

FRAMEWORK LEGISLATION AND FEDERALISM

*Elizabeth Garrett**

INTRODUCTION

In *Separation of Powers as a Safeguard of Federalism*,¹ Bradford Clark identifies the Supremacy Clause as a powerful protection of principles of federalism because it allows federal action only if the “precise procedures” for lawmaking are followed.² He describes the requirements of bicameralism, presentment, and, in the case of some federal actions, supermajority votes.³ He also emphasizes the Senate’s role in policymaking.⁴ The Senate historically has been the arena in which states have significant influence; although that influence has decreased after passage of the Seventeenth Amendment, the rule of equal representation of states in that body continues. Throughout the article, Professor Clark quotes the Supreme Court’s description of the constitutional procedures governing lawmaking as “‘finely wrought and exhaustively considered.’”⁵

The Constitution’s mandates with respect to congressional procedures, however, are also relatively sparse; most of the procedures governing lawmaking in the House and Senate are part of the internal rules of each body, adopted pursuant to Article I, Section 5 of the

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1 Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

2 *Id.* at 1321.

3 *See id.* at 1328–32.

4 *See id.* at 1357–67.

5 *Id. passim* (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

Constitution—the Rules of Proceeding Clause.⁶ No analysis of the “finely wrought” procedures of lawmaking is complete without an assessment of these additional requirements. Moreover, the adoption of framework laws and other internal rules suggests that other safeguards may evolve within the legislative arena in addition to the constitutional procedures Clark relies on to protect federalism.⁷ Finally, even if Clark’s conclusion that courts should vigorously enforce constitutional procedures is correct, similarly aggressive judicial enforcement of framework laws is not necessarily justified and might be counterproductive.

Congress can add to constitutionally mandated procedures with respect to all laws (e.g., the filibuster rules in the Senate, the Rules Committee in the House, the committee structure in both houses), and it can enact more targeted rules that apply only to a subset of legislative proposals. With respect to the latter, Congress sometimes adopts such targeted rules as part of statutes, or framework laws, which establish internal procedures that will shape legislative deliberation and voting on certain decisions in the future.⁸ In one area that affects the relationship between the federal government and the states—the enactment of unfunded mandates that burden states and localities—Congress has adopted a framework law: the Unfunded Mandates Reform Act of 1995 (UMRA).⁹ UMRA has been in effect for over a decade and is an integral part of the procedural environment shaping congressional consideration of certain proposals implicating federalism. In general, UMRA increases the hurdles, in both the House and Senate, to enactment of new unfunded mandates. Although its provisions are not constitutionally required, they are part of the “finely wrought” process through which proposals imposing certain intergovernmental mandates become laws.

6 See U.S. CONST. art. I, § 5, cl. 2.

7 The constitutional procedures relating to separation of powers that Clark relies on to protect federalism actually work to entrench the status quo, rather than to target principles of federalism. If the status quo already includes laws that are detrimental to strong state governments, then the “finely wrought and exhaustively considered” procedures will make it more difficult to repeal those statutes and reach a more balanced arrangement. To put it another way, the status quo that the constitutional procedures protected 200 years ago is a very different one in terms of federalism than the status quo protected in the twenty-first century. See Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1606–07 (2008) (making a similar point).

8 See Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 733–64 (2005).

9 Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.).

In this Article, I will use the theoretical work on framework laws I have developed elsewhere¹⁰ to assess UMRA. In Part I, I will briefly describe UMRA and relate it to the congressional budget process framework, of which UMRA is part. In Part II, I will determine which of the purposes of framework laws UMRA serves, concluding that it serves, to greater or lesser extent, four purposes. It provides a symbolic response to an issue made salient in the early 1990s; it provides a solution to collective action problems often encountered by multi-member legislatures, particularly as it provides information to lawmakers about the scope of proposed unfunded mandates; it is a precommitment and entrenchment device to make it harder for Congress to pass unfunded mandates imposing costs above a certain threshold; and it shifts power away from committees to individual members and to congressional party leaders.

Finally, in Part III, I will identify and discuss two of the challenges facing framework laws designed to further the values of federalism. First, any framework law, including those dealing with federalism, must define *ex ante* the universe of future proposals to which it will apply. That is part of the explanation for UMRA's narrow targeting of unfunded intergovernmental mandates. Other federalism frameworks could aim at different, relatively concrete problems, such as conditions of assistance or preemption. This ability to target a particular set of laws differentiates framework law protection from the constitutional protection Clark describes; constitutional separation of powers principles apply to any laws adopted by Congress, those that further federalism principles as well as those that undermine them. Second, the role that a framework law like UMRA should play in judicial review is unsettled. Just as Professor Clark would advocate for aggressive judicial review to ensure that the constitutional requirements of lawmaking are followed, courts could police Congress' adherence to its own internal rules, especially those passed in statuted form.¹¹ Indeed, there might be some cases, likely very rare instances, where Congress would prefer judicial review to strengthen the force of a framework law. I conclude, however, with skepticism

10 See generally Elizabeth Garrett, *Conditions for Framework Legislation*, in THE LEAST EXAMINED BRANCH 294, 297–318 (Richard W. Bauman & Tsvi Kahana eds., 2006) [hereinafter Garrett, *Conditions*] (specifying conditions that Congress must consider before enacting framework laws); Garrett, *supra* note 8, at 724 (identifying specific examples of framework laws and describing the purposes served by framework legislation).

11 See Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 346 (2003) (referring to framework laws as “statuted rules”).

about judicial review of compliance with framework laws. Not only would it likely lead to a congressional response to avoid judicial review in many cases—perhaps reducing the use of framework laws generally—but courts would also find it challenging to discern whether lawmakers had complied with internal rules in any particular decision.

I. THE UNFUNDED MANDATES REFORM ACT OF 1995

In the 1990s, the intergovernmental lobby placed the issue of unfunded federal mandates on the national agenda.¹² In March 1995 Congress passed, and President Clinton signed, the Unfunded Mandates Reform Act which established a procedural framework to shape congressional deliberations concerning certain unfunded mandates (Title I)¹³ and required administrative agencies to assess the effects of any major regulation imposing an intergovernmental mandate (Title II).¹⁴ Throughout this Article, I will focus primarily on Title I, “Legislative Accountability and Reform”; Title II’s “Regulatory Accountability and Reform” is not relevant to this analysis.¹⁵ UMRA has been in effect since 1996, providing over a decade of experience with its requirements. Each year the Congressional Budget Office (CBO) provides an annual report on Title I’s provisions, and it has produced five- and ten-year assessments;¹⁶ the Government Accountability Office (GAO) has published several assessments of the entire Act and of Title II in particular.¹⁷

12 See *infra* notes 71–76 and accompanying text.

13 See 109 Stat. at 50–64.

14 See *id.* at 64–67.

15 Title II may have played a role in Congress’ decision to use a framework law, rather than internal rules, to effect the changes in legislative procedures. To the extent that lawmakers viewed regulatory reform as part of a package with legislative reform and wanted to adopt both parts of the deal at the same time, then a framework law was the only route to enactment possible because regulatory reform required a vehicle with the force of law. See Garrett, *Conditions*, *supra* note 10, at 312–17 (describing the need to enact all parts of a legislative bargain simultaneously as a reason for the use of the statutory form).

16 See, e.g., CONG. BUDGET OFFICE, A REVIEW OF CBO’S ACTIVITIES IN 2006 UNDER THE UNFUNDED MANDATES REFORM ACT (2007) [hereinafter CBO, 2006 REVIEW], available at <http://www.cbo.gov/ftpdocs/79xx/doc7982/04-03-UMRA.pdf>; CONG. BUDGET OFFICE, A REVIEW OF CBO’S ACTIVITIES UNDER THE UNFUNDED MANDATES REFORM ACT, 1996 TO 2005 (2006) [hereinafter CBO, TEN-YEAR REVIEW], available at <http://www.cbo.gov/ftpdocs/71xx/doc7111/03-31-UMRA.pdf>.

17 See, e.g., U.S. GEN. ACCOUNTING OFFICE, UNFUNDED MANDATES: ANALYSIS OF REFORM ACT COVERAGE (2004) [hereinafter GAO, COVERAGE], available at <http://www.gao.gov/new.items/d04637.pdf>; U.S. GEN. ACCOUNTING OFFICE, UNFUNDED MANDATES: REFORM ACT HAS HAD LITTLE EFFECT ON AGENCIES’ RULEMAKING ACTIONS

UMRA does not prohibit Congress from enacting unfunded mandates; instead, it results in the production and dissemination of more information about intergovernmental mandates (funded and unfunded) pending in the legislature. It also allows members to raise points of order against bills with unfunded mandates that exceed certain thresholds, requiring a separate majority vote to impose the mandate;¹⁸ in the 109th Congress, the point of order temporarily provided additional teeth in the Senate because sixty votes were required to waive it.¹⁹ UMRA defines an intergovernmental mandate as any provision in law that would “impose an enforceable duty” on a state or local government; that would reduce or eliminate funding for previously enacted mandates; or that would increase the stringency of conditions for certain federal entitlement programs or cut funding for such programs.²⁰

The Act’s coverage is relatively narrow; for example, it does not apply in most cases to duties that are imposed by the federal government as a condition of receiving federal assistance or as part of participating in a voluntary federal program.²¹ This gap in coverage is significant and allows bills with substantial implications for federalism to escape UMRA review.²² For example, the No Child Left Behind Act of 2001²³ imposes significant burdens on states and school districts, but it is not within the scope of UMRA because all the costs incurred by subnational governments result from complying with conditions of federal aid.²⁴ UMRA also has a list of specific exclusions, including proposals enforcing constitutional rights or antidiscrimination laws;

(1998) [hereinafter GAO, LITTLE EFFECT], available at <http://www.gao.gov/archive/1998/gg98030.pdf>.

18 See 2 U.S.C. § 658d (2000).

19 See H.R. Con. Res. 95, 109th Cong. § 403, 119 Stat. 3633, 3652 (2005). In the fiscal year 2008 concurrent budget resolution, the Senate, now controlled by Democrats, decided to eliminate the supermajority voting requirement, which was originally to remain in effect through fiscal year 2010. See *infra* note 49 and accompanying text. This change should not have been a surprise: Senate Democrats had vehemently and successfully resisted a supermajority voting requirement when UMRA was originally enacted. See Timothy J. Conlan, James D. Riggle & Donna E. Schwartz, *Deregulating Federalism? The Politics of Mandate Reform in the 104th Congress*, PUBLIUS, Summer 1995, at 23, 32.

20 Unfunded Mandate Reform Act of 1995 § 421, 2 U.S.C. § 658(5) (2000). UMRA also applies to mandates affecting tribal governments, but that aspect of the Act is not relevant to this analysis. See 2 U.S.C. § 1501.

21 See 2 U.S.C. § 658(7)(A).

22 See *infra* text accompanying notes 139–41.

23 Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

24 See GAO, COVERAGE, *supra* note 17, at 23–24.

legislation relating to accounting and auditing procedures for grants; proposals providing emergency assistance to states and localities; national security laws and treaty ratifications; and proposals relating to Social Security.²⁵ The CBO has estimated that only about two percent of the bills it has analyzed contained mandates that fell within these enumerated exceptions.²⁶ Finally, the Act does not apply to appropriations bills (except it does apply to legislative provisions in such bills);²⁷ this exclusion is more significant than the listed exceptions. However, the CBO informally reviews all appropriations bills as they are considered and alerts staff if it identifies any mandates.²⁸

One of the major goals of UMRA, discussed in more detail in Part II.B, is to produce more information about intergovernmental mandates for members of Congress and to ensure that the information plays a role in congressional decisionmaking. When an authorizing committee reports a bill or joint resolution containing any federal mandate, it must provide the bill to the Director of the CBO and identify the mandates.²⁹ The CBO then analyzes the proposed legislation and prepares an UMRA statement that must be included in the committee's report on the bill.³⁰ If the total direct costs of an intergovernmental mandate exceed \$50 million, a figure adjusted for inflation since 1996,³¹ in any of the first five fiscal years after the mandate would become effective, the CBO must provide an estimate of the direct costs.³² UMRA defines "direct costs" as "the aggregate estimated amounts that all State, local and tribal governments would be required to spend or would be prohibited from raising in revenues in order to comply with the Federal intergovernmental mandate."³³ Furthermore, the CBO must identify any increase in federal appropriations or other spending that has been provided to fund the mandate.³⁴ The CBO also provides mandate statements, if requested and "to the greatest extent practicable," for floor amendments, con-

25 See 2 U.S.C. § 658a.

26 See U.S. GOV'T ACCOUNTABILITY OFFICE, UNFUNDED MANDATES: VIEWS VARY ABOUT REFORM ACT'S STRENGTHS, WEAKNESSES, AND OPTIONS FOR IMPROVEMENT 10 (2005) [hereinafter GAO, VIEWS VARY], available at <http://www.gao.gov/new.items/d05454.pdf>.

