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Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services

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I. INTRODUCTION

Few contemporary issues concern state and local policymakers as intensely as unfunded mandates.[1] Mayors, county executives, city councilmen, and the professional associations representing them routinely argue that the federal and state governments have, in recent years, imposed at an accelerating rate expensive requirements on municipalities without granting corresponding funds for compliance, thereby irresponsibly straining the fiscal capacity of municipalities, hampering their ability to provide essential services, and improperly infringing upon the scope of local control. The complaints of municipal policymakers have provoked a variety of proposals for restraining unfunded mandates: obligatory disclosure of the projected costs of proposed mandates, requirements of legislative supermajorities for unfunded mandates, and statutory and constitutional reimbursement arrangements for state-imposed obligations on local governments.

In debate about unfunded mandates, governors and state legislators typically advance a more awkward position, denying that they improperly impose unfunded obligations on localities while decrying the tendency of the federal government to inflict unfinanced responsibilities on the states. President Bush, in his 1992 State of the Union address, also granted important recognition to the anti-mandate cause when he identified strongly with its concerns.[2]

Despite their importance to state and local policymakers, unfunded mandates have received little sustained attention from public finance and municipal government scholars. This Article is an effort at redress, an exploration of the tendency of federal and state officials to impose unfinanced obligations on lower levels of government despite the near universal condemnation of this practice. The Article concludes that the unfunded mandate phenomenon is structural in its origins, understandable in public choice terms as a form of hidden taxation imposed by poorly monitored, opportunistic legislators. Accordingly, the Article concludes that unfinanced mandates require a constitutional response

1. Both for ease of exposition and conformance to common usage, this Article uses the standard term "unfunded mandates" to refer to legislative mandates and, by extension, administrative mandates. Court orders raise different considerations and are therefore outside the scope of this Article's discussion.

2. See Ellen Perlman, *Bush's Budget: Beginning Bargaining Tool*, 9 City & State 23, 23 (Feb. 10, 1992).

rather than the palliative remedies generally advanced by the anti-mandate school.

Part II of this Article provides an introduction to unfunded mandates. This Part describes the unfunded mandate phenomenon in its current form, discusses the prevailing critique of unfunded mandates and the definitional questions in this area, and outlines the remedies developed in response to the perceived problem of unfunded mandates. These remedies generally treat unfunded mandates as glitches in the legislative process that are correctable through relatively minor, mechanical reforms.

Part III uses notions of public choice and agency to develop the Article's principal model. This model depicts unfunded mandates as the products of self-seeking, poorly monitored state legislators who act within a zone of discretion and opportunistically accommodate interest groups incapable of mustering majority support for their demands. Starting initially with a simple voting paradigm at the local level, the Article successively elaborates it until it generates unfunded mandates which, under the model's public choice and agency assumptions, enable state legislators,[3] inadequately observed by the anti-service public, to provide discretionary governmental largesse to minority constituencies without alerting the majority to the deal it is financing through its municipal taxes. These pro-service interest groups, unable to obtain the majority's backing for more attractive political outcomes, such as state provision of the services they desire or fully financed mandates, accept unfunded mandates and the hidden taxation such mandates entail as the best results these groups can achieve given their relatively weak political positions.

Part IV develops a contrasting model that places a benign gloss on states' imposition of unfinanced obligations on localities. This contrasting model suggests that public-regarding state policymakers, when confronting externality-generating governmental activities, multiple jurisdictions, and collective action problems, maximize the welfare of local taxpayers through a network of reciprocal mandates. In this world, the anti-mandate complaints of municipal officials reflect either shortsightedness or the desire to freeload on the public services of surrounding jurisdictions.

Part V of this Article revisits the remedies conventionally proposed to constrain unfunded mandates and concludes that those remedies are generally inadequate for the perceived problem, at best abating the adoption of unfunded mandates at the margin. Under public choice

3. While this Article develops its models in terms of state legislative behavior, these models are readily generalized to governors, regulators, and federal officials.

premises, the standard anti-mandate recommendations are largely deficient because they do not constrain decisionmakers' discretion and opportunistic conduct, the underlying causes of the mandate problem. In a public choice world, better disclosure does not inhibit legislators from inflicting unfinanced burdens on lower levels of government. The problem is not that mandate-imposing legislators are poorly informed but that they are poorly monitored. Similarly, the factors which permit political interests to obtain unfunded mandates for themselves also enable them, individually or in concert with one another, to surmount supermajority requirements and statutory reimbursement rules designed to discourage such mandates. In a public choice world, unfunded mandates can be checked only through a constitutional right of reimbursement which, in its strongest variant, would take the form of prospective nullification, that is, bestowing on lower levels of government (for example, municipalities) the constitutional right to ignore prospectively obligations imposed by higher tiers of government (for example, states) unless the lower levels are fully compensated *ab initio* for all costs. Paradoxically, the program of the anti-mandate school is generally more consistent with the benign, public interest model of unfunded mandates.

The last portion of this Article summarizes its conclusions. The Article concludes that the public choice model explains unfinanced mandates more accurately than the public interest model. At the state level, the public choice model supports constitutional reform, both by amendment and by judicial interpretation, to protect against unfunded mandates and the hidden taxation they entail. Federally, this Article recommends a revised Tenth Amendment doctrine in the spirit of *National League of Cities v. Usery*,[4] protecting constitutionally states and their subdivisions from federal laws that single them out for unreimbursed responsibilities. The Supreme Court's recent decision in *New York v. United States*[5] may presage movement of the Court's Tenth Amendment doctrine in this direction.

In short, opponents of unfunded mandates have essentially framed their indictment in technical terms and cast unfunded mandates as the result of remediable glitches in the legislative process. However, this Article suggests that unfunded mandates raise basic structural issues about the motivations and discretion of political actors, the ability of voters to monitor officials' performance, and the proper constitutional relationship between higher and lower tiers of government and between

4. 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

5. 112 S. Ct. 2408 (1992).

legislatures and courts. The anti-mandate movement thus returns us to fundamental and historical controversies about the nature of governments, and those who populate them, and about the temptations of taxation without accountability.

II. Unfunded Mandates: Background

Historically, unfunded mandates can be traced at least as far back as the time of Tocqueville who, in his 1835 discussion of New England townships, described the tendency of states to impose responsibilities on local governments rather than execute such responsibilities themselves.[6] Indeed, much of the traditional legal framework supporting municipal governments might be characterized as mandates in the sense that state law has historically imposed on localities fundamental requirements concerning internal organization and baseline services, such as state statutes that require localities to establish school boards and public schools.[7] The traditional home rule crusade, emphasizing the virtues of local autonomy and freedom from state interference, can be viewed as the original anti-mandate movement.[8]

Contemporary concern with unfunded mandates stems from the perception that, starting in the early 1970s, the state and federal governments began imposing unfinanced obligations on lower tiers of government both quantitatively and qualitatively more onerous than before. Of these new mandates, those regulating the terms and conditions of employment of local government workforces cause the greatest concern to muncipal policymakers. Such policymakers routinely contend that arbitration, tenure, pension, and disability statutes inflate the wages and benefits paid to municipal employees and impede efficient management of municipal operations.[9]

Another salient category of the new mandates is the increased redistributive activity imposed on localities by unfinanced state mandates. In New York, for example, "burdensome state mandates on

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6. Alexis de Tocqueville, *Democracy in America* 30-31 (Encycl. Brit., 2d ed. 1990).

7. See, for example, Gen. Stat. Conn. §§ 9-203 to 9-206 (1988) (prescribing the structure of local boards of education); Gen. Stat. Conn. § 10-4a (prescribing minimum educational standards for public schools).

8. For an introduction to the home rule movement, see Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 10 (1990).

9. See generally Paul G. Barr, *Mandates Cost Florida Funds*, 21 Pensions and Investments 10 (May 17, 1993); *Arbitration Reforms Are Meaningful*, 20 Connecticut Town & City 1 (May-June 1992); *Municipal, School Leaders Seek Mandate Reform*, 20 Connecticut Town & City 1 (Jan.-Feb. 1992); Connecticut Advisory Commission on Intergovernmental Relations, *State Mandates on Municipalities* (Feb. 1992); *Towns Win and Lose on Mandates*, New Haven Reg. B2 (Apr. 19, 1992).

Medicaid" are frequently blamed for municipal fiscal distress.[10] Similarly, in California, county officials have criticized the state for contracting the scope of the Medicaid program. These officials contend that under state law this contraction has obliged counties to provide increased care for the medically indigent.[11] State officials, in turn, often decry federal Medicaid mandates as unfair and unduly burdensome.[12]

Other frequently criticized mandates target narrower constituencies, such as state-imposed provision by localities of busing to private school students and other special education services.[13] Unfunded environmental mandates enacted by federal and state officials have also become of increasing concern.[14] In response to these unfinanced obligations imposed by higher tiers of government, a consistent refrain emerges from lower level officials who view themselves constrained, Gulliver-like, to levy taxes and deliver services to discharge these obligations: If these mandated undertakings are so important, pay for them yourself.

The most striking statement of the anti-mandate perspective occurred in the unprecedented and unsuccessful effort of Bridgeport, Connecticut to invoke the protection of Chapter 9 of the federal Bankruptcy Code.[15] Bridgeport's insolvency, it was asserted, stemmed in significant measure from state-imposed unfunded mandates that made it impossible for municipal officials to conduct the city's affairs in an efficient and effective manner.[16] The Connecticut Conference of Municipalities, the lobbying association of Connecticut's localities, told the federal bankruptcy court:

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10. Gary Enos, *Virus of Fiscal Distress Spreads to Cities*, 9 City & State 1, 1 (Aug. 10, 1992).

11. See *Kinlaw v. State*, 54 Cal. 3d 326, 814 P.2d 1308 (1991).

12. See, for example, Steven D. Gold, *Changes in State and Local Tax Systems Over the Past 20 Years*, 57 Tax Notes 893, 899-900 (1992).

13. See, for example, *Town of Lexington v. Comm'r of Educ.*, 393 Mass. 693, 473 N.E.2d 673 (1985).

14. Frank J. Sturzl, *A Necessary Heresy: How Environmental Programs Threaten to Bankrupt Cities and How Common Sense Became Heresy; The Tyranny of Environmental Mandates; The Public's View of Mandates; The Power (and the Cost) of Public Perception; TML Survey: Cities Struggle to Keep Up with Environmental Costs* (unpublished manuscripts prepared for Texas Municipal League, on file with author).

15. Bridgeport was the largest municipality of general jurisdiction ever to file under Chapter 9. The two critical opinions of the bankruptcy court are *In re City of Bridgeport*, 128 Bankr. 688 (Bankr. D. Conn. 1991), and *In re City of Bridgeport*, 129 Bankr. 332 (Bankr. D. Conn. 1991). See also David L. Dubrow, *Chapter 9 of the Bankruptcy Code: A Viable Option for Municipalities in Fiscal Crisis?*, 24 Urban Law. 539, 539 (1992) (characterizing the Bridgeport bankruptcy filing as "a critical juncture in municipal finance history" which "sent shock waves throughout the financial community. . . . Bridgeport, with a population of 140,000, is the largest city to ever have attempted to utilize Chapter 9 to restructure its debt.").

16. See Memorandum of Law of the Connecticut Conference of Municipalities in Support of the City of Bridgeport's Authority to File a Chapter 9 Petition at 1.5-1.7, *In re City of Bridgeport*, 128 Bankr. 688 (Bankr. D. Conn. 199) (No. 91-51519).

> Bridgeport has been driven into its current need for Chapter 9 protection by circumstances largely beyond its control . . . [including] mandates imposed by the State on municipalities without adequate funding. Indeed, 82 percent of the more than 250 statutory state mandates are totally unfunded. For example, in 1989-1990 alone, Bridgeport paid $1.7 million in state mandated yet unfunded heart and hypertension benefits for police and fire personnel.[17]
>
> Bridgeport's current state of financial distress was largely induced by the State.[18]

Although these sentiments constitute a particularly forceful indictment of unfunded mandates, they are typical of the views expressed by municipal officials[19] and their professional associations,[20] as well as a substantial body of editorial opinion that denounces the fiscal impact of

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17. Id. at 1.5, 1.7.

18. Supplemental Memorandum of Law of the Connecticut Conference of Municipalities in Support of the City of Bridgeport's Authority to File a Chapter 9 Petition at 8, *In re City of Bridgeport*, 128 Bankr. 688 (Bankr. D. Conn. 1991) (No. 91-51519).

19. See generally *Pay Cities to Enforce Fed Mandates: Pol*, N.Y. Post 14 (June 21, 1993); Ellen Perlman, *Is There Really Mandate Relief on the Horizon?*, 10 City & State 3 (June 7, 1993); Stephen Goldsmith, *Bureaucracy Shackles the Urban Poor*, Wall St. J. A14 (June 10, 1992); Frank B. Connolly, *Towns Whipsawed by Unfair Mandate*, New Haven Reg. 14 (Apr. 15, 1992); *The Time for Action in Our Cities Is Now*, 9 City & State 4 (July 13, 1992); Johanne A. Presser, *Frustrations on the Board*, Newsweek 11 (Sept. 14, 1992). See also Ronald Berkman, et al., eds., *In the National Interest: The 1990 Urban Summit* 13, 25 (Twentieth Cent. Fund, 1992) (recommending that muncipal officials "seek passage of state and federal laws that will bar any future unfunded mandates applying to local governments;" and noting comments of Mayor Gerald McGann of Jersey City, New Jersey: "One of the big problems with Washington and my own state government is the programs that they mandate. They tell us that they want us to perform certain functions, certain services, and then they never clearly give us the money to provide those activities."); William A. Collins, *School Board Fed Up with State Mandates*, New Haven Reg. 11 (Nov. 13, 1992); Alaska Task Force on Governmental Roles, *Final Report* 9, 19 (July 10, 1992) (stating that "there is no doubt that the cost of complying with state and federal mandates is consuming an ever-increasing portion of municipal funds. . . . As in the rest of the country, mandates are of increasing concern to local officials in Alaska.").

20. See, for example, Charles J. Pasqua, *A Major Victory!*, 56 La. Mun. Rev. 3, 3 (Nov. 1991) (describing Louisiana localities as "long over-burdened by the weight of unfunded state mandates which dominated budgetary decisions and made it difficult for elected officials to devote local tax dollars to local priorities and needs"); Arkansas Municipal League, *Policies and Goals of the Arkansas Municipal League* 4 (June 26, 1992) (noting that "[t]he cost of complying with these mandates severely strains municipal budgets to the extent of forcing them to reduce or cut local priorities"); Joe Klein, *Cities, Heal Thyselves*, Newsweek 24, 24 (July 5, 1993) (noting that the nation's mayors are "asking for less burdensome governance—for relief from costly federal requirements, fewer 'unfunded mandates' like clean-air regulations. 'The fiscal crisis in the cities,' said their new president, Jerry Abramson of Louisville, 'is largely a result of unfunded federal mandates'."); Dan Miller, *Mandates Spoil a Honeymoon*, 10 City & State 6, 6 (July 19, 1993) (stating that "[m]andates that force state and local governments to provide the services that the federal government doesn't want to pay for have been eating away at local budgets for years . . ."); Ellen Perlman, *Mayors Face a Big Sell*, 10 City & State 4, 4 (July 5, 1993) (stating that "mayors plan to try to educate residents on what they say is the damage unfunded federal and state mandates do to city budgets and services").

unfunded mandates and the corresponding diminution of local control:[21]

> We've said it many times before, but evidently it needs repeating. States and cities cannot afford to pay for programs they do not initiate, perhaps may not even support. They cannot afford more federal mandates without federal funding behind them. Frankly, they cannot be the ones to shoulder all the burdens of government.[22]

The prevailing anti-mandate rhetoric is nearly universal in character, bipartisan in nature, and embraced by officials from suburban and rural areas[23] as well as big city policymakers[24] and governors.[25] As former President Bush recognized:

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21. See, for example, *Quit Feeding the Flab*, Wall St. J. A6 (Aug. 26, 1992) (claiming that much state and local spending "is to attend to mandates from the next level up"); *State Should Fund or Lift Mandates*, New Haven Reg. B2 (Mar. 15, 1992); Dan Miller, *How to Boost Local Fortunes*, 9 City & State 6, 6 (Sept. 7, 1992) (suggesting an "[i]mmediate[ ] freeze [on] unfunded federal mandates"); Pennsylvania League of Cities, *Pennsylvania State of the Cities Report* 20 (Mar. 1992) (noting that "[l]ocal autonomy and control continues to be threatened by mandates"); Gold, 57 Tax Notes at 899-900 (cited in note 12) (stating that "Medicaid illustrates the problem of unfunded mandates, another important mechanism through which the federal government has affected state finances. . . . Unfunded mandates also have increased state and local costs in other areas, such as environmental programs. . . . [L]ocal revenue systems . . . have been strained by federal and state mandates. . . ."); *Legislature Disobeying Own Law on Funding Legislative Mandates*, Fla. Times-Union 1 (Feb. 20, 1989); *Oct. 27: A Red-Letter Day*, 10 City & State 6, 6 (Aug. 16, 1993) (stating that "we must applaud a sea change in the way mayors and county leaders are attacking the confining bonds of unfunded federal mandates"). See also *Asphalt Bungle*, Wall St. J. A16 (Sept. 7, 1993) (stating that "Congress has its hands full trying to contain the runaway programs it has already created without steamrolling the states with more burdens"); *ICMA, NACo and NLC Join in Mandate Protest*, 10 City & State 6, 6 (Sept. 13, 1993) (noting that "unfunded mandates are overwhelming local government budgets whether they are for a good purpose or not").

