regulations may impose a requirement that local drinking water systems test for a dangerous pesticide, but should allow local systems to terminate testing when the pesticide is not found in the water supply. In

260. Stewart calls this principle “diseconomies of scale,” by which he means the imposition of disproportionate and unnecessary burdens on a locality as a result of inflexible federal regulation. Stewart, supra note 248, at 1219-20.
all instances, the federal government should refrain from micromanaging local implementation to the point where money is wasted on expensive technologies or other compliance methods.

While the above axioms are common sense to the point of triteness, Part V of this Article illustrates that they are often ignored in the drafting of federal regulations. The complex and costly rules that result from their omission are a major cause of the friction between federal and municipal officials. These rules provide local governments with a raft of absurd examples of regulatory excess that undermine the credibility of the entire federal system.

State and local officials should be both willing and able to help federal officials develop alternatives that provide adequate flexibility to tailor national public health and safety requirements to local conditions. A clear federal commitment to consider such alternatives as integral parts of the rule-making process would result in more effective regulation. It would also go a long way toward reducing intergovernmental tension over both new and existing requirements.

5. Local Autonomy and Freedom from Excessive Regulation

As much as local governments demand flexibility and resent micromanagement, both complaints implicitly assume that federal regulation will occur. Yet local governments often take their objections one crucial step further and demand autonomy over decisions whether or not to regulate. During the debate over unfunded mandates legislation in the 103d and 104th Congresses, municipal advocates couched this issue in extreme terms, claiming that they should have autonomy to accept or ignore federal mandates depending on the budgetary exigencies of their individual communities. Under this scenario, environmental concerns would join a much longer queue of all public health and social welfare problems, with municipal

261. See, e.g., Federal Mandate Reform Legislation: Hearings Before the Senate Comm. on Governmental Affairs, 103d Cong. 113 (1994) [hereinafter Federal Mandate Reform Hearings I] (statement of Gregory S. Lashutka, Mayor, Columbus, Ohio):

Prioritizing is a process that all local governments must go through . . . . With a limited amount of funds, not every program can be implemented. Because of the civil and criminal penalties attached to unfunded mandates, local dollars must fund federal environmental programs regardless of demonstrated need or effectiveness, while the local priorities of police and fire protection, homeless shelters, and infrastructure repair are squeezed out.
officials setting priorities without reference to any judgment by national or even state governments regarding the importance or urgency of the problem.

If taken to its logical conclusion, this approach would trump all of the other principles, effectively negating the need for most federal regulation. Indeed, it marks such a drastic reversal from trends in American intergovernmental relations over the last several decades that it is tempting to dismiss it out of hand as the polemics of advocates caught up in the heat of debate. The mayor of one of America's largest cities, however, told his local newspaper that he was prepared to go to jail rather than comply with federal sewage treatment requirements.262 The vehemence of such statements suggests, at the very least, that the federal government has failed to make a compelling case not only for the details of the regulations it has imposed but for its choice of problems to regulate.

To restore credibility, Congress, the EPA, and other federal regulatory agencies must demonstrate that they are conscious of the environmental and other public health and safety requirements they have already imposed on the local governments, and that they keep these requirements firmly in mind when evaluating the need for and the feasibility of new regulatory programs. They must also reevaluate the federal regulatory agenda periodically, discarding those requirements that no longer seem urgent or necessary.

The proposal that Congress and the EPA actively reconsider the existing environmental agenda before adding new items to it falls short of suggesting, as some have, that there should be an annual cap on expenditures for all federal regulation.263 At the same time, the EPA and other agencies should


Philadelphia Mayor Rendell told the group that he had been told he had to spend $250 million to $500 million to meet federal rules regarding oxygen levels in the Delaware River. "They will have to get a federal court to put me in jail before I'm going to spend that... when we have people who don't have enough to eat, who don't have a roof over their head," he [said]." Id. (omission in original).

263. See, e.g., CONTRACT, supra note 3, at 132.

The [Job Creation and Wage Enhancement Act] requires federal agencies to issue an annual report projecting the cost to the private sector of compliance with all federal regulations. The cost of the regulations will then be capped below its current level forcing agencies to (1) find more cost-effective ways to reach goals and (2) identify
do more than convene endless advisory groups of carefully selected municipal officials to jawbone with its senior appointees about their troubles. In the context of each specific rulemaking, an inventory of existing requirements should be used to evaluate the relative importance of any new proposal.

B. THREE REJECTED CANDIDATES

Evaluating federal regulatory decisions on the basis of whether they provide adequate flexibility in the context of local conditions and whether they represent a tolerable and necessary burden on limited local resources should provide an appropriate counterbalance to their justification on transboundary, economies of scale, or equity grounds. Before completing the discussion of potential sorting principles, three additional candidates commonly mentioned in debates over the legitimacy of federal environmental regulation deserve consideration. For both practical and principled reasons, however, none are as useful as the five principles already proposed.

1. Races-to-the-Bottom

In theory, races-to-the-bottom occur when states compete with each other for economic development by offering industry financial and other incentives, including relief from environmental regulation. The desire to avoid such races is a major reason to impose uniform and inescapable standards at the national level. Local governments, though, cannot relocate to avoid stringent state regulation. They may exert significant influence over state legislatures and therefore over state environmental policy, but this influence does not derive from threats to take their business elsewhere.

The inquiry cannot end there, however, because privatization is an increasingly attractive solution to the problems local governments face in managing municipal solid waste, accomplishing sewage treatment, providing potable drinking water, and delivering a range of other essential services. Local governments could plausibly argue that stringent federal regula-

regulatory policies whose benefits exceed their costs to the private sector.

Id.

264. Stewart refers to this principle as the “Tragedy of the Commons,” which he describes as “the rational but independent pursuit of each decision-maker of its own self-interest [which] leads to results that leave all decision-makers worse off than they would have been had they been able to agree collectively on a different set of policies.” Stewart, supra note 248, at 1211.
tion will deter investors from participating in such projects. Such arguments could trigger a race-to-the-bottom at the state level that is functionally indistinguishable from industry-inspired races. This argument raises squarely the related issues of the extent to which such races actually exist and whether they pose serious problems for their contestants.

Recent research questions the existence of races-to-the-bottom with respect to environmental regulation, showing instead that states with the strongest economies also have the strongest environmental programs.\textsuperscript{265} The research was done in the context of industry claims that aggressive regulation chills economic development and drives firms out of states that have such programs. The research found that there was no actual correlation between aggressive regulatory programs and any significant problems in a state's economy.\textsuperscript{266} Those who contend that states should weaken programs to avoid upsetting business are therefore really resting their argument on the threat of future behavior motivated by perception rather than any empirical demonstration that businesses have fled in the past.

Intense competition among states for economic development is both well-documented and, in the view of some commentators, desirable.\textsuperscript{267} Even if such races head toward the

\textsuperscript{265.} \textsc{Stephen M. Meyer,} \textit{Environmentalism and Economic Prosperity: An Update} 10 (1993) [hereinafter \textsc{Meyer Update}]; \textsc{Stephen M. Meyer,} \textit{Environmentalism and Economic Prosperity: Testing the Environmental Impact Hypothesis} 42 (1992) [hereinafter \textsc{Meyer}].

\textsuperscript{266.} In his original study, Professor Meyer concluded, "[s]tates with stronger environmental policies and programs did not exhibit hobbled economic growth or development compared to those with weaker environmental records." \textsc{Meyer, supra} note 265, at 42.

"[T]hose who live and work in states that have vigorously pursued environmental quality and are now contemplating rolling back environmental standards as a quick fix to jump-starting their economies out of recession should reconsider. Based on the evidence there is no reason to expect that loosening environmental standards will have any effect on the pace of state economic growth."

\textsc{Meyer Update, supra} note 265, at 10.

bottom, the commentators argue, they at least force states to be more efficient, delivering to the people only the level of protection that they are willing to finance. Of course, this argument depends on the assumption that debates over whether to ease environmental regulation to attract new business are transparently obvious to the voting public. However, public opinion polling showing that a large majority is unwilling to accept such a trade-off undermines this premise. These results suggest that if these debates were conducted in public, environmental regulations would not be eased. Without getting sidetracked into this admittedly interesting theoretical debate, a race-to-the-bottom without full public disclosure would serve industry’s interests but not the public interest. Such races could have a profoundly negative effect on the quality of environmental protection.

For all of these reasons, regulators may find it difficult to verify whether a race-to-the-bottom regarding environmental regulation does or could exist. Investors with a wide range of opportunities might boycott a state that created a difficult climate for the public facilities they are asked to finance. It is also possible that strong environmental laws could encourage investment by lowering the risk of liability for residual pollution. Unless there is data indicating that a race-to-the-bottom has already begun, regulators seeking to predict whether a race will occur must rely on relatively subjective evidence of its future likelihood. Even where there is data indicating that a number of states are changing key laws in similar ways at the behest of regulated industries, the assertion that the trend reflects a race-to-the-bottom, as opposed to a mutual recognition of a common problem, is problematic and has the capacity to exacerbate intergovernmental tensions.

1210, 1244-47 (1992). Revesz contends that competition between states for industry can be expected to produce an efficient allocation of industrial activity among the states and that if states are foreclosed from competing on environmental grounds, they will find other, perhaps even less desirable, areas in which to compete. Id.

268. See supra notes 169-171 and accompanying text (reviewing public opinion polls relating to the environment).

269. It is possible that the destructive effects of interstate competition may be more susceptible to empirical analysis in other regulatory contexts, or may become more prevalent or measurable in the environmental arena. It will always be worth considering this phenomenon as sorting continues.
2. The Importance of Public Choice

One important argument made by proponents of interstate competition is the assertion that the public's right to choose the level of protection it wishes to purchase can only be effectively served at the local level. Conversely, commentators have argued that narrow special interest groups more easily capture state governments, especially major industries; a strong federal role is thus necessary to guarantee that the full range of public interests will be considered in the regulatory process.

For the purposes of sensibly sorting the responsibility for environmental protection among the three levels of government, does it matter who is right in the debate over which level of government can deliver policy that best incorporates the public interest? Or, put another way, what does public choice theory have to offer the quest for a coherent set of sorting principles?

Traditional public choice theory breaks down when applied to unfunded federal environmental mandates because devolving decisions to the local level would result in an irresolvable conflict of interest within the arena for making the public choice. Environmental mandates regulate local governments in their capacity as polluters and involve highly technical

270. For a thoughtful exposition of this argument, see Zelinsky, supra note 163, at 1369-89 (showing how legislators use unfunded mandates to satisfy minority interests at the expense of the general public). For a contrary analysis, see David A. Dana, The Case for Unfunded Environmental Mandates, 69 S. CAL. L. REV. 1, 18-21 (1995) (arguing that the public understands the consequences of unfunded federal mandates on sub-national governments as well as it understands the consequences of funded federal regulations).

The Supreme Court has also entered the public choice debate. In his dissent to the opinion in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 576-77 (1985), Justice Powell wrote:

The administration and enforcement of federal laws and regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they hardly are as accessible and responsive as those who occupy analogous positions in state and local governments.

271. Stewart argues that decentralized decisionmaking would severely disadvantage national environmental groups—the only effective lobby for strong regulation—although he also recognizes that national decisionmaking impairs local self-determination. Stewart, supra note 248, at 1213. In this era of enthusiasm for public choice theory, Stewart's unabashed endorsement of a system which he believes favors one particular type of national interest group is refreshing, if not necessarily supported by the recent history of de-regulatory initiatives. For a more economically refined analysis of the issue, see Mashaw & Rose-Ackerman, supra note 105, at 115-22.
judgments about what standards are necessary to protect human health and the environment. Devolution creates a conflict of interest for local governments because they are the special interests seeking a particular outcome at the same time that they are the forum for making the choice. In such circumstances, municipal officials would have every incentive to manipulate the information that is available to their constituents about the pollution problems they have caused.

Of course, this analysis does not answer the more difficult question of whether regulation of local government pollution at the state level is sufficient to avoid such conflicts. On one hand, it is possible that municipal officials will have sufficient clout in their state capitols to trump pure public choice. On the other hand, public choice theorists, as well as municipal advocates, have legitimate concerns that complete removal of all decisionmaking to the national level means that people will never learn about the choices that are being made for them until they are presented with the most unpleasant aspect of the process: the tax bill necessary to pay for those decisions. Whether the states are really ready to assume a strong role is a further complication, especially if the federal government continues to cut the grants provided to state regulators to run their environmental enforcement programs.272

In the end, public choice theory cannot provide the basis for a compelling sorting principle because the implications of the theory’s application are both speculative and impossible to verify empirically. Adopting the superficially appealing compromise of giving the states more authority to get decisionmaking "closer" to the people will not mollify local governments. More to the point, it would not represent an honest application of the theory that, in its pure form, demands that decisionmaking be located at the lowest possible level of a political system.273 In sum, to use the lexicon of public choice proponents, the externalities involved in regulating municipal pollution of the environment are sufficiently complicated that they can and should trump the theory’s application in this context.