27 See 2 U.S.C. § 658d(c)(1).

28 See CBO, TEN-YEAR REVIEW, *supra* note 16, at 59 n.2.

29 See 2 U.S.C. § 658b(b).

30 See *id.* §§ 658b(a), (c)–(d), (f), 658c(a)–(b).

31 The threshold in 2006 was \$64 million. See CBO, 2006 REVIEW, *supra* note 16, at 2.

32 See 2 U.S.C. § 658c(a)(2).

33 *Id.* § 658(3)(A)(i).

34 See *id.* § 658c(a)(2)(c), (b)(2)(B).

ference reports, and legislative proposals, including updating its original estimate if necessary.³⁵ From 1996 to 2005, the CBO formally reviewed approximately 5800 bills and other legislative proposals.³⁶

Title I of UMRA is enforced through internal parliamentary devices called “points of order.” A point of order can be raised on the floor of the House or Senate to object to proceeding to a vote on a bill because a procedural requirement has been violated. In the case of UMRA, a point of order lies against any legislative proposal reported out of an authorizing committee that is not accompanied by a mandate report and cost statement.³⁷ In addition, any bill, joint resolution, amendment, motion, or conference report that includes an unfunded intergovernmental mandate exceeding the threshold is subject to a point of order.³⁸ Congress can provide funding for a mandate in several ways. First, it can be funded through new direct spending authority, which provides money without further congressional action.³⁹ Second, if the bill merely authorizes the spending, then it can identify an appropriations bill that would provide the actual funding and include provisions to make the effectiveness of the mandate conditional on Congress’ appropriating the required amounts.⁴⁰ This latter provision is called the Byrd Amendment, named for the Senator from West Virginia who added it during floor deliberations on UMRA.⁴¹ Under this “lookback” provision, UMRA requires congressional reconsideration if insufficient appropriations are provided in the ten years after the mandate becomes effective, either because the appropriations were never enacted or were scaled back, or because the CBO’s estimates of direct costs turned out to be lower than the actual costs.⁴² In that event, the agency notifies Congress of the shortfall, and if Congress does not provide funding or scale back the mandate within thirty days, the mandate ceases to be effective.⁴³

Until fiscal year 2006, UMRA required only a majority vote in either house to waive a point of order raised there.⁴⁴ This meant that

35 See CBO, TEN-YEAR REVIEW, *supra* note 16, at 57 (quoting 2 U.S.C. § 685c(d)).

36 *Id.* at 2.

37 See 2 U.S.C. § 658d(a)(1).

38 See *id.* § 658d(a)(2).

39 See *id.* § 658d(a)(2)(A).

40 See *id.* § 658d(a)(2)(B).

41 See Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1157–60 (1997).

42 See 2 U.S.C. § 658d(a)(2)(B)(iii).

43 See *id.*

44 See CBO, TEN-YEAR REVIEW, *supra* note 16, at 5.

the enforcement procedure really only mattered in the House of Representatives, because the Senate's less restrictive floor procedures had essentially always allowed a senator to force a majority vote on a mandate by moving to strike it from the bill. An objecting representative is further strengthened in the House, because the Act provides that a special rule promulgated by the Rules Committee attempting to waive an UMRA point of order without a separate vote is itself out of order.⁴⁵ This restriction on the Rules Committee is important because most points of order that could be raised in the House, for example, against budget-related proposals, are waived as part of the special rules regulating most debate. The point of order process in the Senate became important in the 109th Congress when the Senate increased to sixty the votes needed to waive an UMRA point of order.⁴⁶ Before that, only about a dozen points of order had been raised, and all of those had been raised in the House.⁴⁷ After the change in the voting requirement in the Senate, more have been raised in the House, and two were raised in the Senate, both of which were sustained, thereby killing two amendments to an appropriations bill that would have increased the minimum wage.⁴⁸ The Senate's voting requirement reverted back to a simple majority in the 110th Congress,⁴⁹ perhaps as a result of the change in partisan control of that body.

Although UMRA can be seen as a stand-alone framework law, triggered by a certain group of intergovernmental mandates, it is formally an amendment to one of the most important modern framework laws, the congressional budget process.⁵⁰ Because of its relationship to the budget framework and because of the ubiquitous

45 2 U.S.C. § 658e.

46 H.R. Con. Res. 95, 109th Cong. § 403, 119 Stat. 3633, 3652 (2005).

47 See GAO, COVERAGE, *supra* note 17, at 7.

48 CBO, TEN-YEAR REVIEW, *supra* note 16, at 5.

49 See S. Con. Res. 21, 110th Cong. § 205 (2007). The version that passed the Senate initially extended the sixty vote supermajority requirement until 2017, but the conference report changed the treatment of UMRA points of order to return to the simple majority requirement. See H.R. REP. NO. 110-153, at 16 (2007) (Conf. Rep.).

50 For descriptions of the modern congressional budget process, see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 446-85 (4th ed. 2007); ALLEN SCHICK, THE FEDERAL BUDGET 118-61 (3d ed. 2007). The federal budget framework is governed primarily by 2 U.S.C. §§ 601-688, 900-907d, the product of several laws passed in the last three decades, including the Congressional Budget and Impoundment Control Act of 1974, Pub L. No. 93-344, 88 Stat. 297, the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038, and the Budget Enforcement Act of 1990, Pub. L. No. 101-508, tit. XIII, 104 Stat. 1388-573.

role of the budget process throughout congressional deliberations, UMRA shares many of the features of the larger framework law. Both respond to collective action problems, which I will discuss in more detail in Part II, that are faced by multimember institutions such as Congress and are particularly acute in the budget context; both emphasize the importance of better information to improve congressional deliberations; and both use point of order techniques to enforce their provisions. At various times during the last three decades of the modern congressional budget process, some of the Budget Act's provisions have also been subject to enforcement through sequesters—or cuts in funding for certain programs triggered when Congress does not keep federal spending within established budget caps.⁵¹ A sequester is overseen by the Office of Management and Budget (OMB) pursuant to statutory instructions that limit the OMB's discretion in implementation.⁵² There is no comparable enforcement for UMRA, other than the Byrd lookback provision which has never been used.⁵³ Even when sequesters have appeared to be in the offing, however, Congress and the President usually find a way to avoid such cuts. Thus, the primary enforcement mechanism for the congressional budget framework has been points of order (often requiring sixty votes in the Senate to waive, but amenable to mass waiver in the House through a special rule), coupled with the occasional threat of sequester.

UMRA differs from some salient features of the congressional budget process in a way relevant to my analysis. One engine of the modern congressional budget process, budget reconciliation, eliminates some of the major hurdles to enacting legislation, particularly in the Senate.⁵⁴ An omnibus budget reconciliation act, which typically includes changes to revenue laws and entitlement programs, cannot be filibustered in the Senate; instead, a reconciliation bill is considered under rules that limit debate significantly and allow passage by a simple majority.⁵⁵ Other provisions make it harder for members to

51 See SCHICK *supra* note 49, at 295.

52 See AARON WILDAVSKY & NAOMI CAIDEN, *THE NEW POLITICS OF THE BUDGETARY PROCESS* 148–49 (3d ed. 1997).

53 See GAO, *COVERAGE*, *supra* note 17, at 16–17.

54 See William G. Dauster, *The Congressional Budget Process*, in *FISCAL CHALLENGES* 4, 26–34 (Elizabeth Garrett, Elizabeth A. Graddy & Howell E. Jackson eds., 2008) (discussing reconciliation and other procedures affecting budget legislation).

55 See, e.g., GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER* 27 (2006) (stating that of ninety major laws enacted between 1975 and 1994 only ten passed with fewer than sixty senators voting in favor, and half of those were budget bills).

amend budget-related legislation on the floor,⁵⁶ which might unravel deals struck in committee, because the amendments would have prohibited revenue effects. Certainly, reconciliation laws still have to meet the constitutional requirements for enactment emphasized by Professor Clark, but passage is more likely for these bills than other major legislation because internal impediments are eliminated or lessened. UMRA, on the other hand, is designed to add *more* obstacles to the enactment of unfunded mandates than usually face legislative proposals; it provides points of order with teeth (immunity from special rule waivers in the House and, at least for a brief period of time, supermajority voting requirements in the Senate) so it can disaggregate deals involving unfunded mandates and force targeted votes on mandates of a certain size.

II. THE PURPOSES SERVED BY UMRA

In other work, I have identified five reasons that Congress may decide to address a problem with a procedural tool like a framework law, rather than just directly adopting responsive substantive legislation or changing the type of substantive legislation it enacts.⁵⁷ In other words, Congress must have had a reason to adopt UMRA as a way to structure future decisions about unfunded mandates rather than altering each unfunded mandate to better comport with the values of federalism when it is considered by the legislature. Framework laws serve at least five purposes that could not be achieved as easily or in the same way without them: providing a symbolic response on a salient issue; articulating neutral rules for a set of future decisions; serving as a coordination device to solve collective action problems; entrenching certain objectives so that future decisions are more likely to meet them; and changing the internal balance of power in Congress.⁵⁸ UMRA is motivated by all but the second purpose of framework laws; indeed, it was consciously designed not to be neutral among outcomes but to stack the deck against unfunded mandates. I will discuss each of the other four purposes as they relate to UMRA.

A. *A Symbolic Response*

Laws often serve expressive or symbolic purposes along with other objectives. This is not necessarily an indictment of the law; indeed, in some cases, the success of a law as a symbol can also facili-

56 See, e.g., Dauster, *supra* note 53, at 19.

57 See Garrett, *supra* note 8, at 733–63.

58 See *id.* at 733.

tate its success along other dimensions. However, in some cases, legislation is designed cynically as empty symbolism to allow lawmakers to appear to respond to constituent demands while allowing politics as usual to continue. There is some reason to believe that UMRA was empty symbolism for at least some supporters; for example, the Byrd lookback provision that requires a reassessment of mandates if the promised funding is never enacted or falls short has never been implemented. The nature of federalism itself may lead to largely symbolic responses by Congress because federalism is a relatively abstract concept that voters find attractive but hard to understand concretely.⁵⁹ We will return to the challenges of abstraction in designing an appropriate framework law in Part III; here, it is sufficient to note that symbolic responses are more likely in such a context—and they are more likely to quiet the public advocating for reform.

However, if supporters hoped to enact an empty symbol, they did not succeed. UMRA has affected the dynamics of congressional deliberation and the substance of legislation enacted by Congress in the more than ten years it has been effective. The CBO reports that its analysts meet frequently with congressional aides so that legislation is drafted to avoid running afoul of UMRA.⁶⁰ Observers generally believe that UMRA has the most influence before a bill reaches the floor as drafters work to avoid its provisions. Former House Rules Committee Chairman Gerald Solomon (R-N.Y.) observed: “It has changed the way that prospective legislation is drafted Anytime there is a markup, this always comes up.”⁶¹ For example, the Internet Tax Freedom Act (ITFA),⁶² considered in 1997, would have prohibited states and localities from collecting some taxes for a period of time.⁶³ This falls under UMRA’s scope because direct costs include amounts that states and localities “would be prohibited from raising in revenues” as a consequence of a mandate.⁶⁴ The CBO originally esti-

59 Cf. Rodney E. Hero, *The U.S. Congress and American Federalism: Are “Subnational” Governments Protected?*, 42 W. POL. Q. 93, 95 (1989) (noting that “it is not clear that citizens understand, much less attach particularly high value to” various principles of government, including federalism).

60 See Theresa A. Gullo & Janet M. Kelly, *Federal Unfunded Mandate Reform: A First-Year Retrospective*, 58 PUB. ADMIN. REV. 379, 384–85 (1998).

61 Allan Freedman, *Unfunded Mandates Reform Act: A Partial “Contract” Success*, 56 CONG. Q. WKLY. REP. 2318, 2318 (1998) (internal quotation marks omitted).

62 Pub. L. No. 105-277, tit. XI, §§ 1101–04, 112 Stat. 2681-719 to 2681-726 (1998) (codified as amended at 47 U.S.C.A. § 151 note (West Supp. 2007)).

63 See Theresa Gullo, *History and Evaluation of the Unfunded Mandates Reform Act*, 57 NAT’L TAX J. 559, 567 (2004).

64 2 U.S.C. § 658(3) (2000).

mated that the Act's direct costs would exceed the UMRA threshold.⁶⁵ The cost statement was a significant factor in Congress' decision to amend ITFA so that it was "narrower in scope and specifically allowed states that were currently collecting a sales tax on Internet access to continue to do so."⁶⁶ The amended proposal's direct costs fell below the threshold; thus, the bill was not subject to a point of order when it was considered on the floor.