22. *On Unfunded Mandates*, 9 City & State 6, 6 (Feb. 24, 1992).

23. See R. E. Teeter, *Strong Cities Make a Strong Nation, Teeter Says*, Ark. City & Town 12, 12 (July 1992) (arguing that "state and federal governments pass new regulations and mandates that have increased our cost of operation, but at the same time reduce their financial support for the cities").

24. See generally Rodd Zolkos, *Republican Mayors, Governors to Oppose Unfunded Mandates*, 9 City & State 4 (Aug. 10, 1992); Ellen Perlman, *Spotlight on Urban Woes*, 9 City & State 1 (Apr. 6, 1992); J. Andrew Hoerner, *States' Fiscal Problems Worsening; Unfunded Federal Mandates Cited*, 56 Tax Notes 547 (1992); Edward I. Koch, *The Mandate Millstone*, 61 Pub. Interest 42 (1980).

25. See L. Douglas Wilder, *Commentary*, 9 City & State 10, 10 (Sept. 21, 1992) (explaining that "[o]ver the past 10 years, the burdens of government have shifted substantially from the federal government to cities and states—the result of federal budgets that mandate more and more programs to be implemented by state and local governments . . ."). See also *Shaky State Finances Blamed on Federal Government*, 5 Amer. Banker-Bond Buyer 12, 12 (Aug. 26, 1991) (quoting Maine Rep. John Martin, Democrat-Eagle Lake, president of the National Conference of State Legislatures as stating that "[t]he shaky finances of most states are due mainly to the 'tidal wave of unfunded mandates, restrictions on revenues and preemptions sent to us by the federal government' "); Paul R. Blackley and Larry DeBoer, *Explaining State Government Discretionary Revenue Increases in Fiscal Years 1991 and 1992*, 46 Nat'l Tax J. 1, 1 (1993) (revealing that "[s]tates have long complained about unfunded federal mandates. . . ").

> [U]nfinanced federal government mandates . . . are the requirements Congress puts on our cities, counties and states without supplying the money. And if Congress passed a mandate, it should be forced to pay for it and to balance the cost with savings elsewhere. After all, a mandate just increases someone else's burden.[26]

Notwithstanding the broad anti-mandate consensus among policymakers and their spokesmen, neither the public finance literature[27] nor the municipal government literature[28] develops a systematic analysis of the contemporary mandate phenomenon.[29] Of the leading public finance texts, Professor Joseph E. Stiglitz's most explicitly acknowledges the existence and critique of unfunded mandates:

> In some cases the federal government has mandated that the state and local governments provide certain services (for instance, access facilities for the handicapped) without providing the requisite funds. The states and local communities have, not surprisingly, complained, arguing that if the federal government attaches such importance to these services, it should also finance them.[30]

Professor Stiglitz, however, does not discuss municipal officials' criticisms of state-imposed mandates, nor does he develop an explanation for the persistence and growth of mandates despite their near universal condemnation. Similarly, Professor Harvey S. Rosen, in his chapter on state-local finance, alludes to the "numerous federal regulations" imposed on localities and suggests that these "regulations . . . may improve welfare . . . [although] some believe that the system of federal

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26. Perlman, 9 City & State at 23 (cited in note 2) (quoting former President George Bush's 1992 State of the Union Address). For one listing of federal mandates, see Robert McCurley, Jr., *Federally Mandated State Legislation* 4-46 (Nat'l Conf. of State Legis., 1990).

27. For example, Joseph Pechman, in his discussion of the fiscal plight of the cities, attributes their financial distress to shrinking tax bases, unresponsive legislatures controlled by rural and suburban interests, and the cities' own profligacy. His analysis of the fiscal relationships among cities, states, and the federal government disregards the perceived problem of unfunded mandates. Joseph A. Pechman, *Federal Tax Policy* 285-98 (Brookings Inst., 5th ed. 1987). Similarly, Professors Richard and Peggy Musgrave, in their leading text on public finance, discuss numerous state and local government issues including differences among jurisdictions in taxing capacity and need, grants-in-aid to states and localities, and school finance reform, but not unfunded mandates. Richard A. Musgrave and Peggy B. Musgrave, *Public Finance in Theory and Practice* 523-63 (McGraw-Hill, 4th ed. 1984). Likewise, Professors Edgar and Jacquelene Browning, in their survey of "special topics in state-local public finance," identify such issues as tax competition among states and municipalities and tax exporting by local jurisdictions; however, they do not discuss the tendency of higher levels of government to impose obligations on lower levels without providing the resources for compliance. Edgar K. Browning and Jacquelene M. Browning, *Public Finance and the Price System* 481-87 (MacMillan, 3d ed. 1987).

28. See, for example, Jefferson B. Fordham, *Local Government Law* (Foundation, 2d ed. 1986).

29. The dearth of academic writings on mandates contrasts sharply with the voluminous scholarly literature on grants-in-aid. See, for example, Rosella Levaggi, *Fiscal Federalism and Grants-in-Aid: The Problem of Asymmetric Information* (Grower, 1991); Lawrence D. Brown, James W. Fossett, and Kenneth T. Palmer, *The Changing Politics of Federal Grants* (Brookings Inst., 1984).

30. Joseph E. Stiglitz, *Economics of the Public Sector* 550 (W.W. Norton, 1986).

regulation over subfederal governmental units has become so complicated that it may be difficult to determine which level of government has responsibility for what."[31] Professor Rosen, however, does not explore either the forces animating such regulation or the tendency of states to impose unfinanced obligations on localities.

Alice Rivlin advances a decidedly negative picture of federal mandates. Contending that mandates blur responsibilities among different levels of government and thus reduce accountability to the electorate, she attributes the mandate phenomenon to the constraints of the federal fisc:

> The federal government's own fiscal weakness has not made it any less eager to tell states and localities what to do. Indeed, when its ability to make grants declined, the federal government turned increasingly to mandates as a means of controlling state and local activity without having to pay the bill.[32]

As an explanation for the proliferation of unfunded mandates, the plight of the federal (and, by extension, the states') treasury is plausible as far as it goes. However, such an explanation leaves unanswered a host of important questions: Why should a higher level of government respond to its fiscal distress by imposing unfinanced obligations on lower levels rather than by increasing its own revenue? Which public activities will upper tiers of government fund from their own resources and which will be consigned to unfunded mandates? Why are public officials burdened by mandates unable to resist their adoption in the halls of Congress and the statehouse?

The definitional scope of the mandate phenomenon is by no means self-evident; indeed, as we shall see,[33] two definitional issues are central to an interpretation of this phenomenon.[34] The first of these is whether

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31. Harvey S. Rosen, *Public Finance* 512-13 (Irwin, 2d ed. 1988).

32. Alice M. Rivlin, *Reviving the American Dream: The Economy, the States and the Federal Government* 107 (Brookings Inst., 1992). Ms. Rivlin's analysis has been echoed by other commentators who characterize the growth of unfunded mandates as a response to fiscal constraint coupled with a desire for activist government. See, for example, David Osborne and Ted Gaebler, *Reinventing Government* 276, 277 (Addison-Wesley, 1992) (stating that "as the federal deficit widened, Congress increasingly turned to mandates . . . [now] local leaders increasingly complain about overregulation from state government"); David R. Beam, *On the Origins of the Mandate Issue*, in Michael Fix and Daphne A. Kenyon, eds., *Coping with Mandates: What Are the Alternatives?*, 23, 29-30 (Urban Inst., 1990) (commenting that "[t]he record of recent decades suggests that federal policymakers are inclined to turn to mandates at times when fiscal resources are scarce . . .").

33. See text accompanying notes 130-36.

34. While the definitional issues discussed in the text are central to an interpretation of the mandate issue, two lesser definitional questions also deserve mention. The first is whether the mandate concept should encompass only statutory requirements or whether the concept should also include administratively imposed rules. Most state mandate statutes take the broader approach, defining mandates to include "executive action" or state-promulgated regulations as well as statutory measures impacting on local governments. See, for example, Illinois State Mandates

laws of general applicability ought to be classified as mandates when they apply to lower levels of government.[35] Consider, for example, workers' compensation laws that impose the same obligations upon municipalities as apply to private employers. Some observers classify such laws as mandates because they result in higher costs for local governments.[36] The California Supreme Court came to a contrary conclusion in *County of Los Angeles v. State*,[37] holding that state legislation which increases localities' worker compensation contributions are not mandates for the purposes of the California mandate reimbursement scheme because similar contributions also are required of private employers.[38] "[L]aws that apply generally to all state residents and entities," the court ruled, do not fall within California's constitutional definition of a mandate, a "new program or higher level of service" imposed by the state on localities.[39] That definition, the court held, does not encompass "[l]aws of general application" but is limited to "functions peculiar to government, programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[40]

Act, Ill. Rev. Stat. ch. 85, § 2203(b) (1991); Gen. Stat. Conn. § 2-32b(a)(2) (1988); Mass. Gen. Laws Ann. ch. 29, § 27C(c) (West, 1992). On the other hand, the State and Local Government Cost Estimate Act of 1981 defines mandates in more limited terms, requiring the Congressional Budget Office (CBO) to project only the impact of proposed federal legislation on states and municipalities. 2 U.S.C. § 653(c) (1988).

Another definitional issue is whether the mandate notion should be tempered by a de minimis rule. Iowa's mandate law, for example, exempts from its coverage any "statutory requirement" generating less than $100,000 in costs annually and less than $500,000 in costs over five years. Iowa Code § 25B.3(2) (1992). Similarly, the Illinois State Mandates Act excludes from its reimbursement arrangement any mandate imposing less than $1000 in annual costs on any local government or less than $50,000 yearly on all local governments. Ill. Rev. Stat. ch. 85, § 2208(a)(5). Likewise, the State and Local Government Cost Estimate Act applies only if a proposed bill will impose expenses on cities and states in excess of $200,000,000 "or is likely to have exceptional fiscal consequences for a geographic region or a particular level of government." 2 U.S.C. § 653(c). In contrast, other state laws more broadly define as a mandate "any" law or regulation imposing costs on local governments. See, for example, Gen. Stat. Conn. § 2-32b(a)(2).

35. The Article concludes that the public choice analysis of unfunded mandates is more consistent with the narrower definition of mandates, excluding laws of general applicability. See text accompanying note 131.

36. See Connecticut Conference of Municipalities, *CCM Report: State Mandates on Cities and Towns* 31 (Jan. 1991).

37. 43 Cal. 3d 46, 729 P.2d 202 (1987).

38. Id. at 209.

39. Id. at 208.

40. Id. See also *City of Sacramento v. State*, 50 Cal. 3d 51, 785 P.2d 522, 530-31 (1990) (applying *County of Los Angeles* to hold that the extension of state unemployment insurance coverage to municipal workers is not a reimbursable mandate requiring a new program or higher service level, but is a nonreimbursable cost stemming from a law of general application).

A second important definitional issue is whether a mandate ought to be considered funded if the higher level of government imposing the obligation does not itself levy a tax to finance the mandate, but instead authorizes the lower tier to levy new taxes to offset mandated costs.[41] The Florida Constitution, for example, treats a state-enacted mandate as funded if the legislature grants the affected localities a new "funding source" which the localities can use to pay for the mandate.[42] The anti-mandate provision of the Louisiana Constitution is similar.[43] In contrast, the Michigan Constitution characterizes state-imposed obligations as unfinanced unless there is a "state appropriation . . . disbursed" to the municipalities to reimburse them, thus placing the direct onus upon the state and its officials to levy the taxes to pay for mandates.[44] Massachusetts law similarly characterizes a mandate as unfunded unless the state itself "by appropriation . . . assum[es]" the localities' costs from the mandate.[45]

Despite these definitional questions, there is general agreement at the core of the concept: A mandate is a requirement imposed on a subordinate level of government to provide a public service that otherwise would not be furnished or to provide a public service in a more costly fashion. A mandate is unfunded if the higher tier of government fails to reimburse fully the lower level for the costs imposed on it.[46]

Most states and the federal government currently require, as part of their legislative processes, the preparation of cost estimates for proposed mandates. Such estimates, usually labelled "fiscal notes," gener-

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41. The Article concludes that a mandate should be considered unfunded when the higher level of government couples the mandate with a new tax that the lower tier of government must levy. In such a situation, the higher level policymakers gain political credit with the group benefitting from the mandate, but force lower level policymakers to pay the political costs of levying the new tax to fund the mandate. See text accompanying notes 122-58.

42. Fla. Const. Art. VII, § 18(a). For background on this provision, see generally Kristin Conroy Rubin, Comment, *Unfunded Mandates: A Continuing Source of Intergovernmental Discord*, 17 Fla. St. U. L. Rev. 591 (1990).

43. The Louisiana Constitution of 1974 excuses localities from complying with mandates unless, inter alia, the state provides "a local source of revenue" and "the affected political subdivision is authorized by ordinance or resolution to levy and collect such revenue." La. Const., Art. VI, § 14(a). Under one interpretation, this language would permit localities to decline a proffered revenue source and thus resist the accompanying mandate. An alternative understanding of this language compels the locality to accept the taxing authority and to implement the local "ordinance or resolution." Id.

44. See Mich. Const., Art. IX, § 29.

45. Mass. Gen. Laws Ann. ch. 29, § 27C(c) (cited in note 34). For background on the Massachusetts reimbursement statute, see Emily D. Lunceford, *The Massachusetts Mandate Statute and Its Application*, in Fix and Kenyon, *Coping with Mandates* at 77 (cited in note 32).

46. See Joseph F. Zimmerman, *Relieving the Fiscal Burdens of State and Federal Mandates and Restraints*, 19 Current Mun. Problems 216, 216 (1992).

ally have been adjudged failures.[47] There is widespread agreement that disclosure of the projected effects of unfunded mandates has, to date, done little to inhibit their adoption.[48] The General Accounting Office (GAO), for example, concluded that the State and Local Government Cost Estimate Act of 1981,[49] which requires the Congressional Budget Office (CBO) to project the costs of proposed mandates on states and localities, rarely has deterred Congress from imposing such mandates.[50]

The failure of disclosure to constrain the proliferation of unfunded mandates has led to the development of alternative remedies, in particular, reimbursement requirements and supermajority rules. The pioneer of mandate reimbursement schemes is Article XIIIB of the California Constitution, which codifies earlier statutes on the subject and generally requires the legislature to fund any new obligation that it imposes on localities.[51] A statutorily established Commission on State Mandates adjudicates localities' claims for compensation, subject to judicial review.[52] The constitutions of other states, such as Michigan and Tennessee,[53] similarly prohibit the legislature from imposing new mandates unless financing is provided. Other states' reimbursement regimes are created by statute. In this vein, members of Congress have proposed statutory protection for states and cities from federal mandates. For

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47. The public choice model of unfunded mandates suggests that fiscal notes fail to deter the adoption of such mandates since the legislators who impose them already understand what they are doing. See discussion in Part V.B.

48. Advisory Commission on Intergovernmental Relations, *Mandates: Cases in State-Local Relations*, M-173 at 14 (Sept. 1990) (stating that "[m]ost states that have a fiscal note statute report that the practice rarely accomplishes the intent of the statute"); General Accounting Office, *Legislative Mandates: State Experiences Offer Insights for Federal Action, GAO-HRD-88-75* at 13 (Sept. 1988) (explaining that "generally the [cost] estimates [of mandates] have not altered the course of legislation. . ."); Alaska Task Force, *Final Report* at 19 (cited in note 19) (reporting that "[i]n practice, reimbursement bills and fiscal notes have proven to be relatively easy to circumvent"); South Carolina Advisory Commission on Intergovernmental Relations, *State Mandated Local Government Expenditures and Revenue Limitations in South Carolina* 63, 70 (June 1988) (claiming that "most of the mandates were passed [by the South Carolina legislature] without the fiscal notes required by law. . . . USC's Bureau of Research and Service reported widespread noncompliance and inappropriate compliance with the existing [South Carolina] fiscal note bill."); Janet M. Kelly, *State Mandates* v, vii (Nat'l League of Cities, 1992).

49. 2 U.S.C. § 653 (cited in note 34).

50. General Accounting Office, *Legislative Mandates* at 9, 17 (cited in note 48). See Theresa A. Gullo, *Estimating the Impact of Federal Legislation on State and Local Governments*, in Fix and Kenyon, *Coping with Mandates* at 41, 47 (cited in note 32); Ann Calvaresi Barr, *Cost Estimation as an Anti-Mandate Strategy*, in Fix and Kenyon, *Coping with Mandates* at 49, 51.