272. See supra note 79 and accompanying text (discussing the effects of federal cutbacks on state governments).

273. Cf. Zelinsky, supra note 163, at 1369-89 (showing how state governments impose unfunded mandates on municipalities).
3. Funding

Clearly, it is the unfunded nature of federal mandates that motivates state and local governments to crusade against them. It is even tempting to suspect that if the federal government fully funded regulatory programs dealing with sewage treatment or drinking water, the movement against environmental mandates would ebb significantly and eventually disappear. Nonetheless, it is crucial to avoid the next logical misstep in the analysis of unfunded mandates that municipal advocates so often advance.

The fact that a mandate is unfunded should not determine whether it is valid any more than the federal government’s willingness to pay for a program should determine whether it is an appropriate policy choice. To the extent that environmental regulations are legitimate and well-justified, federal funding may be politically necessary, essential as a practical matter, or desirable as a policy matter. Its absence, though, should not trump the role of the five principles in determining intergovernmental responsibility. Most Americans would not suggest that citizens should have only as many civil rights as the federal government is willing to finance. Nor would they conclude that the federal government must either compensate the states and private industry for the costs of ensuring occupational health and food and drug safety or abandon its programs in those areas.

Of course, as discussed further in Part V of this Article, the level of federal funding, especially for the support of federal and state regulatory agencies, can have a critical effect on the quality of environmental protection and intergovernmental relations. It can also make the difference between a more effective, cooperative system and a system that relies on coercion or the toleration of unsafe conditions. To reject funding as a threshold sorting principle is not to dismiss its central role in determining what is likely to happen to environmental programs in the foreseeable future.

As significant as the level of federal funding is likely to prove in the implementation of federal and state regulatory programs, it is worth noting that federal largesse can have perverse effects when committed to the actual construction of environmental infrastructure. These effects may not only waste money, but actually decrease the quality of environmental protection provided at the local level. In studies of federal environmental projects such as wastewater treatment
plants, the CBO found that large grants meant that local governments had little incentive to oversee projects carefully, to choose the best technology available, or to plan sensibly for their long-term needs. Federal expenditures did not lead to use of local resources for enhanced environmental protection; instead, "fiscal substitution" occurred, and local revenues devoted to wastewater treatment fell in direct proportion to available federal revenues. The presence of funding also lessened incentives to avoid environmental problems in the first place: "When drinking water treatment is funded at the local level, expanding municipalities have an incentive to promote water conservation in order to delay the need for additional treatment capacity."

The ultimate reason to reject funding as a sorting principle is a practical one, however: the lack of funding for mandates is likely to remain a fact of life for the foreseeable future because it is difficult to imagine a return to the glory days of the late sixties and early seventies when federal largesse motivated subnational governments to sacrifice their authority over a broad array of social programs. Conditioning the federal role in environmental protection on the provision of full federal funding could mean virtually abandoning federal regulation of municipal activities that affect the environment.

The one clear exception to the above conclusions is that, as a matter of principle, federal funding should be provided when it is necessary to help poor communities meet baseline standards, especially in cases where the state in which those communities are located also lacks the resources to supplement local revenues. In such circumstances, the absence of federal or state funding means that federal baseline standards become a dead letter in the law, effectively negating efforts to ensure equity and equal protection.

The final section of this Article applies the sorting princi-

274. CONGRESSIONAL BUDGET OFFICE, EFFICIENT INVESTMENTS IN WASTEWATER TREATMENT PLANTS, at xii (1985); CONGRESSIONAL BUDGET OFFICE, NEW DIRECTIONS FOR THE NATION'S PUBLIC WORKS, at xvi (1988).

275. CBO SAFE DRINKING WATER MEMORANDUM, supra note 67, at 13-14. Between 1972 and 1977, federal funding of wastewater treatment plants rose from $1.4 billion to $7.3 billion while parallel local expenditures fell from $5.4 billion to $0.9 billion. Id. at 14.

276. Id. at 13.

277. See, e.g., Clinton and Congress: Coming to Terms Over Infrastructure, GOVERNING, Jan. 1995, at 73 (discussing recent reductions in federal infrastructure programs).
ples to one of the most controversial and important arenas for the unfunded mandates debate: federal regulation of the drinking water supply.

V. THE SORTING PRINCIPLES APPLIED: FEDERALISM AND THE SAFE DRINKING WATER ACT

Yes, we would all like to eliminate every risk there is in our communities. But in a world of limited resources, we have to make choices. Federal unfunded mandates not only avoid the responsibility of making choices, they impose choices that cost lives at the local level. . . . The extremely conservative levels of testing necessary to comply with the Safe Drinking Water Act, and other pieces of environmental legislation, increase the cost of compliance substantially. . . . Given the choice between a policeman on every corner and eliminating a contaminant that may never affect them, I have no doubt what my citizens would choose. But it is not a choice over which I or my citizens have any say.

—Gregory S. Lashutka, Mayor, Columbus, Ohio 278

For most Americans, turning the tap is an Act of Faith. But if our experience is any guide, that Faith is severely shaken. . . . When you play around with drinking water quality you are playing with fire, perhaps the only instance where water can start fires, metaphorically speaking, rather than put them out. A water supply is a long lever, with the weight of the community's health at the other end. Small changes in water treatment are magnified as large movements in health status.

—Dr. David Ozonoff, Chairman, Department of Environmental Health, Boston University School of Public Health 279

No contemporary environmental problem cuts to the quick of public anxiety more than the safety of our drinking water, and no problem better illustrates the implications of the current breakdown in relations between the three levels of government. The American people count on clean drinking water and expect government to provide it. Yet members of Congress repeatedly cited Safe Drinking Water Act (SDWA) 280 require-

278. Federal Mandate Reform Hearings I, supra note 261, at 112 (protesting unfunded federal mandates in the Safe Drinking Water Act).
ments as among the most onerous and unnecessary federal mandates during the floor debate over the Unfunded Mandates Reform Act of 1995.\textsuperscript{281}

This disjunction between public concern and congressional polemics would be both unremarkable and unimportant if the federal system that regulates drinking water was in fundamentally decent shape. But the UMRA debate occurred in the context of evidence that the system is on the brink of collapse, with widespread violations the norm and significant threats to public health increasingly common. Indeed, it is not an overstatement to suggest that a catastrophe could await us if we do not respond quickly and effectively to the gathering crisis in this crucial regulatory program. In 1990, the EPA's Science Advisory Board, a blue ribbon panel composed of many of the nation's best-known environmental and public health experts, issued a report suggesting regulatory priorities for the Agency that ranked drinking water as one of the top four risks presented by environmental contamination:

Drinking water, as delivered at the tap, may contain agents such as lead, chloroform, and disease-causing microorganisms. Exposures to such pollutants in drinking water can cause cancer and a range of non-cancer health effects. This problem poses relatively high human health risks, because large populations are exposed directly to various agents, some of which are highly toxic.\textsuperscript{282}

This disconcerting conclusion is supported by several independent scientific studies. According to researchers from the Centers for Disease Control (CDC), tap water contaminated by bacteria and other pathogens sickens 940,000 Americans annually; 900 of this number ultimately die from these exposures.\textsuperscript{283} Because intestinal problems are under-reported at


\textsuperscript{282} \textit{Reducing Risk}, supra note 252, at 14 (detailing health risks from polluted tap water).

\textsuperscript{283} John S. Bennett \textit{et al.}, \textit{Infectious and Parasitic Disease, in Closing the Gap: The Burden of Unnecessary Illness} 102-14 (Robert W. Amler
the federal level and many doctors may not associate such illness with bad water, experts say that the actual incidence of waterborne diseases may be ten times higher.\footnote{284}

Beyond the acute effects of bacterial contamination, chemical contamination of drinking water in the United States is increasingly well-documented. In a recent analysis of drinking water contamination in the United States, an EPA risk assessment expert noted that approximately 1.5 trillion gallons of contaminants enter the soil each year as a result of industrial waste disposal, agricultural uses, and domestic refuse disposal. These contaminants pose a direct threat to groundwater drinking supplies.\footnote{285} Inorganic chemicals such as arsenic, cadmium, chromium, lead, nitrite/nitrate, and sulfate are of particular concern because they cause health effects that range from cancer to neuropathy to a diarrhea that is especially harmful in infants.\footnote{286} In addition, a 1980 survey of drinking water found more than 400 separate organic chemicals, including such toxic substances as trihalomethanes, trichloroethylene (TCE), and carbon tetrachloride.\footnote{287} Other surveys have discovered potentially dangerous levels of such potent carcinogens as the pesticides 1,2-dibromo-3-chloropropane (DBCP) and ethylene dibromide (EDB), both of which have been banned for all or most uses in America.\footnote{288}

Despite this evidence of threats to public health, regulatory efforts at the federal and state levels are increasingly dys-

\footnote{284. Joan Rose et al., Waterborne Pathogens: Assessing the Health Risks, 7 HEALTH & ENV'T. DIG. 2 (June 1993); see also U.S. EPA, Surface Water Treatment Proposed Rule, 52 Fed. Reg. 42178, 42183 (Nov. 3, 1987) (estimating that as many as 25 waterborne illnesses may occur for every one that is documented).}


\footnote{286. Id. at 7-8 (listing harmful inorganic chemicals).}

\footnote{287. Id. at 8 (listing harmful organic chemicals).}

\footnote{288. Id. at 8-9 (showing the presence of banned chemicals in the drinking water supply).}
functional. In the summer of 1995, the EPA issued its 1994 annual drinking water compliance report. A cover memo accompanying the report noted grimly:

The report reveals several significant trends, the most important of which is the continuing drop in compliance by community water systems. In FY 1994, the compliance rate dropped to 66%, the lowest level in nine years. A total of 19,568 systems serving 64 million persons reported over 88,000 violations. The most common violation remains violation of the coliform monitoring and reporting requirements—the basic rule of the program and one directly related to public health.239

This Article’s final section examines the regulatory crisis that provoked the unfunded mandates movement by analyzing the history, current status, and future of the Safe Drinking Water Act. It then applies the sorting principles proposed in Part IV to these problems, suggesting three alternative scenarios for reform. The first scenario could be described as the “cooperative federalism” solution. It relies not only on the consolidation of regulatory priorities and the devolution of federal authority to the states, but also on significantly increased funding at all three levels of government. The second scenario, which could be described as the “coercive federalism” approach, suggests how minimal regulatory controls could be maintained even if adequate funding is not forthcoming. Finally, there is the scenario mentioned in the title of this Article: a revolutionary rollback of regulatory protections that puts public health at both imminent and long term risk. A brief history of American efforts to ensure a safe water supply will set the stage for an exploration of these alternatives.

A. THE HISTORY OF FEDERAL DRINKING WATER REGULATION

Federal efforts to regulate drinking water safety date back to the turn of the century when Congress established the Public Health Service Hygienic Laboratory to investigate waterborne infectious and contagious diseases.290 The Public Health Service (PHS) first began to set standards for drinking water in 1914; the standards were revised periodically, as scientific

239. Memorandum from Robert J. Blanco, Director, Drinking Water Implementation Division, Office of Ground Water and Drinking Water and Frederick F. Stiehl, Director, Enforcement Planning, Targeting, and Data Division, Office of Compliance to Distribution 1 (July 26, 1995) (on file with author).

knowledge of the potential threats of chemical and microbial contamination improved. These standards were generally effective in eliminating waterborne diseases for the next several decades, despite large expansions of the population and increasing contamination of the water supply as a result of industrial development.

In 1970, a PHS study suggested that the quality of the water supply had deteriorated significantly, the incidence of waterborne diseases had steadily increased, and the physical and technical capacity of more than half the nation's drinking water systems were in substantial doubt. This alarming news led to the passage in 1974 of the Safe Drinking Water Act and the designation of the EPA as the lead federal agency to set standards and ensure compliance. The legislative battle was hard-fought because many members of the water supply industry feared the intrusion of the federal government into an arena that had never involved either rigorous regulation or punitive enforcement.

291. *Id.* at 504-05. These "Drinking Water Standards" (DWS) required systems supplying interstate carriers to test water to ensure compliance. Although such systems were only a small minority of those operating in the country at the time, the standards were used as a reference by most states and public water systems. *Id.* For a more detailed description of the historical evolution of the standards, see EDWARD J. CALABRESE ET AL., SAFE DRINKING WATER ACT, AMENDMENTS, REGULATIONS AND STANDARDS 3-14 (1989).