The sixty-vote point of order in the Senate also had real consequences when it was in effect. In 2005, the enforcement mechanism was used to defeat two amendments to raise the minimum wage that were offered to an appropriations bill.⁶⁷ Minimum wage bills, which apply to states and localities, are unfunded mandates that typically trigger UMRA's protections because the burden they impose far exceeds the threshold and, of course, they are not funded by the federal government.⁶⁸ Here, dueling amendments were offered, one by Senator Edward Kennedy (D-Mass.) to raise the minimum wage substantially, and the other offered by Senator Michael Enzi (R-Wyo.) to raise the minimum wage and also to exempt many small businesses from many federal labor practices.⁶⁹ One watchdog group, OMB Watch, claimed that the supermajority requirement in the Senate "transformed a relatively harmless procedural mechanism into an insurmountable roadblock to important protections for the public interest."⁷⁰ With the reversion to a simple majority voting requirement in fiscal year 2008, the Senate point of order process will be much less significant.

For those supporters who had hoped that UMRA would usher in real changes in the deliberative process and serve goals in addition to symbolic purposes, it is still quite likely that the symbolism of a framework law was important to them. The issue of unfunded mandates had been placed on the national agenda through a series of symbolic events. The campaign to eliminate or reduce unfunded mandates was led by the intergovernmental lobby. This group is a loosely coordi-

65 CONG. BUDGET OFFICE, MANDATES STATEMENT: H.R. 3529 INTERNET TAX FREEDOM ACT OF 1998, at 4 (1998), available at <http://www.cbo.gov/ftpdocs/6xx/doc608/hr3529-m.pdf>.

66 Gullo, *supra* note 63, at 568.

67 See 151 CONG. REC. S11,547 (daily ed. Oct. 19, 2005); 151 CONG. REC. S11,512 (daily ed. Oct. 17, 2005).

68 Perhaps not surprisingly, both *National League of Cities v. Usery*, 426 U.S. 833, 835-36 (1976), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 528 (1985), deal with federal minimum wage statutes.

69 See 151 CONG. REC. S11,547-48 (daily ed. Oct. 19, 2005).

70 *Senate Uses Minimum Wage Increase to Push Anti-Regulatory Agenda*, OMB WATCH, Nov. 1, 2005, <http://www.ombwatch.org/article/articleview/3151/1/326>.

nated coalition of more than sixty organizations representing state and local public officials.⁷¹ The most influential are “The Big Seven,” comprising the Council of State Governments, the International City Management Association, the Nation’s Association of Counties, the National Conference of State Legislatures, the National Governors’ Association, the National League of Cities, and the United States Conference of Mayors.⁷² These groups funded several studies about the impact of unfunded mandates on states and localities, and they organized high-profile protests to move the issue to the forefront of the national agenda. Perhaps the best known study estimated the costs of unfunded mandates on 314 cities surveyed to be \$6.5 billion in 1993 and \$54 billion in the following five years.⁷³ Although the methodology of the study was attacked,⁷⁴ it was influential in shaping the policy debate. The report was released during a rally on the Capitol steps on “National Unfunded Mandates (NUM) Day” held on October 27, 1993.⁷⁵ The publicity did result in heightened attention to the extent and effect of unfunded mandates; the number of newspaper articles mentioning “unfunded federal mandates” rose from 22 in 1992 to 836 in 1994,⁷⁶ right before the debate began in Congress.

Efforts to pass UMRA fell short, however, despite the lobbying, until the Republican takeover of the House, facilitated in part by the potent symbolism of the “Contract with America.” The Contract was the national platform developed by House Republicans in their successful bid to achieve majority status in the 1994 midterm elections. In its opening passages, the Contract declared, “[I]n this era of official evasion and posturing, we offer instead a detailed agenda for national renewal, a written commitment with no fine print.”⁷⁷ The Contract emphasized that it was a written, binding commitment—thus, the symbolism of using a statute, passed in the traditional way that all legislation is passed, was important in signaling to voters that lawmakers had met their pledge in an especially meaningful way. Republicans promised to bring to the floor of the House, within the first 100 days of the 104th Congress, ten bills, one of which included unfunded mandates

71 See DAVID ARNOLD & JEREMY PLANT, PUBLIC OFFICIAL ASSOCIATIONS AND STATE AND LOCAL GOVERNMENT 1–14 (1994).

72 *Id.* at 15 n.1.

73 PRICE WATERHOUSE, IMPACT OF UNFUNDED FEDERAL MANDATES ON U.S. CITIES 4 (1993) (funded by the United States Conference of Mayors).

74 See Melissa Romine, *Politics, the Environment, and Regulatory Reform at the Environmental Protection Agency*, 6 ENVTL. LAW 1, 32–34 (1999).

75 See Gullo & Kelly, *supra* note 60, at 380.

76 Conlan, Riggle & Schwartz, *supra* note 19, at 27.

77 CONTRACT WITH AMERICA 7 (Ed Gillespie & Bob Schellhas eds., 1994).

reform.⁷⁸ UMRA was indeed one of the first promises in the Contract to be considered in both houses—Majority Leader Dole designated it as S. 1 to signal UMRA's importance to his agenda,⁷⁹ and it was H.R. 5 in the House.⁸⁰ It was the first promise fulfilled, and one of the few promises in the Contract to be enacted.⁸¹ In short, UMRA is a part of a larger symbol, the Contract with America, that continues to represent to Republicans the way they achieved control of the House after decades of being in the minority.

A framework law was the best way to respond to the cries for a reduction in the number and scope of unfunded mandates, even if one assumes that a Republican Congress was likely to pass fewer unfunded mandates without a framework.⁸² The demand by those seeking reform was to change the way Congress makes decisions in this arena. Although lawmakers could promise to behave differently in the future, a framework law is a way for Congress as an institution to credibly commit to a long-lasting change in behavior—at least, the law is as credible as the enforcement mechanisms it contains. Moreover, a framework law which applies indefinitely (until discarded or changed) is a suitable answer to a concern that the problem is a long-term one that demands a comprehensive response, one that will apply to laws in the future, not just to the immediate decision.

In other words, one aspect of the symbolic value of passing a framework law is that it saliently demonstrates Congress' commitment to meet other objectives that a framework is peculiarly suited to—in this case, entrenching the view that unfunded mandates should be harder to pass than other legislation. By virtue of its enactment, its requirements for frequent cost statements, and its lurking threat of points of order that cannot be waived under the radar screen by special rules, it may also more prominently place the issue of unfunded

78 See Job Creation and Wage Enhancement Act, H.R. 9, 104th Cong., tit. X, §§ 10001–10507 (1995).

79 See 141 CONG. REC. 1158 (1995).

80 See *id.* at 564.

81 See Gullo & Kelly, *supra* note 60, at 380.

82 This assumption is doubtful. As I will discuss in Part II.C, collective action problems beset Congress in this arena so even lawmakers committed to a view of federalism which is hostile to unfunded intergovernmental mandates might enact more than they would prefer. Recent experience also suggests that Republican national legislators are just as willing to preempt state and local government action and impose directives on the states as Democrats, albeit on different topics. National laws concerning education, marriage policy, reproductive decisions, and tax policy have been warmly received by Republicans in the same way that environmental regulations, minimum wage laws, and safety rules are by Democrats.

mandates on the congressional agenda in the future.⁸³ Certainly, the even more influential congressional budget process has led to a greater consciousness about budget consequences when Congress is legislating in any realm. John Ferejohn explains that lawmakers will sometimes adopt mechanisms to better assure accountability by facilitating monitoring by constituents because these arrangements increase the trust that the principals are willing to accord their agents.⁸⁴ Although he makes this point with respect to rule changes increasing transparency in government, a similar dynamic may have led to the promise in the Contract with America and the subsequent adoption of UMRA.

B. Solving a Collective Action Problem to Produce Information

Like many other procedures in legislatures, framework laws operate to help multimember bodies solve collective action problems. In particular, frameworks like UMRA and the congressional budget process are designed to produce more optimal amounts of information. Without a centralized entity providing information and a way to ensure it is made available broadly and in a timely manner, valuable information is apt to be underproduced by a legislature. All legislators benefit when a particular legislator or her staff spends time developing data, but the legislator who produces the information uses time that she could have spent on tasks contributing more directly to her reelection. Thus, an individual lawmaker will not internalize all the benefits of information production if she wishes to use it in public debate, but she will shoulder all the costs. In the end, information will be underproduced without intervention. UMRA solves this problem, at least partially, because the State and Local Government Cost Estimates Unit of the CBO prepares mandate cost statements that are available to committees during their consideration of bills and to all members of Congress during floor deliberations.⁸⁵ The CBO itself was created by the 1974 Budget Act to solve a similar collective action problem in producing budget information,⁸⁶ a problem that had dis-

83 See GAO, VIEWS VARY, *supra* note 26, at 22; see also 145 CONG. REC. 1783 (1999) (statement of Rep. Condit) (stating that an “atmosphere of awareness” about intergovernmental mandates “has been fostered by the point of order procedure established under the Unfunded Mandates Reform Act”).

84 See John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 148–49 (Adam Przeworski, Susan C. Stokes & Bernard Manin eds. 1999).

85 See 2 U.S.C. §§ 658(b)–(c) (2000); Gullo, *supra* note 63, at 561–62 & n.3.

86 See Congressional Budget & Impoundment Control Act of 1974, Pub. L. No. 93-344, § 2, 88 Stat. 297, 298 (codified at 2 U.S.C. § 621 (2000)) (establishing the

advantaged the legislative branch relative to the President with his specialized OMB staff.

Intergovernmental mandates present particularly acute problems relating to information that a framework law can mitigate. First, determining the magnitude of costs associated with a particular intergovernmental mandate can be difficult, particularly for a lone member of Congress without a large or sophisticated staff. For example, the estimate of costs to comply with the Fair Labor Standard Act's overtime provisions required studying the effects on 3000 counties, 19,000 municipalities, 17,000 townships, 15,000 school districts, and 29,000 local special districts.⁸⁷ An estimate of the direct costs of intergovernmental mandates contained in the Personal Data Privacy and Security Act of 2005 noted that the requirements would affect more than 190,000 entities, including "75,000 municipal governments, about 3,600 counties, more than 100 public hospitals, about 100,000 schools, 14,000 school districts, and more than 1,500 public post-secondary institutions."⁸⁸ It would be difficult for a member of Congress with his personal staff, or even a committee chair with her staff, to gather and analyze this amount of data. Lobbyists may in some cases provide information about the burden of intergovernmental mandates, although lawmakers and their aides must discount this information somewhat because it is provided by interested parties. Although lobbyists are repeat players who need to establish reputations for truthfulness, they will also work to present information in a way that will buttress their arguments and favor the outcome they prefer. Under the UMRA framework, interested groups still interact with the CBO as it produces mandate cost statements and provides necessary data, but that information is weighed and analyzed by the CBO's professional, nonpartisan staff before it is disseminated to Congress and used in deliberation and debate.⁸⁹

CBO "to assure effective congressional control over the budgetary process" and "to provide for the furnishing of information by the executive branch in a manner that will assist the Congress in discharging its duties").

87 Theresa A. Gullo, *Estimating the Impact of Federal Legislation on State and Local Governments*, in *COPING WITH MANDATES* 41, 46-47 (Michael Fix & Daphne Kenyon eds., 1990).

88 CONG. BUDGET OFFICE, *COST ESTIMATE: S. 1789 PERSONAL DATA PRIVACY AND SECURITY ACT OF 2005*, at 5 (2006), available at <http://www.cbo.gov/ftpdocs/71xx/doc7161/s1789.pdf>; see also S. REP. NO. 104-308, at 43-44 (1996) (concerning the direct costs of an act applying federal workplace health and safety laws to all public workplaces and indicating that the mandate would affect thirty-one states or territories, 54,500 governmental units, and 29,000 local special districts).

89 Interestingly, UMRA may solve a problem facing interest groups that arises from the collective nature of Congress. Before UMRA, interest groups had to interact

Second, information must be provided at a time it is useful—that is, when it can change the outcome of decisions. A member who does not sit on a particular committee may not be aware of an intergovernmental mandate until the bill comes to the floor, and there may be little time for her to generate information, analyze the data, and disseminate it. Even if she can, it is difficult in the House to amend major laws once they reach the floor because they are usually considered under restrictive special rules. Even in the more freewheeling Senate, most of the changes in legislation occur at the committee stage or before the bill arrives for consideration by the full body. UMRA solves this problem by providing information during the committee deliberations and often during the initial drafting stages. If a mandate cost statement does not accompany a bill to the floor, then a point of order can halt its consideration until the information is provided.