51. Cal. Const. Art. XIIIB, § 6.

52. Cal. Gov. Code § 17525-17559 (West, 1993).

53. See Tenn. Const., Art. II, § 24 (providing that "[n]o law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide tbat the state share in the cost"); Mich. Const., Art. IX, § 29 (stating that "[a] new activity or service . . . shall not be required by the legislature . . . unless a state appropriation is made . . .").

example, HR 2338, proposed by Representative Snowe, by act of Congress would release state and local governments from compliance with newly enacted federal laws "unless all expenses . . . are fully funded by the United States."[54]

Observers, including the GAO, suggest that the efficacy of state reimbursement regimes has been mixed at best.[55] Constitutionally based reimbursement schemes have been somewhat more successful in restricting the adoption of unfunded mandates. Nevertheless, in the face of such schemes, legislators frequently impose unfinanced mandates anyway, provide reimbursement on a delayed basis, or deliberately underfund payments to localities, thereby forcing municipal officials to sue to uphold their constitutional protection against unfinanced mandates. Statutory reimbursement rules have been even less successful in curbing new mandates, because legislatures often vote to suspend such rules. The Illinois legislature, for example, has voted repeatedly to suspend its reimbursement obligation under the Illinois State Mandates Act.[56] Florida's experience with statutory reimbursement was similar.[57]

As an alternative approach, some states have enacted supermajority requirements for unfunded mandates. The Florida and Louisiana state constitutions, for example, generally require a two-thirds majority in both houses of the legislature to impose an unfunded mandate.[58] Less stringently, Connecticut's mandate statute required the

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54. HR 2338, 102d Cong., 1st Sess. at 1 (May 14, 1991). See S 2170, 102d Cong., 2d Sess. at 6 (Jan. 30, 1992) (proposing that Congress declare that localities should he given extended deadlines or federal funds for compliance with federal mandates).

55. General Accounting Office, *Legislative Mandates* at 40 (cited in note 48). See also Alaska Task Force, *Final Report* at 19 (cited in note 19) (stating that "[i]n practice, reimbursement hills and fiscal notes have proven to be relatively easy to circumvent"); Richard H. Horte, *State Experiences with Mandate Reimbursement*, in Fix and Kenyon, *Coping with Mandates* at 57 (cited in note 32); Kelly, *State Mandates* at 77 (cited in note 48) (explaining that "[s]tate legislatures are extremely resourceful in circumventing mandate barriers").

56. General Accounting Office, *Legislative Mandates* at 39 (cited in note 48). See also Finance Department, City of Champaign, *Mandates and Other Legislation Affecting Fiscal Matters* 1 (June 16, 1992) (explaining that "[u]nfortunately every time a law imposing a mandate is adopted, the state also amends the Mandates Act to exempt the payment. In fact, the state has never made a payment to any local government under the Mandates Act."); Daniel Keefe, *The Legislative Evolution of the State Mandates Act* 33 (May 14, 1992) (noting "the huge number of bills which have received exemptions from the Act").

57. See Susan A. MacManus, *Enough Is Enough: Floridians' Support for Proposition 3 Limiting State Mandates on Local Government* 2 (unpublished manuscript prepared for the 1991 Annual Meeting of the Florida Political Science Association, on file with the Author) (relaying that in Florida, "the number of unfunded state mandates had escalated significantly throughout the 1980s in spite of the fact that there already was a statutory prohibition against them").

58. Fla. Const., Art. VII, § 18(a); La. Const., Art. VI, § 14(B)(6).

legislature's appropriations and budget committees to approve new mandates unless a two-thirds vote suspended review by those panels.[59]

A common premise shared by all these proposals is that unfunded mandates are a problem of legislative process, curable through relatively palliative measures. As the Article shall now demonstrate, unfunded mandates reflect more fundamental causes and require more fundamental responses.

III. The Public Choice Model of Unfunded Mandates: Federalism, Agency Problems, and Interest Group Accommodation

This Article now examines unfunded mandates from a public choice[60] perspective, the perspective that best explains such mandates.[61] This Part starts with a simple voting model that does not generate mandates and elaborates the model sequentially until it does. In its final form, the public choice model explains unfunded mandates as a problem of federalism, agency, and interest group accommodation, a means by which poorly monitored, self-seeking legislators use their legal superiority over local governments and opportunistically exploit a zone of discretion to satisfy minority constituencies without alerting the majority to the deals financed through its municipal taxes. These minority constituencies accept unfunded mandates because they lack majority support for more desirable, better-financed means of meeting their demands for public services while legislators dispense unfinanced mandates to maximize their political support from these constituencies without the majority comprehending the costs inflicted on it through higher municipal taxes imposed sub silentio by the state. In a public

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59. See Gen. Stat. Conn. § 2-32b(d) (1988) as in effect prior to amendment by Public Act No. 93-434, 1993 Ct. ALS 434. For background on this provision, see generally Geary Maher, *Connecticut's Consideration and Rejection of a Mandatory State Reimbursement Program*, in Fix and Kenyon, *Coping with Mandates* at 93 (cited in note 32).

60. Many current sources can acquaint the reader with public choice theory and its basic premises: officeholders who entrepreneurially maximize their self-interests by dispensing governmental largesse, rent-seeking interest groups which seek such largesse from the public treasury in exchange for their political support, a general public disorganized and unable to protect itself against the bargains struck at its expense by officeholders and interest groups, the capture of public bodies by the constituencies most affected by such bodies' jurisdictions. See, for example, Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 Yale L. J. 1165, 1171 (1993). See also generally Richard A. Posner, *Economic Analysis of Law* 524 (Little, Brown, 4th ed. 1992); Dennis C. Mueller, *Public Choice II* (Cambridge, 1989); Daniel Farber, *Symposium on the Theory of Public Choice*, 74 Va. L. Rev. 167 (1988).

61. The Article considers an alternative approach to unfunded mandates in Part IV and discusses the superiority of the public choice explanation of mandates in text accompanying notes 122-34.

choice world, the vice of unfunded mandates is not that they diminish local autonomy[62] but that they entail hidden taxation.

While this Part formulates the public choice model in terms of poorly monitored state legislatures imposing hidden taxes on municipal taxpayers, the model's lessons are readily generalized to governors, federal officials, and administrative agencies.

To begin construction of this model, initially assume a state of twenty voters[63] grouped into four localities: a central city and three smaller suburban communities. At this preliminary stage, assume further that there is a single public service under consideration to be paid for and provided municipally, that all decisions about public activity and taxation are made by direct voting and simple majorities at the local level, that the world is imperfectly Tiebout-like (that is, voters with similar preferences tend to congregate within the same locality but cannot isolate themselves perfectly),[64] and that the preferences of voters, by local jurisdiction, are as follows:

62. Although mandates impinge on local autonomy, it can be replied that home rule is a conditional value which must often yield to more important considerations. After all, state and federal governments reflect broader concerns that transcend municipal boundaries. Mandates responding to these broader concerns, the rejoinder continues, properly diminish local control in the service of these concerns. In contrast, it is hard to imagine anyone openly arguing the normative propriety of hidden taxation.

63. Some advocates of local expenditures may reside outside the locality and thus not vote. For example, a policeman may work for the central city, live in a suburb, and seek to improve the terms and conditions of his employment through local politics. The simplest way of thinking of such pro-service nonresidents is that they have proxies in the local electorate, such as relatives of the policeman who live in the city and who, on the policeman's behalf, favor higher police salaries. As the public choice model develops, the reader will see that these proxies will obtain higher spending locally if they can. When these proxies cannot, they will attempt to obtain state funding for their demands and, if they lack a statewide majority for state financing, will accept unfunded mandates. When the political struggle moves from the locality to the state arena, the pro-service nonresident becomes a voter in his own right, instead of simply relying on his proxies. For example, the policeman can pressure his own state representative from the suburbs to provide state funding for local police salaries, or, in the alternative, for an unfunded mandate increasing such salaries.

64. Many factors prevent voters from isolating themselves perfectly according to their preferences for public services. For example, the need to minimize commuting costs causes some individuals to live near their places of employment, even though this entails residing in communities offering less than optimal service and tax packages. See Stephen David Galowitz, *Interstate Metro-Regional Responses to Exclusionary Zoning*, 27 Real Prop. Prob. & Trust J. 49, 65 (1992).

Table I

Jurisdiction	For Service	Against Service
Central City	4	6
Suburb A	3	0
Suburb B	3	1
Suburb C	1	2
Statewide Vote	11	9

In this rudimentary world, the story ends with Suburbs A and B voting for the public service while, in Central City and Suburb C, the service and correlative tax are rejected by the electorate.[65] Unfunded mandates do not occur in this simplified setting because, by assumption, public services are determined only locally and there is no higher level of government to impose unfinanced obligations on municipalities.

To begin elaborating these initial assumptions, postulate that issues can be shifted from the local domain to the state arena where direct voting and simple majorities still control. Under these changed circumstances, why would a statewide coalition form to support the public service at the higher level of government? For pro-service voters who can prevail locally, statewide provision of the service presents an opportunity to lower their taxes by spreading costs among a larger group of taxpayers.[66] In addition, voters who comprise the majority in Suburbs A and B might view the public activity as ideologically attractive or as generating positive externalities and thus favor the activity, not merely for the particularized benefits they receive, but as a matter of principle or for the spillovers spawned in other jurisdictions. The pro-service voters in Central City and Suburb C, minorities within their respective communities, turn to the statewide arena and coalition with

65. In a frictionless Tiebout world, in which households can change jurisdictions costlessly, the losers would respond to these electoral outcomes by migrating to the localities corresponding to their preferences. Thus, the lone voter in Suburb B who opposed the proposed public service and tax would move either to Central City or to Suburb C, while the voters in those communities seeking the service rejected by their fellow residents would relocate to Suburbs A and B.

66. Suppose that the voters are debating the public transportation of private school pupils. Suppose further that each voter favoring such transportation has a single child who would benefit, that the cost of such transportation is $100 per child, and that the expense of public services is divided per capita. In Suburb A, the total cost incurred will be $300 (three children at $100 each), resulting in a tax of $100 per taxpayer ($300 total cost divided equally among three voters). In Suburb B, the cost also will total $300 (three children at $100 each), resulting in a tax of $75 per taxpayer ($300 total cost divided over four voters).

If the service can be provided statewide, total costs will be $1100 (11 children at $100 each), yielding a tax of only $55 per taxpayer ($1100 total cost divided among 20 voters).

the pro-service voters of Suburbs A and B as their only means of obtaining the public activity they desire.

Suppose, for example, that the service in question is government-provided busing for pupils attending private schools.[67] Pro-busing voters in Suburbs A and B will favor statewide provision of such busing to spread the cost over a larger tax base. Such voters also might support statewide busing from an ideological affinity with private school families in other communities or because of perceived benefits from facilitating private school attendance by others' children. Pro-busing voters in Central City and Suburb C, outvoted at home, will seek busing at the higher level of government since they cannot obtain it locally.

Under these circumstances, supporters of the public service will demand a statewide vote and, at the higher level of government, prevail by a vote of eleven to nine. However, the victory of the pro-service majority would not result in an unfunded mandate imposed on the four local jurisdictions; more attractive to the victorious coalition is a state agency to finance and administer the service on a statewide basis. Under this approach, the pro-service voters of Suburbs A and B would receive the benefits of statewide cost sharing. These voters would join the pro-service statewide coalition to spread costs over a broader statewide tax base and would behave contrary to their interests if they merely voted to return matters to the smaller tax bases of their localities.[68] Moreover, under the state agency alternative, the pro-service voters of Central City and Suburb C would receive sympathetic administration from a bureau that the statewide majority can protect politically.

In contrast, pro-service voters in Central City and Suburb C will confront problems implementing an unfunded mandate in their respective communities because a majority of the locality remains opposed to the service that, under such a mandate, the majority would be forced to finance and provide municipally. An unfunded mandate is not self-executing; the local administration of an unfinanced obligation imposed by the state is likely to be reluctant and half-hearted, in contrast to the performance of a captured state agency, the *raison d'etre* of which is

67. See, for example, Gen. Stat. Conn. § 10-281 (1986) (requiring municipalities to provide busing services to residents attending certain nonpublic schools).

68. Theoretically, the pro-service voters of Central City and Suburb C would confront lower costs if an unfunded mandate from the state imposed the service upon their respective localities. In Central City, for example, total costs of $400 (four children at $100 each) would be divided 10 ways, resulting in a cost of only $40 per voter. However, the pro-service voters of Central City cannot obtain this result. A locally impotent minority, the statewide success of Central City pro-service voters depends upon their alliance with the pro-service voters from Suburbs A and B who, as the price of alliance, will seek the cheapest alternative for them—that is, statewide taxation and funding.

provision of the public service and which is protected by and thus responsive to the pro-service statewide majority.

Matters become more complex if there are significant diseconomies of scale to a state agency. Nevertheless, in this setting, the political process at this stage in the development of the model still does not generate an unfinanced obligation imposed on the localities; rather, it produces a mandate fully paid for by the state. Suppose, for example, that providing private school busing locally is comparatively inexpensive because the municipalities already transport public school students and the marginal cost of expanding service locally to privately educated pupils is much less than the expense of creating an entirely new state-owned fleet for such busing. Under such circumstances, the voters of Suburbs A and B prefer a mandate fully underwritten by the state because such a mandate would reduce their taxes by spreading costs statewide. In contrast, an unfunded mandate deprives these voters of the fruits of their victory, returning them to their communities empty-handed and to the greater expense of locally financed services. Moreover, the pro-service residents of Central City and Suburb C prefer a fully financed mandate to one unfunded since complete state funding helps overcome local recalcitrance in the provision of the service. Hence, again, an unfunded mandate is the least attractive, and therefore the least likely, outcome for the victorious majority.

If the model is modified to make pro-service voters a statewide minority, the political process still does not generate an unfunded mandate. Suppose now that the preferences of the electorate are as follows:

Table II

Jurisdiction	For Service	Against Service
Central City	3	7
Suburb A	2	1
Suburb B	3	1
Suburb C	1	2
Statewide Vote	9	11

In this setting, Suburbs A and B provide the service locally because majorities in those jurisdictions continue to favor it. However, proposals to undertake the public activity as a statewide enterprise fail by votes of nine to eleven. Hence, there will be no choice at the state level from among a state agency, a fully funded mandate, or an unfunded mandate because, at the higher tier of government, the service is rejected in any form.

Generalizing from these examples, they suggest that direct voting in a federal system does not generate unfunded mandates. Pro-service statewide majorities will prefer state-administered programs or fully funded mandates to spread costs and to obtain friendly administration while, in a federal system with direct voting, statewide minorities cannot obtain unfunded mandates (or any other pro-service outcome) for the public activity they seek.

The next addition to the public choice model is legislative representation. Initially, assume that such representation is without agency problems[69] as legislators reflect perfectly the preferences of their respective constituents. Under this assumption, Tables I and II no longer report the choices of the electorate in direct balloting but rather reflect the votes of state legislators from the four localities, legislators who embody without error the predilections of the individuals who selected them. Once again, unfunded mandates are rejected at the state level. When pro-service legislators constitute a parliamentary majority, they obtain for their constitutents more desirable results, state administration and fully financed mandates, which entail attendant cost spreading and greater possibilities for sympathetic administration. When pro-service representatives constitute a legislative minority, they cannot secure any statewide support for the public services their constituents desire.

Now suppose that, in comparison with the opponents of public activity, the supporters of a public service, expecting to receive concentrated benefits from such service, are more organized, better informed, and more sophisticated in their understanding of the political process than many anti-service taxpayers. Further postulate that there is slack in the agency relationship between legislators and the electorate. When it is difficult for voters to monitor their representatives, those representatives can opportunistically pursue their own interests rather than the preferences of their constituents. Assume additionally that the unsophisticated anti-service voter does not comprehend the import of the unfunded mandate as state legislators thereby impose services without any perceptible state tax increases to signal the corresponding costs.

While the more knowledgeable pro-service groups understand the largesse provided to them via state-imposed mandates, the absence of a discernible state tax increase allows legislators to send a false, anti-service signal to their unsophisticated anti-service constituents since such constituents do not appreciate the link between their municipal tax bills and their legislators' adoption of unfunded mandates. In Professor

69. For an introduction to issues of agency in the context of political representation, see Zelinsky, 102 Yale L. J. at 1171-75 (cited in note 60).

R. Douglas Arnold's terminology, mandates are not "traceable"[70] by unsophisticated anti-service voters to the legislators who adopt them because those voters conceive of municipal taxes as single-stage policies (local decisionmakers levy local taxes) when, in fact, municipal taxes are multi-stage policies (legislators impose mandates; mandates increase local costs; local decisonmakers levy local taxes to cover increased costs).[71] Unfunded mandates thus present legislators with the political temptation to levy hidden municipal taxes. Those taxes are hidden in the sense that the legislators who are ultimately responsible for the service burden triggering such taxes are, for a critical part of the electorate, removed from view and, thus, responsibility.