293. *Id.* at 505-07 (describing the subsequent deterioration of the water supply). The PHS study was entitled the "Community Water Supply Study" (CWSS) and involved a survey of 969 water supply systems. The CWSS found that only 59% of these systems delivered water that satisfied the DWS guidelines; 56% had physical deficiencies; the majority had no rules in place to prevent cross-connection between drinking water and sewage lines; and three-fourths of system operators lacked minimal technical training. These problems not only persist to this day, but arguably have grown worse, and they must temper any temptation to blame the current crisis solely on the overregulation supposedly caused by the 1986 amendments. WATER HYGIENE DIV., U.S. EPA, COMM. WATER SUPPLY STUDY: ANALYSIS OF NATIONAL SURVEY FINDINGS (1971) (previously printed as BUREAU OF WATER HYGIENE, U.S. PHS REP. (JULY 1970)).


295. Douglas, *supra* note 290, at 509-18. This "public health" culture, which views the relationship between the regulators and the regulatees as an informal, cooperative affair, persists to this day and complicates efforts at the state level to enforce the law aggressively.
The basic regulatory framework established by the 1974 Act remains in effect: the EPA must establish standards for common drinking water contaminants; the states are authorized to implement the standards; and drinking water suppliers are required to notify their customers in the event of significant violations.\(^\text{296}\) In retrospect, this system was doomed to poor performance because federal and state regulatory agencies are chronically underfunded. In this weakened condition, state agencies are increasingly unable to deal with a proliferation of small drinking water systems that have severe compliance problems.\(^\text{297}\) But the EPA's persistent failure to issue new drinking water standards distracted attention from these arguably more serious concerns. By 1986, EPA inaction convinced Congress that ambitious reforms were necessary:

The Safe Drinking Water Act is . . . simple in theory. In fact, Congress expected the program to fall quickly into place . . . . It is now 12 years later and the Safe Drinking Water Act once again comes to the floor of the Senate with most of the original promise unfulfilled. The act has failed miserably. Seven hundred different organic, inorganic, biological, and radiological contaminants have been detected in the drinking water supplies of the United States. And yet today after 12 years under the Safe Drinking Water Act we have standards for only 23 contaminants and two-thirds of those were established by the Public Health Service in the 1960's long before anybody had even contemplated a national environmental protection agency. A miserable,

\(^{296}\) 42 U.S.C. §§ 300g-1 (EPA standard-setting), 300g-2 (state delegation), 300g-3 (state enforcement), 300g-4 (state authority to grant variances), 300g-5 (state authority to grant exemptions), and 300g-3(b) (public notification) (1994), as amended by Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, § 110 Stat. 1613. At this stage in the program's development, every state but Wyoming has achieved delegated enforcement authority, or "primacy." U.S. EPA, STRENGTHENING THE SAFETY OF OUR DRINKING WATER: A REPORT ON PROGRESS AND CHALLENGES AND AN AGENDA FOR ACTION, EPA 810-R-95-001, at 15 (1995).


\(^{297}\) In justifying passage of the 1986 amendments, for example, Senator Moynihan noted on the floor that reports by the General Accounting Office (GAO) demonstrated that the EPA and some states were guilty of lax enforcement, with 64,000 reported violations of drinking water standards in 1984 alone. 132 CONG. REC. 6284 (daily ed. May 21, 1986), reprinted in SEN. COMM. ON ENV'T AND PUB. WORKS, 103D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE SAFE DRINKING WATER ACT AMENDMENTS 1983-1992, at 127 (1993) [hereinafter SDWA HISTORY].
discouraging, disturbing record—that is the legacy of the drinking water program at the Federal level of government. 298

The heart of the 1986 amendments is the requirement that the EPA dramatically expand and quicken the pace of the standard-setting process. 299 The law borrowed a list of eighty-three contaminants from Advanced Notices of Proposed Rulemaking published by the Agency a few years earlier, requiring that final standards be set for all of them on a staggered schedule ending on June 19, 1989. 300 Following this first wave, the EPA was required to formulate new standards for an additional twenty-five contaminants every three years. 301 The EPA was also told to issue regulations concerning filtration and disinfection within eighteen and thirty-six months of enact-

298. SDWA HISTORY, supra note 297, at 100-01 (statement of Senator Durenberger). In this atmosphere of righteousness, the conference report was approved by astonishingly wide margins: the Senate vote was 93 to 0 and the House vote was 382 to 21. Id. at 141, 156-57. Both the politics and substance of the legislative debate were affected by the backlash against the Reagan deregulatory agenda. In 1982 and 1983, OMB budget analysts blocked issuance of several EPA-proposed drinking water regulations. BNA ENV'T REP., SAFE DRINKING WATER ACT AMENDMENTS OF 1996: A BNA SPECIAL REPORT 3 (SEPT. 12, 1986). According to Robert Bedell, OMB deputy administrator of information and regulatory affairs, the regulations were held up because “our view is that there should be federal regulatory intervention only in the case of a market failure and then only if the state and local governments are unable to or possible unwilling to deal with the problem.” Id. This early articulation of federalist principles not only fell on deaf ears in Congress, but intensified the commitment to expanding the federal role:

The greatest problem with implementation of the program established by the Safe Drinking Water Act is the failure of EPA to issue standards . . . . The vital need for such standards is exemplified by the fact that a number of States have been forced to expend their limited resources to develop standards in the absence of Federal regulations. National drinking water standards are the cornerstone of the Safe Drinking Water Act and their establishment is most appropriately a Federal responsibility. SDWA HISTORY, supra note 297, at 309.

299. The 1986 amendments also include lengthy and controversial new provisions regarding the protection of groundwater, but these requirements are beyond the scope of this discussion because they primarily involve implementation issues between the EPA and the states. 42 U.S.C. § 300h (1994), as amended by Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, § 110 Stat. 1613.


301. 42 U.S.C. § 300g-1(b)(3).
The amendments banned the use of lead pipes, solder, or flux outright and commanded the EPA to issue a regulation defining when operators of drinking water systems must notify the public that applicable lead levels have been exceeded.

Recognizing that it had unleashed forces that could prove overwhelming to the regulated community, Congress headed off in two opposite directions. On one hand, it expanded the criteria for variances and exemptions, giving the states conditional authority to ease the compliance burden. On the other hand, it strengthened the civil penalties available for violations of the Act and, for the first time, established criminal penalties for particularly egregious violations.

302. Id. § 300g-1(b)(7)(C) (filtration requirements), -1(b)(8) (disinfection requirements).
303. Id. § 300g-6 (outright ban on lead, solder and flux).
304. Id. § 300g-4 (variances), -5 (exemptions). The states were authorized to grant variances on the basis that the “raw water sources which are reasonably available to the systems” cannot meet federal standards. However, a variance was only available on this basis if the system had already tried available pollution control technology and it had not worked. Alternatively, states could grant a variance on the basis that it was unnecessary for a system to employ certain treatment technologies because its raw water source was uncontaminated. States were allowed to grant exemptions to drinking water systems if “compelling factors (which may include economic factors)” render the system “unable” to comply with federal standards and the granting of an exemption will not result in an “unreasonable risk” to health. Beyond these tough substantive standards, the states were required to follow detailed procedures to ensure public notice and comment on their decisions and to place the systems receiving variances on a schedule for reaching full compliance. These provisions have proved sufficiently burdensome that a recent study by the Congressional Budget Office found that state regulators had issued no variances and only fifteen exemptions nationwide between January 1990 and March 1994. CBO CASE STUDY, supra note 148, at 36.

The Safe Drinking Water Act Amendments of 1996 revise the standards for granting variances and exemptions, especially with respect to small systems. To obtain a variance, the small system must show that it cannot afford to comply under criteria established by federal or state regulators. The possibility that a small system could be consolidated or restructured must be considered in determining whether the requirement is truly unaffordable. Pub. L. No. 104-182, §§ 116, 117, § 110 Stat. 1640-44 (1996). It remains to be seen whether state regulators will implement these new procedures more readily at the state level.

305. Id. §§ 300g-3 (civil penalties), 300i-1 (criminal penalties). The Act provides for the assessment of $25,000 in civil penalties per violation per day. Thus, a fine of $250,000 per day is theoretically possible for a system that is committing ten separate violations. The Act authorizes a five year prison term for a person who tampers with a public drinking water system. A person who only “attempts to tamper, or makes a threat to tamper” faces a three year
In all major respects save one, the track record of implementing the 1986 Act was a depressing reprise of the problems that have plagued the program since its inception. The key difference was that the EPA at last leapt into action, completing work on seventy-eight of the initial eighty-three standards within a remarkably short timeframe. But in the absence of either fundamental reforms to the structure of the industry or a dramatic expansion of state regulatory resources, this frenetic activity at the federal level provided the catalyst for a further breakdown in compliance.

The federal drinking water program regulates 200,000 public water systems providing piped water to some 243 million Americans. Approximately 60,000 of the 200,000 total are "Community Water Systems" that serve the same populations year-round. The rest are operated by institutions like schools, factories, hospitals, campgrounds, or motels that either serve people for only a portion of the day or serve transient populations. About eighty percent of the population are supplied by Community Water Systems that serve at least 10,000 people. According to the EPA, these systems "generally possess substantial revenue bases, low rates due to economies of scale, management sophistication, engineering/planning knowledge, and financial capabilities." Another 7.2% of the population are supplied by more marginal but generally viable medium-sized systems serving 3,301 to 10,000 people. An estimated 8.4% of the population are supplied by

---

prison term. Enforcement of these provisions has been sporadic. See infra notes 320-330 and accompanying text.

306. S. REP. NO. 104-169, at 9 (1995). As the report notes, the EPA modified the original list of 83 contaminants to replace seven entries with alternative chemical contaminants.


308. EPA TECHNICAL REPORT, supra note 307, at 4.

309. Id. Of the 140,000 "noncommunity" public water systems, 25,000 are "nontransient," serving locations such as schools and workplaces, while another 115,000 are "transient," serving locations such as campgrounds and hotels. Id. at 4-5.

310. Id. at 7.

311. Id. at 5.

312. Id. at 6-7; see also id. at 70 ("Many aspects of financing capacity are
“small” systems that serve 501 to 3,300 people, while another 2.3% of the population are supplied by “very small” systems serving twenty-five to 500 people. These “small” and “very small” systems “do not possess substantial revenue bases” and “their ability to comply with drinking water regulations is limited.” Indeed, one close observer of the drinking water industry noted that their viability is so precarious that they are abandoned, given away, and even won and lost in poker games. According to an EPA analysis, the proliferation of small systems is the direct result of regulatory vacuums at the federal, state, and local levels:

Prior to enactment of the Safe Drinking Water Act and especially its 1986 Amendments, regulatory and treatment requirements were minimal. For the most part, all that was needed was a well, a pump, a tank, and perhaps a chlorinator. . . . The most significant cost element was the initial cost of constructing a distribution system, in which there are no economies of scale.

While the EPA is understandably focused on the importance of its own regulatory standards, this analysis leaves unstated the more remarkable fact that many state and local governments fail to impose even minimal requirements concerning financial viability and technical competence on people providing such a potentially dangerous service to the public.

The impossible task of chasing these disparate entities is assigned to state regulatory agencies that are falling further and further behind the steepening federal standard-setting and enforcement curve. In 1993, the EPA estimated that state funding was half the level necessary to implement existing regulations, with several new regulations about to go into effect. The funding crunch means that state regulators are unable either to enforce the law effectively or to provide the

the same in these [small to medium] systems as for larger systems,” but they are “less able to maintain their infrastructure than their larger counterparts”).

313. Id. at 6-7. Forty percent of “small” and “very small” systems are publicly owned. Id. at 83. Twenty-five percent are owned by mobile home parks. Id. Fifteen percent are owned by homeowners’ associations. Id. Fifteen percent are investor-owned. Id. Five percent are owned by a category the EPA characterizes as “other.” Id.

314. Id. at 5.


316. EPA TECHNICAL REPORT, supra note 307, at 79.

317. Id. at i.
variances and exemptions that would tailor ambitious federal requirements to local conditions. These problems are so severe that several states are threatened with loss of primacy, returning responsibility for implementing the program to an EPA staff clearly alarmed by the prospect.