Third, a framework can require information to be provided in a way that illuminates the cumulative effect of many decisions made over time. The UMRA framework does not address this informational problem as directly as it does the other two challenges.⁹⁰ UMRA's disclosure provisions apply bill-by-bill or for individual amendments and do not provide a running tally or larger perspective except in the annual reports. The CBO has published five- and ten-year assessments of its work under UMRA, in addition to the annual assessments. These retrospective documents give a fuller sense of all the intergovernmental mandates of significance considered by Congress over several years. However, their focus is on mandates that exceed the statutory threshold, so there is no assessment of the cumulative financial effect of mandates with direct costs below \$50–64 million annually.⁹¹ Presumably, this total figure could be quite substantial; in the first ten years UMRA has been in effect, 700 bills contained intergovernmental mandates, but only sixty-four of those included mandates

with a variety of substantive and appropriations committees, any of which could consider and recommend unfunded mandates. Now, groups can rely on the CBO mandate cost statement process to identify mandates and help them target their efforts, and they have one centralized entity with the responsibility for analyzing such mandates. Thus, lobbyists can use their time more efficiently, providing information to the CBO as it develops estimates and using the information the CBO produces to target particular committees considering significant intergovernmental mandates.

90 See GAO, *VIEWS VARY*, *supra* note 26, at 23.

91 Although the Advisory Commission on Intergovernmental Mandates was charged by UMRA to prepare a series of reports providing a broader vision of federal mandates, setting out their costs and benefits, and providing recommendations for change, the Commission was disbanded at the end of fiscal year 1996 before it could fulfill most of these objectives. See Gullo & Kelly, *supra* note 60, at 386.

that exceeded the threshold.⁹² Congress could require more extensive review of the total direct costs of all mandates and an identification of how many of these mandates were ultimately unfunded. However, this would require a substantial commitment of time and energy by the CBO. Unless there was some way to enforce this informational requirement, it is likely that it would not be a top priority for the CBO as it deploys its limited staff and resources.⁹³

One can imagine different designs for frameworks aimed to produce information about aggregate costs of mandates and designed to increase the likelihood that the information would play a larger role in deliberation, although such frameworks are likely to be unworkable in practice. For example, just as the budget process has applied caps on spending to constrain the overall effect of the many decisions made in the twelve appropriations bills, Congress could set annual or multi-year limits on the total costs of unfunded mandates—a sort of “unfunded mandates budget” that would constrain decisions made in dozens of bills passed during the session. The challenge with such a framework would be its enforcement. Statutory budget caps were enforced until fiscal year 2002 through the sequestration process requiring the OMB to uniformly reduce federal spending if the total exceeded the limit.⁹⁴ It is not clear how Congress could effectively apply such a process to unfunded mandates. Perhaps a point of order process could make it more difficult to enact additional mandates once the limitation had been reached in a particular year. Such an enforcement mechanism would result in a rush to legislate before the cap is reached, and it would also encourage drafters of mandates late in the session to delay the effective dates so that the costs would fall in years with room under the cap. That, in turn, would just exacerbate the problem in the later year—or put pressure on Congress to lift that year’s cap.⁹⁵ Perhaps the Byrd lookback provision could provide a model to enforce a comprehensive mandates budget, but it is difficult to imagine how a set of mandates could be sensibly cut back. One can reduce funding in all federal programs by ten percent to meet a spending cap, although not without sometimes severe fiscal pain, but

92 See CBO, TEN-YEAR REVIEW, *supra* note 16, at 2–3.

93 See Garrett, *supra* note 41, at 1153–54 (describing the ineffectiveness of the State and Local Cost Estimate Act of 1981, the precursor to UMRA, because of absence of enforcement).

94 See Cheryl D. Block, *Budget Gimmicks*, in FISCAL CHALLENGES, *supra* note 54, at 39, 41.

95 This is a problem similar to that raised by advance appropriations, where Congress makes an appropriation in one fiscal year but scores the money against a cap in a future fiscal year. See SCHICK, *supra* note 50, at 75, 78.

how does one cut back a requirement to upgrade government workplaces to meet safety requirements by ten percent? How does one shave ten percent off an intergovernmental mandate that preempted the states' taxing authority in an area? In some cases, the federal government might be able to instruct states to pare the mandate back by a certain amount and provide them the flexibility to determine how to reduce the burden, but many intergovernmental mandates do not operate in ways to make a pro rata reduction in their scope feasible.

Framework laws, like UMRA, can solve the relatively benign, but potentially serious problem of producing sufficient relevant information for a collective body that suffers from free-rider problems. The hope is that better informed lawmakers will not pass as many laws that burden states and localities with unfunded mandates; the argument is that legislators are well-intentioned but through ignorance pass laws that they would prefer not to. However, it may be that a more troubling phenomenon explains why federal lawmakers successfully and frequently negotiate through the "finely wrought" constitutional requirements of lawmaking to pass legislation that undermines the values of federalism. Framework laws can also help in this context by erecting more hurdles than the few in Article I and targeting the more rigorous procedures, as much as possible, to the set of legislative proposals that are especially problematic.

C. *Entrenching a Bias in Favor of Federalism*

Members of Congress are likely to pass more laws burdening state and local governments and preempting state policies than would be optimal for several reasons. First, all national lawmakers wish to effect change in various policies, both because they believe change serves what they view as the best interest of the country and because their reelection is helped when they can tell voters they passed laws that voters favor. Thus, even if some lawmakers believe that certain policies are better adopted and implemented on the state level, they may nonetheless resort to federal lawmaking as a second-best alternative over which they have more influence. In that way, they ensure the reform happens—and they claim credit for it. To put it another way, people seldom seek national office, enduring the difficulties of the modern campaign, only to argue that other political actors ought to be making key decisions while they sit back and watch.⁹⁶

96 Cf. Zoë Baird, *State Empowerment After Garcia*, 18 URB. LAW. 491, 504 (1986) (noting that "Congress faces a conflict of interest whenever its legislation presents an assertion of federal power the states argue infringes on their sovereignty").

Second, the context of allocation of resources in a federal system gives rise to particular pathologies that are likely to lead to congressional enactment of a greater level of unfunded intergovernmental mandates than is optimal. These pathologies are so strong that the constitutional lawmaking requirements will not stand in the way of many of these laws, and thus stringently enforcing the constitutional procedures, as Professor Clark urges,⁹⁷ will not necessarily provide much protection for the values of federalism. Lawmakers who hope to be reelected will rationally prefer to separate the act of establishing popular federal programs from the act of raising funds to pay for them if by doing so they can avoid responsibility for the latter act. In particular, politicians desperately wish to avoid raising taxes, a salient issue for most voters during an election. There are several ways that Congress can try to distance itself from raising taxes. Lawmakers can fund programs through deficit spending, which shifts the burden of financing to people who are not yet voting, and indeed who may not yet be born.⁹⁸ Another attractive funding option for a federal lawmaker is to force state and local governments to shoulder the bill—a practice called “liability-shifting”⁹⁹—as long as the federal legislators can still claim credit for the popular programs that are receiving the funds. The ability to engage in liability-shifting may lead members of Congress to impose more unfunded mandates on states and localities than they think is consistent with a robust federal system.¹⁰⁰ In the end, their preference to claim credit for new programs without taking the blame for decisions made to provide funding overcomes any preference they have about the appropriate balance of power between federal and subnational governments. Many simply cannot withstand the temptation, no matter what their other values and no matter what their partisan affiliation.

Federal lawmakers can engage in liability-shifting because it is difficult for state and local officials to argue persuasively to voters that higher state or local taxes or reduced services are the result of deci-

97 See Clark, *supra* note 1, at 1372–93.

98 The congressional budget framework, particularly after the adoption of Gramm-Rudman-Hollings in the mid-1980s and the Budget Enforcement Act of 1990, see *supra* note 50, has made it more difficult, but certainly not impossible, for Congress to use deficit financing.

99 Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1065 (1995).

100 See Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1472–73 (1995) (explaining the prisoner's dilemma problem in the context of federalism generally).

sions made in Washington, D.C.¹⁰¹ Tracing such an action back to the cost of several unfunded mandates is difficult and time consuming, and voters are apt to be cynical when they hear subnational officials make these arguments, assuming instead that the lower level officials are the ones shirking responsibility. The possibility of taking advantage of this fiscal illusion may cause federal legislators to ignore principles of federalism when constructing national policies, even if their past experience predisposes them to be sympathetic to such values. Moreover, if federal lawmakers avoid all or most of the responsibility for funding national priorities, they may never develop a full sense of the costs of those programs and thus pass more costly programs than would be desirable. It is not only voters who may suffer from a fiscal illusion; lawmakers who are not held accountable for the costs of programs may not appropriately consider them in determining which policies have benefits that exceed their costs.

A framework law can help correct this bias by erecting more hurdles in the path of legislation that is susceptible to these pathologies. Supermajority voting requirements are a straightforward way to make legislating in an area more difficult. Although the cloture rules, which require sixty votes to cut off debate in the Senate and bring a bill to a vote, provide supermajority vote protection to all but a handful of bills like budget reconciliation acts and fast-track trade proposals, a targeted supermajority vote requirement to waive a point of order may be less costly for opponents to use. Opponents using an UMRA point of order coupled with a supermajority voting requirement for waiver, for example, do not need to threaten to filibuster a bill—a threat that is less costly in the modern Senate than it was in previous decades¹⁰² but still more costly than a point of order procedure that includes little or no debate and forces an immediate ruling and vote. In addition, a point of order enforcement scheme empowers one or a few lawmakers with intense preferences on a particular issue—such as a view that our federal system should vest substantially more power and responsibility at the subnational level than is likely, given legislative dynamics. It is clear that some lawmakers do have strong preferences favoring substantial state and local authority and power; Lamar Alexander (R-Tenn.), the senator who pushed the change in 2005 to require sixty votes to waive an UMRA point of order, is one such lawmaker who characterizes himself as incapable of

101 *But see* David A. Dana, *The Case for Unfunded Environmental Mandates*, 69 S. CAL. L. REV. 1, 18–21 (1995) (arguing that voters should be able to get information about liability-shifting if the problem of unfunded mandates is serious enough).

102 *See* WAWRO & SCHICKLER, *supra* note 55, at 259–61.

getting “over being Governor.”¹⁰³ Others in the Senate share these preferences with differing intensities; keep in mind that 368 members of the 110th Congress had some experience as state or local lawmakers before coming to Washington.¹⁰⁴ And a few anticipate that they may return to state office when they leave Congress.¹⁰⁵

Even if only a handful retain their commitment to a particular vision of federalism that would recalibrate the balance to favor subnational governments more, they can use a framework law’s point of order process to block or change proposals inconsistent with that vision. As long as they can command the support of a significant minority, senators can block enactment of provisions subject to a point of order enforced through a sixty-vote supermajority requirement. Had the Senate retained the supermajority voting requirement when the Democrats took over with a slim majority, then the minority party could have effectively used this procedure to block change it opposed. Even when the rules allow only a simple majority to waive the point of order, the framework can be used to make issues more salient by forcing a vote on a particular provision that would otherwise be buried in an omnibus proposal. The ability to disaggregate provisions and force separate votes, even those determined by a simple majority, may be enough to kill the provision. Omnibus bills are usually the product of logrolling; although the bargains may survive targeted votes, it may also be the case that disaggregating the package and requiring separate votes will unravel the agreement.¹⁰⁶ Each provision in an omnibus bill may not alone command majority support,

103 See 152 CONG. REC. S1391 (daily ed. Feb. 16, 2006) (statement of Sen. Alexander). One wonders if he would have found it easier to get over his past had he been elected to a leadership position in the Senate; in 2006 he lost by one vote to Trent Lott (R-Miss.) in the election for minority whip. Adam Nossiter & David M. Herszenhorn, *Mississippi’s Lott to Leave Senate Seat Held Since ’88*, N.Y. TIMES, Nov. 27, 2007, at A20.

104 This figure is derived from the biographies of Congressmembers found in CONG. QUARTERLY, CQ’S POLITICS IN AMERICA 2008: THE 110TH CONGRESS (Jackie Koszczuk & Martha Angle eds., 2007). I considered local government experience to be service as mayor, member of a city council, member of a school board, or county supervisor. State experience included state legislator, governor, lieutenant governor, attorney general, secretary of state, treasurer, tax commissioner, or other “cabinet level” state official. See also Hero, *supra* note 59, at 96 (finding moderate levels of support by members of Congress for principles of federalism, but finding differences across delegations and finding support affected by ideology and party).

105 Notable examples of politicians who have left national positions for state office are Jon Corzine of New Jersey, Bill Richardson of New Mexico, and Arch Alfred Moore, Jr. of West Virginia, all who became governors after service in Congress.