Given the statewide pro-service majority in Table I, the parliamentary vote again will result in either state financing and administration of activities favored by the majority coalition or fully funded mandates. In the alternative case (Table II), the entire anti-service majority easily understands these two choices, which entail perceptible state tax increases. Correspondingly, the anti-service majority's ability to monitor legislative performance is strong. Thus, the legislature, without any slack in its relationship with its majority constituency, implements the desires of that constituency and rejects the easily comprehended proposals to tax and administer at the state level.

However, the public choice model now generates unfunded mandates: When pro-service constituencies confront minority status statewide, they accept such mandates as the most they can obtain at the higher level of government. Poorly monitored legislators opportunistically supply such mandates to enhance their political positions with pro-service groups without signalling to their unsophisticated anti-service constituents the deal being made at their expense.

To construct this scenario, assume anti-service voters are subdivided into those informed and sophisticated enough to understand unfunded mandates and those for whom such mandates disguise the

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70. See R. Douglas Arnold, *The Logic of Congressional Action* 18-19, 47 (Yale U., 1990). Professor Arnold characterizes legislative action as "traceable" to a particular legislator if three elements are satisfied: (1) the action has "a perceptible effect," (2) the action is "identifiable," and (3) the legislator's "contribution" to the action is "visible" to the citizenry. Id. at 47. In the public choice model, unfunded mandates lack the third element because they are not visible to the unsophisticated anti-service electorate, which conceives of its municipal taxes as simply levied by local officials and not as the culmination of events starting in the legislature. See also Cass R. Sunstein, *Public Choice, Endogenous Preferences*, 12 Int'l Rev. L. & Econ. 289, 290 (1992).

71. See, for example, MacManus, *Enough Is Enough* at 15 (cited in note 57) (recounting that in a survey of Florida voters, "only 6 percent see states mandates as the major cause of rising government expenditures. Most to blame are local officials for their irresponsible spending decisions, said over 50 percent of those surveyed. . . . This is not meant to infer that local officials incorrectly laid blame on state mandates, only to suggest that the citizenry-at-large did not see the connection as clearly.").

substance of a pro-service decision by the legislature. Because their state taxes do not increase perceptibly under the mandate device, members of this latter group incorrectly conclude that their state legislators faithfully oppose the expansion of public activity. Table III, a modified version of Table II, describes a legislature reflecting pro-service sentiment (nine representatives), sophisticated anti-service voters (seven representatives), and ill-informed anti-service taxpayers (four representatives). The behavior of this last legislative bloc is crucial to the adoption of unfunded mandates in a public choice world.

Table III

Jurisdiction	For Service	Against Service	
		Informed	Uninformed
Central City	3	4	3
Suburb A	2	1	
Suburb B	3		1
Suburb C	1	2	
Statewide Vote (Total)	9	7	4
		11	

In this context, proposals to provide the service in an easily observed and understood manner, through either state administration or through a fully funded mandate, are rejected by a vote of eleven to nine. As to these proposals, legislators who represent the entire anti-service majority are readily monitored and possess no discretion, and, therefore, effectuate the majority's opposition to public activity rather than impose an observable state tax increase.

When, however, the legislature considers an unfunded mandate, the ill-informed portion of the anti-service electorate effectively drops out of the political process. This constituency does not perceive the import of an unfunded mandate because no state tax increase signals the pro-service nature of the legislature's decision. Consequently, the four representatives of the unsophisticated anti-service electorate, freed from the discipline of advancing their constituents' preferences, can accommodate the pro-service minority through an unfunded mandate without the representatives' constituents comprehending that they are financing the deal through their municipal taxes.

Some legislators who represent unsophisticated anti-service sentiment might resist the temptation to embrace unfunded mandates and the hidden taxation such mandates entail. Although liberated from effective monitoring by their constituents, some legislators nevertheless

might share their constituents' anti-spending ideology and thus oppose unfunded mandates as a matter of personal belief. Alternatively, some representatives, as a result of prior experience in local government or a strongly held belief in home rule, might identify with the municipalities and, accordingly, oppose unfunded mandates. More self-interestedly, a legislator representing unknowledgeable anti-service voters might contemplate a return to local government. For example, a legislator planning to run for mayor might oppose an unfunded mandate for which he expects in the near future to levy the necessary municipal taxes.[72]

Nevertheless, under public choice assumptions, most, if not all, of the four representatives from unknowledgeable anti-service districts join with the nine representatives from pro-service constituencies to form a majority in favor of an unfunded mandate. The unfunded mandate permits these four legislators to satisfy their anti-service constitutents by minimizing state taxes. Unsophisticated anti-service voters erroneously interpret lower state taxes as implementing their opposition to public activities, since these voters do not comprehend that their legislators are increasing the municipal tax burden sub silentio by imposing unfinanced obligations on the localities.

Simultaneously, the legislators enacting an unfunded mandate thereby acquire the support of the pro-service constituencies succorred by the mandate. That support typically translates into campaign contributions and electoral backing in future contests for reelection or higher office. Even a representative running for mayor might rationally decide to acquire the support of pro-service groups to bolster his ambitions through an unfunded mandate, leaving until after his election the question of paying the bill.

The pro-service constituencies in Central City and Suburb C, which are local minorities, would accept an unfunded mandate as their only means of obtaining the government activity they seek since they can neither obtain such activity locally nor secure financing on a statewide basis.

Participation in the statewide mandate coalition of the pro-service constituencies that dominate their respective communities presents a more complex problem. Because these locally dominant voters are majorities at home, they can obtain services municipally, and, they, unlike their counterparts in Central City and Suburb C, do not need a statewide mandate to secure the public activity they desire. Moreover, participation in the mandate coalition entails costs and risks for these locally dominant voters and their representatives. For legislators from

72. In New Jersey, legislators frequently serve simultaneously in municipal office. See note 79.

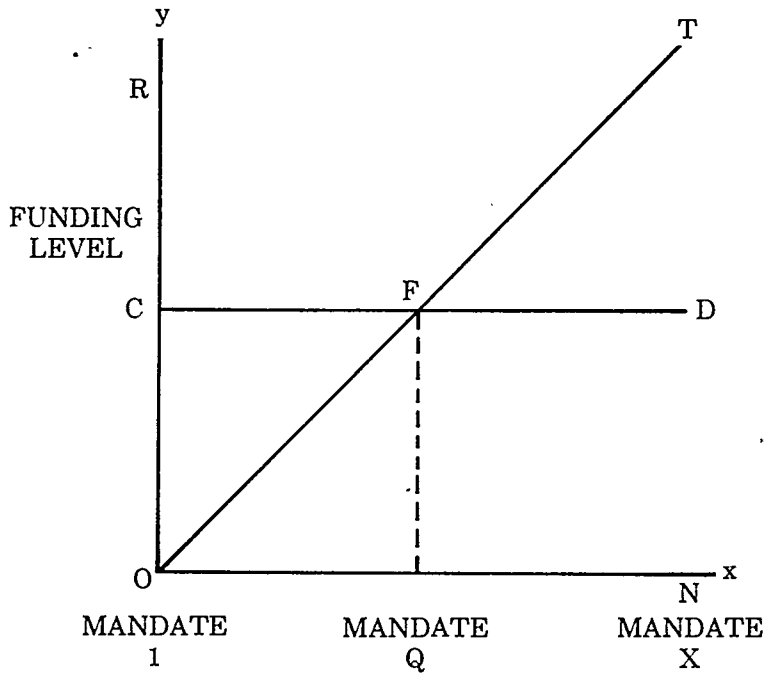
Suburbs A and B, participation in the formulation of the mandate statute diverts time and energy from other tasks to obtain for their constituents a service they already receive locally.[73] For the residents of Suburbs A and B, mandate legislation poses risks to their local autonomy because the mandate, once adopted, might evolve in a fashion contrary to their preferences.

Offsetting these legislative transactions' costs and risks to local autonomy, the pro-service voters of Suburbs A and B may support the statewide mandate coalition from ideological affinity with like-minded voters in other localities or from a perception of spillover benefits generated by public activities in the other two municipalities. Most tangibly, however, voters from Suburbs A and B, through their elected representatives, seek cost-sharing at the state level for their participation in a statewide coalition.

Hence, in this example, some state financing must be used to entice legislators from Suburbs A and B into the statewide mandate coalition. However, such financing must be kept sufficiently low to avoid state tax increases that would alert unsophisticated anti-service voters and make their representatives' pro-service decision traceable. Consequently, the outcome in Table III is a partially funded mandate. If the voters of Suburbs A and B are quite ideological or have a strong sense of positive externalities, relatively little cost-sharing at the state level is necessary to bring their representatives within the statewide coalition. If, on the other hand, these voters are more cost driven or if the legislative transactions' costs or risks to local autonomy from a particular mandate are high, the legislators from Suburbs A and B will participate in the pro-service coalition only if the state assumes a higher percentage of the service's costs, subject to the constraint that, if the state absorbs too much, the resulting state tax increase will signal the otherwise passive anti-service electorate and stimulate it to oppose the mandate. Chart I develops this analysis.

73. On the costs of decisionmaking, see James B. Buchanan and Gordon Tullock, *The Calculus of Consent* 68 (U. Mich., 1962).

CHART I



The y axis of Chart I measures the amount of state money funding any particular mandate. At point O on the y axis, localities receive no reimbursement for the duties the state imposes on them; point R, at the other end, reflects full state financing. The x axis ranks proposed mandates, with those on the left requiring less state money to secure legislative support from locally dominant pro-service groups. Moving right on the x axis, mandates require progressively more state financing to secure backing from voters capable of obtaining services municipally. The horizontal line CD marks the level of state funding which alerts unsophisticated anti-service constituencies via state tax increases; below CD, legislators can appropriate state monies without alerting these anti-service voters. CD thus demarcates the upper boundary of the zone of discretion within which representatives of the unsophisticated anti-service electorate can accommodate pro-service groups without alerting that electorate.

Finally, the diagonal OT reflects for each mandate on the x axis the level of state financing necessary to secure the support of constituencies capable of acquiring the service locally. Mandate 1, at point O, needs no state financing to attract the representatives from Suburbs A and B into the statewide coalition; in contrast, Mandate X, at point N, must

be fully funded to attract to the statewide coalition representatives of locally dominant pro-service voters.

In Chart I, the legislature imposes and partially funds Mandates 1 through Q since, for these mandates, statewide majorities can be formed without the state committing the level of resources that would catalyze the opposition of unsophisticated anti-service voters. The legislature eschews Mandates Q through X since too much state funding is necessary to attract to the coalition representatives of pro-service voters who can obtain the service municipally and a legislative majority cannot be obtained without these representatives.

Hence, the public choice model suggests that, when a pro-service coalition need not offer significant cost sharing to muster support from locally dominant constituencies, the state provides little or no funding for the mandate the coalition seeks. On the other hand, when the statewide coalition must use cost-sharing to attract locally dominant pro-service voters and their representatives to create a legislative majority, the mandate is more heavily funded by the state, but never heavily enough to awaken the opposition of the quiescent portion of the anti-service electorate.

CD might be lowered by an external event (such as a controversial property tax revaluation or an effective publicity campaign by the state's mayors) that sensitizes the anti-service electorate, focusing its attention on the link between unfunded mandates and municipal tax bills. In that case, the legislature will reject some mandates it would have adopted previously. CD will subsequently drift back upward as the crisis (or publicity campaign) ebbs from memory and the attention of the anti-service electorate becomes less focused and intense. The legislature then reverts to business as usual, adopting again the mandates it eschewed during the period of reduced discretion.

To refine the public choice model, the model must account for logrolling.[74] A relatively powerful[75] interest obtains for itself an unfunded mandate without the assistance of allies in the legislative process. At the other end of the spectrum, some groups are too small to logroll themselves into an effective coalition and thus cannot, even in concert, secure mandates for themselves; alliances composed of many weak interests are difficult to assemble and police because each member of the coalition is prone to freeload on the efforts of its putative allies. However, in the middle of the spectrum, groups at intermediate levels of

74. See generally Thomas Stratmann, *The Effects of Logrolling on Congressional Voting*, 82 Am. Econ. Rev. 1162 (1992).

75. "Relatively" powerful because, in contrast to the groups securing state-financed and administered services or fully funded mandates, the best this group can obtain is an unfunded mandate.

influence need to and can organize themselves into successful coalitions to secure unfunded mandates.

To explore the logrolling aspects of the mandate phenomenon, assume initially that three groups[76] seeking different public services fashion themselves into a single voting block, that none of the three groups by itself commands a statewide majority, that legislative representation does not entail any agency problems, and that the world remains imperfectly Tiebout-like.[77] Table IV reflects, under these assumptions, the preferences among voters as manifested both in local decisionmaking and in the positions of the legislators representing them in the state government.

Table IV

Jurisdiction	For Service X	Y	Z	Against Service
Central City	2		1	7
Suburb A		2		1
Suburb B		3		1
Suburb C	1			2
Statewide Vote (for each service)	3	5	1	
Statewide Vote (Total)		9		11

In this world, Suburbs A and B provide service Y municipally since, in those two communities, a majority of the local electorate favors that particular activity; Central City and Suburb C provide none of the three public services because, in those localities, a majority cannot be mustered for any particular activity or for the three activities as a package.

Moreover, in this political climate, legislators representing pro-service voters cannot logroll themselves into a statewide majority since their potential coalition has fewer legislative votes (nine) than the opposing statewide bloc against public activity (eleven). On these facts, the political process does not generate an unfunded mandate or any other pro-service statewide outcome.

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76. This is not to say that these three groups are the only pro-service interests confronting the legislature. As the text indicates, some groups need not logroll to gain support; other groups are too small and numerous to form an effective coalition.

77. See note 64 and accompanying text.

Suppose, however, that the preferences of voters (and thus of their legislators) are reflected in Table V.

Table V

Jurisdiction	For Service X	Y	Z	Against Service
Central City	3		1	6
Suburb A		3		0
Suburb B		2	1	1
Suburb C	1			2
Statewide Vote (for each service)	4	5	2	
Statewide Vote (Total)		11		9

In this context, Suburb A provides service Y locally; Suburb B furnishes services Y and Z since the pro-service voters in that community constitute a majority bloc. None of the three public activities is offered municipally in Central City or Suburb C since, in those two jurisidictions, no pro-service majority can be formed locally.

Turning to a possible statewide coalition, pro-service constituencies in Table V can combine themselves into a majority at this higher level of government. As demonstrated above,[78] an unfunded mandate, which returns tax assessment and service provision to the municipalities, is the least attractive victory for such a coalition since such an outcome denies cost spreading to the voters of Suburbs A and B while subjecting the pro-service voters of Central City and Suburb C to hostile local administration. To disperse costs statewide and to overcome local opposition, the controlling coalition in Table V prefers either direct state administration of the three public activities or fully funded mandates.

Finally, assume some slack in the agency relationship between unsophisticated anti-service voters and the state legislators who represent them, as reflected in Table VI.

78. See text accompanying notes 72-73.

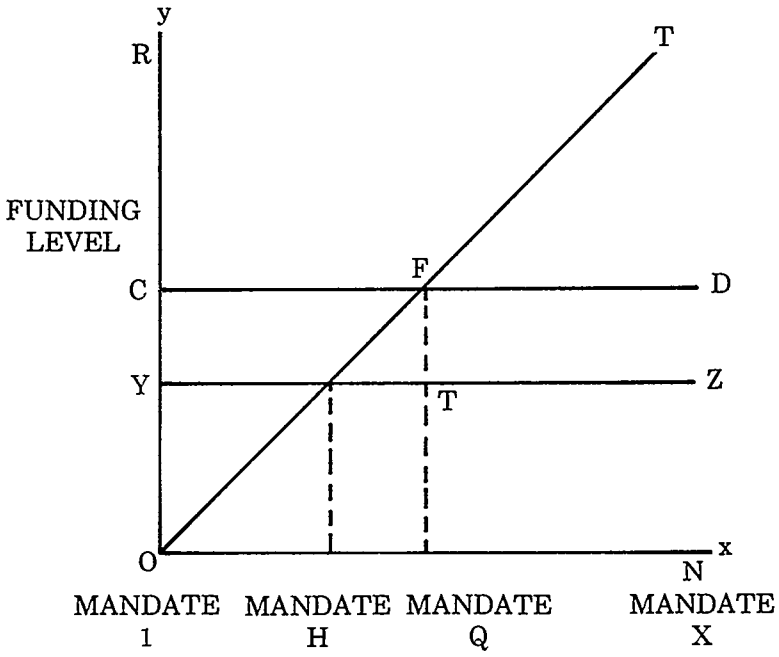
Table VI

Jurisdiction	For Service			Against Service	
	X	Y	Z	Informed	Uninformed
Central City	2		1	4	3
Suburb A		2		1	
Suburb B		3			1
Suburb C	1			2	
Statewide Vote	3	5	1	7	4
Statewide Vote (Total)		9		11	

In this case, the pro-service coalition cannot obtain from the state legislature either state provision of the public activities the coalition seeks or fully funded mandates since these alternatives would require state taxes, alerting the anti-service electorate. However, as a second (or, more accurately, third) best choice, the coalition can secure for itself a package of unfunded mandates by inducing the four representatives elected by unsophisticated anti-service constituencies, poorly monitored by the voters at home, to join the nine pro-service legislators in promulgating such a package.