The predictable legacy of this unfortunate confluence of factors is widespread, chronic, and intractable noncompliance. In 1990, the GAO reported that the number of violations reported to the EPA was "considerably understated" because water system operators did not know how to perform tests or deliberately falsified them or because states overlooked (or excused) noncompliance. Perhaps most troubling of all, the GAO found that federal and state regulators tried to cope with the growing enforcement crisis by adopting informal policies that excuse certain regulatory violations. This ad hoc decisionmaking only served to encourage scofflaw attitudes that further undermine the overall credibility of the program. By 1992, the GAO drew an even starker picture of the true situation in the field:

Funding shortages at the federal, state, and water system level have been and continue to be a major contributor to the program’s prob-

318. See CBO CASE STUDY, supra note 148, at 35-36 (noting that variances and exemptions intended to ameliorate harsh application of regulatory requirements are rarely used by states).

319. See EPA TECHNICAL REPORT, supra note 307, at ii ("Unfortunately[,] public health protection is the first victim of failed state primacy, since the EPA is not staffed to run effective programs at the State level."); see also GAO, DRINKING WATER: WIDENING GAP BETWEEN NEEDS AND AVAILABLE RESOURCES THREATENS VITAL EPA PROGRAM, GAO/RCED Doc. No. 92-184, at 2 (1992) [hereinafter GAO 1992 WIDENING GAP REPORT] (noting that the federal government is considering whether to revoke primacy in several states).

320. GAO, DRINKING WATER: COMPLIANCE PROBLEMS UNDERMINE EPA PROGRAM AS NEW CHALLENGES EMERGE, GAO/RCED Doc. No. 90-127, at 4, 17 (1990) [hereinafter GAO 1990 COMPLIANCE REPORT]; see also id. at 22 (stating that the incidence of falsified results is unclear because states do not “actively seek out the problems”). The GAO recommended that the EPA encourage “efforts to detect and deter” falsification. Id. at 23.

321. Id. at 4.

322. See id. (noting that states adopted policies “suspending or restricting certain EPA monitoring requirements”).

323. Id. at 28. The GAO wrote:

On one hand, states or EPA regions may present a compelling case why such policies may be warranted. On the other hand, EPA is tolerating state and regional policies that directly conflict with existing requirements. Whether or not the policies are justified, our primary concern is that the present situation undermines a program that relies primarily on adherence to published regulatory requirements.

Id.
lems. Increasingly, states have indicated that they are unable to implement core elements of their programs effectively, much less the new and more stringent requirements of the 1986 amendments.\textsuperscript{324} Scofflaw attitudes were becoming systemic, with no end in sight.

In 1993, the GAO completed an analysis of states' efforts to implement so-called "sanitary surveys," a crucial regulatory tool that involves periodic inspections of drinking water systems by state inspectors.\textsuperscript{325} These surveys are the primary method for evaluating compliance other than drinking water system self-reporting.\textsuperscript{326} The GAO found that forty-five states omitted one or more of the fourteen key components recommended by the EPA when they conducted the surveys.\textsuperscript{327} Even when the surveys uncovered violations, state regulators did not take effective action to follow up: the GAO reported that eighty percent of the 200-survey sample disclosed serious deficiencies in the operation of public water systems, with sixty percent of those citing the same problems identified in previous surveys.\textsuperscript{328} These disturbing statistics are almost certainly only the tip of the iceberg. At least twenty-six states did not conduct surveys every three years as recommended by the EPA,\textsuperscript{329} and more than half of the sanitary survey inspectors nationwide lack any formal training on how to conduct a review and report the results.\textsuperscript{330}

By 1996, Congress was ready to act in response to these revelations, after struggling for three years to forge a compromise between conservative Republicans, liberal Democrats, state and local governments, private operators, and environ-
mentalists. President Clinton signed a comprehensive rewrite of the law on August 6, 1996, hailing it as a "model for responsible reinvention of regulations."332

As indicated by passage of bipartisan reauthorization legislation, the legislative debate achieved consensus on several crucial points. Participants agreed that Congress should repeal the requirement that the EPA regulate twenty-five new contaminants every three years.333 They urged Congress to authorize more money to support state programs and to assist small systems.334 However, these points of consensus mask other, more significant differences.335

The drinking water industry, led by a few vociferous and


333. See 1995 SDWA Hearings, supra note 279, at 75 (statement of Carol Browner, Administrator, EPA) (calling the regulation requirement "overly-burdensome"); see also id. at 94 (statement of E. Benjamin Nelson, Governor, Nebraska, representing the Nat'l Governors' Ass'n) (stating that the program is "arbitrary and nonsensical in crucial respects"); id. at 111 (statement of Jeffrey N. Wennberg, Mayor, Rutland, Vermont, on behalf of the Nat'l League of Cities and the Nat'l Ass'n of Counties) ("Under current law, regulated contaminants are chosen by a process that makes about as much sense as selecting Nobel Laureates with an MTV 1-900 poll.").

334. See id. at 75 (statement of Carol Browner, Administrator, EPA) ("[A State Revolving Fund] is critical to helping States assist communities in upgrading and installing treatment facilities to ensure that they can provide safe drinking water to the public."); id. at 96 (statement of E. Benjamin Nelson, Governor, Nebraska, of the Nat'l Governors' Ass'n) ("One of the most important features of this bill is the authorization of $1 billion annually for the capitalization of State Revolving Funds."); id. at 97 (statement of Erik D. Olson, senior attorney, Natural Resources Defense Council) ("We appreciate the bipartisan negotiations that lead to the development of this bill . . . . [W]e are pleased with the bill's authorization of a multi-billion dollar State Revolving Fund for drinking water system upgrades and related purposes."); id. at 112 (statement of Jeffrey N. Wennberg, Mayor, Rutland, Vermont, on behalf of the Nat'l League of Cities and the Nat'l Ass'n of Counties) (discussing the necessity of funding for local and state governments to ensure adequate resources for providing safe drinking water).

335. See, e.g., Margaret Kriz, Cleaner Than Clean?, 26 NAT'L J. 946, 946-47 (1994) (explaining that these disagreements were exacerbated by the unfunded mandates movement that produced an "abrupt change in the political climate" and polarized environmental and municipal interest groups).
articulate municipal officials, contends that the EPA program failed because of over-regulation, misguided standard-setting, and federal insistence on chasing elusive problems that do not pose real risks.\textsuperscript{336} The environmental community believes that regulation is insufficiently aggressive and argues that only expansion of federal regulatory initiatives will succeed in straightening out a very dangerous situation.\textsuperscript{337} Enduring, long-term reform will require federal, state, and local officials to confront and override positions held dear by all these participants.

Municipal advocates are certainly right that the current system for regulating drinking water is so overloaded with regulatory standards that compliance is not just elusive but impossible for a significant minority of drinking water suppliers. Over time, such conditions provoke a dangerous lethargy among the regulated community. If it is impossible to comply with some of the rules, so the thinking goes, why bother complying with any of them? A related manifestation of regulatory overload is that federal and state regulators are susceptible to a debilitating ennui. Overwhelmed by their responsibilities, they find it difficult to undertake effective enforcement efforts. With so many new rules to learn, there is not energy left to launch prosecutions of water systems that violate the old ones. The campaign against unfunded mandates exacerbates these trends by repeatedly citing examples of regulatory standards that appear nonsensical to lay persons, including members of Congress. By defining the problem as one of unfunded federal over-regulation, municipal advocates manage to obscure the growing evidence that noncompliance with health and safety standards is becoming life-threatening in many locations.

The recently enacted reauthorization legislation is an ambitious, if at times garbled, effort to reach a compromise be-

\textsuperscript{336} See 1995 SDWA Hearings, supra note 279, at 105 (statement of Donald Satchwell, on behalf of the American Water Works Ass'n) ("The present standard setting process is technology driven and can result in driving standards far below health protection benefit levels at very high cost . . . ."); id. at 111 (statement of Jeffrey N. Wennberg, Mayor, Rutland, Vermont, on behalf of the Nat'l League of Cities and the Nat'l Ass'n of Counties) ("The current system of standard setting, as defended by some Washington-based environmental special interests, has not only failed to protect the public health, it has in fact put it at greater risk.").

\textsuperscript{337} See id. at 98 (statement of Erik D. Olson, senior attorney, National Resources Defense Council) ("We are fundamentally opposed to the bill's provisions that would delay the court-ordered deadlines, and weaken the standards for arsenic, radon, and disinfection of groundwater . . . .").
tween all of the Safe Drinking Water Act's constituencies. It removes the burden of regulating on a schedule\textsuperscript{338} and it affirmatively requires the EPA to weigh costs and technological feasibility before it promulgates any new requirements.\textsuperscript{339} It also authorizes the appropriation of up to $1 billion annually for state and local drinking water programs.\textsuperscript{340} But the legislation does little to require that the EPA review existing regulations, and it includes only modest efforts to tackle the core problem of small system viability, or "capacity."\textsuperscript{341} Finally, the new law imposes a lengthy list of new mandates on federal and state regulators, including: (1) the regulation of contaminants such as arsenic, radon, sulfates, and disinfection byproducts; (2) issuance of standards for the recycling of filter backwash; (3) formulation of guidelines for drinking water system operator certification; (4) development of a national occurrence database; (5) administration of a multi-billion state revolving fund; (6) formulation of guidelines for and review of state programs to assess the status of drinking water sources; (7) issuance of guidelines for state water conservation plans for small systems; and (8) the development of new standards for bottled water.\textsuperscript{342}

If any of these reforms are to prove effective, they must be carried much further by federal and state regulators who will face the same political resistance that delayed congressional action for so long. Further, the success of all such efforts will

\begin{footnotes}
340. Id. § 130, § 110 Stat. at 1662-72.
341. See id. § 104, § 110 Stat. at 1624 (requiring review and, if appropriate, revision, of national primary drinking water standards at least every six years); 113, § 110 Stat. at 1633-34 (offering amnesty from enforcement as an incentive to small systems to restructure or consolidate); § 119, § 110 Stat. at 1646-50 (threatening to withhold funds unless states develop a "strategy" for capacity development); § 125, § 110 Stat. at 1653 (requiring review of no fewer that twelve existing monitoring requirements within two years of the date of enactment); § 130, § 110 Stat. at 1667 (authorizing use of limited funds for restructuring and consolidation of existing water systems).
342. See id. § 107, § 110 Stat. at 1626 (regulating disinfection byproducts); § 109, § 110 Stat. at 1626 (requiring regulation of arsenic, sulfate, and radon); § 110, § 110 Stat. at 1630-31 (requiring standards for recycling filter backwash); § 123, § 110 Stat. at 1651-52 (requiring development of operator certification guidelines); § 126, § 110 Stat. at 1958-59 (requiring development of a national occurrence database); 130, § 110 Stat. at 1662-71 (administration of funds); § 132, § 110 Stat. at 1672-74 (source water); § 134, § 110 Stat. at 1678-79 (water conservation plans); § 305, § 110 Stat. at 1684-85 (bottled water standards).
\end{footnotes}
UNFUNDED ENVIRONMENTAL MANDATES

depend on the levels of financing made available to implement the program by deficit-conscious federal and state legislatures. Congressional appropriations committees have shown little inclination to increase the EPA's budget, after cutting it by approximately ten percent in 1996. Even more important, it is far from clear that state legislatures will augment federal grants and loans with sufficient funding of their own. As history demonstrates all too clearly, the statute only provides a general framework for federal and state regulators and municipal owners and operators. The achievement of real success in protecting public health cost-effectively is a far more complicated proposition.

B. THE SORTING PRINCIPLES APPLIED

To establish a more effective and balanced regulatory system, three fundamental reforms are necessary: a revised process for standard-setting, systematic efforts to eliminate nonviable systems, and the establishment of site-specific compliance programs that allow federal, state, and local officials to tailor regulation to local conditions and priorities. The cumulative result of these reforms would be a regulatory program of shared responsibility among the three levels of government.

The federal government's primary role would be to set standards for the purity of drinking water delivered at the tap. Because it is technically difficult and expensive to determine which contaminants are most prevalent in drinking water supplies and what levels of such contaminants are relatively safe, it makes sense to centralize such efforts. Not only do states and municipalities lack the resources to formulate comprehensive standards, the likely result of local attempts to take over this function would be widely disparate levels of protection for different portions of the population, with the weakest standards likely in the poorest communities. As important as it is to set new standards for emerging threats, however, the first step must be to develop more sensible priorities among existing standards.

Under a reformed system of shared responsibility, the states would retain responsibility for enforcing federal stan-

343. See supra note 13 and accompanying text (describing the recent congressional battles over the EPA's budget).
344. See supra note 79 and accompanying text (describing the steady decrease in state funding for environmental regulation).
ards, using sanitary surveys and other available regulatory tools. But such efforts are unlikely to achieve significantly higher levels of overall compliance among smaller systems unless there are extensive changes in the structure of the industry, including both public and private suppliers. The only way to accomplish those changes is for the states to undertake a systematic effort to coax or, if necessary, push nonviable systems out of business. A reformed program would also give local governments the opportunity to assume more responsibility for determining how to set regulatory priorities on a system-by-system basis. Working under the supervision of state regulators, drinking water systems could apply for interim exemptions from some applicable standards so that they could devote resources to their most urgent problems.