106 See GLEN S. KRUTZ, HITCHING A RIDE 32–35 (2001) (describing the use of omnibus bills to facilitate compromise).

even if the bill as a whole can pass the House or Senate. Special rules in the House keep such packages intact; a point of order that singles a provision out for a separate vote threatens that equilibrium.¹⁰⁷

UMRA puts additional procedural hurdles in the way of unfunded intergovernmental mandates that exceed a certain threshold of direct costs. Other frameworks could apply similar procedures to different kinds of legislation that implicate federalism values, such as federal laws that preempt state or local requirements.¹⁰⁸ In these cases, a framework acts as a precommitment device to protect certain values of federalism through enhanced procedures.

One question that arises with any precommitment device is what group of lawmakers is being bound by the framework? In the case of UMRA, the enactors sought to bind themselves and future Congresses. The need to bind themselves stemmed from the awareness of the pathologies discussed above that might lead Congress to pass more unfunded mandates than members would prefer. More importantly, UMRA's framework provided a way to demonstrate to voters that the Contract with America would be more than empty promises because it would include binding enforcement procedures. In this respect, the precommitment was more symbolic than real, since presumably those lawmakers would have attempted to keep their promise even in the absence of the disciplinary device.

However, UMRA applies indefinitely, suggesting that lawmakers sought to entrench a particular vision of federalism beyond the 104th Congress, and perhaps beyond the period of Republican control.¹⁰⁹ In particular, the supermajority voting requirement, passed in a later Republican Senate,¹¹⁰ was intended to provide some assurance to those who were in the enacting Congress' (perhaps slim) majority that they could block enactment of certain proposals even if they could only muster the support of a minority. Recent Congresses have had razor-thin majorities, which means both that a member of today's

107 Another mechanism that can disaggregate logrolls is the line item veto power or its close cousin, the enhanced rescission authority that had been provided to the President in a different framework law also growing out of the Contract with America. See Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200, *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998); see also Elizabeth Garrett, *The Story of Clinton v. City of New York: Congress Can Take Care of Itself*, in ADMINISTRATIVE LAW STORIES 47, 56–57 (Peter L. Strauss ed., 2005) (describing enhanced rescission).

108 See *infra* text accompanying notes 144–49.

109 For suggestions that such was the intent of the enacting Congress, see Angela Antonelli, *Promises Unfulfilled: Unfunded Mandates Reform Act of 1995*, REGULATION, Spring 1996, at 44–45; Comm. on Fed. Legislation, *The Unfunded Mandates Reform Act of 1995*, 50 REC. ASS'N BAR CITY N.Y. 669, 683 (1995).

110 See *supra* note 19 and accompanying text.

majority may be in tomorrow's minority, and that the minority block is likely to be fairly strong. If the future majority wishes to avoid obstruction by a determined minority, it will have to repeal the entrenching aspect of the framework. Here, the supermajority voting requirement to waive an UMRA objection was repudiated as part of the conference agreement on a large omnibus concurrent budget resolution.¹¹¹ In other cases, however, lawmakers may find repealing parts of the framework difficult if interest groups value it, remain vigilant, and can credibly threaten to punish those who vote for the repeal. Other supermajority voting protections in the budget process have proved more resistant to repeal.

UMRA may also represent an effort by one house of Congress to bind the other house. Past experience had demonstrated that the Senate was more inclined to enact unfunded mandates reform than the House, a state of affairs consistent with Professor Clark's view of the Senate as the key player in the constitutional scheme for lawmaking that provides some protection for the values of federalism.¹¹² Legislation proposing unfunded mandates reform had been adopted in the Senate in the 103rd Congress, but had been blocked in the House.¹¹³ Thus, when both houses were controlled by the Democrats—as they were in that Congress—the Senate took the problem of unfunded mandates more seriously, in part because it was more ideologically conservative than the Democratic House and perhaps in part because of the difference in how states are represented in the Senate. When a shift in partisan control of Congress removed the obstacles to UMRA in the House, it is not surprising that the framework ultimately adopted more severely constrained the House than the Senate. Indeed, it essentially transformed the rules governing the House floor so that they resembled the Senate's floor process with respect to unfunded mandates. The House Rules Committee lost the power to waive UMRA points of order in a special rule governing debate on a bill with unfunded mandates, thereby allowing individual members to raise a point of order and force a separate vote on any unfunded mandate.¹¹⁴ Thus, UMRA may be an example of one house attempting to influence the outcomes in the other house before formal interchamber negotiations begin in conference committee.

111 See *supra* note 49 and accompanying text.

112 See Clark, *supra* note 1, at 1371–72 (discussing the effect of the Seventeenth Amendment on the influence of states in the Senate but noting the continued key role that the Senate plays in the constitutional scheme of lawmaking).

113 See Conlan, Riggle & Schwartz, *supra* note 19, at 28–31.

114 See *supra* note 45 and accompanying text.

One question about frameworks as precommitment devices is whether they really are enforceable. Frameworks are part of the internal rules of each house, albeit rules adopted as part of statutes. Either house can change its rules through a majority vote,¹¹⁵ and both houses have ignored rules when enough members wanted to pass legislation that might be hindered by robust enforcement of disciplinary devices. UMRA's enforcement mechanisms have been invoked very infrequently in the past decade, and in only a few cases did the objection halt deliberation on the offending provision.¹¹⁶ However, the effect of the point of order may well be felt before the bill reaches the floor, as legislation is changed by drafters and committees to avoid triggering a point of order when they are not confident they have the votes on the floor to waive the objection.¹¹⁷ So merely analyzing the points of order and their outcomes does not provide a full picture of the influence of enforcement provisions. One question, to which I shall return in Part III, is whether courts have a role, as Professor Clark urges they do with respect to constitutional procedures, to ensure that internal rules like those put in place by UMRA are followed by Congress.¹¹⁸ Should a bill that has met the requirements of bicameralism and presentment nonetheless be subject to judicial challenge perhaps because a point of order that could have properly been raised never was?

D. *Altering the Balance of Power in Congress*

In many cases, drafters of framework laws intend to shift power within Congress because they believe the current institutional arrangements are part of the reason for the series of problematic decisions targeted by the framework.¹¹⁹ Also, some drafters may hope to

115 Rules in the Senate may require supermajority support to change rules. See *infra* note 153 and accompanying text.

116 See Gullo, *supra* note 63, at 562 (providing an estimate of the number of objections raised in the first eight years). As discussed above, the two points of order raised in the Senate were sustained and killed the amendments. See *supra* text accompanying notes 67–70. In addition, one point of order raised early in the House was sustained, although the point of order was probably improperly asserted. See Garrett, *supra* note 41, at 1144–45.

117 See GAO, COVERAGE, *supra* note 17, at 19 (“This is like a shoal out in the water. You know it is there, so you steer clear of it.” (quoting a lobbyist for the National League of Cities)).

118 See *infra* text accompanying notes 156–81.

119 For an analysis of the budget framework as a way to shift power within Congress, see D. RODERICK KIEWIET & MATHEW D. McCUBBINS, *THE LOGIC OF DELEGATION* (1991). See also McNollgast, *The Political Economy of Law*, in 2 *HANDBOOK OF LAW AND ECONOMICS* 1651, 1683 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (“[M]uch of

benefit from any change and thus support the framework for self-interested reasons. UMRA clearly has shifted power away from committees in Congress, although it is not as clear where the power moved. It appears to have strengthened centralized entities in Congress, as well as empowered individual members on the floors of the House and the Senate. In addition, the temporary change in Senate rules to add the teeth of a supermajority voting requirement to the UMRA point of order procedure strengthened substantial minority blocks in the Senate.

If decisions concerning unfunded mandates suffer from the pathologies described above, those pathologies may be particularly acute in congressional committees, the place where most decisions about whether to use unfunded mandates to achieve policy goals are made. The committee system works, in part, because its members have particular interests in the subject matter of the committees on which they sit. Members are willing to invest significant time in committee work to develop expertise in a specialized arena because they are motivated to do so, perhaps because their constituents are especially affected by the committee's decision or because of their personal interest in the topic.¹²⁰ Other lawmakers will defer to the committee because of its members' greater knowledge, but they will also be aware that the preferences of the median lawmaker may diverge from the preferences of committee members. Although there is disagreement about how representative congressional committees are of the larger membership,¹²¹ it is clear that party leaders are aware

the legislative process involves attempts to mitigate the problem of delegation inside the legislature, principally to committees and party leaders.”).

120 See KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 75 (1992); Arthur Lupia & Mathew D. McCubbins, *Who Controls? Information and the Structure of Legislative Decision Making*, 19 *LEGIS. STUD. Q.* 361, 371 (1994).

121 Compare GLENN R. PARKER, *CONGRESS AND THE RENT-SEEKING SOCIETY* 74–81 (1996) (arguing that committees will consist of preference outliers because of distributional politics), and Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 *J. POL. ECON.* 132, 148–52 (1988) (same), with GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN* 176–210 (2d ed. 2007) (arguing that committees are largely representative but providing different views of the importance of the party structure in Congress), and KREHBIEL, *supra* note 120, at 105–50 (same). For further discussion on this topic, see COX & MCCUBBINS, *supra*, at 210 (“Self-selection . . . is only half the story. The other half, equally important, is the regulatory effort of each party’s committee on committees.”); KIEWIET & MCCUBBINS, *supra* note 119, at 100–31 (analyzing the makeup of the House Appropriations Committee and subcommittees and finding committees to be relatively representative).

of the possibility of divergence in preferences and use various methods to ensure that committees do not stray too far afield.

Framework laws are a way to shift the balance of power away from committees when other lawmakers are concerned enough about the divergence to bear the higher costs of monitoring or disciplining committees. In the case of unfunded mandates, lawmakers may fear that the temptation to use unfunded intergovernmental mandates to achieve policy objectives passionately supported by committee members is so great that the substantive committees will inevitably adopt substantially more than the optimal level of such mandates. In other words, although the committee members may not diverge significantly from the median lawmaker's preference as to the right policy, committee members, who support that policy intensely, may be more willing to use unfunded mandates to achieve that objective than would the median lawmaker. More concretely, members on the House Committee on Natural Resources may value certain environmental policies so strongly that they discount too heavily the values of a more robust system of federalism. If they can more easily enact certain policies by passing the responsibility for funding them to states and localities, they will do so even when that funding decision is inefficient, not in the best interest of a federal system, or both.

UMRA constrains congressional committees in several ways. First, it vests the power of identifying intergovernmental mandates and determining their direct costs in the CBO, a centralized entity that has stronger ties to congressional party leaders and the budget committees than to the authorization committees.¹²² The data on intergovernmental mandates that the CBO provides is crucial under the framework because the availability of some points of order on the floor depends on whether direct costs of an unfunded mandate exceed a statutory threshold. Because there is substantial discretion in how one interprets and gathers the data, a self-interested committee could manipulate a cost statement to avoid triggering further enforcement. The CBO, on the other hand, is more responsive to the congressional leadership and the body as a whole. Moreover, CBO directors and staff have zealously protected their reputations as non-partisan, professional experts who produce credible information. The well-respected chief of the State and Local Government Cost Estimates Unit, Theresa Gullo, has held that position since the enactment of UMRA, serving throughout several changes in the partisan control

122 See Comm. on Fed. Legislation, *supra* note 109, at 685 (finding this to be problematic because it "gives enormous discretion to the . . . CBO, which will provide the fiscal data that supports or refutes a challenge to a mandate").

of Congress.¹²³ Certainly, the CBO faces some political pressures—and a CBO Director appointed by Republicans is likely to have different views and reach different conclusions on some issues than a CBO Director appointed by Democrats—but he and his staff may well be seen as a more faithful agent of the average legislator than committees when it comes to unfunded mandates.

The power taken from committees has gone to other congressional players—in this case, individual members and party leaders.¹²⁴ The ability to object to consideration of unfunded mandates on the floor of both houses tends to shift control to individual members of Congress, at least those who can command majority support or—for a short time—support of forty others in the Senate.¹²⁵ The point of order allows members to unravel deals struck in committee, and in the House it undermines the ability of the Rules Committee to further protect such deals through special rules limiting amendments or waiving points of order. This again can be seen as an indication that the full body had lost some trust in its agents, the committees. In David Epstein and Sharyn O'Halloran's study of delegation, they identify the use of restrictive rules as a measure of trust in the committee to produce proposals that will reflect the floor's preferences.¹²⁶ In other words, the floor will not demand to be as active in crafting a proposal, and will accept more restrictive rules, if it can trust that the committee's output will not diverge substantially from the preference of the median legislator.