To finalize the public choice model, it must account for the factors that contract legislators' discretion to adopt mandates. The most important limiting factor is the political influence of municipal officials in the legislative process. These officials are the state's most significant anti-mandate constituency since they must levy local taxes to pay for mandated services and suffer the consequent political costs. Municipal officials, unlike the state legislators who impose unfunded mandates, cannot hide the tax consequences of such mandates from their constituents and, indeed, will absorb the electoral repercussions of the taxes needed to pay for mandated costs. The strength of local officials' anti-mandate pressure depends on many variables, including the personal lobbying skills of these officials, the quality of their relationships with individual legislators, the vitality of the state's home rule ideology, the presence of potential allies with whom municipal officeholders can log-roll, and historical and institutional factors that can affect legislative outcomes. Chart II, the ultimate elaboration of the public choice model, modifies Chart I to account for local officials' efforts to reduce the legislature's zone of discretion.

CHART II



In Chart II, YZ constitutes a lower boundary to that zone enforced by municipal policymakers. Mandates 1 through H are funded at level Y due to the intervention of local officials in the legislative process; Mandates H through Q are financed at levels ranging from Y to C.

When municipal decisionmakers are highly influential in the legislature, YZ approaches CD, constricting the legislature's zone of discretion. In the ultimate case, political pressure from local officeholders causes YZ to overlap CD, eliminating altogether the legislature's discretionary zone and, with it, unfunded mandates. In that setting, the influence of municipal officials blocks Mandates 1 through Q; the presence of the anti-service electorate stops Mandates Q through X.

Alternatively, the model can postulate more limited influence for local officials, which lowers YZ downward and, with it, mandate funding levels. At the extreme, YZ overlaps ON and Chart II collapses into Chart I—that is, municipal officials are incapable of reducing at all legislators' zone of discretion.

The growth and persistence of the new mandates in the face of near-universal criticism suggests that, notwithstanding the efforts of municipal officials to reduce the discretionary zone in which unfunded mandates are adopted, local officials frequently lack the political re-

sources to reduce that zone appreciably. The repeated enactment of unfunded mandates reflects the repeated defeat in the legislature of the mayors' lobby by pro-service constituencies. In the terminology of Chart II, local officeholders can, with skill and effort, reduce, partially and temporarily, the zone CFYT. However, over time, that zone tends to be large and persistent.

How can one explain the apparent inability of local officials, in a public choice world, to offset the legislative influence of pro-service constituencies? In part, this inability reflects long-term trends in American politics that have deprived local officials of tangible and intangible resources with which to counteract the influence of pro-service groups. The decline of party loyalty and party organizations, for example, has loosened political ties with which municipal policymakers previously would have swayed legislators against the adoption of unfunded mandates. The demise of patronage similarly has deprived mayors of resources with which, in an earlier age, they would have sanctioned members of the legislature. Conflicting personal ambitions might also make legislators unresponsive to the anti-mandate pleas of municipal officials; a legislator might view his community's mayor as a potential rival down the road for higher office, such as a congressional seat.[79]

In many cases, political isolation also accounts for municipal officials' inability to repulse mandate proposals in the legislature. When pending legislation would impose costs on a broad class of institutions, the leaders of those institutions become potential allies for the mayors. When, for example, the legislature considers workers' compensation rules that burden public and private employers alike, the localities can join with the business community in opposition. On the other hand, an unfunded mandate targeted only at municipalities leaves the mayors bereft of such allies and consequently more vulnerable to the political influence of the constituency seeking the proposed mandate.

Local decisionmakers, moreover, are disadvantaged in conducting political trench warfare against pro-service constituencies by the heavy

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79. Similarly, U.S. Senators might view warily the anti-mandate complaints of governors who potentially could unseat them; likewise, a member of the U.S. House of Representatives might view himself as a long-term political rival of a governor whom he seeks to challenge or whom he expects to confront for a vacant U.S. Senate seat.

It is interesting to speculate how the mandate phenomenon would have developed in the absence of the Seventeenth Amendment to the Constitution. Presumably, federal senators elected by state legislators would have been highly responsive to legislators' anti-mandate complaints and, in the absence of popular elections, would not have needed to accommodate pro-service constituencies at the expense of such legislators.

New Jersey bas an unusual practice of electing municipal officials to the legislature while they continue to serve in local office. Presumably, a legislator thinks twice about imposing an unfunded mandate when, as the mayor, he simultaneously must levy the local taxes to pay for the mandate.

dependence of local budgets on state aid provided by the same legislators who impose mandates. Pro-service groups can, with relative impunity, inflict on state legislators the most basic forms of political punishment for opposing their demands; a legislator who consistently resists the programs of pro-service groups may find himself fighting for reelection against an opponent underwritten by those groups. At a minimum, the threat of such opposition will encourage legislators to cooperate, particularly when such cooperation takes the politically cheap form of unfunded mandates.

In contrast, municipal officers are dependent upon state legislators for budgetary support and thus constrained from retaliating when such legislators impose unfunded mandates; the legislator whom local officials would punish politically for the adoption of an unfinanced mandate is the same legislator who determines the level of state assistance received by the locality. Given the heavy reliance of most municipalities on such assistance, a mayor cannot credibly threaten retaliation against his city's legislative delegation for supporting unfunded mandates since the mayor depends on that same delegation to maintain state support for his city.

Hence, local officials' opposition to unfunded mandates tends to be diffuse, directed generally against the legislature as an institution rather than targeted against particular legislators in an electorally potent fashion. Consequently, when legislators decide to use their discretion to accommodate pro-service constituencies, municipal opposition is often little more than background noise, safely disregarded because of local dependence on state aid from the legislature.[80]

The inhibiting effect of this budgetary dependence is reinforced by local officials' collective action problems in opposing mandate-supporting legislators. Suppose that, notwithstanding their reliance on state assistance, some mayors contemplate heavy political pressure on pro-

80. Of course, legislators do not have infinite room for budgetary retaliation against local officials, because much state aid to municipalities responds to constituencies the legislators cannot ignore. For example, state assistance for local schools greatly concerns teachers' and parents' groups; these groups protect such assistance and preclude legislators from inordinately reducing it.

Nevertheless, just as a zone of legislative discretion over unfunded mandates exists, there is a similar area within which legislators can retaliate against local officials who become too aggressive in their political tactics vis-a-vis the legislature. For example, state assistance formulas often are quite complicated, making it difficult for interested groups to monitor the nature of the legislature's decisions. Some constituencies are more sophisticated than others in their understanding of the legislative process; when the legislature reduces municipal aid aimed at these less sophisticated constituencies, they may not comprehend fully the legislature's maneuver and blame local officials for service reductions.

In short, although legislators do not have total discretion over levels of assistance to localities, they have enough control to discipline local officials by threatening budgetary retaliation if those officials too stridently oppose unfunded mandates.

mandate legislators by, for example, recruiting alternative candidates for the legislature and campaigning actively for them. Other mayors, when deciding whether to join this risky strategy, will reasonably decide against participation because they fear budgetary retaliation if pro-mandate incumbents are reelected over mayoral opposition and expect the legislature to relax its burdens on localities if enough anti-mandate legislators are elected from other communities. Hence, the rational strategy for any particular mayor ex ante is to freeload on the other mayors' efforts; as each mayor makes this decision, none engages in effective anti-mandate activity in his own community.

One would thus expect that, *ceteris parabus*, in states with one or two relatively large municipalities (for example, New York, Nebraska), mayoral anti-mandate pressure is brought to bear on the legislature more effectively than in states with numerous, equally sized localities (such as Connecticut) and consequent collective action problems within their mayors' lobbies.

Finally, local officials face a great rhetorical disadvantage in opposing mandates.[81] To anti-service voters, who conceive of municipal taxation as a one-stage process and thus solely the responsibility of local officials,[82] anti-mandate rhetoric is an exercise in blame-shifting, an attempt by municipal decisionmakers to shift responsibility for their actions onto others. To pro-service voters, anti-mandate rhetoric is anti-service rhetoric. Mayors who oppose state-imposed special education[83] obligations may protest that they are not against special education but only object to the state's failure to finance it. Nevertheless, supporters of special education mandates can easily characterize the mayors as opposed substantively to their cause. The public choice model suggests there is force to this characterization; for groups receiving unfunded mandates, the alternative typically is no services at all since these groups lack the political clout to obtain local provision of or full state funding for the services they seek.

The public choice model further suggests that the validity of the Tiebout assumption is an important determinant of the level of state funding for mandates. If many voters cluster within separate, homogeneous municipalities according to their shared preferences for public

81. See, for example, Koch, 61 Pub. Interest at 44 (cited in note 24) (asking, "[W]ho can vote against clean air and water, or better access and education for the handicapped?").

82. To reiterate an earlier point, the lessons of the public choice model readily apply to federally enacted mandates. Just as the unsophisticated anti-service voter views local taxation as a one-stage process and thus the unequivocal responsibility of municipal decisionmakers, he views his state taxes as the sole province of the legislature and the governor, and thus dismisses their anti-mandate rhetoric as an effort to shift responsibility for their decisions onto federal officials.

83. Here, again, this Article speaks illustratively with special education merely an example of one of the many good causes creating rhetorical problems for mandate opponents.

services, they obtain such services locally. Accordingly, more cost sharing is required to induce these locally dominant voters and their representatives into a statewide pro-service coalition. On the other hand, if taxpayers are not clustered by service preferences but are more randomly distributed among municipalities, fewer pro-service taxpayers acquire public activities locally. Hence, more pro-service taxpayers, via their representatives, join the state-level pro-mandate coalition simply to secure desired services rather than to demand cost-sharing by the state.

This observation in turn implies that the suburbanization of the American metropolis underlies the contemporary mandate problem.[84] Many commentators attribute the growth of unfunded mandates to resource constraints and a consequent tendency to shift public expenditures onto lower tiers of government.[85] Indeed, under the public choice model, reduced state revenues encourage legislators to dispense unfunded mandates to accommodate interest groups without alerting anti-service taxpayers via state tax increases.

However, the public choice model suggests that the progressive maturation of suburban communities is a deeper, underlying cause of the mandate phenomenon. Consider the early years of suburbanization, during which an initial wave of city dwellers departs to previously rural localities, transforming these localities into bedroom communities. In this opening stage of metropolitan decentralization, the Tiebout pattern—relatively small, homogeneous populations segregated by public service and tax preferences—accurately depicts the new commuter communities ringing the city. These recently settled suburbs are an unlikely source of mandate pressure in the state legislature since voters in each such community obtain locally the services they desire. Because proposed state mandates attract suburban support only with significant cost-sharing, such mandates are unattractive to the legislature. Moreover, the departure of voters from the city reduces the number of political losers in the city, which diminishes the urban constituencies that seek desired services via state-imposed mandates.

However, as the suburbs grow and mature, their populations become more heterogeneous. Consequently, suburban political processes include more losers who cannot obtain municipally the public services they desire and who thus resort to unfunded mandates as acceptable (if suboptimal) outcomes.

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84. Suburbanization is not the only such cause. As the Article discusses below, the evolution of legislatures from part-time, amateur bodies with strong party organizations into full-time, professional bodies with weak party structures also underpins the growth of the new mandates.

85. See, for example, Rivlin, *Reviving the American Dream* at 107-09 (cited in note 32).

The public choice model also implies that unfunded mandates reflect the relative political weakness of the groups obtaining them. This conclusion will seem paradoxical to local policymakers, who perceive these groups as overpowering opponents in the legislature. Indeed, constituencies that acquire unfunded mandates are, by definition, more politically successful than pro-service groups that lack sufficient electoral, organizational, and financial resources to secure from the legislature any satisfaction for their demands. However, in comparison with the clienteles that obtain direct state administration of their demands or fully-financed mandates, groups that secure unfunded mandates are the bronze medalists of the political race; they are denied the benefits of complete, statewide cost-sharing and risk in their home communities unsympathetic administration of the public services they seek.

Finally, the public choice model suggests that unfunded mandates are a particularly troubling variant of the concentrated benefit-dispersed cost paradigm central to public choice analysis.[86] Under this model, mandates are properly characterized as concentrated benefit-hidden cost legislation. As long as legislators stay within the zone of discretion, below the level of state financing that alerts unsophisticated anti-service voters,[87] those voters will not perceive the costs thrust upon them by their own (nominally anti-service) representatives. Pro-service groups invest time and resources monitoring and rewarding legislators in expectation of significant and obvious returns from their efforts. Unsophisticated anti-service taxpayers, on the other hand, do not engage in comparable issue-by-issue oversight of the legislature since, for them, the stakes involved in mandates are hidden from view.

IV. The Public Interest Model of Unfunded Mandates: Externalities, Multiple Jurisdictions, and Collective Action Problems

This Part presents an alternative model of unfunded mandates, a model premised on the assumption that legislators act to advance the public interest rather than to accommodate pro-service constituencies.[88] While the public choice perspective on mandates is substantially more convincing,[89] the public interest model provides a useful contrast and proves particularly helpful when examining the recommendations of the anti-mandate school, recommendations which, paradoxically, are gener-

86. See, for example, Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 Wash. & Lee L. Rev. 385, 402 (1992).

87. That is, level CD of state financing in Charts I and II. See p. 1379 and p. 1384.

88. As is the case with the public choice model of unfunded mandates, the public interest model readily applies to the federal Congress as well as executives and administrators.

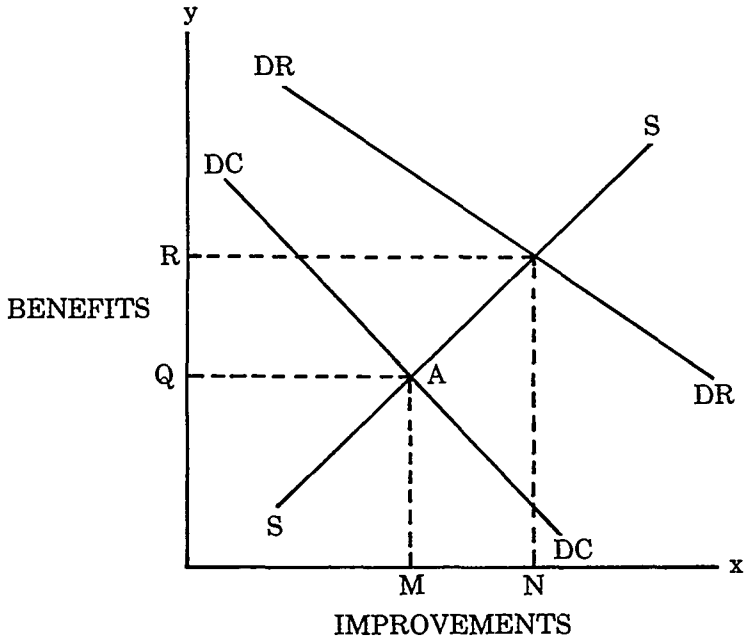
89. See text accompanying notes 122-29.

ally more consistent with the benign, public interest interpretation of the mandate phenomenon.[90] From the public interest perspective, unfunded mandates maximize welfare in a world of multiple localities, interjurisdictional spillovers, and collective action problems while preserving a measure of local autonomy. The public interest setting reverses the heroes and victims of the public choice scenario. Public-regarding state legislators impose unfunded obligations upon localities to optimize the municipal production of positive externalities or to minimize negative externalities stemming from the decisions of local governments; the anti-mandate plaints of municipal officials reflect either shortsightedness or the desire to freeload on the public services provided by surrounding jurisdictions.

To construct this alternative model, start with a public activity provided only by Central City, which the City can undertake at various levels. Assume, for example, that the City's harbor is the metropolitan region's only commercial port facility and that potential publicly financed port improvements range from the modest to the extravagant. Suppose also that more limited renovations of the harbor's infrastructure would principally benefit Central City and its residents through jobs and local tax revenues; more extensive renovations would transform the port into a regional facility with additional benefits accruing to suburban jursidictions and their residents. Chart III illustrates this situation.

90. See text accompanying note 105.

CHART III



In Chart III, the x axis measures the level of investment in the City's port with rightward movement indicating greater expenditures on harbor infrastructure. The y axis measures the benefits from port improvements with upward movement on the axis reflecting greater levels of benefits. The diagonal SS depicts the prevailing supply curve. DCDC represents the demand curve for the City's policymakers; each point reflects a quantity of port improvements and a corresponding level of benefits for City residents. DRDR represents the demand curve for the entire region. For each possible level of port expenditures, DRDR is higher than the corresponding point on DCDC since DRDR incorporates gains to suburbanites as well as to City dwellers.[91]

Left to their own devices, the leaders of Central City maximize the welfare of their constituents at point A where quantity M of port improvements generates level Q of benefits to City residents. However, for the region as a whole, M constitutes underinvestment; quantity N of harbor renovations produces for suburban residents cost-effective, in-

91. The gap between DRDR and DCDC progressively widens as it moves rightward. As the port becomes larger in scope, it becomes more of a regional facility, yielding proportionately greater benefits to suburban communities.

cremental gains captured by the distance between Q and R on the y axis.