With adequate funding, all of these reforms could be carried out in the mode of cooperative federalism. With less funding, their implementation would follow the coercive federalism model. Without reform and without funding, the country risks a revolution in regulatory protections with potentially dire consequences for public health.

1. Standard-Setting and the Cutback of Current Regulation

A strong federal role in establishing standards for drinking water safety is justified by the first three sorting principles proposed in Part IV of this Article: controlling the effects of transboundary pollution, achieving regulatory economies of scale, and ensuring equity and equal protection for all Americans.

Transboundary pollution has a clear, if not yet quantified, effect on the integrity of drinking water sources. As Congress noted in justifying passage of the 1974 Act, "water in the hydrologic cycle does not respect State borders." 345 In the absence of uniform, minimal federal standards, drinking water resources affected by activities in more than one state would deteriorate as the states adopted disparate levels of protection or failed to control the wide range of industrial activity that threatens interlocking ground and surface waters.

Economies of scale can be achieved at the federal level because the development of sound science to support regulation of drinking water contaminants is extraordinarily expensive and clearly exceeds the capacity of the individual states, now

or in the foreseeable future. This scientific challenge is difficult enough to demand the devotion of the nation’s best intellectual resources to a coordinated research program.

Regulators face four distinct and costly challenges. First, they must analyze the toxicological effects of hundreds of chemicals that may infiltrate drinking water. There are remarkable research gaps in our understanding of such effects, even for common and widely-used chemicals.\(^{346}\) It will clearly require a national effort to even begin to address this gap in a systematic and cost-effective manner. Second, regulators must develop a more comprehensive database documenting the occurrence of contaminants in drinking water. Seven major national “occurrence” studies have been conducted since 1969, but the EPA describes them as providing only a “snapshot” measurement of contamination that “may not be representative of average water quality over time.”\(^{347}\) Compilation of better, more comprehensive data to guide standard-setting will require a national effort.\(^{348}\) Surveys conducted by individual drinking water systems—or even individual states—cannot substitute for national studies as the basis for selecting contaminants that must be regulated. Third, regulators must determine what technologies are available to eliminate regulated contaminants, since it makes little sense to impose standards that are technically impossible to meet.\(^{349}\) This task involves maintaining a comprehensive understanding of worldwide state-of-the-art technologies, their costs, their advantages, and their disadvantages. Fourth, the activities involved in actually conducting a modern rulemaking are very expensive: data must be compiled, rule proposals drafted, public comments considered, public hearings conducted, and legal or legislative

\(^{346}\) According to industry reports submitted to the EPA, nearly six trillion pounds of some 72,000 chemicals are either manufactured in, or imported to, the country annually. TOXICS WATCH, supra note 259, at 76. A 1984 analysis by the National Research Council estimated that we have compiled health and safety data on only 20% of such chemicals. Id. at 76 n.c.

\(^{347}\) EPA TECHNICAL REPORT, supra note 307, at 8-9.

\(^{348}\) The Safe Drinking Water Act Amendments of 1996 require the EPA to establish a national occurrence database within three years of the date of enactment, in consultation with the EPA Science Advisory Board, the National Academy of Sciences, the states, and other “interested parties.” Pub. L. No. 104-182, § 126, § 110 Stat. 1613, 1658-59 (1996).

\(^{349}\) The Safe Drinking Water Act Amendments of 1996 continue to expand existing requirements that the EPA compile information about such technologies, taking into consideration the size of the water system that must employ them. §§ 104-105, 111.
challenges to the rule defended. Given the difficulty most states have had in mustering resources to enforce existing standards, it is difficult to imagine them developing the capability to run ambitious rule-making programs.

Finally, considerations of equity and equal protection justify federal regulation. It is becoming increasingly clear that too many Americans suffer widely divergent exposure to drinking water threats. As discussed above, those living in local jurisdictions that have allowed small, nonviable systems to proliferate are threatened by significantly more severe exposure to contamination than citizens served by large, well-run systems. This disparate treatment is unfair and, if the track record of many state and local jurisdictions is any indication, can only be rectified by rigorous standard-setting at the federal level.  

While a strong federal role is clearly justified, the current regulatory system flaunts the equally important principles that federal regulation must tailor requirements to local conditions and avoid counterproductive overburdening of local resources. There is a dangerous and growing gap between the output of the national regulatory process and the ability of water system operators to comprehend, much less implement, such requirements. This gap cannot be dismissed as a mere matter of laziness or bad attitude at the local level. Although critics of the Act attribute these problems to an unduly stringent process for setting health-based standards, a more important cause is the statutory schedule requiring the EPA to regulate twenty-five new contaminants every three years.  

350 While a strong federal role is clearly justified, the current regulatory system flaunts the equally important principles that federal regulation must tailor requirements to local conditions and avoid counterproductive overburdening of local resources. There is a dangerous and growing gap between the output of the national regulatory process and the ability of water system operators to comprehend, much less implement, such requirements. This gap cannot be dismissed as a mere matter of laziness or bad attitude at the local level. Although critics of the Act attribute these problems to an unduly stringent process for setting health-based standards, a more important cause is the statutory schedule requiring the EPA to regulate twenty-five new contaminants every three years.  

351 Although the 1996

350 See supra notes 317-324 and accompanying text (demonstrating the consistent failure of local entities to enforce regulations against small nonviable systems).  

351 42 U.S.C. § 300g-1(b)(3) (1994) (establishing a schedule for the EPA standard-setting). As for the standard-setting process itself, the original statute directed the EPA to regulate any contaminant that "may have any adverse effect on the health of persons and that is known or anticipated to occur in public water systems." § 300g-1(b)(3)(A) (emphasis added). In contrast, the recently-enacted Safe Drinking Water Act Amendments of 1996 repeal these criteria and instead instruct the EPA to set standards (1) if a contaminant "may have an adverse effect" on public health; (2) "the contaminant is known to occur or there is a substantial likelihood that the contaminant will occur with a frequency and at levels of public health concern"; and (3) in the "sole judgment of the [EPA] Administrator, regulation of such contaminant presents a meaningful opportunity for health risk reduction." Pub. L. No. 104-182, § 102, § 110 Stat. 1613, 1617-21 (emphasis added). The 1996 Amendments further instruct the EPA to prepare a cost/benefit analysis when proposing all future standards and to publish a determination whether the benefits of the
Safe Drinking Water Act Amendments repeal this require-
ment,352 dozens of these standards have already been set.353

A close examination of the rationale the EPA has offered
for some of these regulatory decisions provides a vivid illus-
tration of the perils of regulation-by-quota. Throughout the Fed-
eral Register notices that justify its decisions, the EPA has
struggled with a fateful combination of limited information
about the toxicological effects of many contaminants and al-
most no reliable information about their prevalence in the
drinking water supply. Too often, it has plowed ahead and
regulated anyway, even in situations where there is no reliable
data to justify even minimal monitoring requirements.354 In
some cases, the EPA has regulated contaminants produced in
such small amounts that it is difficult to understand how they
could ever be defined as a nationally significant problem.
Consider the following example, which resulted in promulga-
tion of a maximum contaminant level (MCL)355 and monitoring
requirement in 1992:

Beryllium is a light, grayish white metal . . . . Total consumption of
beryllium for 1987 was estimated at 315 tons . . . .

standards do—or do not—justify its costs. §§ 103-104. While it remains to be
seen whether these changes will have a significant effect on the EPA’s regula-
tory policies or output, it is easy to imagine how these provisions could be in-
terpreted to justify either an aggressive or a conservative approach to such
decisionmaking, especially given the subjectivity of the terms used and the
“sole judgment” language.

352. § 102.
353. By 1995, the EPA had issued standards for 78 of the 83 contaminants
on the initial list. See supra note 306 and accompanying text (describing the
flurry of EPA standard-setting following the 1986 amendments to the Safe
Drinking Water Act).

354. To their credit, EPA officials recognized these flaws, commenting in a
1993 report to Congress:

Congress’ mandate to regulate 83 specific contaminants identified in
the SDWA’s 1986 amendments, plus an additional 25 contaminants
every 3 years, limits the Agency’s ability to concentrate on establish-
ing and implementing national standards for only the highest priority
contaminants . . . . In some cases, contaminants have been forced
onto regulatory schedules that out pace [sic] EPA’s ability to develop
needed technical information. Some regulations have unquantified
benefits, yet impose significant costs. New approaches for selecting
contaminants and developing regulatory responses need to be a cen-
tral component of SDWA reform.

EPA TECHNICAL REPORT, supra note 307, at iv.

355. A “maximum contaminant level” is the statutory and regulatory term
used to describe health-based standards that establish a ceiling on the
amount of a contaminant that is allowed to be present in drinking water pro-
vided to the public. 42 U.S.C. § 300g-1(b)(4) (1994), amended by Safe Drink-
There is little information available on the environmental fate of beryllium and its compounds.

Because of the limited amount of information available, it is not possible to describe overall human exposure to beryllium, or to assess the relative contributions of various sources. It can be noted, however, that the intakes from drinking water and air by the overwhelming majority of the population would appear to be quite small.

Even where the EPA has information indicating that contaminants capable of causing adverse health effects are generated in relatively large quantities, it frequently lacks any reliable information about the contaminant's infiltration into drinking water: "EPA estimates that 37 million pounds of [adipates] were produced in the U.S. in 1985... No national, regional or State data are available that describe the occurrence of [adipates] in drinking water from ground or surface water sources."

Finally, the EPA has chosen to regulate even where existing data indicates that a contaminant probably does not pose a significant threat to drinking water:

Endrin... is [a] pesticide first introduced into the United States in 1951... Most uses of endrin were canceled by 1980...

In the National Screening Program for Organics in Drinking Water (NSP) survey conducted by EPA from 1977-81, finished drinking water samples were collected from 12 ground water and 3 surface water supplies. None... contained concentrations of endrin in ex-
Regulating in such circumstances serves only to convince local governments that the federal government has lost all sense of proportion. In response to municipal complaints, the EPA has attempted to scale back monitoring for such contaminants so that it imposes relatively low costs. In the current anti-regulatory atmosphere, though, the relatively low cost of compliance does not assuage protests by those who believe that its imposition is absolutely unwarranted. Beyond the body blows that such regulatory decisions deliver to the overall credibility of the program, there is the equally pressing concern that they preoccupy regulators who have far more urgent things to do. As the GAO has documented, federal and state regulators have lost their grip on the daily performance of all types of drinking water systems. Until and unless this dangerous state of affairs is rectified, they cannot afford to squander energy on voluminous rulemakings that seek to remedy minor or non-existent problems.

However easy it is to ridicule the current rule-making process, it is far more difficult to design an effective cure. Over the last three years, the legislative debate has focused on whether Congress should reduce EPA discretion by superimposing elaborate cost/benefit analysis as the quid pro quo for future EPA decisionmaking. Proponents of this approach,

358. Synthetic Organic and Inorganic Chemical Regulations, supra note 356, at 30,391. The MCL for endrin appears at 40 C.F.R. § 141.61(c). Or consider this example:

The major source of environmental contamination by HEX [hexachlorocyclopentadiene] is the aqueous discharge from production facilities, with small concentrations present as contaminants in commercial products made from it. However, HEX is not frequently found in the environment and, even when present, it is rapidly degraded. Therefore, current environmental exposure is extremely low. Some isolated cases of site contamination due to disposal of HEX wastes have been reported but no data are available on occurrence and exposure from drinking water, food or air.

Synthetic Organic and Inorganic Chemical Regulations, supra note 356, at 30,394. The MCL for HEX appears at 40 C.F.R. § 141.61(c).

359. The EPA estimated that the total monitoring costs for the contaminants mentioned here, as well as 18 others, would be some six million dollars a year, largely because it intended to limit the frequency of required monitoring. Synthetic Organic and Inorganic Chemical Regulations, supra note 356, at 30,434.

360. See discussion supra notes 320-330 and accompanying text (describing the widespread failure of regulators to obtain drinking water system compliance).

361. As noted supra note 351 and in the accompanying text, the Safe
including the most vociferous municipal campaigners against unfunded federal mandates, clearly hope that imposition of such requirements would stem the rule-making tide by forcing the EPA to develop a far more comprehensive record before taking action. It is far from clear, however, that this approach will either solve the legitimate problems identified by municipal advocates or succeed in restoring and maintaining the safety of the drinking water supply.