123 Most CBO staff like Gullo are professionals who remain in their positions, notwithstanding partisan shifts in Congress; she began working at the CBO as a federal budget analyst in 1985 and has been the chief of the State and Local Government Cost Estimates Unit for the entire period that UMRA has been effective. The CBO Director is appointed for a four-year term, 2 U.S.C. § 601(a)(1)–(3) (2000), so he is also somewhat insulated from partisan politics; since the creation of the CBO in the mid-1970s, CBO Directors have worked to avoid being identified as part of partisan politics. Cf. Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 51 DUKE L.J. 1277, 1315 & nn.119–20 (2001) (noting the benefits of, and difficulties sometimes occasioned for politicians by, the nonpartisan nature of the CBO directorship).

124 For a discussion of the shift in power away from committees generally, see DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* (1991).

125 See *supra* note 49 and accompanying text.

126 See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS* 182–83 (1999); see also Garrett, *supra* note 8, at 759–62 (discussing similar uses of frameworks to remove power from committees that other legislators no longer trusted as faithful agents).

The amount of power shifted to party leaders by UMRA differs according to the context.¹²⁷ To the extent that committee chairs can otherwise establish independent power bases,¹²⁸ a framework like UMRA that empowers centralized entities tends to work to the advantage of party leaders. However, the House Rules Committee has long been closely associated with party leaders, so the weakening of its control over House floor deliberations may also reduce the power of those leaders. Typically, parliamentary devices such as points of order have been mechanisms to strengthen the control of party leaders over the floor because the meaning of procedural votes is often relatively opaque to constituents.¹²⁹ Thus, leaders can call on party loyalty to gain support on procedural votes when members might not support them on a vote on final passage. In contrast to other procedural devices, such as some of the very obscure budget points of order,¹³⁰ UMRA points of order are much more straightforward, and the groups that care about unfunded mandates—members of the inter-governmental lobby—are relatively sophisticated observers of the legislative process. So it seems unlikely that UMRA procedures can be used to hide decisions from voters in the same way that other procedures can.

Finally, the effect on the power of party leaders depends on the way in which a point of order is raised. When raised to strike an unfunded mandate that is part of a larger bill negotiated by party and committee leaders as a comprehensive package designed to attract majority support (or supermajority support to survive a filibuster in the Senate), then the objection is contrary to the interests of leadership. On the other hand, the Senate's temporarily strengthened point of order was used to defeat attempts to add nongermane provisions to appropriations bills on the floor of Congress. In such cases, the ability to rule such amendments out of order with only forty-one votes allowed party and committee leaders more control over the fate of their legislative product once it reached the Senate floor, where non-

127 Cf. Mathew D. McCubbins, *The Legislative Process*, in *THE ENCYCLOPEDIA OF DEMOCRATIC THOUGHT* 403–08 (Paul Barry Clarke & Joe Foweraker eds., 2001) (noting that procedures delegate power to allow the front-bench and back-bench to check each other); McNollgast, *supra* note 119, at 1685 (describing how procedures provide checks and balances among players in Congress, including party leaders, committee chairs, and members).

128 With the weakening of seniority as the primary basis for appointing committee chairs in the last decades, the power of the chair that is independent from the party leadership has also weakened. See COX & McCUBBINS, *supra* note 121, at 52–54.

129 See GARY W. COX & MATHEW D. McCUBBINS, *SETTING THE AGENDA* 29 (2005).

130 See Dauster, *supra* note 54, at 30–34 (describing the particularly convoluted Byrd Rule in the reconciliation process).

germane amendments can typically be considered and adopted. Senators have long used nongermane amendments to bring issues to the floor that committees have blocked or leaders have refused to schedule for deliberation.¹³¹ Thus, any parliamentary device that can allow leadership to more easily defeat such attempts increases its power.

To conclude, UMRA has clearly resulted in some changes in the balance of power in both bodies. Committees have lost power with respect to unfunded intergovernmental mandates. On balance, party leaders have probably gained some power, but not as much as they have under other frameworks, such as, for example, the congressional budget process. Individual members have more power to play a meaningful role in floor deliberations, although in the House they can succeed in challenging unfunded mandates only if they have the support of a majority. In the Senate, determined minorities could block consideration of unfunded mandates for a short period of enhanced procedures, but the result of the process in this body is more mixed. Leaders could also use the supermajority vote requirement when it was in effect to keep members from adding nongermane unfunded mandates to appropriations and other important bills, even if those amendments could garner majority support.

III. CHALLENGES FOR FEDERALISM FRAMEWORKS

This exploration of UMRA has provided insight into framework laws generally by providing a concrete example that can illustrate some of the purposes such laws serve. It has also filled out the picture of the “finely wrought” and “considered” (even if not always exhaustively so) procedures that a statute in this arena must travel. Unlike the constitutional provisions that Professor Clark extols, UMRA is targeted to make more arduous the path of enacting certain laws that pose a particular threat to federalism. We are left with at least two questions. First, why limit the procedural obstacles contained in UMRA only to unfunded intergovernmental mandates and not other types of laws that implicate federalism? The possibility of broader coverage for a framework turns in large part on whether lawmakers could describe the set of bills that would trigger the framework before they know the precise details of the proposals that should be subject to the rules. Second, should courts enforce procedural frameworks like UMRA in the same way that Clark encourages them to do with respect to constitutional separation of powers? The enactors of UMRA not

131 See MARTIN B. GOLD, *SENATE PROCEDURE AND PRACTICE* 104–08 (2004) (describing how nongermane floor amendments are a route around committees and leadership to bring issues directly to the floor).

only assumed that judicial enforcement of the legislative provisions would be inappropriate, but they explicitly provided for judicial review only of violations of Title II's regulatory provisions.¹³² Others have argued that more aggressive judicial review of internal rules, even those passed as statutes, implicates constitutional concerns.¹³³ From my perspective, one important problem with limited judicial review is that it would make Congress less likely to adopt frameworks in the first place, denying the legislature the ability to use frameworks to achieve worthwhile purposes. One solution is to allow Congress to opt in to judicial review with an explicit provision in a framework law, an option I expect Congress to exercise very rarely and which would squarely present the constitutional questions raised by judicial involvement in the enforcement of internal legislative rules.

A. *Identifying the Scope of Coverage for Federalism Frameworks*

One necessary condition for Congress to address a problem through a framework law is that lawmakers must be able to identify a relatively concrete problem and then describe it with enough specificity so that the framework can be triggered in the right circumstances.¹³⁴ This specification has to occur when the framework is passed and before lawmakers are sure which bills may fall within its scope in the future. This condition for frameworks is particularly important with respect to rules entrenching particular outcomes that are less likely to occur in the absence of a framework. Take UMRA as an example. The concern, as we saw above, is that Congress will systematically enact more unfunded mandates than is socially optimal because of a fiscal illusion. UMRA is therefore triggered whenever there is a significant unfunded intergovernmental mandate, and its procedures make it harder for lawmakers to pass such a mandate. If Congress had to decide to apply more onerous procedures on a bill-by-bill basis, then lawmakers, tempted by the allure of shifting the funding for a particular policy to states and localities, would be unlikely to agree to the enhanced procedures. The more information lawmakers have about the particular bill, often the less likely they will be to apply additional procedures. So it is important to put a framework law into effect that will apply to future decisions before lawmakers have a clear idea which policies they support may be

132 2 U.S.C. § 1571 (2000).

133 See, e.g., Bruhl, *supra* note 11, at 372–413; Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CAL. L. REV. 1341, 1357–63 (1990).

134 See Garrett, *Conditions*, *supra* note 10, at 296.

stymied by the framework. In short, they must operate behind a partial veil of ignorance.¹³⁵

Of course, this reality presents a challenge for drafters of frameworks. They have to be able to describe generally the set of bills that they want to fall within the scope of the framework before they have a detailed knowledge of those particular proposals. Thus, they need some information about the problem they are targeting, but not so much that self-interest stands in the way of formulating an effective framework. Adrian Vermeule terms this the information-neutrality tradeoff.¹³⁶ To succeed as a precommitment device, drafters of a framework must have sufficient information about the problem, the contexts in which it is likely to develop, and the behavior that may be used to evade the framework so that they can craft a sufficiently precise description of its coverage. One challenge for frameworks in the context of federalism is to define the scope of the framework with enough specificity so that it includes all the proposals likely to be problematic. A framework that purports to apply to all laws “implicating federalism” or some other vague phrase would be unworkable. UMRA targeted one group of bills likely to be especially threatening to the principles of federalism—unfunded intergovernmental mandates—but it leaves unaffected arenas with significant implications for the federal system and that could be defined with sufficient precision, like laws using conditions of federal assistance to produce certain outcomes in states, or laws preempting state or local regulation that do not already trigger the provisions of UMRA.¹³⁷ Let us look at each of these possible framework laws.

UMRA’s coverage has been criticized as too limited even to effectively deal with the problem it purports to attack: federal laws that shift significant direct costs to states and localities.¹³⁸ The largest gap in this respect identified by critics is the failure to cover laws imposing

135 This concept is derived from JOHN RAWLS, *A THEORY OF JUSTICE* 118–23 (rev. ed. 1999). It is an important aspect of Elster’s analysis of constitutions as commitment devices. See JON ELSTER, *ULYSSES UNBOUND* 130–33 (2000). The partial veil of ignorance idea has been developed in other contexts by legal scholars. See, e.g., Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 965–77 (1990); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001). I also discuss it in the context of frameworks providing neutral rules for certain decisions. See Garrett, *supra* note 8, at 736–41.

136 See Vermeule, *supra* note 135, at 428–29.

137 For example, preemption of state taxing authority might trigger UMRA; preemption of state laws regulating women’s reproductive freedom will not. Both have implications for federalism.

138 See Garrett, *supra* note 41, at 1138.

requirements on states as conditions of federal assistance.¹³⁹ It is not clear that conditions of assistance present as serious a problem for federalism as unfunded intergovernmental mandates because they are accompanied by at least some federal funding, albeit perhaps not sufficient to defray all the costs imposed on subnational governments. Nonetheless, using conditional assistance to effect policy will not be as tempting to federal lawmakers as unfunded mandates because they must come up with at least some of the money for the policy. Some also argue that conditional assistance is not as problematic because states can always avoid the conditions by turning down the money, but this argument is not compelling.¹⁴⁰ Walking away from federal funding because of onerous conditions is not a realistic option for many states, which need the funds for their schools, infrastructure, homeland security, and other purposes.¹⁴¹

One federalism framework proposed after the enactment of UMRA, the Federalism Act of 1999, targeted only a subset of conditions: “any provision that establishes a condition for receipt of funds under the program that is not related to the purposes of the program.”¹⁴² The Federalism Act thus targeted so-called “crossover sanctions,” but it did not include in its coverage a second set of conditions often equated with mandates: “crosscutting requirements” that apply “generally applicable requirements across the board to further various national social and economic policies.”¹⁴³ Presumably, however, Congress could draft a framework that applied to both sets of conditions if it wanted to. Such a framework could be crafted using UMRA as a model; it could require information about the various types of conditions and identification of any funding provided to offset the costs. Enforcement could be provided by points of order. A member could raise an objection if the bill was not accompanied by a statement about the conditions of assistance when it came to the floor, and a different objection could be raised if the statement indicated the condition was not sufficiently funded by the federal assistance provided in

139 See, e.g., GAO, *COVERAGE*, *supra* note 17, at 22–25; Gullo, *supra* note 63, at 568–69.

140 See *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

141 See Garrett, *supra* note 41, at 1127.

142 See Federalism Act of 1999, H.R. 2245, 106th Cong. § 8(b)(2) (1999). The Senate companion bill was called the Federalism Accountability Act of 1999, S. 1214, 106th Cong. (1999).

143 See ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM 7–10 (1984), available at <http://www.library.unt.edu/gpo/acir/Reports/brief/B-7.pdf>; see also Michael Fix & Daphne A. Kenyon, *Introduction to COPING WITH MANDATES*, *supra* note 87, at 1, 3–4 (describing both crossover sanctions and crosscutting requirements).

the bill. Waiver of the points of order could occur by majority or supermajority votes.