In response to the prospect of such underinvestment, suburban localities might agree to reimburse the City for the additional improvements measured by the segment MN. However, given a multiplicity of suburban jurisdictions, the high transactions costs of negotiating an agreement and freeloading by some suburbs could impede regional accord. The creation of a metropolitan port authority encompassing the City and all its suburbs provides a more likely solution. The leaders of such an authority, charged with optimizing benefits for the entire region, will undertake level N of port improvements and will spread the costs over a metropolitan tax base. However, the City might resist the creation of a regional authority because such an authority would divest the City of all control over the port. Hence, the state, through a grant-in-aid, might instead change the costs confronting the City's policymakers, thereby inducing them to build the regional facility while permitting the port to remain in local hands. Specifically, the state could pay the City the amount represented by segment MN in return for the City's commitment to expand its port infrastructure to level N.

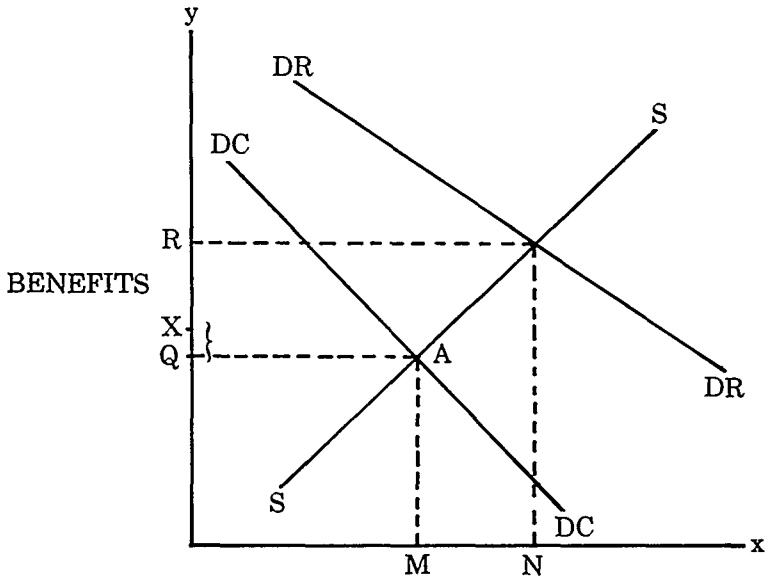
Assuming a public-regarding legislature, the model in this initial stage does not generate an unfunded mandate. While a suburban-dominated legislature could force the City to maintain the harbor at point N without reimbursing urban taxpayers for the extra cost MN, an unreciprocated, unfinanced mandate of this sort would be as opportunistic as the mandates that arise in a public choice world; such a mandate would nakedly redistribute costs from urban to suburban taxpayers in violation of the premise of a public-spirited legislature.

To elaborate the public interest model so that all localities can generate benefits for surrounding communities, suppose that Suburb A owns the region's only airport, that Suburb B possesses the metropolitan area's train station, that Suburb C contains a highway interchange of regional importance, and that each of the three suburbs confronts alternatives like those faced by the City in Chart III (a smaller facility which principally benefits the locality or a larger facility which generates cost-effective spillovers for the other jurisdictions). Suppose further that each locality would receive more spillover benefits from expanded structures in the other three municipalities than the cost incurred by the locality in enlarging its own particular facility to the metropolitan optimum.[92] Chart IV below describes the costs and benefits of

92. Note that in the development of the public interest model of unfunded mandates, it is necessary to assume that there is no subsidization between the metropolitan municipalities because the externalities each community receives from its neighbors are at least large enough to

expanding each community's facility and is identical to Chart III, except that the gains accruing to the three neighboring jurisdictions have been subdivided among those jurisdictions. The segment QX, for example, measures the gain to Central City of a larger regional airport in Suburb A.

CHART IV



IMPROVEMENTS

Like the Central City, each suburb, left to its own devices, rehabilitates its respective structure until the marginal benefit for its residents equals the marginal cost of further refurbishment, which leads to four instances of metropolitan underinvestment. However, each jurisdiction would augment its well-being by enlarging its facility in return for the other three localities' agreement to do likewise. The City, for example, would maximize the welfare of its residents by expanding port improvements from M to N if, in return, the City receives its spillover benefits, QX, from a larger airport, train station, and highway interchange.

Such a regionally coordinated outcome might be achieved again through interjurisdictional bargaining, through the creation of a metro-

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offset its own mandated costs. If that assumption is relaxed, unfunded mandates suffer from the same redistributive flaw as grants-in-aid; that is, some localities incur mandated costs exceeding the positive externalities they receive from other jurisdictions and thus must subsidize those other jurisdictions via mandated activity. This issue is discussed in text accompanying notes 127-28 and is an important reason for ultimately rejecting the public interest model.

politan authority that assumes ownership of all four of the region's transportation facilities, or through state grants-in-aid to each of the four communities to induce expansion of its particular facility to point N.

However, a public-regarding legislature might also realize the optimizing outcome through a network of reciprocal, unfunded mandates, ordering each municipality to enlarge its respective structure to level N. Such an approach avoids the collective action problems of interjurisdictional bargaining, which is costly to conduct and vulnerable to freeloading tactics. In contrast to a metropolitan authority, which eliminates all local control, mandates recognize each community's interest in retaining residual authority over the facility within its boundaries. Moreover, state grants entail an unwarranted subsidy of the metropolitan region by taxpayers outside the region, for example, residents of the state's rural counties who do not benefit from improved infrastructure in the state's urbanized zone but who, under state-financed grants, subsidize that infrastructure through their state taxes. On the assumptions of the public interest model, unfunded mandates avoid this redistribution since their costs fall only upon the metropolitan area's taxpayers, who benefit from the mandated expansion of the region's infrastructure.[93] Hence, the public-regarding legislature turns to mandates as the most appropriate means of coordinating the municipal production of interjursidictional externalities.

In this context, local officials might welcome, or even initiate, the legislature's adoption of the network of reciprocal mandates, favoring state legislation to overcome collective action problems while maximizing the welfare of the localities.

Generalizing further, assume now that all regional transportation facilities are located in the City, that most public school children are educated in the suburbs, that expanded transportation infrastructure generates positive externalities for the suburbs while the benefits of better public schooling spill over to the City, and that a coordinated expansion of activity generates for each locality more positive spillovers received than additional costs incurred.[94] In such circumstances, state legislators pursuing the public interest maximize the welfare of the metropolitan area by obliging the City to maintain transportation facilities at the higher level benefitting the suburbs while simultaneously imposing on suburban school systems more costly requirements that local

93. As noted earlier, this unrealistic assumption provides an important reason for rejecting the public interest model.

94. Again, this is an important assumption that ultimately should be rejected. See text accompanying notes 127-28.

decisionmakers would otherwise eschew because the benefits accrue to the City.

In this world, anti-mandate complaints from local policymakers reflect either shortsightedness or the desire to freeload. Viewed in isolation, it seems reasonable for Central City's mayor to chastise the legislature for forcing his municipality to maintain regional transportation facilities without providing the necessary funds. However, in the context of a network of reciprocal mandates, some of which help the City and its residents, such criticism appears myopic, overlooking the gains that inure to the City from the mandates simultaneously imposed on suburban localities. Alternatively, the mayor's criticism of state laws requiring the City to maintain regional infrastructure might reflect shrewd opportunism on his part, a game of pick-and-choose to retain the spillovers benefitting his constituents while relieving his jurisdiction of the obligation to contribute to the reciprocal network of interjurisdictional externalities. Either way, in the public interest model, legislators should disregard mayors' opposition to unfunded mandates as reflecting either shortsightedness or the desire to freeload, or both.

The public interest model further suggests that unfunded mandates can properly, if somewhat paradoxically, be characterized as devices for preserving local control, a characterization most municipal officials would resist. If, however, state policymakers seek a strong response to the existence of interjursidictional spillovers, state-imposed mandates protect local control better than the alternative, metropolitan authorities, because mandates, while constraining municipal governments, permit them residual authority, thereby accommodating some measure of local self-governance.

Consider now a final variation of the public interest model in which potential negative externalities impel local decisionmakers to ask the legislature to impose unfinanced mandates upon them as a bonding device. Suppose that the four communities in the hypothetical metropolitan region decide to increase appreciably their educational spending, boosting substantially per pupil outlays. Assume further an important degree of mobility among communities and significant Tiebout relocation between localities in response to large differences in public services.

The four municipalities might implement their agreement to increase school outlays via an unfunded mandate adopted at their behest by the legislature. Since legislators already bargain on a daily basis, it might be transactionally more efficient for the localities to negotiate the details of their agreement through the agency of their legislators rather than conducting ad hoc negotiations on their own. More importantly, embodying their compact in state legislation ensures the enforceability

of its terms and precludes future freeloading by one of the four localities if it experiences a change of heart. Suppose, for example, that, in the next municipal election, anti-service forces might obtain control of Suburb A and seek to repudiate the prior administration's commitment to increase school spending, thus triggering an outflow of school age families from Suburb A into the other three communities. To prevent this possibility, the current leadership of the four communities would ask the legislature to codify their agreement in a state statute requiring higher minimum educational outlays. With such a statute in place, Suburbs B and C and Central City can more securely increase their own school expenditures, knowing that new leadership in Suburb A must, as a matter of state law, maintain the school spending levels to which their predecessors agreed.

In this setting, mandated educational spending reflects neither the legislature's opportunistic accommodation of groups interested in higher school expenditures nor the maximization of affirmative spillovers from education. Rather, the state's mandate avoids a negative externality, that is, the anticipated emigration of families with school age children if one community were to renounce its commitment to increase school spending.

V. Responding to Mandates

A. Overview

With the public choice and public interest models in place, this Article now examines the remedies of the anti-mandate school and concludes that these remedies generally will not deter higher-level policymakers from imposing unfinanced obligations on subordinate units of government. The conventional proposals of the anti-mandate school do not address the heart of the problem: the zone of discretion in which poorly monitored, self-serving legislators accommodate pro-service constituencies without alerting the unsophisticated portion of the anti-service electorate. Ironically, the program of the anti-mandate school is more consistent with the public interest model and its benign view of unfunded mandates than with the more critical public choice analysis of such mandates. This Part concludes that only conferring upon lower tiers of government the constitutional power of prospective nullification, that is, the constitutional right to ignore a mandate in the absence of full cost reimbursement provided *ab initio*, can decisively deter such unfunded mandates. Under such a scheme, as yet untried by

any state,[95] legislatures will adopt mandates only when a centralized state agency entails diseconomies of scale and fully funded mandates utilize economies of local service provision.

This Part, as the previous two, speaks in terms of state impositions on local governments and legislative behavior. However, its conclusions readily extend to federal mandates levied on states and localities and to the actions of executives and administrators.

B. Disclosure

At first blush, fiscal notes seem likely to discourage unfunded mandates by enhancing anti-service voters' abilities to monitor legislators, thus preventing such legislators from satisfying the demands of pro-service constituencies. In Chart I,[96] cost projections for proposed mandates promise to educate the unsophisticated anti-service electorate, lowering the threshhold, CD, at which it perceives the effects of unfunded mandates, thereby reducing the zone of discretion in which opportunistic officials can placate pro-service interest groups. At its most effective, disclosure promises to lower CD to the x axis, precluding the legislature from imposing any unfinanced obligations on localities.

Implicitly, this analysis appeals to the example of disclosure in market settings and to the belief that disclosure ensures efficient market outcomes. If better information improves market outcomes, by analogy, better information should also improve legislative results by deterring unfunded mandates.

Contrary to this comforting story, fiscal notes generally are judged ineffective in practice.[97] The most common explanation for this failure is the allegedly low caliber of data furnished during the legislative process. Fiscal notes, the argument runs, are often of poor quality and thus do not generate the desired impact on public opinion or legislative deliberations. Under this line of thought, the appropriate remedy is the development of better information about proposed mandates by trained professionals independent of the legislature.[98]

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95. As yet, no state has attempted this scheme. See note 119.

96. See p. 1379.

97. See notes 47-50 and accompanying text.

98. See, for example, South Carolina Advisory Commission, *State Mandated Local Government Expenditures* at 68 (cited in note 48) (claiming that "[t]he fiscal note should be prepared by a neutral, quantitatively sophisticated group"); Samuel D. Mamet, *Mandates—Help or Hindrance?*, Colorado Municipalities 8, 12 (Jan.-Feb. 1988) (explaining that "[a]n effective fiscal notes process which adequately identifies the fiscal impact of state legislation on local governments is a cornerstone to adequately assessing the state mandate problem"); Kelly, *State Mandates* at v (cited in note 48) (warning that "those charged with the preparation of fiscal notes cannot or do not provide accurate and reliable cost estimates to the legislature").

However, three factors suggest that in a public choice world, even the most expertly prepared cost estimates will not inhibit legislatures from adopting proposed mandates. First, the transactions costs of assimilating information make it improbable that many voters will, on their own, absorb the data contained in fiscal notes. Second, the control of the electoral process by the mean, rather than the marginal, voter makes disclosure politically potent only in the unlikely event that the disclosed information is widely absorbed by the electorate. Finally, the heavy dependence of municipalities on state assistance inhibits local officeholders from disseminating to voters data about state-imposed unfunded mandates in a politically effective manner.

Assume that each of the four legislators representing unsophisticated anti-service sentiment in Table III[99] has one thousand constituents. Suppose further that high quality fiscal notes, prepared by an independent professional staff, accurately quantify the financial implications of proposed mandates.

Giving such fiscal notes to the four legislators will not affect their behavior; these legislators, by the hypotheses of the public choice model, already understand the opportunistic maneuvers in which they are engaged. The problem is not that these legislators are poorly informed but that they are poorly monitored. At most, fiscal notes are minor irritants to these political entrepreneurs, easily disregarded as the legislators maximize their political self-interests by accommodating pro-service groups without alerting their anti-service constituents.

A legislator's inclination to ignore fiscal notes will be reinforced by the knowledge that it is time consuming and costly for mandate opponents to disseminate this data to his electorate[100] or, more precisely, to the bloc of 501 voters, including the mean voter, who can prevent the legislator's reelection.[101] While municipal officials should in theory spread among voters information about unfunded mandates and the opportunistic behavior of the legislators adopting them, in practice most local officeholders will not deploy aggressively data from fiscal notes for fear of offending the legislators on whom the localities simultaneously depend for significant financial assistance.[102]

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99. See p. 1376.

100. Indeed, the transactions costs associated with the dissemination and absorption of information lie at the heart of the agency problem, allowing poorly monitored agents to pursue their interests rather than the interests of their principals. See, for example, John W. Pratt and Richard J. Zeckhauser, *Principals and Agents: An Overview*, in John W. Pratt and Richard J. Zeckhauser, *Principals and Agents: The Structure of Business* 4-8 (Harv. Bus. Sch., 1985); Zelinsky, 102 Yale L. J. at 1165 (cited in note 60).

101. See Musgrave and Musgrave, *Public Finance* at 104 (cited in note 27).

102. See text accompanying note 80.

Furthermore, the information contained in fiscal notes will not be particularly helpful to a potential challenger for the seat of a mandate-supporting legislator. Opposition to unfunded mandates will not generate support among the pro-service groups benefitting from such mandates. For unsophisticated anti-service taxpayers, who perceive municipal taxation as a single-stage process and thus the sole responsibility of local officeholders, anti-mandate rhetoric is an unconvincing attempt by the legislative challenger to blame the incumbent for municipal taxes levied, not by him, but by local officials. For these voters, the challenger should be addressing state issues, not meddling in local affairs.

The market analogy highlights the weakness of disclosure as a device for altering legislative outcomes. In market settings, information is effective without wide absorption since relatively few knowledgable purchasers and sellers at the margin determine outcomes for the market as a whole. Suppose, for example, that each of one thousand voters holds a corporation's stock, which new research indicates is undervalued at the prevailing price. Assimilation of this information by even a single shareholder can drive the market price to its efficient level.[103] Moreover, the network of brokers and financial advisors, anticipating direct and indirect compensation for bringing fresh information to investors, will disseminate newly available data as effectively as possible.

In contrast, information about unfunded mandates, absorbed by a single, marginal voter, will not deter an opportunistic legislator from exploiting the ignorance of his 999 other anti-service constituents. Given the dependence of local officials on state assistance, no effective network will undertake the daunting task of disseminating data about mandates to the mass of anti-service taxpayers, assuming that any level of information can force these voters to jettison their one-stage view of municipal taxation.