As discussed at length in Parts IV.B and IV.C of this article, forcing Congress and the EPA to compile elaborate analyses of regulatory costs and benefits has the potential to complicate and congeal the regulatory process, but it is unlikely to inspire more sensible regulation. If copious cost/benefit analysis returns us to an era of EPA paralysis, municipal frustration will be temporarily relieved. But this outcome will not restore public confidence that the worst threats to the drinking water supply are being addressed, especially if another catastrophe like the 1993 incident in Milwaukee occurs. In that event, we may well see another swing of the pendulum and the renewal of legislative activism, a prospect that municipal officials should rightfully dread.

Complicating future rulemaking also does nothing to address the problem of burdensome and poorly justified regulations that are already on the books. In fact, complex new procedures could have the unintended effect of compounding these problems because they would inevitably stymie EPA efforts to review and reform existing requirements. Aware of this pitfall, the 1996 Amendments include requirements that the EPA review and, if necessary, modify existing requirements in accordance with the new standard-setting criteria. The new law also instructs the EPA to review the monitoring requirements for at least twelve contaminants within two years after the date of enactment. But these relatively soft mandates will be

Drinking Water Act Amendments of 1996 respond to these concerns by requiring the EPA to conduct cost/benefit analyses as a predicate to all future rulemaking, while leaving the decision how to respond to these analyses to the Agency’s “sole” discretion.

362. For a description of the Milwaukee incident, see supra note 283 and the sources cited therein.


364. § 125 (requiring review of no fewer that twelve existing monitoring requirements within two years of the date of enactment).
meaningless unless federal regulators decide to make them a priority, and they may well find themselves overwhelmed by the 1996 Amendments' lengthy list of new projects.\(^\text{365}\)

An inappropriate emphasis on cost also has the potential to shred the delicate net of existing health protection by dragging future federal standards down to the least common denominator of what is affordable by small drinking water systems. If the EPA and the states consider costs without facing the problem of system viability, the vast majority of Americans who are served by medium to large-sized systems would only get the benefit of the standards that are affordable by systems that should be out of business.

Congress has tried to grapple with this problem by setting up a two-track system for standard-setting, directing the EPA to establish different standards for small systems than for larger ones where appropriate.\(^\text{366}\) In a further effort to ensure that small systems receive special treatment, Congress has expanded the process for granting temporary variances from regulatory standards at the state level.\(^\text{367}\) Once again, however, it will be up to federal and state regulators to ensure that protests about costs by smaller systems do not infect their consideration of appropriate standards for larger systems, especially if state regulators avoid using variances, as they have in the past.\(^\text{368}\)

More enduring reform of the standard-setting process has already begun with the elimination of regulatory quotas.\(^\text{369}\) But meaningful reform cannot end there. The EPA must also undertake a systematic reevaluation of existing requirements and eliminate those which are not based on reliable national occurrence data or clear evidence of adverse health effects.

---

365. See supra note 341 and accompanying text (enumerating the new mandates contained in the 1996 amendments).

366. § 104 (establishing different cost/benefit considerations for large and small systems); §§ 105, 111 (establishing special treatment standards for small systems); § 125 (providing special monitoring relief for small systems).

367. § 116.

368. As noted supra note 304, state regulators have virtually ignored the variance and exemption opportunities afforded by current law, probably because of the elaborate procedures involved and their chronic underfunding. It will take far more than new statutory provisions to change this mindset and bring this dead letter of the law to life.

This second step will occur only if Congress both encourages the EPA to undertake it and gives the Agency enough funding and political support to conduct a sensible retrospective review. At the same time, the EPA must devote adequate resources to the development of a national occurrence database to support its future rulemaking. The EPA recognizes the importance of this work and has already begun such an effort. Once reliable information is available, it will be possible to base regulatory decisions on the dual propositions that the federal government should not act unless a problem is nationally significant, but must act decisively when it is.

2. Ensuring System Viability

The EPA and the states regulate industrial sources of pollution where and how they find them. If regulation has the effect of driving non-viable, "dirty" firms out of business, regulators may rejoice privately but they can never afford to appear satisfied publicly. To suggest that the federal or state regulatory role should include overt efforts to drive small entities out of business is not just a controversial proposition, but a radical one. Nevertheless, the only outcome more difficult to foresee is how the integrity and vitality of federal and state drinking water programs can be restored without a concerted campaign to eliminate nonviable small systems. In the context of providing a service that can have such severe effects on public health, the choice is either to find radical alternatives to current regulatory approaches or to risk lowering public health standards to the least common denominator of the national drinking water supply's weakest links.

Because small drinking water systems lack economies of scale in both technology and administration, they incur an estimated sixty-eight percent of total compliance costs. This inefficiency places a disproportionate burden on approximately twenty-six million customers. The differences in economies of scale and the resulting per capita burden are startling: according to an EPA analysis, the incremental costs imposed by federal drinking water requirements varied from a two percent increase for customers served by the largest systems (a $3 an-

370. EPA TECHNICAL REPORT, supra note 307, at 12. The 1996 Safe Drinking Water Act Amendments elevate this project to a statutory mandate. § 126 (requiring compilation of a national occurrence database within three years of the date of enactment).

371. EPA TECHNICAL REPORT, supra note 307, at 4-6.
annual increase per household) to a fifty-five percent increase for customers served by the smallest systems (a $145 annual increase cost per household). Small and very small systems are also plagued by severe problems in obtaining funding for necessary capital improvements and operating expenses and struggle constantly with escalating regulatory violations. In 1994, ninety percent of the 19,568 Community Water Systems that violated SDWA requirements were small or very small systems.

Perhaps the most amazing aspect of this unfortunate situation is how largely unnecessary it is. The EPA estimates that about half of all small systems are located within Standard Metropolitan Statistical Areas and therefore have the “potential” for restructuring, either by interconnection or through sharing management expenses and expertise with larger municipal systems. An additional thirty percent of small systems “appear to be viable and do not need to restructure,” but the remaining twenty percent “do not currently appear viable and are unable to restructure.”

While federal and state regulators clearly understand the importance of eliminating nonviable small systems, assigning the government responsibility for actually accomplishing this change will require adjustments not only in attitude but in the division of responsibility among all three levels of government. To date, the EPA has confined itself to serving as the research arm of the viability effort, leaving the difficult jobs of crafting and enforcing effective standards to the states. The Agency has produced a series of materials explaining how the viability of such systems might be measured and improved, all of which

---

372. Id. at 66. Customers served by the largest systems paid a projected total of $145 per household for drinking water, while those served by the smallest systems paid a projected total of $409 per household.
373. Id. at 70-75. Those small and very small systems that are privately owned are especially hard-pressed because they cannot gain access to publicly subsidized sources of financing, such as bond pools and revolving loan funds.
374. U.S. EPA, EPA 812-R-95-001, The National Public Water System Supervision Program, FY 1994 Compliance Report 23 (1995) [hereinafter EPA FY 1994 Compliance Report]. Because small systems make up 87% of all Community Water Systems, id., it is not surprising that they make up an almost proportionate number of systems in violation. The real issue, however, is whether we are prepared to tolerate such a high rate of noncompliance and whether this rate will increase even more as new requirements go into effect and systems that exist on the edge of viability are pushed over the brink.
376. Id. at 91.
are undoubtedly enlightening to state regulators. None, however, provide either the incentive or the political cover state regulators need to buck often overwhelming resistance to consolidation. As one national expert in the area has observed:

The true "basket cases" are those that have defaulted on their SDWA compliance responsibilities and simply can no longer hold things together . . . . This is every state regulator's nightmare: you issue an order on Mom & Pop's water company and the only response they are capable of making is to hand you the keys to the water system. That puts you in the same category as the people who foreclose on family farms.

The sorting principle of equity and equal protection argues for establishing enforceable standards to determine viability at the federal level. In the absence of federal standards, systems that are incapable of providing water that is safe to drink will serve too many Americans. The political pressure brought to bear at the state level and the states' slowness to respond to the deepening viability crisis suggests that in the absence of federal intervention, American drinking water systems will never achieve a uniform, minimally acceptable level of protection.

While the EPA can establish a baseline for determining viability, it will have great difficulty implementing such standards even-handedly at the local level. To accomplish that challenging goal, state and local governments must enlist wholeheartedly in the effort, with state agencies serving as enforcers and local governments actively cooperating as alternative suppliers in the restructuring effort. The need to achieve this cooperation, as much as any other single factor, underscores the importance of reforming the standard-setting process to restore the credibility of the program in the municipal community.

There are two possible scenarios for dealing with the


379. A few states have developed programs for assessing the viability of new systems and for tracking the status of existing systems; the most prominent are Connecticut, Maryland, Pennsylvania, and Washington. EPA TECHNICAL REPORT, supra note 307, at 95-96 (detailing some of the viability initiatives currently in place at the state level).
problem of small system capacity. First, Congress could establish a federal loan program for small systems, delegate administration of the program to the states, and require state administrators to condition loans on demonstrations that applicants are in fact viable. The Safe Drinking Water Act Amendments of 1996 take exactly this approach. The Act conditions state use of federal aid on a demonstration of the local recipient's viability or capacity.\textsuperscript{380} Further, the new law earmarks ten percent of state revolving funds specifically for capacity development, as well as the support of state regulatory, source water, and operator certification programs.\textsuperscript{381} Unfortunately, the intense demands for these other uses of the money may mean that small system consolidation programs will get short shrift. Apart from the possibility that the funding authorized by the legislation could be so limited that it will have only a minimal impact, using financial incentives to motivate consolidation may well prove too indirect a strategy, especially in the case of very small systems that lack the sophistication to participate in a federal funding program.

The second scenario would require states to undertake aggressive initiatives to ensure viability as a condition of maintaining their authority to run their own drinking water programs. Current regulations require merely that states establish and maintain an "activity to assure that the design and construction of new or substantially modified public water system facilities will be capable of compliance with the State primary drinking water regulations."\textsuperscript{382} Given all of the other problems that beset state programs, this vague language has failed to elevate viability to the level of effort it so clearly deserves. What is needed is a clear mandate that makes the issue of new and existing capacity a top priority for state pro-
grams and, if the states do not undertake a meaningful effort, returns the program to the EPA to implement.

The 1996 Amendments go halfway toward implementing this approach. The new law requires the states to formulate standards for determining the capacity of new drinking water systems or risk losing twenty per cent of their annual grants. If state regulators receive adequate funds to implement these changes, they could make a significant difference over the long-term. If, on the other hand, they do not receive an adequate infusion of funding up front, the penalty Congress has chosen will only compound the problem.

Further, prospective standards, even if aggressively implemented, do nothing to address the serious problems posed by existing, nonviable, small systems. Undoubtedly overwhelmed by the politics of taking on the towns and private operators that run these systems, Congress settled for a half-hearted provision that requires the states both to compile lists of small systems with significant rates of noncompliance and to develop “strategies” for improving their viability. The states have four years to accomplish these ambitious goals or risk losing between ten and twenty percent of their federal grant funding.

If the EPA invokes this fiscal penalty, it will further compound the crisis in state regulatory programs by withholding money from states that have ceased to care rather than transferring authority to federal regulators. The EPA is likely to recognize the implications of this dynamic and reduce its demands on the states, much as it has done in the past. The new law’s message that federal and state regulators should set standards for small systems on a different—and less protective—basis than applies to medium and large systems is likely to compound these trends. The result will be very little progress toward compelling consolidation and eliminating nonviable small systems unless the regulators themselves discover the will to do so.

More enduring reform will require federal and state regulators to recognize the urgent need to apply capacity standards to existing systems, while systematically finding alternative


384. Id. The law instructs the EPA to penalize non-complying states by withholding 90% of a state’s grant in fiscal year 2001, 85% in fiscal year 2002, and 80% in each subsequent fiscal year. Id.
water supplies for people served by the least viable. To be effective, a state viability initiative must include "takeover" authority: the state must be prepared to assume responsibility for providing drinking water to customers until it can establish an alternative arrangement.\textsuperscript{385} Additional federal funding would make viability initiatives more politically palatable to the states, especially in cases where the state economy is so depressed that the state lacks the resources to support such efforts.

