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Should Unfunded Regulatory Mandates Be Subject to Legislative Approval?

Regulatory Policy Commentary

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Congress should approve federal regulations that mandate significant state expenditures.

Unfunded federal regulatory mandates on state, local, and tribal governments continue to present a fiscal challenge to those governments. Congress is considering several proposed amendments to the Unfunded Mandates Reform Act, or UMRA, to hold federal agencies more accountable for the costs they impose on other levels of government. One mechanism that has appeared in other bills¹ – legislative approval of final regulations – has not been invoked specifically to deal with the problem of intergovernmental mandates, yet it makes considerable sense in this context.

Before federal agencies spend money from the federal treasury Congress must provide both an authorization, which is often written in broad and aspirational terms, and an appropriation, which is made in recognition of fiscal realities and the limits that they impose. Yet those same federal agencies spend money from state treasuries – treasuries that don't have the ability to print money – on the agencies' own initiative and a statutory authorization, often broad and vague, to issue regulations.² Once the details of a regulation and its associated fiscal mandate are known, shouldn't some legislative body, somewhere, vote for that expenditure?

How might this work in practice? In the vast majority of final rules federal agencies would certify, as they do now, that the rule does not contain an intergovernmental mandate that met the thresholds set out in UMRA. If it could not so certify, however, the agency would submit the rule to Congress to be affirmed by a Congressional resolution of approval before it became effective. Until it was approved, the fiscal mandate would not be binding: the state legislature could vote to comply, but would not be required to do so. Regulations that imposed a significant fiscal burden but could not secure approval from any legislature would remain advisory only. As is now the case with Secondary National Ambient Air Quality Standards, the states would be expected to comply, but without a binding deadline and without being subject to a penalty.

The question then arises, whose estimate of the fiscal burden would be used to determine when Congressional approval is required? Burden estimates by federal agencies and by the affected

¹ Regulations from the Executive in Need of Scrutiny Act, or REINS Act, H.R. 10 and S. 299, 112th Congress.

² Regulations can also cause an increase in expenditures from the federal fisc – a topic beyond the scope of this commentary, but one to which Congress might also want to give attention.

governments tend to be very different.³ Given the nuances of constitutional federalism and separation of powers, it seems likely that the determination of whether a federal regulation meets the threshold that requires legislative approval would have to be made initially by the federal executive branch, either by the issuing agency or by the Office of Management and Budget.

To ensure that this determination is done in good faith, the UMRA certification and the underlying burden estimate could be judicially reviewable. This need not raise the specter of excessive or intractable litigation; in order to avoid frivolous suits, standing to challenge an UMRA certification could be limited to state and tribal governments. Because the facts under review would be confined to the fiscal impact of the mandate, courts would not need to wade into the complex science or policy considerations underlying the agency's regulatory decision. The standard of review could be preponderance of the evidence; if deference is due to the expertise of either party in determining a fiscal burden, states would seem to have at least as strong a claim as do federal agencies.

Moreover, if a reviewing court ruled in favor of a state plaintiff, there would be no vacatur or remand of the regulation. The only consequence would be that the difficult questions – Is it worthwhile? Who should pay? – would be directed to the legislature, where they belong. This outcome satisfies the stated goal of UMRA: “to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding.”⁴

³ See, for example, *A Framework for Reviewing EPA's State Administrative Cost Estimates: A Case Study* (Cambridge: Abt Associates, Inc.; EPA Contract EP-W-05-022; 14 September 2007) Available for download at: <http://yosemite.epa.gov/ee/epa/erm.nsf/vwGA/B83C2D0421278972852573930077BE5B>

⁴ 2 U.S.C. § 1501(2).