Relaxing many of the foregoing assumptions will not affect the basic conclusions. If, for example, no single, well-informed investor possesses or can borrow the resources to buy undervalued stock until the stock's price accurately reflects its economic value, relatively few knowledgable purchasers can, at the margin, accquire stock until its price embodies currently available information. Disclosure thus affects the market's outcome even though the bulk of the market's participants remain uninformed.[104] Similarly, when relaxing the postulates of median

103. For more extensive treatment of these issues, see generally Alan Schwartz and Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 Va. L. Rev. 1387 (1983).

104. See generally id.

voter theory, suppose that a winning candidate assembles his majority by aggregating different blocs concerned about different issues. The fundamental analysis stands: disclosure about mandates is unlikely to impact electoral outcomes not only because many voters must absorb such information to make a difference, but also because municipal officials, the obvious network to disseminate data generated by fiscal notes, will be reluctant to offend legislators with significant power over such officials' budgets. In sum, under public choice assumptions, improving the quality of fiscal notes will not change the fundamental political dynamics underlying unfunded mandates.

Paradoxically, improved fiscal notes, advanced by the anti-mandate school to discourage unfunded mandates, are quite consistent with the public interest model and its benign view of such mandates. While better information may reveal to public-regarding lawmakers that they have underestimated the costs and overestimated the interjurisdictional benefits[105] of mandates and may thus reduce legislators' propensities to impose unfinanced obligations on municipalities, in a public interest world, more professionally and independently produced fiscal notes may also reveal that legislators have heretofore underestimated the benefits and overassessed the costs of proposed mandates. Consequently, better cost estimates might disclose additional opportunities for the legislative enhancement of welfare through additional mandates, leading to more, rather than fewer, of them.

C. Supermajority Rules

Under public choice assumptions, supermajority requirements deter few mandates, given that most anti-service voters are likely to be unsophisticated and given the possibilities for logrolling among pro-service constituencies.

The ability of supermajority requirements to discourage unfunded mandates depends initially upon the size of the opportunistic legislative bloc seeking to accommodate pro-service groups without alerting anti-service constituents. In Chart III, a two-thirds rule[106] thwarts unfinanced obligations on localities since the critical cluster of four poorly monitored representatives from anti-service districts falls just short of the number necessary to combine with the nine pro-service legislators for a two-thirds majority.

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105. Such benefits may either be the creation of positive externalities or the avoidance of negative externalities.

106. Such a rule applies, for example, under the Florida and Louisiana state constitutions. See note 58 and accompanying text.

However, in a public choice world, it is probable that most anti-service taxpayers are unsophisticated, that the opportunistic legislative bloc is accordingly larger than indicated in Chart III and that, consequently, supermajority requirements must approach unanimity to stifle unfunded mandates. Hence, in the context of unfunded mandates, in contrast to other settings,[107] supermajority requirements are unlikely to affect legislative outcomes; rather, they constitute procedural niceties easily surmounted by pro-service interest groups.

While it is worthwhile for pro-service voters to understand the multi-stage policy[108] that is the unfunded mandate (since they will profit significantly from that policy), anti-service voters tend to view municipal taxation in single-stage terms which are plausible and, indeed, appealing. Under this view, local officials are elected to set local taxes; fingerpointing at other levels of government evades the responsibility that local officials are elected to execute. This one-stage perspective is reinforced by a form of rational ignorance.[109] While it pays for pro-service voters to invest their time and energy to understand the mandates from which they benefit, anti-service voters perceive no comparable incentive to overcome their superficial comprehension of the forces determining their municipal tax bills. Moreover, the only actors in the political system with incentives to educate anti-service voters about mandates—municipal officials—have important counterincentives which prevent the education from being too thorough.[110]

The anti-service electorate is thus predominantly unsophisticated, that is, uncomprehending of mandates and their significance, and consequently misled by a low state tax burden into believing that mandate-dispensing legislators have faithfully implemented an anti-service outlook. Hence, as long as they stay below the level of state financing that alerts anti-service voters,[111] legislators view the concerned constituencies as lopsidedly favoring unfunded mandates since these attentive constituencies are overwhelmingly the beneficiaries of such mandates.

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107. This argument does not imply that supermajority rules are invariably ineffective; in many cases, supermajority requirements can affect decisively legislative outcomes. This Article contends that, in the limited context of unfunded mandates, supermajority requirements are easily overcome because of the prevalence of unsophisticated anti-service sentiment and logrolling opportunities. On supermajority requirements more generally, see Buchanan and Tullock, *The Calculus of Consent* (cited in note 73); Mueller, *Public Choice II* (cited in note 60); Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*," 12 Int'l Rev. L. & Econ. 145 (1992).

108. See Arnold, *The Logic of Congressional Action* at 20 (cited in note 70).

109. On the theory of rational ignorance, see Browning and Browning, *Public Finance* at 66 (cited in note 27).

110. Municipal officials depend for financial assistance on the same legislators who levy mandates. See the discussion in note 80 and accompanying text.

111. That is, level CD of state financing in Chart I. See p. 1379.

Moreover, pro-service groups can readily surmount supermajority rules by logrolling or by expanding existing coalitions. Such coalitions aggregate both the votes of pro-service legislators and the resources necessary to attract representatives of anti-service constituencies. While the transactions costs of assembling and policing alliances make it more expensive for groups to obtain unfunded mandates for themselves, such costs merely discourage the adoption of mandates at the margin.

Consider, for example, a pro-service constituency which, prior to a supermajority requirement, can secure for itself an unfunded mandate with the support of fifty-one percent of the legislature. After the enactment of a two-thirds rule, this constituency finds it necessary to locate a coalition partner. Similarly, an existing alliance of pro-service groups will respond to a new supermajority requirement by expanding its membership.

At the margin, some groups might abandon their mandates rather than incur the costs of entering into a coalition; some existing logrolls that need to expand to obtain a supermajority will become unmanageable. Some groups possess too few resources, such as too few voters or too little in campaign contributions, to attract coalition partners and thus will lack a place in a successful logroll. Neverthless, after the adoption of supermajority rules, groups currently obtaining mandates in a public choice world generally will pool their resources in explicit or implicit alliance with one another, even though this means they must work somewhat harder to obtain succor from the legislature.

Consequently, in a world characterized by unsophisticated anti-service sentiment and reasonable possibilities for logrolling, one-sided legislative votes for the adoption of unfunded mandates are likely, rendering supermajority requirements mere formalities in the legislative process.

From a public interest perspective, supermajority rules can ensure a proper level of consensus before the legislature imposes an unfunded mandate. While supermajority requirements occasionally might impede desirable additions to the network of state-imposed, reciprocal obligations among localities, these requirements also can secure appropriately high levels of parliamentary agreement on the existence of spillovers before the state intervenes in local affairs.

D. Retrospective Reimbursement Regimes

Under public choice assumptions, pro-mandate forces can readily surmount statutory reimbursement regimes for the same reasons they can overcome supermajority rules: logrolling opportunities and the prevalence of unsophisticated anti-service sentiment. Pro-service constituencies that dominate legislative deliberations can induce the legis-

lature to suspend its self-imposed statutory reimbursement obligation. Hence, in a public choice world, statutory reimbursement requirements constitute little more than formalities, easily overpowered by pro-service interest groups.

Constitutional reimbursement schemes are more diverse in nature and thus more complex to analyze. From a public choice perspective, neither a constitutional provision like Florida's or Louisiana's, which allows suspension of compensation by a two-thirds vote of the legislature, nor a constitutitonal scheme like Tennessee's, which authorizes the adoption of mandates if the state shares some unspecified level of the costs, is likely to discourage legislators from imposing unfinanced obligations on localities.[112]

In contrast, constitutional provisions like California's and Michigan's, which require full funding by the state of most mandates and empower the courts to enforce such funding, promise to discipline the legislature by forcing it to confront the complete costs of satisfying pro-service constitutencies. A judicially enforceable, constitution-based reimbursement regime endows localities with the legal resources to sanction legislators who impose unfinanced obligations as, in the absence of full funding, localities can resort to the courts, compelling the legislature to appropriate funding while the localities comply with the mandate. Such reimbursement reforms the structural relationship between the state and its localities, attacking the legislative zone of discretion at the core of the mandate problem by providing municipalities with a judicial remedy against unfunded mandates.

However, under public choice assumptions, such retrospective reimbursement will not deter all unfinanced mandates given delay in reimbursement to the localities, legislative procrastination in conforming to judicial decrees, and a requirement of municipal compliance during litigation over reimbursement. Suppose, for example, that the legislature imposes an unfunded obligation upon municipalities in year one, that municipal entitlement to reimbursement is finally adjudicated in year four,[113] and that, while such adjudication is underway, localities must supply the mandated service without payment from the state.[114]

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112. However, Professor Janet Kelly suggests that, in practice, Tennessee's anti-mandate amendment has been more effective than its language would indicate. Kelly, *State Mandates* at 56 (cited in note 48).

113. California case law suggests that a four-year lag is not atypical between the adoption of a mandate and the ultimate adjudication of the localities' right of reimbursement.

114. Kathleen Sylvester, *The Mandate Blues*, 2 Governing 26, 29-30 (Sept. 1989) (noting that "while California will provide almost $200 million in reimbursements to localities this year, local officials still contend that the process doesn't really work very well. To begin with, cities and counties don't have any option about compliance. If they think a mandate causes an undue burden, they must comply while appealing to the Commission on State Mandates . . . .").

In such a setting,[115] the opportunistic legislator of the public choice model could rationally supply unfinanced mandates, counting on the lag in the retrospective reimbursement process to postpone the fiscal consequences of accommodating pro-service groups. By year four, when the costs of that accommodation finally come due, the legislator will have been re-elected, retired, or risen to higher office. Hence, assuming significant delay of mandates' budgetary repercussions, retrospective reimbursement will not deter legislators so inclined from supplying pro-service constituencies with these mandates.[116]

Indeed, an opportunistic legislature judicially ordered to underwrite a mandate will simply ignore the court's order until after the next election and, perhaps, later. This possibility has proved more than conjectural.[117]

In theory, states might shorten the reimbursement delay, thus increasing the likelihood that legislators imposing obligations on localities must finance them on a reasonably current basis. For example, municipalities' constitutional claims for mandate reimbursement can be confided to the original jurisdiction of the state's highest court.[118] In practice, however, such agreements deserve only limited confidence given legislators' incentives to disregard judicial reimbursement orders until at least after the next election, in effect "playing the float" to their own political advantage.

Under the public interest model, mandate reimbursement is a chimera. If the network of reciprocal mandates is welfare-enhancing, there is no need to compensate municipalities for undertaking coordinated activity which increases their well-being. Similarly, there is no need to discipline legislatures through reimbursement requirements when the legislatures are doing something they ought to do. In a public interest world, the litigation spawned by reimbursement controversies represents deadweight loss, socially unproductive fighting irrelevant to the

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115. In a variation of this strategy, the legislature could impose a mandate and deliberately underfund its reimbursement. Professor Janet Kelly's survey of the states' experience with reimbursement arrangements suggests that this is more than a theoretical possibility. Kelly, *State Mandates* at 41 (cited in note 48).

116. This analysis is similar to the contention that public officials grant deferred pension rather than current wage concessions to government employees, expecting the cost to come due during the terms of their successors.

117. Legislative recalcitrance in complying with constitutionally based court decrees has been a hallmark of school finance litigation. See, for example, Linda J. Fontaine Fagan, *Texas Special Session Ends with School Funding in Limbo*, State Tax Notes (Dec. 11, 1992) (LEXIS, Estate library, STN file) (describing the failure of the Texas legislature in special session to comply with a court order to reform school funding).

118. However, important constituencies, including the court itself, are likely to object to the absorption of much of the court's docket by mandate reimbursement cases.

welfare-maximizing nature of the obligations that public-regarding legislators impose on localities.

E. Prospective Nullification

Constitutional reimbursement in its most thoroughgoing form would empower localities to nullify a mandate prospectively if the legislature ignores its constitutional obligation to provide full financing.[119] Under such an arrangement, a municipality believing itself burdened by an unfunded mandate would not comply with it. The state would then sue to enforce its mandate if it believed that adequate payment was being provided. Critical to such an arrangement would be the prerogative of the objecting municipality to ignore the challenged mandate during the litigation with the state.

The right of prospective nullification would deprive unfunded mandates of most of their value to pro-service groups since, in the face of such mandates, unwilling localities would not provide the required service. Under a prospective nullification scheme, unfunded mandates might serve for pro-service constituencies a symbolic purpose or a tactical function in obtaining eventual financing from the legislature or in securing desired services in closely divided communities.[120] Nevertheless, prospective nullification would deprive unfunded mandates of

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119. The state coming closest to a rule of prospective nullification is Florida, the constitution of which provides that localities shall not "be bound" by unfunded state mandates. Fla. Const., Art. VII, § 18. However, the seemingly broad protection thus afforded municipalities is undercut by the exemptions from this rule. For example, mandates approved in the legislature by a two-thirds vote need not be funded. Id. Similarly, mandates coupled with a new local revenue source are deemed funded and thus binding upon the localities. Id. When the constitutional rule does apply, however, Florida municipalities apparently possess a right of prospective nullification. See id.

Louisiana's constitution similarly provides that state-imposed mandates are not "effective within a political subdivision . . . until, and only as long as" such mandates are funded, language that also appears to establish a right of prospective nullification. La. Const., Art. VI, § 14. However, as with Florida, the limited coverage of this rule deprives it of much practical significance. For example, this provision does not apply to school-related mandates or to mandates affecting the terms and conditions of employment of fire and municipal police personnel. Id. The Louisiana Constitution's mandate provision also does not apply to mandates adopted by a two-thirds legislative vote. Id. In the remaining cases, however, the Louisiana Constitution apparently provides municipalities a right of prospective nullification. See id.

Colorado's anti-mandate statute, on its face, provides municipalities the right of prospective nullification, declaring unfunded mandates to "be optional on the part of the local government." 1991 Colo. Rev. Stat. § 29-1-304.5(1). However, just as legislatures can and have exempted themselves from statutory reimbursement requirements, the Colorado legislature can suspend this statutory rule as to any mandate it selects. See id. at § 29-1-304.5(2).

120. An unfunded mandate might make some anti-service voters reconsider their position, thus transforming a small, pre-mandate local majority against the service into a small, post-mandate majority for the service.

most of their substantive content since localities could decline to provide the required activities.

Under prospective nullification, unfunded mandates lose most of their appeal to entrepreneurial legislators since such mandates offer little profit to pro-service constitutencies. Unlike retrospective constitutional reimbursement, which permits an opportunistic legislator to satisfy pro-service groups currently relying on delay in the funding obligation to postpone fiscal consequences, prospective reimbursement forces legislators to supply full compensation to localities *ab initio* to generate municipally provided services. Accordingly, legislators and the constituencies previously supplied unfunded mandates would be forced, from the beginning, to confront one another above the zone of discretion, in full view of anti-service taxpayers. Their bargaining typically will not come to political fruition since, had these interest groups possessed adequate support, they would not have accepted unfunded mandates in the first place. A legislature constrained by municipalities' right of prospective nullification would adopt a mandate only when a state-administered agency entails significant diseconomies of scale and the decentralized provision of the service accordingly generates cost savings.[121]

Under public interest assumptions, prospective nullification is an unacceptably radical form of home rule which permits municipalities to postpone for extended periods the implementation of desirable mandates and deters the legislature from imposing on localities appropriate obligations to increase positive interjurisdictional spillovers and abate negative externalities.

VI. Observations

For a number of reasons, the public choice model is, by a substantial margin, the most compelling of the possible explanations of the unfunded mandate phenomenon. The model is consistent with the observable facts: the unfinanced obligations imposed by federal and state law in practice correspond to the predictions of public choice theory, bestowing concentrated benefits upon specific constituencies such as government employees who profit from improved terms and conditions of employment, recipients of redistributive largesse like welfare payments and Medicaid services, and private school children who secure publicly financed busing.[122] Moreover, the constituencies obtaining unfunded mandates in practice represent the kinds of groups that the public choice model predicts will acquire mandates rather than more

121. See p. 1373.

122. As Pogo would understand, I have three such children.

desirable forms of financing and administration. Municipal employees, welfare recipients, and private school families are not particularly popular constituencies and cannot easily marshal majority support for their demands. These groups are, however, self-conscious and frequently well-organized, with sufficient political influence to procure the consolation prize of the legislative process—the unfunded mandate—since the resulting costs are hidden from legislators' anti-service constituents.