3. Challenge Regulation

The systematic pruning of regulatory requirements and a concerted effort to drive nonviable systems out of business will go a long way toward restoring stability to the drinking water programs at both the federal and state levels. These changes will not happen overnight, however, and they will not provide a total solution. Inevitably, federal and state regulators must face and bridge a growing gap between the costs of necessary pollution control and the resources now committed at the local level, a gap that one estimate places as high as $17 billion through the year 2000.\textsuperscript{386}

More than ninety-five percent of public drinking water systems rely on direct customer charges to finance their opera-

\textsuperscript{385}. EPA TECHNICAL REPORT, supra note 307, at 96 (discussing the importance of takeover authority and its application in the state of Connecticut). According to the EPA, this ultimate fall-back authority can be very expensive to exercise. \textit{Id.}

\textsuperscript{386}. APOGEE RESEARCH, INC., AMERICA'S ENVIRONMENTAL INFRASTRUCTURE: A WATER AND WASTEWATER INVESTMENT STUDY 6 (1990). This and similar estimates are based on necessarily speculative forecasts regarding the funding capacity of drinking water systems, the amount of federal and state aid that might be available, the capital investment needed to repair aging infrastructure, and the cost of complying with regulations that have not yet been issued. \textit{Id.} at 6, 9. For an analysis of future regulatory costs and how they could affect the average household, see EPA TECHNICAL REPORT, supra note 307, at 44-69. \textit{See also} CBO CASE STUDY, supra note 148, at 13-14 (estimating average household costs for drinking water given compliance with current Safe Drinking Water Act standards). The CBO concluded that 86% of households should incur annual costs of less than $20 to meet current regulatory standards, although some four percent of households served by small systems could face annual costs in excess of $100 and one percent could face annual costs in excess of $300. The CBO further found that proposed new regulatory requirements would significantly increase compliance costs, and could triple such costs for households served by small systems. \textit{Id.} at ix-x, 13-24.
tions.\textsuperscript{387} To repair aging drinking water delivery system infrastructure, to utilize state-of-the-art technologies, and to achieve the levels of public health protection required by the law, local drinking water system operators must require their customers to pay significantly higher costs. System operators' willingness and ability to take such action depends in turn on how persuasively they can articulate the need to spend more money within the context of their local communities. Americans are not accustomed to paying much for water supplies. The combined total of water and sewer charges is the lowest utility expense incurred by the average household, falling below cable television and telephone service and costing approximately one-fourth of electricity costs.\textsuperscript{388} The imposition of major new costs will require a profound adjustment in public attitudes and expectations. It could also prove politically volatile, especially for local elected officials.

One possible solution is to give large, viable drinking water systems the opportunity to conduct comprehensive audits of their short- and long-term deficiencies. The audits would then be used to develop tailored compliance plans forremedying those deficiencies within an acceptable period of time. As an incentive to participate in the self-audit program, state regulators would be authorized to grant a temporary amnesty from enforcement of monitoring, reporting, and technology requirements, provided that fundamental health-based standards were met in both the short and long-term.

This type of program would represent the ideal application of the fourth sorting principle proposed in Part IV above because it would mean that local conditions become the driving force for future regulation. Site-specific audits and long-term strategic plans should ensure that no money is wasted on requirements that are not absolutely necessary in a system-specific context. Audit results would also give local officials the opportunity to explain in detail to their customers how they intend to improve the safety of the drinking water supply. The program would shift the content of the current debate from the wisdom of generic federal regulation to actual local needs.

\textsuperscript{387}CBO CASE STUDY, \textit{supra} note 148, at 32 (comparing local cost estimates of compliance with current regulations with estimated municipal fiscal capacity).

\textsuperscript{388}EPA TECHNICAL REPORT, \textit{supra} note 307, at 65-69 (reporting the percentage of household income spent on water and sewer costs in comparison with other utilities from 1980-1991).
Obviously, the adoption of site-specific compliance plans poses the real danger that federal and state regulators will be duped into tolerating serious violations of essential standards in exchange for elusive municipal promises of future improvement. Defining an irreducible level of protection that must be provided throughout the audit period would undoubtedly pose a challenge to regulators' resources and ingenuity. Unlike many other environmental programs, even one-time incidents of suppliers exceeding certain drinking water standards can have catastrophic effects. To prevent this destructive outcome, administrators must carefully craft regulatory amnesties to give adequate incentive without suspending the baseline of protection needed to avoid damage to public health.

At the same time, it is ridiculous to suggest that only total compliance with all applicable standards is acceptable, given the widespread noncompliance we currently tolerate. Regulators supervising self-audits must first separate essential from non-essential requirements and must then weigh the benefits of concrete long-term improvements against the toleration of interim, limited harm. At this stage in its development, the federal program developed by the EPA under the Safe Drinking Water Act contains a critical mass of core regulatory standards that can establish this baseline, as well as enough additional requirements to allow regulators to offer a convincing trade. To be anything more than a few pilot projects, however, site-specific compliance planning requires better funding of state bureaucracies. Indeed, adequate funding is the quid pro quo for successful implementation of all of these proposed reforms.

4. Information Disclosure

The Safe Drinking Water Act has long required operators of public drinking water systems to send their customers periodic notice of violations they have committed and exemptions or variances they have received. As the program's track record attests, these provisions have had little effect on escalating noncompliance. Nevertheless, the Clinton administration, environmentalists, and their allies in Congress made it a top pri-

---

389. See infra notes 404-405 and accompanying text (comparing the number of violations reported in 1994 with the number of enforcement actions the EPA took).

ority to expand these notification provisions. As a result of these efforts, the 1996 Amendments require annual "consumer confidence reports" that would list the status of all regulated contaminants in a system's drinking water supply. Indeed, EPA Administrator Carol M. Browner characterized these provisions as the "single most effective action we can take to protect the environment," predicting that the public would be more willing to pay for testing and pollution control once they knew more about actual levels of contaminants in their drinking water.

Given all the problems that plague her agency's implementation of the drinking water program, Browner's statement appears naive, even quixotic. After all, it is not as if consumers served by the inadequate water systems can easily vote with their feet, taking their business elsewhere. Arming consumers with information will only prove immediately useful to those affluent enough to afford the cost of bottled water.

Browner, however, faces some very difficult political realities: one of the most effective ways to stave off future attacks on her agency's budget and legal authority is to motivate a public backlash that will pressure local officials out of their complacency and their often successful efforts to vilify federal and state regulators. From that perspective, she rightfully hopes that information disclosure will serve the important functions of restoring a grass roots constituency for aggressive regulation and persuading the public that it must make necessary infrastructure investments.

The two flaws in this plan are the difficulty of designing effective notifications, especially for the less educated, less affluent consumers who are most vulnerable to the problems caused by polluted water and the long time necessary for effective disclosure to have a direct effect on regulatory policy. If the meaning of the notice is unclear, disclosure will not only be ineffective, but could inspire further distrust of government. As tempting as it is to grasp this superficially popular solution in


an era when so-called "command and control" regulation is increasingly unpopular, it is unlikely that information disclosure will motivate enough change to justify its elevation over other, more important reforms.

C. COOPERATION, COERCION, OR REVOLUTION

The key distinction between the cooperative, coercive, and revolutionary scenarios is money, specifically money for the implementation of federal and state regulatory programs. Under this Article's proposed changes, more money for more bureaucrats means faster and better revamping of existing regulations, extensive changes in the structure of the drinking water industry, and the widespread adoption of facility-specific regulatory alternatives. Less money means the maintenance of extensive regulatory requirements on the books, the continued proliferation of small systems, and the possibility that an outbreak of waterborne diseases in a major American city will once again send the pendulum whipping back to an era of federal regulatory activism.

Because leaders of the unfunded mandates movement have forged expedient political alliances with industry groups crusading against big government and excessive regulation, they have thus far missed this crucial point. Instead, they have delivered what they think is a clever ultimatum to federal lawmakers: either give us more money or eliminate the mandates that cost money. In the aftermath of the 1994 Republican electoral revolution, this ultimatum synchronized with the mood of Congress. Yet it is one thing for Congress to enact laws like the Unfunded Mandates Reform Act that place procedural impediments in the path of future regulation and quite another for Congress, federal and state regulators, and local

---

394. In 1994, this alliance was dubbed the "unholy trinity" by a despairing environmentalist and the label has stuck. General Policy: Draft Memo Outlines Groups' Strategy for Superfund, CWA, Drinking Water Bills, 24 Env't Rep. (BNA) 1967, 1967 (1994). The three elements of the trinity are unfunded mandates relief, regulatory reform through the application of comparative risk assessment and cost/benefit analysis, and compensation for government "takings" of private property. Conservative commentators argue that the alliance could accomplish a comprehensive rewrite of major federal environmental laws, although it has not yet made much progress toward achieving that goal. Ann Reilly Dowd, Environmentalists Are on the Run, FORTUNE, Sept. 19, 1994, at 91.

officials to craft lasting and effective changes to the existing regulatory system.

1. Cooperation

Under the cooperative model of reform, federal and state agencies would be funded to the point where they could offer a consistent and reliable regulatory presence, not only for purposes of enforcement but also to provide desperately needed technical assistance. The EPA would receive adequate funding to conduct the research that is so desperately needed to reveal both what contaminants are prevalent in national drinking water supplies and what risks these substances pose to public health and the environment. The Agency would complete work on several pending proposals that deal with key environmental threats. It would also develop a test for measuring drinking water system viability and persuade state agencies to apply it in the field. Finally, the EPA would continue its efforts to coax and cajole state legislatures to fund their own regulatory efforts adequately, backing this pressure up with the threat that primacy will be withdrawn and returned to federal enforcers who are capable of assuming this responsibility in isolated and dire cases.

The need for expanded state funding to achieve cooperative reform is even more acute. Adequate resources at the state level would permit sanitary surveys to assume their rightful place as the centerpiece of state implementation. Surveys would be conducted regularly and thoroughly. Any system displaying deficiencies would be placed on a tight schedule for resuming compliance. The second priority for state regulators would be a systematic effort to encourage and, if necessary, compel system consolidation, a draining and difficult task that is critical in the long-term. Their third priority would be to offer large, demonstrably viable municipal drinking water systems the opportunity to design facility-specific long-term compliance plans.

How much money is necessary to support this level and quality of effort? Unfortunately, this critical question cannot be answered with much precision. The current congressional debate is so distorted by budget-cutting fervor that it does not produce a reliable picture of what resources are really necessary to accomplish more enduring reform. Further, because some of the priorities discussed above have never been proposed in these terms before, no estimates of how much it would
take to implement them are available. Nonetheless, one can make two basic observations about the costs of a cooperative approach. First, although the reform of federal regulations will reduce compliance costs over the long-term, effective reform of the Safe Drinking Water Act will require a substantially increased, up-front investment of both federal and state regulatory resources. Second, the most acute need for resources is at the state level, where the EPA has documented shocking resource shortfalls. In 1993, the EPA estimated that state drinking water programs were experiencing a $162 million shortfall in total funding needs of $304 million. The EPA has tried to turn this situation around through patient reeducation on a state-by-state basis, a prospect made far more arduous by the low priority state legislators assign to drinking water regulation.

The 1996 Amendments authorize annual appropriations of $1 billion for state drinking water revolving funds through 2003, but it is far from clear whether these amounts will actually be appropriated. The Amendments authorize states to spend up to fourteen percent of their annual grants—or $140 million total—for their own regulatory programs, but ten percent funding for new initiatives regarding capacity development, operator certification, and source water protection. In sum, the prospects for dramatic increases in funding may well...
depend on changing attitudes at the state level, at the same time that the federal government eagerly devolves responsibility for additional domestic programs.

2. Coercion

The alternative to well-financed cooperation is underfinanced coercion. Under this model, the EPA and state regulators would be compelled to leverage scarce resources by bringing high profile enforcement actions, inspiring compliance through the threat of public exposure and disgrace. Although they have not yet reached this point, if current budget trends continue, federal and state regulators will be forced to abandon any systematic effort either to write new regulations or to monitor and counsel compliance with existing requirements. Instead, they will be forced to focus limited resources on the pursuit of only the most life-threatening and widespread instances of noncompliance. It is far less expensive to bring a handful of punitive actions against a well-selected sample of drinking water system operators than to implement the law in a more comprehensive and even-handed manner.