Another set of legislation is often viewed as particularly problematic for a robust system of federalism: federal laws that preempt state laws. Again, a framework could be crafted to cover these laws because this is a specifically concrete problem to lend itself to ex ante specification; indeed, the proposed Federalism Act would have adopted special procedures for bills that preempt state or local government authority. Under the provisions of that proposal, committees, including conference committees, would have to identify any provision in a legislative proposal that preempted state or local government regulation.¹⁴⁴ Then the CBO Director would be required to prepare a federalism impact assessment that would describe the preemptive effect of the law and any costs imposed on subnational governments.¹⁴⁵ The committee report would include this assessment, as well as identify preemptions and provide a constitutional basis and justification for each preemption.¹⁴⁶

The challenge with this sort of framework is enforcement. Although the parameters of the doctrine are subject to disagreement, preemption is a definite enough concept that the scope of the framework law can be described sufficiently before any particular law is under consideration. But what happens if Congress simply does not identify the preemption and enacts the law anyway? Maybe someone will object, and the objection will be waived, or maybe no one will object. Interestingly, in either case courts might provide the discipline. With a legislative framework in place designed to specifically identify and provide information about the existence and extent of a preemption, courts could more appropriately apply rules of statutory construction that require express preemption before interpreting a federal law to preempt state law.¹⁴⁷ In other words, if the text is

144 H.R. 2245 § 8(b)(1).

145 *Id.* § 8(b)(2). It is not clear that the CBO or the committee itself is the best entity to describe the preemption and its constitutional basis, although certainly the CBO is the right entity to provide cost estimates. In earlier work, Adrian Vermeule and I have suggested a framework law to deal with constitutional issues implicated by legislation and described a specialized staff that might provide expertise in analyzing bills. See Garrett & Vermeule, *supra* note 123, at 1317–19 (proposing an Office for Constitutional Issues).

146 H.R. 2245 § 8(b)(2).

147 See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 17 (2007) (arguing in favor of a clear statement of express preemption because it would better ensure congressional attention to—and vigorous debate of—issues involving state regulation, and describing the current state of the jurisprudence as inconsistent).

ambiguous and there is no identification of the preemption in a committee report and accompanying federalism impact statement provided before floor deliberation, then the court could refuse to find any preemption and construe the provision in favor of state authority. Similarly, an agency interpreting the statute as it promulgates regulations would not preempt state or local regulation unless Congress had expressly provided for such a preemption.¹⁴⁸ The Federalism Act took this approach by enacting special rules of construction relating to preemption and prohibiting interpreters from finding a preemption unless it was expressly set forth in the statute or the federal statute directly conflicted with a state law in such a way that the two “cannot be reconciled or consistently stand together.”¹⁴⁹ Although the Federalism Act limited the search for preemption to the text, the framework law could instruct courts to search both the text and certain kinds of legislative history, such as the federalism impact assessment.

This kind of framework involves the judicial branch in enforcement by mandating certain canons of construction and thereby affecting how statutes that fall within the scope of the framework are interpreted. It can rely on clear statement rules and other techniques of statutory interpretation to help ensure that Congress focuses on the particular issue and addresses it expressly and clearly in the text and an accompanying federalism statement. In that way, the framework makes even more salient an issue that some courts have tried to bring to Congress’ attention through the use of clear statement rules.¹⁵⁰ Also, to the extent that the framework itself directs courts to apply clear statement rules, as the Federalism Act did, it reduces the chance that judges and courts will adopt different interpretive strategies, thereby diluting the disciplining effect of any clear statement rule.

148 For a discussion of the current interpretive practice relating to agencies and preemption, see Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 743–55 (2004); Elizabeth Garrett, *Step One of Chevron v. Natural Resources Defense Council*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 55, 73–75 (John F. Duffy & Michael Herz eds., 2005) (discussing the use of clear statement rules in judicial review of agency interpretations).

149 H.R. 2245 § 9(a), see also Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem* 43–46 (St. John’s Univ. Sch. Of Law Legal Studies Research Paper Series, Paper No. 07-0079, 2007), available at <http://SSRN.com/abstract=1009230> (proposing a framework law enforced in part through judicial use of clear statement rules in statutory interpretation).

150 See, e.g., *United States v. Bass*, 404 U.S. 336, 349 (1971) (“In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”).

But this type of judicial enforcement does not require that courts get into the business of enforcing Congress' own internal rules. That is the second challenge to which we now turn.

B. *Judicial Enforcement of Framework Laws*

When frameworks such as UMRA are enacted as a statute, Congress is usually careful to state explicitly that each house is exercising its authority under the Constitution to "determine the Rules of its Proceedings."¹⁵¹ This disclaimer clause in a framework statute will emphasize the "full recognition of the constitutional right of either House to change such rules (as far as relating to such House) at any time, in the same manner, and to the same extent as in any case of any other rule of each House."¹⁵² In the Senate, once the framework law is enacted, it remains in place until it expires according to any sunset provisions in the law or until the Senate changes or repeals it (presumably in either a statute or a simple resolution). In this way, a framework law is no different than the Standing Rules of the Senate, which remain in effect from session to session because the Senate is a continuing body.¹⁵³ The House adopts its rules at the beginning of each new session,¹⁵⁴ and it treats framework laws as it does other internal rules, clarifying in the resolution putting House rules in place that rules contained in previously enacted framework laws are readopted.¹⁵⁵

151 U.S. CONST. art. I, § 5, cl. 2.

152 Unfunded Mandate Reform Act of 1995 § 108, 2 U.S.C. § 1515 (2000).

153 Some have argued that this feature of Senate rules is unconstitutional because it allows past Senates to impermissibly bind future ones, particularly because amendments to the Senate rules can be filibustered and require a two-thirds vote for cloture. See, e.g., John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 520–38 (2004) (concluding first that any rule can be changed by majority vote). Nonetheless, whatever the validity of the reason, Senate rules are not readopted each session, in contrast to the House. See *id.* at 511–12. Moreover, the Senate's recent decision to depart from the supermajority voting requirement with respect to UMRA points of order and return to a simple majority vote occurred in the context of a legislative vehicle that cannot be filibustered, the concurrent budget resolution. See *supra* note 49.

154 Although this provides the House an opportunity for substantial revision of the rules every two years, the changes are largely incremental, and the basic structure of the House rules has been largely unchanged since the adoption of the so-called Reed's rules in the 1880s. See COX & McCUBBINS, *supra* note 129, at 75–76. This suggests that procedures enacted through internal resolutions are relatively durable even though not adopted as statutes.

155 See, e.g., H.R. Res. 5, 108th Cong. § 1 (2003) (readopting "applicable provisions of law . . . that constituted rules of the House at the end of the One Hundred Seventh Congress").

Congress clearly does not envision that rules it enacts as part of a statute will be the subject of any sort of judicial review. In the description of the conference report on UMRA, Senator Kempthorne stated confidently, in describing the judicial review section of Title IV: "Title I deals with the requirements of Congress, and judicial review is not appropriate for the internal actions of Congress."¹⁵⁶ Part of the reason for the absence of judicial review is that internal rules of Congress do not have legal force and effect, a fact that is clearly evident when they are passed through simple or concurrent resolutions, which do not meet the constitutional requirements for lawmaking. In *INS v. Chadha*,¹⁵⁷ the Court noted that exercise of the rulemaking authority is an exception to the requirements of bicameralism and presentment because it "only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances."¹⁵⁸

The proposition that internal rules are not statutes even if contained in framework legislation does not entirely answer the question of whether courts have an appropriate role to play in their enforcement. First, if Congress were to adopt a rule that violated another constitutional provision, including those setting out certain procedures to govern the legislative branch, judicial review might well be appropriate.¹⁵⁹ But the issue here is different from a question of whether the framework law itself is constitutional.¹⁶⁰ The issue is whether a court should entertain the argument that Congress did not comply with its own rules when it debated and enacted a particular law, with a possible remedy of voiding the law entirely.¹⁶¹ Further,

156 141 CONG. REC. 7747 (1995) (statement of Sen. Kempthorne).

157 462 U.S. 919 (1983).

158 *Id.* at 956 n.21.

159 See Miller, *supra* note 133, at 1348–51.

160 There might be an argument that any supermajority votes to waive a point of order violate the Constitution, which arguably requires only majority votes to pass legislation in the absence of a specific constitutional mandate otherwise. See generally Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995) (arguing against the constitutionality of an internal House rule requiring a three-fifths vote to pass tax increases). But see John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995) (defending the rule's constitutionality). For further discussion, see *Skaggs v. Carle*, 110 F.3d 831, 836 (D.C. Cir. 1997) (finding that members of Congress did not have the ability to challenge the House rules in Court).

161 The appropriate remedy in such a case is unclear. Perhaps the court would merely strike the provision that violated the framework rule. On the other hand, a court could not be certain that the law would have passed without that particular

does one's view of the right answer to that question change if the rule was passed as part of a statute, with the participation of the other house and the President?¹⁶² I am not interested here in the descriptive aspects of this question, i.e., whether the courts would intervene under current jurisprudence. There, it is fair to say that judicial intervention is unlikely, with at least one court declining to enforce a congressional rule enacted in a statute as a nonjusticiable political question¹⁶³ and a recent appellate decision applying a fairly strong version of the enrolled bill doctrine to refuse to determine whether the same version of a law passed both houses of Congress before one version was enrolled and submitted to the President.¹⁶⁴ However, Supreme Court precedent is somewhat murky and difficult to reconcile,¹⁶⁵ and it is made even more challenging because of the cutback in legislator standing.¹⁶⁶ Instead, I will address some of the normative issues raised by the possibility of judicial review of Congress' compliance with framework legislation.

In his influential article *Due Process of Lawmaking*, Judge Hans Linde argues that review of legislation pursuant to the Due Process Clause should primarily involve review of the process the legislature followed in enacting the law.¹⁶⁷ Some of those procedures, including the ones emphasized by Professor Clark in his work, are constitution-

provision, so it could be argued that the entire statute would be void. These are the same questions analyzed in cases involving severance of one provision of a law found unconstitutional from the rest of the law, or in state cases involving single-subject rules for legislation. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 50, at 357–65 (discussing single-subject rules).

162 See, e.g., Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 973–76 (2007).

163 *Metzenbaum v. FERC*, 675 F.2d 1282, 1288 (D.C. Cir. 1982).

164 *Pub. Citizen v. U.S. Dist. Court*, 486 F.3d 1342, 1349–55 (D.C. Cir. 2007) (applying the enrolled bill rule of *Field v. Clark*, 143 U.S. 649 (1892), and dismissing a challenge to the Deficit Reduction Act).

165 Compare *Field*, 143 U.S. at 672 (holding that the signing of an enrolled bill by the Speaker of the House and the President of the Senate functions as an official attestation that the bill is the one that actually passed Congress, and the “respect due to coequal and independent departments requires the judicial department to act upon that assurance”), with *United States v. Munoz-Flores*, 495 U.S. 385, 391 (1990) (rejecting a claim that invalidating a statute on Origination Clause grounds would evince a lack of respect for the determinations of the House).

166 See *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997). For a discussion of standing and other issues of justiciability in the context of framework legislation, see Aaron-Andrew P. Bruhl, *Return of the Line Item Veto? Legalities, Practicalities, and Some Puzzles*, 10 U. PA. J. CONST. L. (forthcoming 2008) (manuscript at 45–58), available at <http://ssrn.com/abstract=999644>.

167 See Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 245 (1976).

ally mandated, but others are internal rules adopted by the houses themselves and changed over time to reflect experience and new circumstances. As Linde describes them,

[T]he process everywhere is governed by rules, and these rules are purposefully made and from time to time changed and . . . most of them are sufficiently concrete so that participants and observers alike will recognize when a legislative body is following the due process of lawmaking and when it is not.¹⁶⁸

Linde argues that compliance with these rules should be the subject of judicial review, not just internal enforcement, because they are crucial to the legitimacy of the laws and to the assurance that the legislature will act consistently with due process guarantees.¹⁶⁹ Although Linde does not specifically address statuted rules, he does note that important rule changes were adopted as part of the Legislative Reorganization Acts of 1946¹⁷⁰ and 1970,¹⁷¹ which contained provisions adopting internal rules for both houses as part of comprehensive statutes.¹⁷²

Framework laws are important structures for the due process of lawmaking because they often serve purposes related to improving the deliberative process—solving coordination problems, entrenching important values that are apt to be overlooked because of decision-making pathologies in a collective body, or providing neutral rules for decisions in the future that will be highly charged. Third-party enforcement of some sort might be particularly important with respect to the last two purposes—entrenchment and neutrality—because many lawmakers will be tempted to evade the procedures when their immediate interests in passing legislation outweigh their longer-term interest in the value that they sought to entrench. In the circumstances of federalism, a framework law like UMRA is justified in part because it constrains lawmakers from enacting substantial unfunded mandates in order to establish policies their constituents want while avoiding responsibility for funding those programs. Given the temptation to enact unfunded mandates in particular cases, legislators will try to avoid the bite of the disciplining framework; enforcement by the judicial branch could provide more teeth. Thus, due

168 *Id.* at 242.

169 *See id.* at 242–43.

170 Ch. 753, 60 Stat. 812.

171 Pub. L. No. 91-510, 84 Stat. 1140.

172 *See* Garrett, *Conditions*, *supra* note 10, at 294, 296 (relating these Acts to framework laws).

process of lawmaking seems to point strongly in favor of greater judicial involvement with respect to framework laws.