The relevance of public choice assumptions for unfunded mandates is reinforced by the transformation of Congress and the state legislatures from part-time bodies with significant party discipline into professionalized assemblages of full-time careerists with weak party loyalties, an evolution which makes the public choice view of legislative behavior even more compelling.[123] The contemporary legislator is an independent, electoral operator who relies on his legislative seat as his main source of income and professional identity and, accordingly, is more likely to behave in the self-protective, entrepreneurial fashion predicted by public choice theory than his old-style, party-based predecessor for whom legislative service was an avocation rather than a primary career. It is instructive that the rise of the "new" legislator parallelled the rise of the new mandates; the latter is in large part a manifestation of the former. As legislatures became increasingly comprised of full-time political entrepreneurs, legislators increasingly behaved in the fashion indicated by the public choice model, dispensing unfunded mandates to accommodate interest groups and to advance their own political ambi-

123. The contemporary debate about term limitations largely centers on the normative significance of the American legislator's transformation into a full-time political professional. Proponents of term limits seek to restore the tradition of citizen-legislators; opponents of term limits generally view more sanguinely the emergence of legislatures as full-time, professionalized bodies, dismissing as misplaced sentimentalism the possibility or desirability of returning to earlier patterns of legislative bebavior. For purposes of this Article, it does not matter which side in the term limit debate is normatively correct. The Article notes that both sides essentially agree on the character of contemporary legislatures as full-time, careerist institutions and that the individual serving in such an institution tends to act in the self-interested, entrepreneurial fashion predicted by public choice theory. For a summary of the term limit debate by an advocate of such limits, see generally George F. Will, *Restoration: Congress, Term Limits, and the Recovery of Deliberative Democracy* (Macmillan, 1992). For discussion of the transformation of state legislatures into full-time, careerist bodies, see generally Alan Ehrenhalt, *The United States of Ambition* (Random House, 1991); Morris P. Fiorina, *Divided Government in the American States: An Unintended Consequence of Legislative Professionalism?* (unpublished manuscript prepared for the 1993 annual meeting of tbe Midwest Political Science Association, on file with Author). For a more positive view of contemporary legislatures, see Rivlin, *Reviving the American Dream* at 93, 106 (cited in note 32) (criticizing old-style legislatures in wbich "[m]embers served part time, were paid little, and were dependent on their primary jobs" in contrast to more professionalized, full-time bodies). See also Arnold, *The Logic of Congressional Action* at 194 (cited in note 70) (characterizing the contemporary Congress as "a careerist legislature filled with reelection-minded politicians").

tions while hiding the resulting costs from their tax-conscious constituents.

Also significant is the progressive maturation of suburban localities from relatively homogeneous bedroom communities into more heterogeneous, urbanized jurisdictions.[124] The public choice model predicts that suburban maturation breeds unfunded mandates; when there are more numerous and more varied participants in local political processes, there are consequently more losers who resort to higher levels of government and, hence, unfunded mandates to obtain what they cannot win locally.[125] Again, the observable facts correspond to the theory, with the rise of the new mandates parallelling the evolution of America's suburbs into more variegated communities.

Finally, the public choice model is bolstered by considering alternative explanations for unfunded mandates, a process of elimination that leaves public choice assumptions the most compelling interpretation of such mandates. While the predilections of individual decisionmakers, as well as the history, culture, and institutions of a particular state, can influence the mandate phenomenon in that state,[126] the underlying phenomenon is too systematic and too widespread to be explained merely by local factors; fundamental forces must be at work across different jurisdictions. One can similarly reject an ideological explanation for unfunded mandates, laws which virtually no one defends in ideological terms.

The best alternative to the public choice paradigm—the public interest model—is, for two reasons, ultimately an unconvincing explanation of unfunded mandates. First, the public interest model depends on particularly heroic assumptions: that the mandated externalities received by each jurisdiction exceed the jurisdiction's mandated costs and that legislative behavior vis-a-vis unfunded mandates is public-regarding in nature.[127] Second, the availability of grants-in-aid and fully financed mandates to affect lower tiers of government suggests that legislators eschew these devices and enact unfunded mandates instead to hide costs.

To continue an earlier example,[128] suppose that Central City's expenses from mandated transportation infrastructure exceed the offsetting externalities City residents receive from mandated school programs in the suburbs. In this (not unlikely) case, the network of state-imposed obligations fails to maximize the well-being of Central City residents,

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124. See generally David Rusk, *Cities Without Suburbs* (Johns Hopkins, 1993).
125. See notes 84-85 and accompanying text.
126. See discussion on pp. 1383-86.
127. See discussion in Part IV.
128. See the discussion following note 94.

since they are paying more than they are receiving, and the public interest defense of such unfinanced obligations accordingly fails. Equally heroic is the supposition that mandate-enacting legislators are public-regarding; one need not embrace the assumptions of public choice theory in all respects and in all circumstances to conclude that the unfunded mandate is principally a manifestation of legislative opportunism.

Indeed, a legislature seeking to encourage a particular activity at lower tiers of government can always induce the activity through grants-in-aid. A legislature insisting on a specific activity at subordinate levels of government also can adopt fully financed mandates to force the localities to comply while compensating them completely for their costs. To continue this example, the legislature could grant the City assistance for expanded harbor infrastructure from the state's treasury or could force the improvements it wants and pay for them from state tax revenue. It thus appears that legislators prefer unfunded mandates over grants-in-aid and fully financed mandates because these require state financing and taxation whereas unfunded mandates do not. That observation points back to the public choice model and its teaching that legislators embrace unfinanced mandates to hide costs from their constituents.

The public choice model explains a central episode of federal-state relations in the post-World War II era: the demise of general revenue sharing. Unrestricted revenue sharing, in Professor Aaron Wildavsky's apt phrase "the entitlement that failed,"[129] can be viewed as across-the-board mandate reimbursement, a single bloc payment to states and localities in recompense for all the otherwise unfinanced obligations Washington imposes upon them. Enacted originally by dint of President Nixon's ideological support, after he passed from the scene, the only active supporters of general revenue sharing were state and local officeholders, since no group's mandated service depended upon continuation of revenue sharing. Bereft of allies in Congress and lacking presidential protection, the governors and mayors themselves could not prevent federal legislators from reclaiming revenue-sharing funds for their own use. For members of the U.S. House and Senate, it was politically compelling to abolish revenue sharing since they left intact the mandates that revenue sharing offset (and thus retained the support of the constituencies receiving mandated services) while obtaining for themselves valuable direct federal spending to dispense in return for further support.

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129. Aaron Wildavsky, *The New Politics of the Budgetary Process* 327 (Scott, Foresman & Co., 1988).

The public choice model cautions that most of the nostrums advanced by the anti-mandate school inadequately address the mandate problem. While opponents of unfunded mandates treat them as remediable through relatively minor fixes in the legislative process (improved fiscal notes, supermajority rules, statutory reimbursement regimes), public choice analysis suggests that, for the anti-mandate cause, the only effective remedies are of a constitutional nature, eliminating the legislative zone of discretion through judicially enforceable reimbursement requirements. Lesser measures are ultimately premised on the hope that the legislative adoption of mandates is public-regarding in character,[130] a hope which is excessively credulous; indeed, if legislative conduct with respect to unfunded mandates is public-regarding in character, no mandate problem exists.

In designing a constitutional remedy, the public choice model suggests that municipalities do not need protection from laws of general applicability, but do require protection from legislatures that putatively discharge mandated costs by empowering lower tiers of government to raise taxes.[131] Proposals targeted only at municipalities[132] leave them isolated in the legislative process, bereft of allies to help reduce the legislative zone of discretion. In contrast, when the legislature considers proposals affecting municipalities in the same fashion as other persons within the state, the localities have partners in the lawmaking process, obviating the need for special care of municipal interests.[133] A legislature that imposes its regulation broadly is not "commandeering"[134] the apparatus of municipal government to engage in hidden taxation since the legislature, in such a case, openly infiicts costs as well on businesses, households, or other entities.

When the legislature bestows upon localities the ability to tax to offset mandated costs, the legislature, far from solving the mandate problem, reveals the opportunistic nature of its actions. Rather than levy the necessary taxes itself, the legislature in such situations seeks

130. See Part V.

131. See id.

132. Or, in the case of federal legislation, at states and localities.

133. The resulting borderline problems, distinguishing between laws of general applicability and mandates subject to reimbursement, lie well within the competence of the judiciary. The most difficult borderline case is legislation applying nominally to a broad class of entities but de facto affecting only localities. For example, a state environmental regulation may, on its face, apply to all providers of water but, in practice, impact only municipalities because all of the state's water systems are municipally owned. These and similar situations should he resolved in favor of reimbursement because the legislature has the political incentive to skirt reimbursement whenever possible.

134. The phrase is Justice O'Connor's. *New York v. United States*, 112 S. Ct. 2408, 2425 (1992).

the political benefits of accommodating mandate recipients while forcing local officials to incur the costs of such accommodation.

These observations counsel, as a matter of federal constitutional doctrine, resurrection in modified form of the Tenth Amendment review of federal statutes affecting states and localities embraced in *National League of Cities v. Usery*[135] and subsequently rejected in *Garcia v. San Antonio Metropolitan Transit Authority*.[136] Under this revised understanding of the Tenth Amendment, the Court would strike down as unconstitutional unfunded mandates imposed federally on subordinate units of government. For this purpose, mandates would be defined as those unfinanced statutes and regulations burdening only states and their local subdivisions.

In *Usery*, the Court narrowly held that the Constitution protects the states from federal intrusion into the core functions of state government.[137] By an equally narrow margin, *Garcia* repudiated that approach, holding that the task of divining core government functions is too problematic for the courts and that the interests of the states are protected politically in Congress.[138]

The latter observation seems particularly naive from the vantage of the public choice model, which suggests that, in the halls of Congress, the constituencies seeking unfunded mandates are often better positioned to advance their political interests than the states and municipalities are to defend theirs.[139] Moreover, the definition of mandate proposed by this Article (unfinanced laws targeted only at states and their subdivisions), while not without borderline problems,[140] generates a more manageable inquiry for the courts than the elusive effort to identify core government functions. The Tenth Amendment doctrine proposed by this Article follows the Court's *Carolene Products*[141] tradition, a tradition that extends judicial protection to persons structurally incapable of protecting themselves politically.

Under this approach, the statute at issue in *Garcia* and *Usery*, the Fair Labor Standards Act,[142] would pass Tenth Amendment muster since the Act applies broadly to private as well as public employers. On the other hand, under this Article's proposal, Congress could not consti-

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135. 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

136. 469 U.S. 528 (1985).

137. *Usery*, 426 U.S. at 851-52.

138. *Garcia*, 469 U.S. at 547-55.

139. See note 80 and accompanying text.

140. See notes 34-46 and accompanying text.

141. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n.4 (1938).

142. 29 U.S.C. §§ 201-219 (1988).

tutionally impose narrowly targeted obligations on cities and states unless it fully reimbursed them for the costs.

New York v. United States[143] suggests that the Court is moving in this direction. In that decision, the Court invalidated on Tenth Amendment grounds the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985.[144] Under the "take title" provision, states failing federal standards for the disposal of low level radioactive waste must assume ownership of such waste and all liabilities attached to it.[145] Writing for a unanimous Court, Justice O'Connor invalidated the take title arrangement in terms consistent with the public choice model of unfunded mandates.[146]

Garcia and *Usery*, Justice O'Connor observed, are distinguishable as instances "in which Congress has subjected a State to the same legislation applicable to private parties,"[147] a distinction consistent with the argument that states and municipalities are less isolated politically, and therefore less deserving of judicial assistance, when they have allies in the effort to restrict legislative discretion. Moreover, legislation like the take title provision, which applies only to states, allows federal decisionmakers to make policy hidden from view, leaving state officials exposed to the public's wrath:

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials tbat suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while tlie federal officials wlio devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished wlien, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.[148]

Given the substantial division of opinion in *Garcia* and *Usery* and the import of *New York v. United States*, it probably will prove easier to move the federal judiciary towards an anti-mandate Tenth Amendment doctrine than to induce the states to adopt effective constitutional

143. 112 S. Ct. 2408 (1992).

144. Id. at 2434 (referring to 42 U.S.C. § 2021b-j). The Court sustained the other provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985. *New York*, 112 S. Ct. at 2434.

145. 42 U.S.C. § 2021e(d)(2)(c).

146. *New York*, 112 S. Ct. at 2429.

147. Id. at 2420.

148. Id. at 2424.

provisions proscribing unfunded mandates. The public choice model indicates that legislatures, left to their own devices, will not willingly impose bona fide constitutional restraints on their deal-making discretion, any more than legislators who benefitted from malapportionment disinterestedly surrendered their political power by redistricting voluntarily.[149] Legislatures can be convinced to enact fiscal note requirements, supermajority rules, and statutory reimbursement regimes since in practice these devices do little to constrain legislative discretion to dispense unfunded mandates. Effective constitutional restraints on mandates are a different matter, a degree of self-discipline legislators are unlikely to inflict upon themselves.

Even in states with popular initiation of constitutional amendments, the public choice model gives scant cause for optimism. Pro-service voters will oppose anti-mandate amendments to retain the largesse they receive (or hope to receive), while, the model suggests, unsophisticated anti-service voters will not know to favor such amendments.[150] Although anti-service voters might be educated by aggressive mayoral campaigning[151] or by external events that increase the saliency of unfunded mandates, such as a statewide property tax revaluation, the informational difficulties confronting anti-mandate forces should not be underestimated. Indeed, these informational difficulties lie at the core of the mandate problem.[152]

This analysis suggests a search for state constitutional provisions, similar to the Tenth Amendment, from which the courts can fashion doctrines protecting municipalities from state-imposed unfunded mandates, a search particularly appropriate in this time of more general interest in state constitutional law.[153]

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149. The legislative reapportionment saga is, of course, well-known and does not require exposition here. See, for example, *Baker v. Carr*, 369 U.S. 186, 210-237 (1962) (addressing a constitutional challenge to the Tennessee Apportionment Act of 1901). This saga suggests that the legislatures themselves cannot solve the mandate problem because legislators will not willingly surrender their own political power.

150. See, for example, Linda J. Fontaine Fagan, *Voters Reject "Proposition 1" School Funding Proposal*, 4 State Tax Notes 1096, 1097 (1993) (reporting the defeat of an anti-mandate amendment to the Texas Constitution).

151. For a description of the campaign waged by municipal officials in Florida for the adoption of an anti-mandato amendment to the state constitution, see Larry Kelly, *Talking Points for Taking It to the People* (Mar. 10, 1991); Avenel Associates, *Post-Election Analysis of Amendment #3* (Nov. 16, 1990).

152. See Table III, p. 1376.

153. See generally Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147 (1993); William J. Brennan, Jr., *Foreword: Symposium on the Revolution in State Constitutional Law*, 13 Vt. L. Rev. 11 (1988); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986); Justice Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. Balt. L. Rev. 379 (1980).

It would not seem difficult to find in a constitutional provision like Michigan's anti-mandate amendment a municipal right of prospective nullification which would enable localities to ignore mandates until their claims for reimbursement have been ajudicated.[154] In states without such provisions, it seems possible, although more difficult,[155] to infer a right of prospective nullification from traditional home rule authorities adapting Justice O'Connor's reasoning from *New York v. United States* to the relationship between states and their municipalities.[156] The courts will find it most problematic to construct a right of prospective nullification in states with limited anti-mandate amendments in their state constitutions. In these jurisdictions,[157] the existence of constitutional provisions specifically addressing the mandate problem in a limited fashion probably precludes the extension of traditional home rule authority into expansive anti-mandate doctrines on the theory that specific and recent measures pre-empt the application of older and more general measures.[158]

VII. CONCLUSION

Although critics of unfunded mandates generally treat them as remediable glitches in the legislative process, correctable through relatively minor reforms like better information, supermajority requirements, and statutory reimbursement regimes, unfinanced mandates arise from deeper causes and necessitate more fundamental remedies. Unfunded mandates are best understood in public choice terms, as a form of hidden taxation through which poorly monitored policymakers use their discretion to accommodate pro-service groups without alerting their anti-service constituents to the deals these constituents are financing. Decisionmakers do not adopt unfunded mandates because they are ill-informed but, rather, because such mandates allow decisionmakers to satisfy interest groups seeking public largesse without revealing to anti-service voters the resulting costs these voters bear. The

154. For a judicial interpretation of the anti-mandate provision of the Michigan Constitution, see *Schmidt v. Dep't of Educ.*, 441 Mich. 236, 490 N.W.2d 584 (1992).

155. See, for example, *City of New Orleans v. State of Louisiana*, 426 S.2d 1318 (La. 1983), in which the Louisiana Supreme Court refused to construe the state constitutional home rule provision as affording localities protection from unfunded mandates: "The autonomy of local governmental subdivisions with home rule charters is limited by general legislation enacted under the State's police power." Id. at 1321.

156. See notes 143-48 and accompanying text.

157. See, for example, notes 42, 43, and 58 for a discussion of the Florida and Louisiana anti-mandate amendments.

158. See Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss, *Gulotta v. State of New York*, No. 93006067 (N.Y. June 30, 1993) (contending that the system of state-imposed unfunded mandates violates, *inter alia*, provisions of the New York state constitution).

groups obtaining unfunded mandates are likely to overcome supermajority and reimbursement rules placed in their paths. As a problem of constitutional dimension, unfunded mandates and the hidden taxation they entail can only be eliminated by constitutional reform.