The Safe Drinking Water Act authorizes the EPA to extract penalties of up to $25,000 for each day on which a supplier commits a single violation of drinking water regulations. Such penalties can multiply astronomically when several violations occur over long periods of time. The Agency may also issue administrative orders mandating immediate compliance and enforce those orders in federal court; in some cases, orders requiring immediate compliance can prove a more expensive proposition than straight civil penalties. Federal law imposes criminal penalties for the filing of false statements with the government and this provision has been used to prosecute violators of the Safe Drinking Water Act’s various reporting requirements. Finally, the Act and its implementing regu-

401. 42 U.S.C. § 300g-3(g)(1).
402. See, e.g., United States v. Wright, 988 F.2d 1036, 1037 (10th Cir. 1993) (upholding a conviction under the federal criminal code, 18 U.S.C. § 1001, for filing false reports under the Safe Drinking Water Act and its im-
lations require states that obtain primacy to demonstrate that they have given their regulators equally effective enforcement tools.\footnote{403}

In comparison to the numbers of violations reported, these powerful authorities are rarely used by federal and state regulators. In fiscal year 1994, for example, 19,568 community water systems self-reported 98,290 violations, but state regulators brought only a total of 1,491 enforcement actions and the EPA brought a total of 4,051 against community water systems and other types of systems, combined.\footnote{404} Close to 3,000 of the EPA actions were mere notices of violation; the Agency issued only 309 final administrative orders and filed only forty-four complaints seeking penalties in federal court.\footnote{405}

There are several possible explanations for this weak track record. In the face of severe resource constraints, federal and state regulators have placed far more emphasis on churning out new regulations than enforcing those already on the books. The regulated community, especially small drinking water systems, has besieged them with complaints and inquiries. Federal and state regulators have also found it very difficult to prosecute municipal officials or small drinking water system operators, in light of the political clout of the former group and hapless ineptitude of the latter. Because they are not in the mode of emphasizing enforcement, federal and state regulators find it discouraging to contemplate protracted litigation against even the most intransigent and culpable violators. A renewed emphasis on aggressive enforcement would require not only a reordering of resources and development of new skills and capabilities, but also a fundamental psychological adjustment.\footnote{406}

\footnotetext[403]{implementing regulations, 42 U.S.C. §§ 300g, 300g-1(b)(1), 300(f)(3) and 40 C.F.R. §§ 141.13, 141.22, 141.31.}
\footnotetext[405]{EPA FY 1994 COMPLIANCE REPORT, supra note 374, at 20-22, 68 (reporting national trend data on the status of compliance and enforcement of safe public drinking water regulations during fiscal year 1994).}
\footnotetext[406]{Id. at 68. For an excellent discussion of the problems that arise in enforcing environmental laws against public facilities, see Marcia R. Gelpe, Pollution Control Laws Against Public Facilities, 13 HARV. ENVTL. L. REV. 69, 74-80 (1989).}
What violations should be a priority for reinvigorated enforcement efforts? Quality is surely more important and effective than quantity: rather than chase a slew of relatively minor violations to the inconclusive point where a small penalty is imposed administratively, regulators would have more impact if they prosecuted a few high-profile violations of the most important microbial and chemical standards to the point where the courts imposed severe penalties.

In addition, citizens may take the law into their own hands, pursuing the more egregious violations in circumstances where they believe that the government will fail to protect them. The Safe Drinking Water Act authorizes citizens' suits against drinking water system operators currently in violation of the law, and allows courts to award attorneys' fees and costs to parties who prevail in such actions. To date, citizens have brought only a handful of such suits. Private

407. 42 U.S.C. § 300j-8 (1994), amended by Safe Drinking Water Act of 1996, Pub. L. No. 104-182, § 129, § 110 Stat. 1613, 1660-62. At least 60 days before filing suit, the citizen must provide notice to the EPA and the state in which the violation occurs. Citizens' suits may not proceed if federal or state regulators are "diligently prosecuting" their own civil actions against alleged violators. Id. § 300j-8(b). The Safe Drinking Water Act Amendments of 1996 do not change these provisions, except with respect to federal agencies and departments. See § 113, § 110 Stat. at 1634-36 (omitting any changes to citizen suit provisions covering non-federal parties); § 129, § 110 Stat. at 1660-62 (modifying such provisions as they apply to federal agencies and departments).

408. See, e.g., Vernon Village, Inc. v. Gottier, 755 F. Supp. 1142, 1151-53 (D. Conn. 1990) (confirming the right of the resident of a trailer park to bring a citizens' suit alleging violations of the Safe Drinking Water Act). But see ACORN v. Edwards, 81 F.3d 1387, 1394-95 (5th Cir. 1996) (reversing a district court decision confirming community organizations' right to file citizen suit to enforce the lead provisions of the Safe Drinking Water Act, and holding that 42 U.S.C. § 300j-24(d) is unconstitutional under the tenth Amendment of the United States Constitution), petition for cert. filed, 65 U.S.L.W. 3110 (U.S. July 22, 1996) (No. 96-174); Mattoon v. City of Pittsfield, 980 F.2d 1, 6-7 (1st Cir. 1992) (dismissing citizens' suit brought by residents of city in which outbreak of giardiasis occurred because plaintiffs failed to demonstrate ongoing violations of the Safe Drinking Water Act). The Supreme Court's decision in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 56-63 (1987), aff'd in part and rev'd in part on other grounds, 890 F.2d 690 (4th Cir. 1989), which requires plaintiffs to demonstrate ongoing violations, is a significant barrier to citizens' suits. However, in the situation hypothesized here of severe budget shortfalls and chronic noncompliance, plaintiffs should be able to overcome this impediment. Environmental advocates in Congress tried to amend the Safe Drinking Water Act to overturn Gwaltney; municipal lobbyists vigorously opposed the proposal and it was not included in the final legislation. Drinking Water: Citizen Suit Provision Dropped; SDWA Reform Bill Scheduled for Markup, 1994 Daily Env't Rep. (BNA) 180 (Sept. 20, 1994).
enforcement is likely to increase, however, as it becomes more and more clear that regulators are unable to address the most pressing problems.

While coercive enforcement is clearly less desirable than a cooperative and comprehensive regulatory approach, it has the potential to maintain minimal regulatory compliance, especially if state regulators muster the political will to pursue selected violators with a vengeance. But there is undoubtedly a fine line between the coercive model and a revolutionary rollback of fundamental protection. Where that line lies may not be apparent until it has been crossed.

3. Revolution

What would the revolution look like? One of its major characteristics would be the collapse of state primacy programs. This particular development has already begun. In 1994, the EPA warned nine states to improve their programs by meeting federal deadlines for the implementation of new regulations or face the loss of primacy: California, Colorado, Hawaii, Indiana, Kansas, Maryland, South Dakota, Pennsylvania, and Virginia. Thus far, all of the states pulled back from the brink, but many are clearly getting to the point where the loss of primacy would come as a relief to state officials buffeted by budget shortfalls and the devolution of other important federal programs.

The takeover of even a few state regulatory programs would likely prove overwhelming to the EPA. Because the Act permits citizens' suits against the EPA when the EPA misses the deadlines for fulfilling its regulatory quotas, federal

A second impediment to the use of citizens' suits to enforce federal environmental laws is the Supreme Court's recent decision in Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1132-33 (1996). This case precludes suits seeking an injunction against a state agency when Congress has enacted a remedial scheme specially designed to enforce the right sought, but it is unclear whether courts will construe it to apply to a suit against a local government.

409. The crisis in state primacy programs has been brewing for several years. In a 1992 press account of a meeting between then-EPA Administrator William Reilly and several state governors who had requested an opportunity to surrender control of their drinking water programs, a senior EPA official, James R. Elder, described the situation as a "crisis" and warned that the program could "fall flat on its face" unless the government took effective action. Drinking Water: Reilly to Meet with Governors to Consider "Crisis" Over Funding, State Primacy Issues, 23 Env't Rep. (BNA) 645 (1992).

regulators have no choice but to continue to commit resources to writing new regulations even as their ability to implement existing requirements all but collapses.

The deterioration of federal and state programs would cause an increase in violations, to the point where scofflaw attitudes become prevalent even among the large water systems that have the financial capacity to meet regulatory goals. No operator would consciously risk providing contaminated water to the public. Rather, the danger is that the potential for lax management and human error would multiply significantly in an atmosphere where enforcement of complicated regulatory requirements appears nonexistent.

All of these problems would invariably produce an increased incidence of waterborne diseases, as well as continued exposure to chemical contaminants that cause chronic, long-latency health effects. In the best-case scenario, the acute effects on public health caused by the collapse of regulation would become obvious sooner rather than later, and federal and state regulators would at last be motivated to take more definitive action. There are two other possibilities: contaminated drinking water supplies would cause deaths, and in reaction the EPA would try frantically to rebuild a credible federal regulatory system; alternatively, the damage caused by contaminated water would be subsumed in statistics that obscure the link between the illness and its cause, and the public would never realize the price it had paid.

VI. CONCLUSION

The Framers of the Constitution never contemplated the advent of the modern regulatory state. They did foresee constant tension among the three levels of government and incorporated mechanisms to relieve it into the design of American government. The primary arena for mediating this tension is not the courts' interpretation of the Constitution, but rather the political and administrative processes that are the source of such disputes. Politicians and bureaucrats at all levels of government must either renegotiate the most disruptive federal rules or risk a breakdown in intergovernmental relationships that will make all of them look foolish, impotent, or worse.

Unfunded mandates are the most pointed recent example of intergovernmental tension, exacerbated several-fold by the absence of federal funding. Mayors and other municipal offi-
cials have legitimate grievances concerning both the goals and the details of the federal environmental programs that regulate municipal services. However, in their effort to get a quick fix for their problems, they have couched the debate in intemperate rhetoric that rails against big government without ever acknowledging that a central target of their protest—national environmental programs—enjoys overwhelming popular support.

The Reagan era provides a troubling illustration of the ramifications of confusing the message by obscuring the grievance. Like the current mandates movement, the Reagan administration adopted devolutionary themes and demonized the federal bureaucracy as a justification for changes sought by its far less popular corporate supporters. This extreme approach inspired an equally extreme reaction, directly causing the current crisis in the regulatory state. Those seeking to uphold the Reagan legacy see only this side of its history and urge resolution of the crisis by dismantling federal regulations as quickly and comprehensively as possible. Yet, they never explain how, in the aftermath of this revolution, the country can accomplish the social imperative of ensuring the safety of the air we breathe, the food we eat, and the water we drink. If the public debate is again distracted by tirades against big government, and we avoid the effort it will take to craft more enduring reforms, the environmental progress of the last quarter century could be squandered.

Over the next few years, we must face the challenge of sorting the appropriate roles of federal, state, and local governments in protecting human health and the environment from municipal pollution. If we do not sort such responsibilities and reform the current regulatory system appropriately, two damaging scenarios will occur. The responsibility for regulating the environmental consequences of local government activities will devolve hastily and without restriction to state and local governments ill-equipped to assume it. Simultaneously, we will experience revolution in the worst sense of the word: a rapid withdrawal of essential regulatory standards without any effective alternative controls. Both scenarios could have potentially cataclysmic effects on public health and natural resources; the inability to reconstruct effective regulatory strategies once the current system is dismantled would compound these effects.

It is the thesis of this Article that there are two acceptable
alternatives to the devolution or revolution scenarios described above. One solution is a return to the cooperative federalism that dominated national politics between 1930 and 1960. Cooperative federalism requires the establishment of uniform national health or technology-based standards that leave state and local governments adequate flexibility to avoid wasting resources on unimportant problems and reduce unwarranted federal interference in local implementation. Its success is predicated on adequate funding of federal, state, and local governments to permit each to assume its appropriate role. The second, far less desirable but still viable alternative could be described as coercive federalism, an approach which by default dominates too many major environmental programs. Coercive federalism would retain the federal role in establishing uniform national standards, but would abandon any real effort to plan and implement comprehensive regulatory programs. Instead, it would rely on selective enforcement and imposition of stiff penalties to motivate compliance.

Several fundamental principles must govern the sorting of government responsibilities under either a cooperative or coercive federal approach. The federal government should regulate transboundary pollution that crosses state lines. The existence of significant economies of scale in the formulation of regulatory standards also militates a federal response. Where differences in the level of regulatory control would harm vulnerable groups such as people of color, the poor, children, or the elderly, federal regulation should receive much more careful consideration. On the other hand, the federal government should forego regulation unless a compelling case is made that the problem is both significant and national in scope. Federal agencies and Congress should consider the cumulative burden they have imposed on state and local governments before issuing new regulatory standards and should periodically cull requirements that are no longer a priority. Subnational governments should retain full authority to craft alternatives to restrictive federal standards when cost-effective solutions depend on the consideration of local environmental conditions such as geography, geology, and the nature and scope of contamination. If used strategically, federal funding can make mandates more palatable politically, but should never be used to determine the legitimacy of a mandate that is otherwise justified by the sorting principles.

Finally, the country must recognize that until and unless
it commits itself to fund regulators adequately, both protection and reform will be impossible. Beneath the surface of every angry anecdote is the frustration that bureaucrats could not, would not, and did not solve the problem. Placing them under further siege, without the resources to regulate not only less but smarter, will not help counties, cities, and towns—or their citizens—over the long-run.