If, however, courts began to enforce some of the internal congressional rules using a due process of lawmaking rationale, several problems would arise.¹⁷³ First, and most important, outside enforcement would be a strong deterrent to adoption of the frameworks in the first place. Although the effect of frameworks is not illusory, it is certainly true that lawmakers are more willing to put a framework in place because they understand that internal rules are less durable than other kinds of rules—statutory or constitutional. How Congress would react to increased judicial scrutiny depends on how far-reaching that scrutiny would be. If courts began to be more involved in ensuring compliance with any internal congressional rule—whether passed as a statute or through a wholly internal process—then Congress would presumably continue to use frameworks. In that case, just as now, nothing would be different depending on the form of rule adoption. However, it seems more likely that any increase in judicial review would be focused not on rules adopted in purely internal vehicles, but only on framework laws which have already involved another branch of government—the President—in their adoption. In that case, legislators might work to avoid using framework laws as much as possible, coordinating passage of multiple parts of a package in other ways. Judicial review will have only made it more difficult for Congress to achieve what it wants in the way that it wants without any corresponding increase in judicial review (as Congress circumvents the courts by eschewing the framework law format).

Thus, a uniform rule that courts will enforce framework laws is undesirable, but perhaps it would be attractive to lawmakers to have a choice: an option of a structure that provides for outside enforcement, and an option to continue with only internal disciplinary devices. Lawmakers could then decide what level of accountability they wanted to offer their constituents in designing the framework law.¹⁷⁴ Here, the key question is how can lawmakers reliably signal to courts that they want judicial review as an additional enforcement mechanism in some cases but not in others? Some courts might interpret the choice of the statutory form for adoption of internal rules as

173 Such enforcement would presumably come usually when a private party would challenge the validity of a law on the ground that Congress did not follow the relevant rules when it enacted the law. It would be harder to envision a challenge on the ground that a law that should have been enacted was not because of improper application of some rule, particularly given the stringent limitations on lawmaker standing.

174 Cf. Ferejohn, *supra* note 84, at 136–49 (describing the accountability-discretion tradeoff that lawmaker-agents consider).

the signal to encourage judicial intervention. That would be a mistake, not just because the statutes usually contain a disclaimer clause,¹⁷⁵ but also because legislators primarily use the statutory form not to signal their desire for increased durability but to satisfy a need to enact all packages of a comprehensive reform in one legislative vehicle.¹⁷⁶ Moreover, the absence of a disclaimer clause in a framework law should not be understood as a signal welcoming judicial review; it is more likely an oversight. Indeed, the disclaimer clause itself is typically phrased as a recognition of the principle that provisions in a statute affecting only the internal rules of one or both houses is an exercise of the rulemaking power and can be changed unilaterally and at any time by the relevant body.¹⁷⁷ In other words, the disclaimer provision is not the same as a reserve clause; it is instead a statement of the default rule for statutized and other internal rules.

I would propose, instead, a regime which allows Congress to explicitly opt in to judicial review of compliance with framework laws. Without an explicit provision in the text describing the scope of judicial review, the default should remain that courts are only minimally involved in cases involving internal rules. Otherwise, Congress is likely to retreat from framework laws entirely, using internal rules coordinated, if necessary, with statutory proposals enacting comprehensive reform. This consequence would be a negative development for the due process of lawmaking, without any corresponding advantages.

Of course, Congress will seldom, if ever, invite judicial enforcement. An express request for enforcement by third parties outside congressional control¹⁷⁸ is more likely for frameworks that are not apt to be triggered during the political tenure of the enactors. Most frameworks, however, will influence decisionmaking in the short term, often within the same Congress that adopted it. Perhaps an issue will become so politically salient to voters that they will demand some credible signal of durability, beyond enactment as a statute, and in

175 See *supra* text accompanying notes 151–52.

176 See Garrett, *Conditions*, *supra* note 10, at 312–17.

177 See Bruhl, *supra* note 11, at 364–65.

178 Such third parties include courts and executive branch enforcers; Congress is more willing to allow enforcement by entities it has more direct influence over, such as the CBO or the Joint Committee on Taxation. For example, Congress attempted to vest sequestration, the most stringent enforcement of the budget process, in the GAO, and only switched that enforcement to the Office of Management and Budget when the Supreme Court ruled the delegation to the GAO unconstitutional. See *Bowsher v. Synar*, 478 U.S. 714, 736 (1986).

those cases Congress may decide to opt in to a system of judicial review. If this occurs, courts will be forced to face squarely the question of whether judicial review of a statutized rule is constitutional. The question will be framed differently than it has been in prior cases because the statute itself will indicate that Congress has asked for such third-party enforcement. Others have argued that judicial enforcement of internal rules, even those in statutes, would be unconstitutional,¹⁷⁹ although few have considered the possibility (perhaps because it is so unlikely) that review would be explicitly provided for.¹⁸⁰ Case law is unclear whether the outcome of this constitutional question would turn on whether Congress has given away some of its power to another branch, rather than tried to usurp the prerogatives of the executive or judicial branch.¹⁸¹

I leave the constitutional questions posed by judicial review of framework laws that expressly contemplate such review to others. From my perspective, the more interesting question is a practical one: could a court determine in many cases whether the rule had been followed or whether Congress had decided to waive or repeal the rule before enacting the statute? There would be many stages in the legislative process that a court would need to assess to reach an answer to that question. As we have seen, each house could repeal or modify a rule first adopted through a framework law through an internal resolution. Many points of order, although not those related to UMRA, are waived as a group in a special rule governing a particular bill.¹⁸² All these sources would have to be consulted to determine whether

179 See, e.g., Bruhl, *supra* note 11, at 404–15; see also Miller, *supra* note 133, at 1364, 1374 (determining that judicial review would be constitutional, but that courts should decline to review because compliance with procedural rules is a political question that courts should refrain from deciding).

180 For an exception, see Bruhl, *supra* note 166 (manuscript at 47–53) (describing possible ways around current standing doctrine that seems to stand in the way of judicial review of one framework law, the Line Item Veto Act).

181 Compare *Clinton v. City of New York*, 524 U.S. 417, 447–49 (1998) (holding the Line Item Veto Act unconstitutional because of its failure to comply with the Constitution's bicameralism and presentment requirements, even though Congress had augmented the President's power), with *Bowsher*, 478 U.S. at 732–34 (holding Congress' retention of removal power over the Comptroller General to intrude unconstitutionally into the President's power to execute the laws), and *INS v. Chadha*, 462 U.S. 919, 951–59 (1983) (holding the one-house veto unconstitutional because among other things, it was an exercise of legislative power at the expense of the President's veto power).

182 See, e.g., *Metzenbaum v. FERC*, 675 F.2d 1282, 1285–86 (D.C. Cir. 1982) (describing an example of a waivable point of order in the Alaskan Natural Gas Transportation Act); see also *id.* at 1287–88 (holding the issue nonjusticiable, but also suggesting that any objection had been waived in a special rule).

Congress had violated a rule or decided, as it has the power to do, to waive it through the appropriate procedure. Those procedures would not be uniform across all framework legislation. Some objections in the House can be waived in special rules, some cannot; some require a supermajority vote to waive in the Senate, some can be waived by a simple majority vote.

After consulting all these sources, the court's role, if such a role is constitutional, would be to ensure compliance, but this task is also fraught with difficulty.¹⁸³ If both houses waived the rule in the manner provided for in the rules, then there is no rule to enforce. Provisions in framework laws do not require that waiver be justified in any particular way; they allow Congress to waive the objection and continue to consider the bill as long as the procedure, including any supermajority voting requirement, is followed. One danger of inviting judicial review of compliance with internal rules is that a court may impose some burden of reasonable explanation for a waiver.¹⁸⁴ Such a requirement would be inconsistent with point-of-order enforcement, which typically does not provide for much debate of the parliamentary objection. It might also be inconsistent with the purpose behind framework laws, such as UMRA, where Congress has determined that it does not want to prohibit enactment of unfunded mandates entirely, but it does want to allow a member the ability to disaggregate substantial mandates and force Congress, by majority or supermajority, to agree to impose them. In that way, the law ensures that lawmakers at least know of the provision, which may be buried in a complex omnibus bill, and can be held accountable by voters and interest groups for burdening the states and localities.

Other cases would involve a challenge to a law enacted by Congress on the ground that no objection was raised even though the law contained a provision subject to a point of order. Sometimes that

183 Cf. Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 579–80 (2007) (contrasting judicial review of timing rules with the review of other internal rules because the former are relatively straightforward).

184 In other contexts, the Supreme Court has reviewed the state of the legislative record to determine if the empirical basis on which Congress legislated was sufficient. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (concerning the American with Disabilities Act); *United States v. Morrison*, 529 U.S. 598, 635 (2000) (concerning the Violence Against Women Act); see also Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 83 (2001) (describing the Court's scrutiny of the legislative record as "undermin[ing] Congress's ability to decide for itself how and whether to make a record in support of pending legislation"); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1733–37 (2002) (exploring the complexity of defining the legislative record).

inquiry would be straightforward. To consider an example from UMRA, if the CBO statement identified an unfunded intergovernmental mandate above the threshold and no lawmaker objected to its consideration on the floor, then arguably the court can fairly easily determine that the framework was violated. But what if the challenge is that the CBO's estimate of the direct costs was too low, so that the law did not trigger the internal enforcement when it should have? Can a court appropriately second-guess the budget experts at the CBO and reevaluate the financial burden placed on subnational governments? Some of the determinations for the budget points of order are even more complicated, relying not just on complex estimating techniques but also application of congressional precedents. Not only does the process sound increasingly constitutionally problematic—as one branch begins to interfere in the internal operations of another coordinate branch—but the questions posed are also not those that a court is particularly competent to decide.

There is an argument, however, that some minimal level of judicial scrutiny might complement the role of the CBO in a framework law like UMRA.¹⁸⁵ To the extent that the decisions of an entity like the CBO play a large role in determining the fate of programs important to legislators, then some political pressure will be brought to bear on expert staff to tailor their estimates to allow lawmakers to achieve their objectives. The threat that a faulty CBO analysis might trigger limited judicial review of the congressional procedure used to pass the mandate might provide insurance against politicization of its staff and decisionmaking. Moreover, lawmakers might want to explicitly allow for the possibility of judicial intervention as a mechanism to bind themselves from exercising inappropriate political influence over decisions that voters believe should be made on the basis of expertise. Under this conception of judicial review, courts could be seen as serving a roughly analogous function in reviewing CBO statements in the course of assessing the congressional procedures used to pass intergovernmental mandates as they do in cases reviewing agency rulemaking under “hard look” review. In these cases, judges require that agencies explain their regulatory decisions in a rational and logical way, but they do not necessarily substitute their judgment on the merits for that of the agency.¹⁸⁶ Similarly, the court would not revisit the actual computation of the direct costs of an unfunded mandate if a party claimed the mandate should have triggered UMRA protections,

185 I appreciate Bob Rasmussen's insight on this point.

186 See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 383 (1986) (describing this sort of “hard look” review of agency policy).

but it would assess whether the statement was supported by sufficient explanation. Although the notion of the court as a backstop to somewhat insulate the professional staff of the CBO from inordinate political pressure has some appeal, the experience with hard look review in administrative law suggests that the judicial intervention would not remain minimal, and the benefits of the threat of judicial review could be outweighed by the disadvantages of judicial intervention in arenas where courts have little institutional competence.¹⁸⁷ Moreover, increasing the requirements for the CBO's mandate statements would be burdensome for the staff dealing with many bills under substantial time pressure, a problem similar to that of ossification in the agency context.¹⁸⁸

CONCLUSION

Thus, whatever one's view of Professor Clark's argument that courts should aggressively enforce the constitutional provisions governing lawmaking as a way to safeguard federalism, judicial review of internal rules, including those adopted in statutory form, presents practical problems and potentially serious constitutional concerns. Understanding the role of framework laws—both the decade-long experience with UMRA and the promise of other federalism frameworks that would make it more difficult for the federal government to preempt state laws or enact significant conditions of assistance unrelated to the purpose of the federal funding—is crucial for a fully informed view of how lawmaking procedures interact with federalism. But beyond perhaps playing a role in statutory interpretation techniques as envisioned in the proposed Federalism Act to apply to federal preemptions, framework legislation should not become an additional avenue for judicial involvement in this realm.

187 Cf. Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1285–86 (1999) (arguing that “[t]he case for judicial review of agency action has . . . been a tactic to advance substantive ends”).

188 Cf. Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–62 (1995) (describing the problem of ossification in agency rulemaking).

